

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-101

**OTIS MAHONEY,
Claimant–Respondent,**

v.

**DISTRICT OF COLUMBIA HOUSING AUTHORITY,
Self-Insured Employer–Petitioner.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 NOV 18 AM 11 20

Appeal from a January 29, 2015 Supplemental Order Declaring Default and
a May 21, 2015 Reconsideration of Order Declaring Default by
Administrative Law Judge Gerald D. Roberson
AHD No. PBL 00-086C, DCP No. LT3-HCD001153

(Decided November 18, 2015)

Jonathan M. Grossman for Claimant
Andrea G. Comentale for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals
Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On January 29, 2015, an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia Department of Employment Services (DOES), found Employer to be in default of a Compensation Order issued June 2, 2009, and awarded Claimant “a penalty that consists of 12 times Claimant’s monthly wage, provided, that the increase shall not exceed 12 months’ compensation.” “Supplemental Order Declaring Default”, January 29, 2015 (the Default Order).

On February 12, 2015, Employer filed a “Motion for Reconsideration” of the Default Order, which the ALJ denied in a “Reconsideration of Order Declaring Default” issued May 21, 2015 (the Reconsideration Denial).

On June 22, 2015, Employer filed “Petitioner’s Application for Review” (AFR) with the Compensation Review Board (CRB), appealing both the Default Order and the Reconsideration Denial. The remaining procedural and factual details of relevance are set forth in the Discussion below.

DISCUSSION

The following timeline sets forth the history of the matter that is presently before us:

1. October 29, 2004: AHD issued a “Recommended Compensation Order” (CO 1) denying Claimant’s claim for relief seeking temporary total disability (ttt) from June 17, 2002 to date and continuing.
2. November 30, 2005: The CRB issued a “Decision and Order”, vacating the award and remanding for further consideration (DRO 1).¹
3. May 23, 2006: AHD issued a Compensation Order on Remand (COR 1), denying a revised claim for relief of ttt from April 20, 2002 to date and continuing.
4. October 20, 2006: The CRB affirmed COR 1. Claimant appealed the affirmance to the District of Columbia Court of Appeals (DCCA).
5. June 24, 2008: The DCCA reversed the CRB’s affirmance, and remanded the matter with instructions that the CRB remand further to AHD for a new hearing, because the DCCA determined that statements made by the ALJ in the formal hearing misstated the burden of proof and may have prejudiced Claimant’s ability to present his claim.
6. August 13, 2008: The CRB remanded the case to AHD with instructions to proceed in accordance with the DCCA’s mandate.
7. June 2, 2009: Following a new formal hearing in front of a different ALJ (the original ALJ having retired), a second Compensation Order on Remand was issued (COR 2). In COR 2, Claimant’s claim for relief was granted, being a claim for ttt from April 20, 2002 to date and continuing.

COR 2 is the subject of the award of a penalty.
8. October 22, 2009: Employer paid Claimant \$123,480.00, purportedly representing ttt benefits due from April 20, 2002 to October 24, 2009.
9. November 25, 2009: Employer paid Claimant \$870.24 representing ttt from November 8, 2009 to November 21, 2009.

¹ Although the order was titled “Decision and Order”, it was a remand order, and we therefore denominate it “DRO”.

As of this date, Employer's payments for benefits from April 20, 2002 to June 2, 2009 were current, but paid late, since they were not made within 30 days of an award.² See D.C. Code § 1-623.24 (b)(3).

10. January 27, 2010: The CRB vacated COR 2 (the June 2, 2009 award) and remanded the case to AHD for further consideration.
11. February 16, 2010: A Compensation Order on Remand (COR 3) is issued, again granting the claim.
12. February 25, 2010: Employer pays ttd purporting to cover period October 25, 2009 to November 7, 2009, and the period from November 22, 2009 through February 13, 2010.

We note that nothing further of relevance transpired for approximately 3 years and 8 months.

