

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-018

**WANDA M. FRANCIS,
Claimant-Respondent,**

v.

**HOWARD UNIVERSITY HOSPITAL and SEDGWICK CMS,
Employer/Insurer-Petitioner.**

Appeal from a January 15, 2015 Order for Payment of Default Penalty by
Administrative Law Judge Nata K. Brown
AHD No. 06-040F, OWC Nos. 603915 and 606928

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JUL 2 PM 10 47

(Decided July 2, 2015)

Krista N. DeSmyter for the Claimant
William H. Schladt for the Employer

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

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On August 30, 2004, Ms. Wanda M. Francis was working security at Howard University Hospital (“Howard”). On that day, she injured her cervical spine and right shoulder while struggling with a patient. *Francis v. Howard University Hospital*, AHD No. 06-040B, OWC Nos. 603915 (April 25, 2008).

Ms. Francis was receiving temporary total disability benefits, medical benefits, and vocational rehabilitation services, but as of August 30, 2004, Ms. Francis asserted she was entitled to permanent total disability benefits. Howard refused to pay permanent total disability benefits, and the parties proceeded to a formal hearing before an administrative law judge (“ALJ”).

In a Compensation Order dated January 16, 2013, the ALJ ruled Ms. Francis had not met her burden to prove she was entitled to permanent total disability benefits. *Francis v. Howard University*, AHD No. 06-040E, OWC Nos. 603915 and 606928 (January 16, 2013). The Compensation Review Board (“CRB”) vacated the Compensation Order on the grounds that the

ALJ had not properly applied the burden-shifting analysis required by *Logan v. DOES*, 805 A.2d 237 (D.C. 2002) to determine Ms. Francis' entitlement to permanent total disability benefits. *Francis v. Howard University*, CRB No. 13-013, AHD No. 06-040E, OWC Nos. 603915 and 606928 (September 26, 2013).

The ALJ issued a Compensation Order on Remand on March 26, 2014. The ALJ, again, denied Ms. Francis' request that she be adjudicated permanently totally disabled. *Francis v. Howard University*, AHD No. 06-040E, OWC Nos. 603915 and 606928 (March 26, 2014). The CRB affirmed the Compensation Order on Remand. *Francis v. Howard University Hospital*, CRB No. 14-043, AHD No. 06-040E, OWC Nos. 603915 and 606928 (July 1, 2014).

The parties attended another formal hearing in October 2014 to adjudicate Ms. Francis' entitlement to an MRI and an adjustable bed. In a Compensation Order dated October 29, 2014, an ALJ ruled Ms. Francis' request for an MRI of her cervical spine and an adjustable bed were reasonable and necessary; the ALJ granted Ms. Francis' claim for authorization for a cervical spine MRI and an adjustable bed. *Francis v. Howard University Hospital*, AHD No. 06-040F, OWC Nos. 603915 and 606928 (October 29, 2014). This compensation order was not appealed.

When Howard did not reimburse Ms. Francis for the adjustable bed she had purchased prior to the formal hearing, Ms. Francis filed a Motion for Order Declaring Default ("Motion"). Because the October 29, 2014 Compensation Order had not been appealed and no stay had been issued, the ALJ assessed a penalty in the amount of 20% of the award against Howard pursuant to § 32-1515(f) of the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501 *et. seq.* ("Act").

Howard appeals the January 15, 2015 Order for Payment of Default Penalty on the grounds that the law "requires an adjudication of the amount of the award before entry of a default." Memorandum in Support of Application for Review, unnumbered page 1. Howard asserts it

does not doubt that on October 29, 2014, Judge Brown issued a Compensation Order indicating that the Claimant was entitled to reimbursement for the purchase of an adjustable bed. However, no evidence was presented at the time of the hearing as to the cost of the adjustable bed in question. The Order does not indicate a dollar amount for which an Order of Default may be obtained.

Id. at unnumbered pages 2-3. Howard further contends the receipt Ms. Francis submitted with her motion is not sufficient to establish the dollar amount awarded by the October 29, 2014 Compensation Order. For these reasons, Howard requests the CRB vacate the January 15, 2015 Order for Payment of Default Penalty.

In response, Ms. Francis argues that even though Howard was given a receipt for the adjustable bed she had purchased prior to the formal hearing, Howard did not make timely payment of the benefits awarded in the Compensation Order; therefore, a penalty (as opposed to a default) is appropriate. Ms. Francis requests the CRB affirm the Order for Payment of Default Penalty.

ISSUE ON APPEAL

Is the January 15, 2015 Order for Payment of Default Penalty arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law?

ANALYSIS¹

To be clear, a “penalty and a default are not mutually exclusive remedies and one or both may be awarded,” *Hensley v. Cheechi & Company*, CRB No. 10-075(R), AHD No. 92-359J, OWC No. 115568 (November 27, 2012), but a default is different from a penalty. A penalty seeks additional money because an employer failed to pay the correct compensation owed; a default seeks a determination that a sum certain was not paid. *Id.*

On December 31, 2014, Ms. Francis filed a Motion for Order Declaring Default.² Although captioned as a request for a default, the body of the Motion states

D.C. Code §32-1515(f) of the Act provides in pertinent part that “[i]f 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 amounts an amount equal to 20 percent thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order as provided in D.C. Code §32-1522 [Review of Compensation Orders] and an order staying payment of the additional compensation has been issued by the mayor or court.” [Emphasis removed.] The Act clearly states “[t]he payment of any amounts required by a compensation order shall not be stayed pending final decision unless so ordered on the grounds that irreparable injury would otherwise ensue to the employer.” See, D.C. Code §32-1522(b)(2). [Emphasis removed.]

