

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 16-016**

**OTIS MAHONEY,  
Claimant-Respondent,**

**v.**

**DISTRICT OF COLUMBIA HOUSING AUTHORITY,  
Self-Insured Employer-Petitioner.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 JUL 8 PM 1 15

Appeal from a January 13, 2016 Compensation Order on Remand by  
Administrative Law Judge Gerald D. Roberson  
AHD No. PBL 00-086C, DCP No. LT3-HCD001153

(Decided July 8, 2016)

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

Before JEFFREY P. RUSSELL, LINDA F. JORY, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

**DECISION AND ORDER**

**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.

On November 18, 2015, the CRB issued a Decision and Remand Order (DRO). In the DRO, the CRB concluded that although the award of a penalty for late payment of portions of a prior award of compensation was in accordance with the law, the amount of the penalty assessed by the ALJ had been calculated improperly based upon a faulty application of the statute, and that the ALJ erroneously failed to consider an award of interest on the late payment penalty due to the ALJ’s erroneous assertion and conclusion in the Supplemental Order Declaring Default that interest on late payments was not awardable under the law.

More specifically, the CRB ruled:

D.C. Code § 1-623.24 (g) governs what shall occur in the event that a compensation order is not paid in a timely fashion. It reads:

If the Mayor or his or her designee fails to make payments of the award for compensation as required by subsection (a-3)(1), (a-4)(2) or (b)(3) of this section, the award shall be increased by an amount equal to one month of the compensation for each 30-day period that payment is not made; provided, that the increase shall not exceed 12 months’ compensation. In addition, Claimant may file with the Superior Court of the District of Columbia a lien against the Disability Compensation Fund, the General Fund of the District of Columbia, or any other District fund or property to pay the compensation award. The Court shall fix the terms and manner of enforcement of the lien against the compensation award.

Subsection (a-3)(1) deals with payments of claims at the claims administration level before there has been any litigation in the DOES, and has no application to this case. Similarly, subsection (a-4) has no application, having been repealed.

The provision of relevance here, subsection (b)(3), reads:

The Mayor or his or her designee shall begin payment of compensation to the claimant within 30 days after the date of an order from the Department of Employment Services Administrative Law Judge.

Nowhere in the statute does the word “default” appear. This is a provision assessing a penalty for failure to pay a compensation order in a timely manner, and also a provision for a process whereby a claimant can obtain a lien against District of Columbia assets for unpaid awards.

Further, the statute is drafted as to make it apparent that the time for payment is within 30 days of the award by the ALJ. Presumably the legislature was aware of the existence of an appellate procedure and was aware that there would be

instances, such as the one before us, where an award would be made which would ultimately be vacated either by the CRB or the DCCA, yet the statute specifically starts the clock running from the date of the award by the ALJ.

Despite the fact that by the time Claimant sought imposition of the statutory penalty, Employer was no longer “in default” of the award, as that term is commonly understood.

Section 1-623.24 (g) is not a default provision, it is a late payment penalty provision. It imposes a one month penalty for every 30-day period that payment is not made, up to a maximum penalty of 12 months’ worth of penalties. Unlike the private sector act, the penalty is calculated in discrete delinquency increments, rather than as a flat percentage of the late payment, and in order for a penalty to be assessed, there must be a 30-day period of delay to trigger a penalty increment.

There is no dispute that a “Department of Employment Services Administrative Law Judge” ordered payment of benefits in a compensation order issued June 2, 2009. The statute required that the amounts due under that award be paid within 30 days of June 2, 2009, or, by July 2, 2009. Payment was not made until October 22, 2009.

Accordingly, Employer is liable for “an amount equal to one month of the compensation for each 30-day period that payment is not made”, which in this case means the penalty is owed for the thirty-day period from June 3, 2009 to July 3, 2009, for a second thirty-day period from July 4, 2009 to August 3, 2009, a third thirty-day period from August 4, 2009 to September 2, 2009, and a fourth-thirty day period from September 3, 2009 to October 2, 2009. Thus, Employer is liable for a penalty equal to four month’s compensation.

While the ALJ was not in error regarding Claimant’s entitlement to a penalty, he was in error to assess a penalty equal 12 months of compensation [footnote omitted] inasmuch as there were only 4 thirty-day increments during which the payments were not made.

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 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 asserted 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.

#### CONCLUSION AND ORDER

The award of a penalty for late payment is supported by substantial evidence and is in accordance with the law. The award of 12 month's compensation as the amount of the penalty is not supported by substantial evidence, is not in accordance with the law, and is VACATED.

The matter is remanded for entry of an award of a penalty equal to four month's compensation, and for further consideration of any claims for interest on the amount of underpayments as are supported by the record evidence, subject to Employer's being provided the opportunity to contest the amount of interest for which it may be liable.

