

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-193

**ATRICIA ARMSTEAD,
Claimant-Respondent,**

v.

**DPI SPECIALTY FOODS and LIBERTY MUTUAL INSURANCE ,
Employer/Insurer – Petitioners.**

Appeal from a November 29, 2012 Order by
Administrative Law Judge Amelia Govan
AHD No. 12-216, OWC Nos. 671592 & 685441

Gregory V. Chestnut, Esquire for the Petitioner
Michael Kitzman, Esquire for the Respondent

Before HEATHER C. LESLIE,¹ HENRY MCCOY, *Administrative Appeals Judges* and LAWRENCE D.
TARR, *Chief Administrative Appeals Judge*,

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the November 29, 2012, Order issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that Order, the ALJ granted the Claimant's request for penalties. We VACATE.

FACTS OF RECORD AND PROCEDURAL HISTORY

On May 15, 2010 the Claimant suffered an injury to her left shoulder. On September 28, 2011 the Claimant suffered an injury to her left shoulder and left lower extremity. A dispute arose

¹Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

over the Claimant's entitlement to temporary total disability benefits from December 13, 2011 to the present and continuing, authorization for ongoing medical treatment, and payment of causally related medical bills. The Employer contested whether or not the above injuries were medically causally related to the injuries.

A Formal Hearing was held and a Compensation Order (CO) issued on August 31, 2012. In that CO, the ALJ concluded the Claimant's left shoulder symptoms were medically casually related to the May 15, 2010 injury. The ALJ also concluded the Claimant's left lower extremity symptoms were not medically causally related to either work injury. The CO awarded the Claimant the requested disability benefits and authorization for medical benefits and payment of medical bills for the left upper extremity only.

On September 20, 2012, the Office of Hearings and Adjudications received from the Claimant a Motion for Order Declaring Default. In that motion, the Claimant alleges the Claimant did not receive timely payment pursuant to the August 31, 2012 CO and that pursuant to D.C. Code § 32-1515(f), the Claimant was entitled to an Order of Default for the Employer's noncompliance with the outstanding CO.

In a letter to the ALJ dated October 11, 2012, the Employer argued that as the payment was sent to the Claimant on September 13, 2012, a date within the ten day time period mandated in D.C. Code § 32-1515(f), payment was timely and the Employer was not in default of the CO.

On November 29, 2012, the ALJ granted the Claimant's Motion for Default, finding the payment was untimely pursuant to D.C. Code § 32-1515(f) and *Orius Telecomm., Inc. v. DOES*.²

The Employer timely appealed. The Employer argues it cannot be found in default because the Claimant was paid benefits. The Claimant, in opposition, states that the CO was received by the Claimant on September 6, 2012 and as such, payment was due no later than Monday, September 17, 2012.

THE STANDARD OF REVIEW

In review of an Order from AHD that does not contain Findings of Fact or Conclusions of Law, the Board must affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See, 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, § 51.93 (2001).

DISCUSSION AND ANALYSIS

Although the Claimant titled her motion, "Motion for Order Declaring Default", she requested relief pursuant to D.C. Code 32-1515(f) which awards penalties for late payment of a CO.

D.C. Code § 32-1515 (f) and 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

² 857 A.2d 1061 (D.C. 2004).

amount equal to 20% thereof, which shall be paid at the same time as, but in addition to, such compensation.

There is a significant and important distinction between penalties and a default, given that an order declaring a default is a specific statutory creation under D.C. Code § 32-1519, which has numerous requirements which differ from those associated with a penalty for late payment of compensation due.

D.C. Code § 32-1519 (a) states,

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. After investigation, notice and hearing, as provided in § 32-1520, the Mayor shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order.

D.C. Code § 32-1519 exists for the purpose of permitting persons "to whom compensation is payable" to avail themselves of the judgment enforcement procedures available through the D.C. Superior Court. In the instant matter, given that Employer asserts that it did eventually make full payment, a ruling that it is in default would be moot as judgment enforcement procedures would be unnecessary. See *Brown v. Davis Memorial Goodwill Industries*, CRB No. 07-161, OWC NO. 568170 (October 10, 2007).

We do agree with the Employer's argument that it is not in default as payment was made within 30 days after compensation is due. Thus, the Employer is not in default pursuant to D.C. Code § 32-1519 (a).

The ALJ, when analyzing whether or not the Claimant was entitled to penalties pursuant to D.C. Code § 32-1515 (f), stated,

On October 11, 2012 AHD received correspondence from Employer regarding the motion for default. Therein, Employer states that is should not be found in default of the August 31, 2012 Compensation Order because it did issue payment within the 10 day time limitation. Employer attached a copy of a check issued to Claimant on September 13, 2012. However, the undersigned finds that payment was not timely in that it was not received by Claimant within the 10 days of issuance of the August 31, 2012 Order.

Employer does not dispute the contention that Claimant received the check on September 18, 2012. Neither party has submitted documentary proof of the date of receipt of the August 31, 2012 Compensation Order. The award became due on the date of the Compensation Order was dispatched by the agency by certified

postal mail. 7 DCMR § 228.1 (b). The District of Columbia Court of Appeals has decided that the dispositive date for determining entitlement to penalties pursuant to § 32-1515(f) is the date on which the Claimant received the award check, rather than the date it was issued by Employer. Orius Telecomm., Inc. v. DOES, 857 A.2d 1061 (D.C. 2004).

Order at 1-2.

We assume that the ALJ meant the award became due 10 days after “the date the Compensation Order was dispatched” as the ALJ earlier stated payment was not timely because the Claimant did not receive payment “within the 10 days of issuance of the August 31, 2012 Compensation Order.” This is in error. It is well settled under the Act, compensation payable pursuant to an award becomes due when the award is actually received by employer/carrier. *See* D.C.M.R. § 228.4³; *Orius Telecommunications, supra, Brinkley v. RTL Electric*, CRB No. 05-23, OWC No. 580138 (July 20, 2005).

As the ALJ acknowledged, neither party submitted documentary proof of the date of receipt of the Compensation Order. The Claimant does state she received the CO on September 6, 2012 in argument, but does not offer any date on which the Employer received the CO. We cannot tell, based on the record before us, when the Employer received the CO, the date which then determines whether or not payment on September 18, 2012 was timely. This may very well be because of confusion surrounding whether or not the Claimant was seeking an order of default, by the title of her motion, or penalties based upon the statute referred to in the body of the default motion.

On the record before us, we cannot ascertain when the Employer received the CO. Upon remand, the ALJ shall determine if an award of penalties is proper either with the record available or by re-opening the record to allow for additional evidence to determine when the Employer received the CO.

³ D.C.M.R. § 228.4 states,

Whenever the Act or this chapter provides a time period during which an action is to be taken, unless otherwise expressly provided, the time period shall run from the actual receipt of a document.

CONCLUSION AND ORDER

Because the November 29, 2012 Order fails to identify the correct operative date from which to commence the ten day period, it lacks a necessary factual basis, and is therefore arbitrary, capricious, an abuse of discretion, and contrary to law. The Order is VACATED and remanded for further findings of fact consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

February 12, 2013
DATE