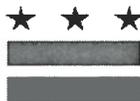


**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-101(1)**

**OTIS MAHONEY,  
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA HOUSING AUTHORITY,  
Employer/Carrier-Petitioner.**

On Reconsideration of the Compensation Review Board's  
November 18, 2015 Decision and Remand Order.  
AHD No. PBL 00-086C, DCP No. LT3-HCD001153

(Decided December 10, 2015)

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 DEC 10 AM 8 31

Jonathan M. Grossman for Claimant  
Andrea G. Comentale for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

**DECISION ON RECONSIDERATION**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

On January 29, 2015, an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia Department of Employment Services (DOES), found Employer to be in default of a Compensation Order issued June 2, 2009, and awarded Claimant "a penalty that consists of 12 times Claimant's monthly wage, provided, that the increase shall not exceed 12 months' compensation." "Supplemental Order Declaring Default", January 29, 2015 (the Default Order).

On February 12, 2015, Employer filed a "Motion for Reconsideration" of the Default Order, which the ALJ denied in a "Reconsideration of Order Declaring Default" issued May 21, 2015 (the Reconsideration Denial).

On June 22, 2015, Employer filed “Petitioner’s Application for Review” with the Compensation Review Board (CRB), appealing both the Default Order and the Reconsideration Denial. The remaining procedural and factual details of relevance are set forth in the Discussion below.

On November 18, 2015, the CRB issued a Decision and Remand Order (DRO), in which it was determined that the ALJ’s award of a late payment penalty was proper, but that the award of 12 months of compensation benefits exceeded what Claimant was entitled to receive, and remanded the matter for entry of an award of 4 months additional compensation benefits. In that DRO, the CRB also rejected Claimant’s argument that certain underpayments should be treated as late payments for the purpose of determining the amount of the penalty owed.

On November 25, 2015, Claimant filed “Respondent’s Request for Reconsideration of Decision and Remand Order Dated November 18, 2015” (Claimant’s Motion), seeking reconsideration of the decision relating to the underpayment ruling.

On November 30, 2015, Employer filed “Petitioner’s Consent request for Extension of Time To Respond to Respondent’s Request for Reconsideration of Decision and Remand Order Dated November 18, 2015”, requesting an extension until December 8, 2015 to file its response. On that date, Employer filed “Employer’s Response to Respondent’s Request for Reconsideration of Decision and Remand Order Dated November 18, 2015” (Employer’s Response).

For the reasons set forth below, the request for reconsideration is denied.

## DISCUSSION

The portion of the DRO at issue in Claimant’s Motion reads as follows:

Regarding Claimant’s assertion that since Employer concedes that it “under calculated” the proper compensation rate, each underpayment should be considered non-payment, and hence Employer is liable for the statutory penalty for periods when the payments were incorrectly calculated, we must disagree.

In this case, there is no assertion by Claimant that any discrepancy existed with respect to the compensation rate that was known to Employer until Employer discovered the miscalculation on its own, and then made up the difference. Were we to agree with Claimant that the penalty ought to apply in such a circumstance, Employer would be seriously discouraged from detecting and correcting such payment errors.

While a reasonable argument can be made for Claimant’s position, we view the penalty provision to be fundamentally about timeliness, not compensation rates. To Claimant’s suggestion that Employer could pay \$1.00 a month and thus avoid the imposition of a penalty, and such a rule would be absurd, we have these responses.

First, such a “payment” would in all likelihood be deemed to be *de minimis*, to the point of having no legal effect. Secondly, it would be equally absurd to argue that an unintentional and unrecognized underpayment of \$1.00 a month that Employer discovers and corrects on its own would subject Employer to the substantial statutory penalty.

In normal instances, we view the appropriate remedy for an unintentional underpayment to be a request for interest on the amount paid late for the period of the delay.

The orders on appeal contain no factual findings concerning the amounts in question as they relate to the underpayments. We note, however, that the ALJ erroneously asserts that interest on accrued or unpaid benefits is not allowed under the act. That is not the case. *See, Mitchell v. D.C. Public Schools*, CRB No. 11-007, AHD No. PBL 08-100A, DCP No. 30080441654-001 (October 5, 2011).

Although the ALJ did not premise the erroneous award of 12 months of penalties upon a theory of underpayment, since we are remanding the matter for entry of an penalty award consistent with the foregoing Decision and Remand Order, if, on remand, the record contains sufficient evidence to establish the amount of interest to which Claimant may be entitled for such underpayments, the ALJ may consider that claim, provided Employer has the opportunity to contest the claimed amount of interest.

In Claimant’s Motion, Claimant asserts the CRB erred in characterizing the discovery of the underpayment as being the result of Employer’s own discovery of the underpayment, arguing as follows:

Although DCHA’s initial failure to pay \$22,035.92 [the claimed amount of the underpayments] of the award may not have been intentional, DCHA’s deliberate refusal to address Mr. Mahoney’s counsel’s concerns about the underpayment for eleven months and then failing to pay an additional three and one half months constitutes “intentional” conduct that should be compensated by a penalty, not interest. DCHA intentionally and repeatedly failed to correct the underpayment about which it had been notified. Notably, it only made payment after Mr. Mahoney’s counsel took the extraordinary step of seeking intervention of the Deputy Attorney General. Such improper conduct—failing to correct an underpayment when being put on notice of same—cannot be grouped in with instances where DCHA discovers an underpayment on its own and then promptly pays the underpaid amount, which is the factual pattern upon which the CRB vacated Mr. Mahoney’s award.

Claimant’s Motion, p. 4.

Claimant attached a number of documents purportedly supporting his contentions. As Employer points out in Employer’s Response, the documents, particularly those contained in “Attachment

B” upon which Claimant relies to support his contention that the underpayments were intentional, were not admitted into evidence at the time of the formal hearing. Employer’s point is well taken, and we cannot consider these documents which are not in the record.

While we do regret that the DRO included a misperception of Claimant’s position regarding the genesis of the underpayment and the facts regarding its resolution, we are not persuaded that the penalty provisions are intended to be a remedy for payments that are made timely (or rather, are not late incrementally as discussed in the DRO) but are later determined to be smaller than they should have been.

The D.C. Comprehensive Merit Personnel Act contains no specific provisions for penalties for underpayments, and to the extent that Claimant asserts and can prove that Employer acted maliciously, intentionally and/or with negligence to his detriment, his remedy is not to be found in the workers’ compensation statute, but lies elsewhere and in a different forum.

The Motion is denied.

*So ordered.*