13. November 4, 2013: Claimant filed a "Motion for Miscellaneous Relief" seeking a determination that Employer had been in default of the June 2, 2009 COR 2. In this appeal, Employer contended that it did not receive this motion at the time it was filed.
14. December 29, 2014: The ALJ who issued COR 2 having become a member of the CRB, issued an "Order to Show Cause" (OSC) why "all pending matters" should not be handled by a new ALJ based upon "the existing record".
15. January 29, 2015: A different ALJ issued a "Supplemental Order Declaring Default", finding that Employer "is in default of the Compensation Order dated June 2, 2009", citing Employer's failure to oppose the "Motion for Miscellaneous Relief" or the OSC. The relief granted was a penalty "that consists of 12 times Claimant's monthly wage, provided, that the increase shall not exceed 12 months' compensation."
16. February 12, 2015: Employer filed a "Motion for Reconsideration" at AHD, averring that it never received service of the "Motion for Miscellaneous Relief".
17. February 27, 2015: The ALJ in AHD issued a "Reconsideration of Supplemental Order", in which the parties were directed to "submit documentation" to "ascertain payment of compensation" as ordered in the February 16, 2010 COR 3.
18. March 2, 2015: Employer filed an AFR with the CRB, appealing the January 29, 2015 "Supplemental Order Declaring Default".
19. March 4, 2015: Employer filed a "Motion to Dismiss Application for Review", seeking a dismissal of the AFR without prejudice, pending the ALJ's resolution of the Motion for

² We note there is a gap in payments from October 25 to November 7, 2009. This gap has not been the subject of any discussion in either Employer's or Claimant's briefs. Neither party has raised this apparent gap as a specific issue in this appeal, thus we will not address it.

Reconsideration of the order declaring a default and seeking permission to re-file the AFR if the ALJ's decision is adverse to Employer.

20. March 17, 2015: The CRB granted Employer's motion.
21. April 24, 2015: Claimant filed a "Supplemental Brief in Support of Motion for Miscellaneous Relief" in AHD, asserting that Employer is in default of the October 29, 2004 Recommended Compensation Order (CO 1), the June 2, 2009 Compensation Order on Remand (COR 2), and the February 16, 2010 Compensation Order on Remand (COR 3).
22. May 21, 2015: The ALJ issued a "Reconsideration Order Declaring Default", again finding Employer to be in default of the June 2, 2009 Compensation Order on Remand (COR 2), and finding "Employer failed to timely pay temporary total disability benefits, as ordered by the June 2, 2009 Compensation Order. Employer is in default of the Compensation Order dated June 2, 2009. Employer is further ORDERED to pay Claimant WITHOUT FURTHER DELAY."
23. June 22, 2015: Employer filed an AFR with the CRB, constituting a re-filing of the previously dismissed appeal, an appeal of the May 21, 2015 "Reconsideration Order Declaring Default" and a memorandum of points and authorities in support thereof (Employer's Brief).
24. Claimant filed an Opposition to Application for Review and memorandum of points and authorities in support thereof (Claimant's Brief).

Employer first argues that the two orders declaring it to be in default are erroneous as a matter of law because the June 2, 2009 COR 2 had been vacated prior to Claimant's ever having sought to obtain a default order.

Claimant argues, to the contrary, the ultimate determination as to the validity of a compensation order is irrelevant to whether Employer is obligated to pay the compensation order in a timely fashion, citing D.C Code § 1-623.24(g), and relying upon the CRB decision in *Newby v. D.C. Public Schools*, CRB No. 10-115 (June 29, 2010).

Employer counters that *Newby* is distinguishable from the present case, because while in *Newby*, the claimant sought the statutory penalty at a time when Employer still had not paid under a then valid but later vacated compensation order, in this case Claimant is seeking a default and penalty award for an order that was vacated prior to the request for a default and penalty.

Claimant responds that this argument must fail because the purpose of the statutory provision is to encourage (or mandate) timely payment of compensation orders and it is immaterial to achieving that purpose that a compensation order is ultimately vacated. Otherwise, Claimant argues, Employer has no incentive to make timely payment of compensation orders, and will "routinely" fail to pay them in the future.