In other words, although the caption of Ms. Francis’ Motion includes the term of art “default,” she actually requested a penalty for Howard’s failure to timely pay for the adjustable bed awarded in the October 29, 2014 Compensation Order.

In its appeal of the January 15, 2015 Order for Payment of Default Penalty, Howard argues that the law “requires an adjudication of the amount of the award before entry of a default.” Memorandum in Support of Application for Review, unnumbered page 1. Reading “penalty” for Howard’s use of the term “default,” according to the concurring opinion in *Tagoe* (an opinion joined by two administrative appeals judges and later adopted by a panel of three administrative appeals judges (*Tagoe v. Howard University Hospital*, CRB No. 10-007 & 10-009, AHD No. 03-287 & 03-286, OWC No. 568310, (July 30, 2010)):

In order to obtain an order of default, Petitioner must first obtain a compensation order identifying with specificity which medical bills in what amounts are to be paid, beyond the current existing compensation order which

¹ Because the Order on review is not one based on an evidentiary record produced at a formal hearing, the applicable standard of review by which we assess the determination reached by the Office of Hearings and Adjudication is whether the decision 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).

² The CRB has taken official notice of the contents of Office of Hearings and Adjudication, Administrative Hearings Division’s administrative file.

merely orders that causally related medical care be provided, but does not identify specific bills or services by date and amount. Upon obtaining that compensation order, Petitioner can, if the specific bills remain unpaid, return and seek a default order after the period for compliance has passed.

Before a claimant can pursue his or her rights under section 32-1519(a), and secure a supplementary order of default, there must be a compensation order awarding the claimant reimbursement of the medical expenses he/she incurred. Section 32-1519(a) states in relevant part:

In case of 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.

As previously noted, the *Lazarus* court, in construing the virtually identical language found at 33 USC § 918(a) of the Longshore Act, distinguished between the authorization or provision by an employer of medical services “and paying employees for expenses incurred in obtaining such services” where the employer refuses or neglects to provide or authorize the ordered medical care -- in which event a subsequent award of medical expenses obtained by the employee “in a suit against the employer is ‘compensation’ within the meaning of [section 918(a)].” 958 F.2d at 1301. What is required, in order to convert the incurred medical expenses into compensation owed by the employer to the employee, is that the employee “file a claim with the Secretary to recover his expenses.” *Id.*

Consistent with the foregoing, before Petitioner in the instant case may seek a supplementary order of default pursuant to D.C. Official Code § 32-1519(a), she must institute a claim under the Act seeking the award of payment of the expenses and/or debt she has incurred for causally related medical expenses that Respondent has refused to pay. Upon the issuance of a compensation order following hearing and evidentiary determination as to the amount of causally related medical expenses that Petitioner has, as a result of Respondent's refusal or neglect, been forced to pay or incurred by way of debt, [footnote omitted] Respondent is required to pay the amount ordered within thirty days of the date of the award. If not paid within that period, Petitioner would at that time be entitled to seek a supplementary order of default pursuant to section 32-1519(a), including the amount of any penalty pursuant to section 32-1515(f) that might at that time prove warranted.

Tagoe v. Howard University Hospital, CRB No. 08-187, AHD No. 03-287, OWC No. 568310 (February 13, 2009). The CRB is aware that the procedure set forth in *Tagoe* was developed in the context of a request for a default; however, there is no reason the same requirements should not apply to a request for a penalty. This conclusion is particularly appropriate when applying the *Tagoe* logic that

[because] 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. [Footnote and internal citations omitted.]

Wells v. Falke, Inc., CRB No. 11-076, AHD No. 06-401B, OWC No. 581868 (September 20, 2011). Until there is an order establishing a claimant has made out-of-pocket expenditures to obtain medical care or has incurred indebtedness for such care, an entry of an order of default, *Id.*, or an entry of an order assessing a penalty, *Id.*, is premature; however, unlike the situation in *Tagoe* wherein the claimant sought unspecified medical expenses causally related to her compensable injury, Ms. Francis essentially had filed a claim to recover her expenses for the adjustable bed when she sought authorization for an MRI and for a discrete item that already had been purchased to treat her compensable injury, the adjustable bed. At the formal hearing, Howard raised the defense of the reasonableness and necessity of those treatments and lost.

Howard’s argument on appeal fails because as of the date the Compensation Order issued, Ms. Francis already had made her out-of-pocket expenditure to obtain the adjustable bed awarded in that Compensation Order; by the time the Compensation Order issued, the amount Ms. Francis paid for that particular item sought in her claim for relief already had been reduced to a known dollar amount as evidenced by the receipt attached to her Motion. Howard protests that the actual bed Ms. Francis purchased is more expensive than the one it would have authorized, but such is the risk an employer runs when it elects to deny authorization for specific medical treatment and contest the reasonableness and necessity of that treatment.

CONCLUSION AND ORDER

The January 15, 2015 Order for Payment of Default Penalty is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law and is AFFIRMED.

So ordered.