

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-016

PAUL McDONALD,  
Claimant,

v.

MID-AMERICAN ELEVATOR COMPANY  
and STRATEGIC COMP, *et al.*,  
Employer/Carrier-Petitioner.

Appeal from a January 13, 2015 Supplemental Order Declaring Default  
by Administrative Law Judge Gerald D. Roberson  
AHD No. 14-215, OWC No. 6999980

Allen J. Lowe for Claimant  
Joseph F. Giordano for Employer Mid-American Elevator  
Chad A. Michael for Mid-Atlantic Elevator

Before, LINDA F. JORY, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board:

**DECISION AND ORDER TO VACATE**

FACTS OF RECORD AND PROCEDURAL HISTORY

This case is before the Compensation Review Board (CRB) on the request of Employer for review of a Supplemental Order Declaring Default (SODD) issued on January 13, 2015 by the Administrative Hearings Division (AHD) which found that Mid-American Elevator was in default of a Compensation Order (CO) issued on September 30, 2014 and ordered a 20% penalty be added to an amount owed to Mid-Atlantic. The September 30, 2014 CO found that an employer-employee relationship existed between Claimant and Mid-American Elevator although Mid-Atlantic Elevator and The Hartford Insurance Group (Hartford) had made payments that totaled \$121,388.73.

The CO awarded workers' compensation benefits as a result of a September 11, 2012 work-related injury and ordered Employer Mid-American Elevator to pay temporary total disability compensation benefits from April 30 2013 to the present and continuing as well as causally

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
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related medical expenses. The Administrative Law Judge included the following language in the Order:

Mid-Atlantic Elevator and the Hartford Insurance are entitled to a credit from Mid-American and Strategic Comp. in the amount of \$121,388.73.

CO at 6.

Mid-American Elevator and Strategic Comp (Employer) filed an Application for Review (AFR) with the CRB, asserting the ALJ used the incorrect legal standard when he applied the 'relative nature of the work' test in addressing the issue of who was the Claimant' s employer.

On November 3, 2014, Mid-Atlantic Elevator and Hartford filed a Motion for an Order Declaring Default before the AHD, alleging that Mid-American Elevator and Strategic Comp were in default of the CO as Mid-Atlantic Elevator and the Hartford had yet to receive payment in the amount of \$121,388.73. Mid-American Elevator responded that Strategic and Mid-American had filed an Application for Review with the CRB. Further Mid-American argued the CO does not "order" them to make any payments to Mid-Atlantic as the CO found Mid-Atlantic was entitled to a credit. On January 13, 2015, the ALJ concluded Mid-American Elevator and Strategic Comp were in default of the Compensation Order for failure to timely remit payment of benefits and that Mid-Atlantic was entitled to a 20% penalty attached to all unpaid benefits awarded in the September 30, 2014 CO.

Mid-American and Strategic Comp filed a timely Application for Review (AFR) asserting the SODD is arbitrary, capricious and an abuse of discretion or otherwise not in accordance with law.

On February 11, 2015, Mid-American Elevator filed with the CRB a Motion to Consolidate its AFR of the CO and the AFR of the SODD, which was denied by the Chief Administrative Appeals Judge on April 21, 2015

Mid-Atlantic Elevator and Hartford responded on February 23, 2015 requesting the CRB affirm the SODD. Mr. McDonald also filed a response requesting that Mid-American's AFR be denied and dismissed.

On March 3, 2015, Mid-American filed a Reply Memorandum and on March 4, 2015 Mid-American filed a Motion to Strike Mr. McDonald's response, asserting Mr. McDonald is not a party adverse to the AFR pursuant to 7 DCMR § 258.7 and therefore he has no right to participate.

On April 27, 2015, the CRB affirmed the ALJ's application of the "relative nature of the work test", citing *Gross v. DOES*, 826 A.2d 393 (D.C. 2003) and affirmed the CO. *See McDonald v. Tompkins Mid-American and Liberty Mutual Insurance Co, et al.*, CRB No. 14-122, AHD No. 14-215, OWC No. 699998. (DO).

## ISSUES ON APPEAL

1. Is the credit awarded by the ALJ “Compensation” as defined in D.C. Code § 32-1501(6) rendering the penalty provision of §32-1515 applicable?
2. Is the SODD issued on January 13, 2015 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law?

## ANALYSIS

The function of the CRB is appellate review; depending upon the type of order on appeal, the standard of review applied by the CRB differs. When a party appeals a Compensation Order, the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law; if the Compensation Order is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion, the CRB must affirm that Compensation Order. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C.2003) In this case, Employer appeals an Order issued in response to a motion; therefore, the CRB must affirm that order unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW § 51.03 (2001).

