

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



ODIE DONALD II  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 16-153**

**ANDREA L. GRANT-HOPKINS,  
Claimant-Respondent**

v.

**ALION SCIENCE AND TECHNOLOGY and  
CHUBB INSURANCE GROUP,  
Employer/Insurer-Petitioner.**

Appeal from a November 18, 2016 Order for Default and Penalty  
by Administrative Law Judge Nata K. Brown  
AHD No. 05-254B, OWC Nos. 606489, 607735

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2017 MAR 7 AM 9 39

(Decided March 7, 2017)

Krista N. DeSmyter for Claimant  
Charles F. Midkiff for Employer

Before LINDA F. JORY, GENNET PURCELL 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 is an appeal from an Order for Default and Penalty which followed a Second Compensation Order on Remand ("SCOR") that was issued on May 5, 2016. The SCOR was issued in response to a Decision and Remand Order ("DRO") issued by the ("CRB") on June 10, 2015. The following background is taken from the DRO:

Claimant worked for employer as an executive administrative assistant. On February 22, 2004, Claimant was injured at work when a door slammed on her right wrist, causing a crush injury. On February 24, 2004, Claimant sought treatment for her right wrist from Dr. Rida Azer and he performed surgery to

remove a ganglion cyst and reconstruct a tear to the dorsal capsule on her right wrist.

On October 30, 2007, an Administrative Law Judge (ALJ) found *inter alia* Claimant sustained an accidental injury on February 22, 2004 to her right wrist in the course of her employment. *Grant v. Alion Science and Technology/NAI Personnel*, AHD No. 05-254A, OWC Nos. 606489, 607735 (October 2007). On January 15, 2014, Claimant presented additional claims at a formal hearing before an ALJ, seeking surgery and temporary total disability in connection with problems associated with her right shoulder. A Compensation Order (CO) issued which denied Claimant's claims as the ALJ determined Claimant did not offer sufficient evidence to invoke the presumption of compensability pursuant to §32-1521. The CRB issued a Decision and Remand Order which reversed the CO as the CRB determined Claimant had adduced two medical opinions that support a link between the wrist injury and Claimant's shoulder problems and remanded the matter to the ALJ to determine if Employer had adduced evidence to overcome the presumption. *Grant-Hopkins v. Alion Science and Technology*, CRB No. 14-027, AHD No. 05-254B (June 26, 2014) OWC Nos. [606489 and 607735].

A Compensation Order on Remand issued which again denied Claimant's claims. *Grant-Hopkins v. Alion Science and Technology*, AHD No. 05-254B, OWC Nos. 606489 and 607735 (January 27, 2015)(COR).

*Grant-Hopkins v. Alion Science and Technology*, CRB No. 15-025 at 1, 2 (June 10, 2015)("DRO").

The Compensation Review Board ("CRB") determined:

The ALJ's factual finding that Employer rebutted the presumption of compensability is not supported by substantial evidence in the record. Consistent with *Brown*, *Lorinczi* and *Swails*, we conclude that Employer's evidence is insufficient to sever the causal connection and therefore insufficient to rebut the presumption. We must vacate the COR as [sic] conclude it is not supported by substantial evidence nor in accordance with the law.

Because Employer failed to rebut the presumption of compensability, Claimant's claim is compensable as a matter of law. Although the CO and the COR list the only issue to address was whether Claimant's right shoulder condition was medically causally related to her February 22, 2004 work accident, a review of the hearing transcript reveals the nature and extent of claimant's disability was identified as an issue to be adjudicated by the ALJ. HT at 7.

The case is accordingly remanded for conclusions of law and findings of fact on the nature and extent of Claimant's disability, if any, and an appropriate award.

DRO at 4.

The SCOR concluded Claimant was entitled to temporary total disability (“TTD”) benefits from the date of her shoulder surgery until she recovered from the surgery. On June 22, 2016, Claimant filed a Motion for Order Declaring Default with the Administrative Hearings Division (“AHD”) asserting Employer did not authorize Claimant’s shoulder surgery pursuant to D.C. Code § 32-1507 and that Employer failed to make the required benefit payment to Claimant pursuant to D.C. Code § 32-1515. AHD issued the Order for Default and Penalty (“ODP”) which did not make a determination that Employer/Insurer was in default of a Compensation Order but ordered Employer to pay Claimant a penalty amounting to a 20 percent penalty in addition to the benefits awarded to Claimant within 10 days of the date of the ODP.

