CRB No. 11-076

KENNETH WELLS,

Claimant–Respondent,

v.

FALKE, INC., and THE HARTFORD INSURANCE COMPANY,

Employer and Insurer–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Gerald D. Roberson
AHD No. 06-401B, OWC No. 581868

Shawn M. Nolen, Esquire, for the Petitioner

Matthew Peffer, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[1] HENRY W. MCCOY AND LAWRENCE D. TARR, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the employer for review of an Order issued July 14, 2011 by an Administrative Law Judge (ALJ) in the Hearings and Adjudications section of the District of Columbia Department of Employment Services (DOES). In that Order, the ALJ granted the request of the claimant (Mr. Wells) for entry of an order declaring the employer (Falke) to be in default of the terms of a prior Compensation Order in which the employer was found to be liable for the provision of certain medical services, and to impose a penalty for providing those medical services later than 10 days after the Compensation Order was issued.

[1] Judge Russell is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-03 (June 23, 2011).

BACKGROUND

On November 19, 2010, an ALJ in the Hearings and Adjudications section of DOES issued a Compensation Order in which it was determined that Mr. Wells's claimed medical care and treatments to his low back and his right knee were causally related to a stipulated work-related injury sustained on October 2, 2001 while Mr. Wells was employed by Falke. In that Compensation Order, the ALJ also granted the claim for relief, which included provision of a lumbar epidural injection and surgery to the right knee.

On May 25, 2011, Mr. Wells filed a Motion for Order Declaring Default in connection with the Compensation Order of November 19, 2010, alleging that the medical treatment had not been provided. Citing D.C. Code § 32-1515 (f), which establishes a 20% penalty for failure to pay compensation awarded within 10 days of the award, and relying upon *Lazarus v. Chevron,* 958 F.2d 1297 (5th Cir. 1992) and *Cohen v. Pragma Corp.,* 445 F. Supp 2d. 15 (U.S.D.C. D.C. 2006) as persuasive authority, and further citing D.C. Code § 32-1519 (a),[2] authorizing the issuance of an order declaring an employer in default where compensation awarded is not paid within 30 days of an award, Mr. Wells prayed "that the Administrative Hearings Division issue an Order declaring default and awarding the surgery to the right knee and epidural to the low back." The motion contained neither an amount of the alleged the default nor did it specify the amount of any claimed penalty.

Falke opposed the request for imposition of a penalty and default declaration, arguing that subsequent to the issuance of the Compensation Order, "upon the finding of a causal relationship between Claimant's right knee and lumbar condition to his work injury, the issue as to whether or not the recommended treatment is reasonable and necessary became ripe for consideration". Opposition of Employer/Insurer to Motion for Order Declaring Default, unnumbered page 2, paragraph 3. Falke then averred that it "initiated" utilization review (UR) on December 15, 2010, the result of which was that the procedures were not certified by the UR provider. Since the reasonableness and necessity of the procedures was, in Falke's view, still "in dispute", a penalty request is "without merit". *Id.,* paragraph 6. Further, citing *Lazarus, supra,* and the CRB decision in *Tagoe v. Howard University Hospital*, CRB No. 08-187 (February 13, 2009) (*Tagoe I)*, Falke argued that medical benefits are not "compensation" until such time as a claimant has obtained medical care at claimant's own expense and obtained an award reimbursing those out-of-pocket expenses.

On July 15, 2011, the ALJ issued an Order granting the request for "default, and a penalty". The Order did not specify any amount in which Falke was in default, and did not specify the amount of any penalty. The ALJ implicitly rejected Falke's argument that it was entitled to raise the defense of reasonableness and necessity after the claimed medical care had been awarded, noting that the specific care at issue had been claimed at the formal hearing as part of the claim for relief, that Compensation Order granted the claim for relief, and the Compensation Order had not been modified or stayed.

[2] In the Order of July 14, 2011 which is before us, the ALJ stated in a footnote that Mr. Wells cited only D.C. Code § 32-1515 as statutory support for the request for penalties and default. However, review of the motion reveals that Wells cited D.C. Code § 32-1519 (a) on unnumbered page 2, in paragraph 2, as supporting the default request.

Falke timely appealed the Order of July 15, 2011.

STANDARD OF REVIEW

This appeal concerns an Order based not upon factual findings made on an evidentiary record, but upon the contents of the agency administrative record, the filings of the parties, and the prior Compensation Order of the ALJ. Accordingly, the CRB must affirm the order under review unless the order is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See,* 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, § 51.93 (2001).

DISCUSSION AND ANALYSIS

As a preliminary matter, we note that this case deals in large part with a default award made pursuant to D.C. Code § 32-1519(a). That provision contemplates that orders such as the one before us be issued "After investigation, notice and hearing, as provided in § 32-1520". Presumably, perhaps because no facts were in dispute, the hearing procedure was waived. Neither party on appeal raises the lack of a hearing as relevant to the efficacy of the order, nor does either party assert that any of the facts recited by the ALJ in the order are unsupported by resort to review of the agency administrative file or the contents of the Compensation Order of November 19, 2010. Accordingly, we shall proceed to consider the matter presented.