At the outset we must deny Mid-American Elevator’s Motion to Strike Mr. McDonald’s reply. Mr. McDonald is the proper party to request an order declaring a CO in default as the CO did grant Mr. McDonald’s claim for relief and ordered Mid-American to make payment of temporary total disability benefits. Therefore, Mr. McDonald does have an interest at stake in the appeal.

While working as a vertical transportation mechanic on September 11, 2012, Mr. Paul McDonald injured his left shoulder. Mr. McDonald never worked for Mid-Atlantic Elevator, but Mid-Atlantic Elevator began paying Mr. McDonald workers’ compensation benefits based upon an administrative error.

A dispute arose over the identity of Mr. McDonald’s employer, and on August 25, 2014, Barbee-Curran Elevator Company, Mid-American Elevator, Mid-Atlantic Elevator, and Tompkins Mid-American Joint Venture participated in a formal hearing before an administrative law judge (“ALJ”). Mr. McDonald, Barbee-Curran Elevator Company, Mid-American Elevator, Mid-Atlantic Elevator, and Tompkins Mid-American Joint Venture were all represented by counsel at the formal hearing. As noted above the ALJ determined that Mid-American Elevator was the employer responsible for Claimant’s work injury and that Mid-Atlantic, which was never Claimant’s employer, was entitled to a credit in the amount of \$121,388.73. Mid-American did not appeal the credit awarded by the ALJ and as noted above the CO was affirmed.

Mid-American asserts the ALJ lacked the authority to award a credit to Mid-Atlantic Elevator and Hartford for the monies paid by mistake to Claimant for disability compensation and for medical expenses. Employer asserted:

Once the ALJ decided that Claimant was not employed by Mid-Atlantic on the date of the accident, Mid-Atlantic and Hartford were no longer parties to the claim. It follows that the ALJ acted in an extrajudicial manner by then proceeding to award a monetary “credit” to the Mid-Atlantic and Hartford which had, by then, become strangers to the litigation by virtue of the prior undisputed finding by the ALJ.

Mid-American Brief at 4.

We agree with Mid-American that neither the District of Columbia Workers’ Compensation Act (Act) nor its regulations contain a provision which establish a duty on the part of a putative employer and its workers’ compensation insurer to reimburse monies paid by mistake by another employer. However, the CO which awarded the credit has been affirmed and we note that Mid-American did not appeal the credit in its AFR of the CO.

The only issues before this Panel concern the SODD. With regard to the SODD, Employer asserts:

[T]he credit award to Mid-Atlantic and Hartford was not “Compensation” as defined in D.C. Code Section 32-1501(6) rendering the penalty provision of D.C. Code Section 32-1515 inapplicable.

Employer further asserts:

Furthermore, because the granting of a credit was an *ultra vires* act, the subsequent acts of finding Petitioners in default of the compensation order and assessing a 20% penalty for late payment were, by extension, *void ab initio* because they were attempts to seek enforcement of a remedy which was beyond the powers of the ALJ to grant.

Mid-American Brief at 4,5.

We agree with both of Mid-American’s assertions with regard to the SODD.

The pertinent sections of the Act with regard to penalties on an unpaid award and collection of defaulted payments are §§ 32-1515(f) and 32-1519(a).

Section 32-1515(f) states:

If any compensation, payable under the terms of an award is not paid within 10 days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20% thereof, which shall be paid at the same time as, but in

addition to, such compensation, unless review of the compensation order making such award is had as provided in §32-1522 and an order staying payments has been issued. The Mayor may waive payment of the additional compensation after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

Compensation is defined in § 32-1501(6) as:

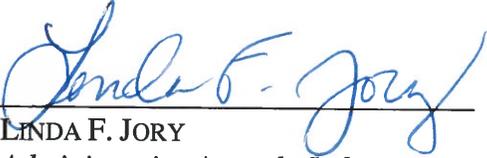
Compensation means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided herein.

We agree with Mid-American that enforcing the previously ordered credit is beyond the powers of the ALJ. We further conclude a credit between employers or insurers is not “money payable to an employee or to his dependents” and is therefore not compensation. The fact that Mid-American Elevator is unable to provide said credit to Mid-Atlantic does not warrant a penalty or an order declaring a default.

#### CONCLUSION AND ORDER

We conclude the January 13, 2015 Supplemental Order Declaring a Default is not in accordance with the law and accordingly it is **VACATED**.

FOR THE COMPENSATION REVIEW BOARD:

  
LINDA F. JORY  
*Administrative Appeals Judge*

May 6, 2015  
DATE