Employer timely appealed the ODP to the CRB by filing Defendant’s Application for Review and Memorandum of Points and Authorities in Support of Defendant’s Application for Review (“Employer’s Brief”). Claimant filed a Memorandum of Points and Authorities in Opposition to the Application for Review (“Claimant’s Brief”).

Because Claimant was not the recipient of an award of payment of medical expenses associated with shoulder surgery nor was the issue of authorization of the surgery ever the subject of an award or Compensation Order, the ALJ did not properly adhere to the requirements of either the penalty provision of D.C. Code § 32-1515 or the default provision of D.C. Code § 32-1519, we vacate the Order for Default and Penalty issued on November 18, 2016

#### ANALYSIS

Because the Order under review is not based on an evidentiary record produced at a formal hearing, the applicable standard of review by which we assess the determination reached by the ALJ in AHD 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).

Employer asserts that Claimant was requesting penalties on medical expenses not yet incurred therefore the ODP is in direct contradiction with the law and must be reversed and vacated. In support, Employer quotes the following language of the CRB’s decision in *Wells v. Falke, Inc.*, CRB No. 11-076 (September 20, 2011)(*Wells*):

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.

Employer asserts:

In the *Wells* matter, as in this one, there is “nothing in the Order establishing either that [Claimant] has made any out-of-pocket expenditures to obtain medical care, or obtained an order entitling [Claimant] to reimbursement for out-of-pocket expenditures (on incurred indebtedness) related to obtaining that care.” *See id* at

4-5. Rather in the present matter, Claimant's Motion seeks a default and penalty not only with regard to medical expenses not yet paid, but also for medical expenses not yet *incurred*. Neither the Motion nor the Order contains a dollar amount for which payment is sought or on which penalties are requested. More importantly, neither the Motion or the Order contains any assertion that the Claimant has made any out-of-pocket expenditures for medical care. Accordingly, as the Board determined in *Wells*, this matter is not suitable for the entry of an order of default or penalty.

Employer's Brief at 3,4 (emphasis included).

Claimant asserts:

After several administrative appeals, ultimately on May 5, 2016 Mrs. Hopkins' claim for payment of causally related medical treatment, authorization for medical treatment and benefits was granted. The Employer and Insurer did not appeal the Compensation Order of May 5, 2016. Nevertheless, the Employer refused to provide authorization for the requested medical treatment and failed to pay the outstanding medical expenses. As such, on or about June 6, 2016 Mrs. Hopkins filed a motion requesting an order declaring penalties with the ALJ seeking authorization for the ordered medical treatment and payment of the medical bills and a 20% penalty for the failure to pay timely benefits as required by D.C. Code § 32-1515(f).

Claimant's Brief unnumbered at 1, 2.

Claimant further asserts that she did not request relief pursuant to D.C. Code § 32-1519 although Claimant would have had that option as Employer did not make payment within thirty days.

Claimant's arguments lack merit and are rejected. D.C. Code § 32-1515(f) provides in pertinent part:

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 . . .

Not only do we find that Claimant was not awarded payment for the shoulder surgery, Claimant was not awarded payment of medical benefits. Furthermore even if Claimant had been awarded authorization for the shoulder surgery the only way Claimant could be the recipient of a 20 percent penalty for late payment of said benefits is if Claimant paid for the procedures herself and presented a claim to Employer for the amount of her out-of-pocket payments. 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. *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 (5<sup>th</sup> 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.

*Wells, supra* at 4.

Similar to *Wells*, there is nothing in the order under review establishing either that Claimant has made any out-of-pocket expenditures to obtain any medical care, or obtained an order entitling her to reimbursement for out-of-pocket expenditures (or incurred indebtedness) related to obtaining that care. Moreover, there was no finding that Employer was obligated to pay any reimbursement to Claimant for medical care in the SCOR or in any prior Compensation Order. Such a finding is a necessary predicate to the assessment of a penalty for late payment. The order awarding a 20 percent penalty is not in accordance with the law and must be vacated.

#### CONCLUSION AND ORDER

The November 18, 2016 Order for Default and Penalty that ordered Employer pay a 20 percent penalty on an undetermined amount of benefits is not in accordance with the law and is REVERSED and VACATED.

*So ordered.*