*So ordered.*

DRO at 5 – 7 (footnote omitted).

On January 13, 2016, the ALJ issued a Compensation Order on Remand (COR), in which the mandate of the CRB was described as requiring an answer to the following questions:

1. Whether a penalty can be assessed against Employer pursuant to the Act, D.C. Code § 1-623.24 (g) for failure to comply with the June 2, 2009 Compensation Order? [sic]
2. Whether interest should be assessed against Employer on the amount of underpayments? [sic]

COR at 3.

The ALJ proceeded to rule as follows:

The record reveals AHD ordered payment of benefits in a compensation order issued June 2, 2009, and the statute required that the amounts due under the award be paid within 30 days of June 2, 2009. Employer did not commence payment until October 22, 2009. Given these facts, the CRB stated the following:

Accordingly, Employer is liable for “an amount equal to one month of the compensation for each 30-day period that payment is not made”, which in this case means the penalty is owed for the thirty-day period from June 3, 2009 to July 3, 2009, for a second thirty-day period from July 4, 2009 to August 3, 2009, a third thirty-day period from August 4, 2009 to September 2, 2009, and a fourth-thirty day period from September 3, 2009 to October 2, 2009. Thus, Employer is liable for a penalty equal to four month’s compensation.

*Mahoney*, at page 6.

As such, the record establishes entitlement to a penalty for 4 thirty-day increments during which payments were not made.

Regarding the assessment of interest for underpayment, the existing record does not contain sufficient evidence to assess whether Employer is liable for interest due to an underpayment of compensation. The record does not reveal the parties intended to address this issue at the prior formal hearing, and the parties did raise a dispute concerning Claimant’s compensation rate. The record reveals Employer discovered the miscalculation of the compensation rate on its own, and adjusted Claimant’s payment. Claimant filed a “Motion for Miscellaneous Relief” seeking determination on whether the prior ALJ awarded interest on his compensation award. During the formal hearing, Claimant did not assert a discrepancy existed with respect to the compensation rate that was known to the Employer. The parties did not put forth any evidence regarding underpayment of compensation presumably as a result of the incorrect compensation rate, and no evidence has been provided regarding the time period for which an underpayment occurred. As such, the existing record does [sic] contain sufficient evidence to establish the amount of interest to which Claimant may be entitled for such underpayments.

### **Conclusions of Law**

Claimant has established entitlement to penalty for 4 thirty-day increments during which payments were not made.

### **Decision**

Based upon the record herein, and the applicable law, it is hereby ordered, that:

1. Claimant’s claim for relief is hereby **GRANTED in part**. Employer is liable for a penalty equal to four months compensation.

**SO ORDERED.**

We are satisfied that the omission of the word “not” was an inadvertent error, given the context that preceded it.

Claimant filed an Application for Review (AFR) of the COR and a memorandum of points and authorities in support thereof (Claimant’s Brief) with the CRB, arguing that the record contains sufficient evidence to establish what interest is due on the late payments, and requests that the CRB make an independent award of such interest on its own and without further remand.

Employer filed an Opposition to the AFR (Employer’s Brief). Employer argues that Claimant AFR mischaracterizes the mandate of the CRB, arguing instead that because no claim for interest was included in the claim for relief at the time of the hearing, the record cannot possibly contain sufficient evidence to support such an award.

Although we do not necessarily agree that the record does not contain sufficient information for such a calculation to be made, we must agree that because the claim for relief did not contain any claim for interest, the ALJ’s determination that such an award is not appropriate at this time is in accordance with the law, and we affirm the COR.

#### DISCUSSION

The issue of entitlement to interest due on the amount of the compensation that was paid late was injected into this case because in the original Supplemental Order Declaring a Default, the ALJ made the erroneous statement that interest on benefits due is not awardable under the Act. The CRB panel reviewing the matter assumed, erroneously it turns out, that the ALJ included this conclusion of law in the order because a claim for interest had been made. It was incumbent upon the CRB panel to correct so clear a misunderstanding of the law.

It now appears undisputed that no such claim for interest has been made, and thus the erroneous statement of law was superfluous.

Despite the fact that our DRO specifically advised that Employer be afforded an opportunity to contest any amount of the interest claimed, we are now aware that no such claim was before the ALJ in the late payment proceedings, and hence any indication by the CRB panel that such further consideration be undertaken in connection with the Supplemental Order Declaring a Default, this DRO or this COR is stricken as being beyond our jurisdiction.

Neither party raises any other objections to the COR, hence our review is concluded.

#### CONCLUSION AND ORDER

The award of a penalty for late payment is supported by substantial evidence, is in accordance with the law, and the Compensation Order on Remand is affirmed.

*So ordered.*