Enforcement proceedings concerning Compensation Orders are sometimes made more complex than is necessary by the imprecise use of the terms "penalty" and "default". Default proceedings are governed by D.C. Code § 32-1519, and they exist for a specific and limited purpose: to permit a claimant who has not received the compensation that is due under a Compensation Order to obtain a determination of the *amount* due, and take that determination to either the D.C. Superior Court and obtain a judgment in the amount of the default as part of an action to enforce the award (i.e., to commence a debtor/creditor collection action in civil court), or in the case of an insolvent or otherwise recalcitrant employer, seek payment of the amount of the award in default from the Special Fund established in D.C. Code § 32-1540.

This is different from a penalty for late or non-payment of compensation due under an award, a circumstance which is governed by D.C. Code § 32-1515 (f), which calls for the imposition of a 20% penalty to be added to compensation that is not paid within ten days of the award of that compensation. An employer can be subject to the assessment of a penalty without a default being declared as that term is used in the Act. Conversely, an employer can be declared in default without there ever being a penalty assessment. Similarly, an employer can have a penalty assessed for late payment of an award, and if the penalty assessment (which is itself also an "award") is not paid within 30 days, be in default of that penalty award. And there are other potential permutations.

If one keeps in mind the distinction between a default order and a penalty award, it becomes a simpler matter to determine what the ALJ in this case was being called upon to do and what error may or may not have occurred.

The default provision reads as follows:

> In case of a default by the employer in the payment of compensation due under any award of compensation for a period of 30 days after the compensation is due and payable, the person to whom such compensation is payable may, within 2 years after such default, make application to the Mayor for a supplementary order declaring the amount of the default.

D.C. Code § 32-1519 (a).

That the default provision only relates to monetary compensation that is already identifiable as to the amount at the time the claimant makes "application" for a default order is apparent from both the language of the default provision, and from an understanding of the purpose of the default provision discussed above. Thus, it has no application to awards of medical services *per se*. While an employer is obligated to provide such medical care as is awarded in a compensation order, medical care is not "payable", its *cost* is, and the cost of that care is not "payable" to a claimant, at least initially, it is "payable" to the provider of that care until such time as someone else, possibly the claimant, pays for it. Whether it is then payable to a claimant depends upon other facts, including whether it was paid for by the claimant on the one hand, or by some other insurer, or some public sector entity from whom a claimant might have been able to obtain the care.

As the CRB has held, medical benefits are not, in and of themselves, "compensation" until such time as they have been paid for by a claimant and are subject to being reduced to a known dollar amount. In order for an employer to be in default in connection with an award of medical benefits, a claimant must seek and obtain an order establishing the specific dollar amount of the claimant's out-of-pocket medical costs and ordering that they be reimbursed to the claimant. Thereafter, if that award of out-of-pocket reimbursement remains unpaid after 10 days, the claimant can seek a 20% penalty. If the award of reimbursement remains unpaid after 30 days, the claimant can seek an order declaring the amount in default.[3] *See, Tagoe v. Howard University Hospital*, CRB No. 10-009 (July 30, 2010) (*Tagoe II)*, and *Tagoe v. Howard University Hospital*, CRB No. 08-187 (February 13, 2009) (*Tagoe I).* These cases adopted the views expressed in *Lazarus v. Chevron,* 958 F.2d 1297 (5th Cir. 1992) and *Marshall v. Pletz*, 317 U.S. 383 (1943), to the effect that:

> If an employer furnishes medical services voluntarily, by paying a health care provider for its services, it does not pay "compensation" within the meaning of the Act. Compensation includes only money payable to an employee or his dependents … not payments to health care providers on an employee's behalf. If, however, the employer refuses or neglects to furnish medical services, and the employee incurs expense or debt in obtaining such services, an award of medical expenses obtained by an employee in a suit against the employer is compensation.

Lazarus, *supra*, at 1301.

