COMPENSATION REVIEW BOARD

CRB No. 10-075(R)

HORACE E. HENSLEY,
Claimant,
v.

CHEECHI & COMPANY and ATLANTIC MUTUAL INSURANCE COMPANY,
Employer and Insurer.

Upon Remand from the District of Columbia Court of Appeals, DCCA No. 11-AA-0930
AHD No. 92-359J, OWC No. 115568

John Noble, Esquire, for the Claimant
Alan M. Carlo, Esquire, for Employer and Insurer

Before: LAWRENCE D. TARR, HENRY M. MCCOY, and MELISSA LIN JONES, *Administrative Appeals Judges*

LAWRENCE D. TARR, *Administrative Law Judge,* for the Review Panel:

DECISION AND ORDER

This case is before the Compensation Review Board (CRB) on the August 16, 2012, decision by the District of Columbia Court of Appeals (DCCA), *Hensley v. District of Columbia Department of Employment Services* (DOES), 49 A.3d 1195 (D.C. 2012) , affirming in part and reversing and remanding in part the CRB's Decision and Order, *Hensley v. Cheechi & Company,* CRB 10-075, AHD No. 92-359J, OWC No. 6115568 (June 29, 2011).

PROCEDURAL HISTORY

The claimant, Horace E. Hensley, worked for the employer, Cheechi & Company, as a comptroller. Mr. Hensley had a pre-existing arthritic condition, ankylosing spondylosis, which in 1987 was exacerbated by the claimant's work activities, rendering him temporarily totally disabled. *Hensley v. Cheechi & Co.,* H&AS No. 87-437, OWC No. 115568 (October 20, 1987). In 1993, the claimant was found to be permanently and totally disabled. *Hensley v. Cheechi & Co.,* OHA No. 92-359D, OWC No. 115568 (April 15, 1999).

The present matter concerns the 2009 decision, *Hensley v. Cheechi & Co.* AHD No. 92-3591, OWC No. 115568 (February 3, 2009). In that decision, an administrative law judge, (ALJ) held the claimant's bilateral hip and knee conditions, gastroenterology services, fibromyalgia, enthesopathy services, restrictive lung disease, cardiology treatment, and treatment with an eye doctor were not

causally related to the work accident, awarded the claimant a 20% penalty for underpayments in compensation benefits paid between February 22, 1990, and July 13, 1997, and denied the claimant requests for penalties under D.C. Code §32-1528, and for reimbursement of payments made for transportation, assisted living, barber shaving, neck surgery, and out of pocket expenses. *Hensley v. Cheechi & Co.* AHD No. 92-3591, OWC No. 115568 (February 3, 2009).

On review, the CRB affirmed all of the ALJ's determinations except his finding that the claimant was owed a 20% penalty for underpayments of compensation benefit for the period of February 22, 1990 to July 13, 1997. *Hensley v. Cheechi & Company,* CRB 10-075, AHD No. 92-359J, OWC No. 6115568 (June 29, 2011).The claimant appealed the CRB's decision to the District of Columbia Court of Appeals (DCCA).

In its August 16, 2012, decision, the DCCA affirmed all but one of the CRB's holdings. . The DCCA affirmed the CRB's determinations on the ALJ's findings regarding the claimant's failure to prove that the claimed medical conditions and services were causally related to the work accident, the CRB's determination that the employer did not act in bad faith, and the CRB's finding that the employer was not liable for the claimed reimbursements.

However, the DCCA held the CRB erred when it reversed the ALJ's finding that the employer owed a 20% penalty for underpayments of compensation benefit paid between February 22, 1990 and July 13, 1997 for scheduled cost-of-living adjustments.

The CRB had interpreted the claimant's claim as requesting a supplementary order declaring the amount in default and held the claim not timely because it was not made within two years as required by D.C. Code §32-1519(a). Although the parties argued before the DCCA the question as to when the two year limitation in D.C. Code §32-1519 (a) began to run, the DCCA held the actual issue presented was determining whether the claimant was seeking a default order:

> We conclude that, while the foregoing questions may ultimately be involved, the actual issue is whether what petitioner sought (and obtained) through his hearing before the ALJ was "a supplementary order declaring the amount of the default" within the meaning of § 32-1519 (a), and, thus, whether the two-year limit described in § 32-1519 (a) was implicated in this case.

49 A. 3d at 1203.

The DCCA reversed the CRB's determination that the claimant's request was time-barred. Recognizing that authorities have not been unanimous in resolving the distinction between penalty and default, the DCCA remanded this case.

As will be discussed, the CRB concludes that what the claimant sought and obtained by his request for a supplementary award was a penalty pursuant to §32-1515 and not a default under §32-1519 (a).

DISCUSSION

The issue before the CRB involves the employer's failure to timely pay the claimant a supplementary allowance, commonly called the cost of living allowance or COLA.

D.C. Code 32-1506 (a) provides:

> When the average weekly wage has changed as provided for in § 32-1505, any person who has a total and permanent disability or any surviving spouse or domestic partner who is receiving payments for income benefits under this chapter in amounts per week less than the new maximum for total disability or death shall receive weekly from the carrier, without application, an additional supplemental allowance calculated by the Mayor in accordance with the provisions of subsections (b) and (c) of this section; provided, that such allowance shall not commence to accrue and be payable until the average weekly wage exceeds $ 396.78. The Mayor shall notify the carrier of the amount of such additional supplemental allowance.

On April 30, 1993, the claimant was found to be permanently and totally disabled due to the aggravation of his ankylosing spondylosis caused by his work environment. He was eligible to receive the supplementary allowance one year later. See, *Long v. Plaza Realty Investors,* Dir Dkt. No 97-45, OHA No. 92-462B, OWC No. 104068 (October 14, 1998).

At a December 22, 2009, formal hearing, the claimant requested penalties under §§32-1515 (f). This Code section provides.

> 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 by the Mayor or court. 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.

In the February 3, 2010, CO, ALJ Roberson held:

> In this case, Employer provided payment history for indemnity benefits covering the period from November 18, 1987 to March 23, 2009. Employer began permanent total disability benefits on September 1, 1993. From February 22, 1990 until May 12, 1993, the record reveals Employer paid $ 1,000.94. From February 17, 1994 to July 13, 1997, Employer paid Claimant $ 1214.94. During this same period, the Office of Workers' Compensation Programs established maximum compensation rate as $ 551.46 for 1990, $ 584.10 for 1991, $ 613.09 for 1992, $ 647.84 for 1993, $ 679.17 for 1994, $ 701.52 for 1995, $ 723.34 for 1996, and $ 748.83 for 1997.

> On January 13, 1989, Employer advised Claimant his new compensation rate effective January 1, 1988 would be $ 453.29. CE 18. Based on the 5% COLA, Employer noted $ 475.95 would be the new rate effective January 1, 1989. An additional 5% increase for successive years would produce a compensation rate of $ 524.73 for 1990, $ 550.97 for 1991, $ 578.52 for 1992, $ 607.45 for 1993, $ 637.82 for 1994, $ 669.71 for 1995, $ 703.19 for 1996, $ 738.35 for 1997. See CE 18.

The ALJ further determined the claimant was underpaid:

> Claimant's biweekly compensation rate would have entitled him to benefits of $ 1049.46 for 1990, $ 1101.94 for 1991, $ 1157.042 for 1992, $ 1214.90 for 1993, $ 1275.64 for 1994, $ 1339.42 for 1995, $ 1406.38 for 1996, and $ 1476.70 for 1997. As noted above, Employer paid Claimant $ 1000.94 from February 22, 1990 to May 12, 1993, and paid Claimant $ 1214.94 for the period of February 17, 1994 to July 13, 1997. As such, Employer underpaid Claimant from February 22, 1990 to July 13, 1997.

The ALJ held

> Therefore, Claimant has established entitlement to a 20% penalty for unpaid compensation benefits for the period of February 22, 1990 to July 13, 1997. The penalty should be applied to the principal only excluding compounded interest.

On review, the CRB interpreted the claimant's request as a request for default under D.C. Code §32-1519(a). This section states in pertinent 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. 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.

The CRB further held that the claim was not timely because it was not filed within the Code section's 2 year limitation, and reversed the ALJ's decision. Upon reconsideration on remand, we AFFIRM the ALJ's decision. The CRB finds that what the claimant sought and obtained by his request for a supplement award (commonly called COLA) was a penalty pursuant to §32-1515 and not a default under §32-1519 (a) .

ANALYSIS

A review of the case law shows that there has been much confusion in identifying claims that involve "penalty" and claims that involve "default."[1]

[1] Some of the confusion might be due to the fact that the common meaning of the word "default" is very broad. See. Merriam-Webster's Collegiate Dictionary 390 (11th ed. 2005) ("failure to do something required by duty or law").

For example, in *Deane v. Total Blood Management, Inc.,* CRB No. 07-080, AHD No. 05-019A, OWC 587134 (May 17, 2007), an ALJ issued a decision titled "Supplemental Compensation Order Declaring Default" an ALJ awarded the claimant a 20 % penalty. On review, the CRB stated in a footnote:

> We note that this case does not in fact deal with a "default', as that term is used in the Act, specifically, in D.C. Code § 32-1519, in which an award that remains unpaid after 30 days of coming due may be declared in default, for the purposes of enabling enforcement of the award through resort to the courts of the District of Columbia. This case, by contrast, deals solely with a penalty for late payment, which is not a default.