There is nothing in the order under review establishing either that Mr. Wells has made any out-of-pocket expenditures to obtain any medical care, or obtained an order entitling him to reimbursement

[3]Waiting the full 30 days before seeking relief in such cases would permit the award of the 20% penalty and the determination of the default in a single order. This procedure would appear to be the most sensible, but is not legally required.

for out-of-pocket expenditures (or incurred indebtedness) related to obtaining that care. The representations made in this appeal are that that care, although provided after a lengthy delay, has been provided and paid for by Falke. This case is, therefore, not suitable for the entry of an order of default, and the order declaring Falke in default is therefore vacated. [4]

In so ruling, we reject Mr. Wells's assertion in this appeal that "The CRB has recently affirmed the right of a … claimant to receive an Order of Default and 20% penalties as a result of late payment of causally related medical benefits Ordered by the AHD", citing *Swinson v. Gal Tex Hotel Corporation*, CRB No. 10-010 (March 10, 2011). Nothing in *Swinson* supports that statement. That case dealt with a Compensation Order's award of "future medical bills", which the employer challenged as being beyond the authority of an ALJ to award, inasmuch as since one can't foresee the future, one can't be ordered to provide unspecified future medical care which might turn out to be unreasonable, unnecessary, or unrelated to the work injury.[5]

In rejecting the employer's challenge, the CRB pointed out that there was nothing in the ALJ's usage that foreclosed the employer from contesting future medical care claims on any of these grounds. In so doing the CRB added that there was likewise nothing in the ALJ's Compensation Order or the Act that forecloses the claimant in that case from seeking default orders, protective orders, or other relief, as warranted by future events. The CRB was merely pointing out that the future is the future, and that either party's rights in that future will be based upon the facts as they arise in the future.

There is a second issue, and that is whether Falke is liable for a 20% penalty, and the answer to that must be no, because a penalty requires a determination first as to the amount of compensation due under a Compensation Order. In this case, there has yet to be a finding that Falke is obligated to pay any reimbursement to Mr. Wells for medical care awarded in a prior Compensation Order, and such a finding is a necessary predicate to the assessment of a penalty for late payment.

The fact that the time period for triggering a penalty is so short—10 days—renders nearly inescapable the conclusion that the penalty provisions are not intended to refer to the provision of medical services. It is hard to imagine that many medical procedures could be scheduled to occur within so short a time frame.

It certainly can be argued that the enforcement mechanisms in the Act with regard to timeliness in providing medical care under an award are not as robust as are those relating to payment of ongoing

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[4] Although Mr. Wells cited *Cohen v. Pragma Corp., supra,* in his Motion before the ALJ, he does not cite it in his Memorandum before us. We have considered it nonetheless, and do not find it persuasive, primarily because of the following factual recitation in the first paragraph; "After Pragma and its insurance company refused to reimburse Ms. Cohen for her medical expenses, Ms. Cohen sought relief pursuant to [the LHWC Act]." Thus, it is apparent that any medical benefits for which there was a declared default represented reimbursements for services obtained by the claimant for which she was out-of-pocket. Hence, it is consistent with the cited language of *Tagoe I, Tagoe II,* and *Lazarus.*

[5] It might be more accurate for us to state that "Nothing in *Swinson* that *we can find* supports" Mr. Wells's statement. We urge counsel to bear in mind that making bald assertions concerning the meaning or holding of a cited authority is not useful unless that authority is so well known that its applicability and relevance to the argument at issue is obvious. By failing to quote from or describe how *Swinson* has applicability to this case, we are forced to guess about what in *Swinson* we have been asked to consider, which risks our having guessed wrong.

monetary benefits. Whether this is by design, or is by oversight, is not for us to say. Whether there are other forums in which specific performance or mandatory injunctive relief might be obtained are matters about which we have no ability to express ourselves, but if there are such avenues, they are outside our jurisdiction. In any event, granting the request for imposition of a penalty where, as here, there is no underlying monetary award, is contrary to law and the granting of that claim is vacated as well.

Lastly, we note that Falke did not raise the "ripeness" of UR defense on appeal that it raised before the ALJ. Thus, while we need not address the correctness of Falke's argument to the ALJ, we will state that there are procedures in place within the formal hearing process that are designed to identify *all* disputes relative to claims arising under the Act, including the exchange and subsequent submission of a Joint Prehearing Statement in which all disputes are to be listed, and claims for relief formulated. This process is in place to ensure that disputed claims are resolved as expeditiously as possible, to promote the humanitarian purposes of the Act in seeing to timely resolution of disputes and especially ensuring the prompt provision of benefits, including medical care, to injured workers. Absent some compelling reason, such as evidentiary surprise, or a last minute addition to the claim for specific medical care, it is hard to envision a scenario in which it would make administrative or policy sense to permit or encourage piecemeal litigation of workers' entitlements under the Act. For example, if there is a dispute about a worker's average weekly wage as well as a dispute about the worker's status as an employee under the Act, it makes no sense to have a separate prior proceeding on employer-employee relationship, and await the outcome of that proceeding before convening a second formal hearing to consider average weekly wage.

A party risks waiver of an issue if that party sleeps on its rights to dispute that issue.

CONCLUSION

The declaration of a default and award of an otherwise un-denominated penalty contained in the Order of July 14, 2011 is arbitrary, contrary to established precedent, and is therefore not in accordance with the Act.

ORDER

The granting of the claim for relief in the Order of July 14, 2011 is reversed and vacated.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

____September 20, 2011_____
DATE