Similarly in *Brown v. Davis Memorial Goodwill Industries,* CRB 07-161, OWC No. 568170 (October 10, 2007) an Office of Workers' Compensation claims examiner issued an Order Declaring Default that awarded the claimant a 20% penalty for the late payment of an approved settlement. The CRB, also in a footnote, said:

> We note that the order under review herein is not an "Order Declaring Default", as that term is used in the Act. Rather, it is a determination that a penalty should be awarded because a payment of compensation was made late, not a determination that that a payment has not been made. This is a significant and important distinction, 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. It exists for the purpose of permitting persons "to whom compensation is payable" to avail themselves of the judgment enforcement procedures available through resort to the D.C. Superior Court.

To add to the confusion, the penalty and a default are not mutually exclusive remedies and one or both may be awarded. As the CRB held in *Wells v. Falke, Inc,* CRB No. 11-076, AHD No. 06-401B, OWC no. 581868 (September 20, 2011):

> Enforcement proceedings concerning Compensation Orders are sometimes made more complex than is necessary by the imprecise use of the terms "penalty" and "default". Default proceedings are governed by D.C. Code § 32-1519, and they exist for a specific and limited purpose: to permit a claimant who has not received the compensation that is due under a Compensation Order to obtain a determination of the *amount* due, and take that determination to either the D.C. Superior Court and obtain a judgment in the amount of the default as part of an action to enforce the award (i.e., to commence a debtor/creditor collection action in civil court), or in the case of an insolvent or otherwise recalcitrant employer, seek payment of the amount of the award in default from the Special Fund established in D.C. Code § 32-1540.
>
> This is different from a penalty for late or non-payment of compensation due under an award, a circumstance which is governed by D.C. Code § 32-1515 (f), which calls

> for the imposition of a 20% penalty to be added to compensation that is not paid within ten days of the award of that compensation. An employer can be subject to the assessment of a penalty without a default being declared as that term is used in the Act. Conversely, an employer can be declared in default without there ever being a penalty assessment. Similarly, an employer can have a penalty assessed for late payment of an award, and if the penalty assessment (which is itself also an "award") is not paid within 30 days, be in default of that penalty award. And there are other potential permutations.

In the case at bar, the claimant was seeking additional money because the employer failed to pay him the correct compensation owed. He was not seeking a determination that an amount, *i.e.* sum certain, was not paid. As the DCCA noted, that in previous cases interpreting §32-1519 (a), the CRB held that this section does not pertain to situations such as the one involved in the present case.

To the contrary, in cases where claimants seek compensation orders establishing they are entitled to payment of a 20% penalty, the CRB consistently has held §32-1515 (f) is the operative statute. Upon careful consideration, we reaffirm these holdings because we find it is more consistent with the statutory language and legislative intent.

Since there is no dispute that the employer did not timely pay to the claimant the correct amount of compensation owed, the ALJ's imposition of a penalty under §32-1515 (f) is AFFIRMED.[2]

Lastly, in its post-remand written submission, the employer asks the CRB to decide a matter that arose after the ALJ's CO.

While the matter was pending before the CRB, the insurer was put under an Order of Liquidation and benefits are now being paid by Maryland Property and Casualty Insurance Guaranty Company. The Maryland guaranty corporation is not obligated to pay late payment penalties when such penalties are assessed against a carrier. *Property and Casualty Insurance Guaranty Corp. v. Yanni*, 397 Md 474, 919 A. 2d 1 (2007). Therefore, the employer argues the CRB should find that no penalties are owed.

We decline to decide this issue. First, both counsel have stated that shortly after Judge Roberson's CO, the employer paid the penalty assessed, even though it believed it should not have to pay. Employer and Carrier's March 19, 2010, Response to Application for Review at 3, October 19, 2012, post-remand Statement of Claimant at 4, 5. Therefore, this issue is moot.

[2] We acknowledge, as also noted by the DCCA, that the CRB is guided by judicial interpretations of analogous provisions of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) and that the several cases cited by the DCCA under the LHWCA that show the federal courts' interpretations of similar provisions have not been completely consistent. With the present decision, we overrule our June 29, 2011 decision because we find it is not in line with the CRB's previous holdings and more importantly find our present decision is consistent with the statutory language and the legislative intent.

ORDER

All determinations made by the ALJ in his February 3, 2009, Compensation Order are supported by substantial evidence and in accordance with the law. That Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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LAWRENCE D. TARR
Administrative Appeals Judge

November 27, 2012
DATE

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