While we do not accept Claimant's rationale that his interpretation must be accepted because a contrary interpretation incentivizes non-compliance by Employer, we agree that there is no reason to distinguish this case from *Newby*.³

D.C. Code § 1-623.24 (g) governs what shall occur in the event that a compensation order is not paid in a timely fashion. It reads:

If the Mayor or his or her designee fails to make payments of the award for compensation as required by subsection (a-3)(1), (a-4)(2) or (b)(3) of this section, the award shall be increased by an amount equal to one month of the compensation for each 30-day period that payment is not made; provided, that the increase shall not exceed 12 months' compensation. In addition, Claimant may file with the Superior Court of the District of Columbia a lien against the Disability Compensation Fund, the General Fund of the District of Columbia, or any other District fund or property to pay the compensation award. The Court shall fix the terms and manner of enforcement of the lien against the compensation award.

Subsection (a-3)(1) deals with payments of claims at the claims administration level before there has been any litigation in the DOES, and has no application to this case. Similarly, subsection (a-4) has no application, having been repealed.

The provision of relevance here, subsection (b)(3), reads:

The Mayor or his or her designee shall begin payment of compensation to the claimant within 30 days after the date of an order from the Department of Employment Services Administrative Law Judge.

Nowhere in the statute does the word "default" appear. This is a provision assessing a penalty for failure to pay a compensation order in a timely manner, and also a provision for a process whereby a claimant can obtain a lien against District of Columbia assets for unpaid awards.

Further, the statute is drafted as to make it apparent that the time for payment is within 30 days of the award by the ALJ. Presumably the legislature was aware of the existence of an appellate procedure and was aware that there would be instances, such as the one before us, where an award would be made which would ultimately be vacated either by the CRB or the DCCA, yet the statute specifically starts the clock running from the date of the award by the ALJ.

Despite the fact that by the time Claimant sought imposition of the statutory penalty, Employer was no longer "in default" of the award, as that term is commonly understood.,

Section 1-623.24 (g) is not a default provision, it is a late payment penalty provision. It imposes a one month penalty for every 30-day period that payment is not made, up to a maximum penalty

³ The incentive argument fails, because Employer would still be running the risk of not prevailing on appeal and thus making itself liable for a penalty. At most, distinguishing this case from *Newby* might incentivize Employer to fail to pay in a case where Employer is highly certain that it would prevail on appeal.

of 12 months' worth of penalties. Unlike the private sector act, the penalty is calculated in discrete delinquency increments, rather than as a flat percentage of the late payment, and in order for a penalty to be assessed, there must be a 30-day period of delay to trigger a penalty increment.

There is no dispute that a "Department of Employment Services Administrative Law Judge" ordered payment of benefits in a compensation order issued June 2, 2009. The statute required that the amounts due under that award be paid within 30 days of June 2, 2009, or, by July 2, 2009. Payment was not made until October 22, 2009.

Accordingly, Employer is liable for "an amount equal to one month of the compensation for each 30-day period that payment is not made", which in this case means the penalty is owed for the thirty-day period from June 3, 2009 to July 3, 2009, for a second thirty-day period from July 4, 2009 to August 3, 2009, a third thirty-day period from August 4, 2009 to September 2, 2009, and a fourth-thirty day period from September 3, 2009 to October 2, 2009. Thus, Employer is liable for a penalty equal to four month's compensation.

While the ALJ was not in error regarding Claimant's entitlement to a penalty, he was in error to assess a penalty equal 12 months of compensation⁴ inasmuch as there were only 4 thirty-day increments during which the payments were not made.

Regarding Claimant's assertion that since Employer concedes that it "under calculated" the proper compensation rate, each underpayment should be considered non-payment, and hence Employer is liable for the statutory penalty for periods when the payments were incorrectly calculated, we must disagree.

In this case, there is no assertion by Claimant that any discrepancy existed with respect to the compensation rate that was known to Employer until Employer discovered the miscalculation on its own, and then made up the difference. Were we to agree with Claimant that the penalty ought to apply in such a circumstance, Employer would be discouraged from detecting and correcting payment errors.

While a reasonable argument can be made for Claimant's position, we view the penalty provision to be fundamentally about timeliness, not compensation rates. To Claimant's suggestion that Employer could pay \$1.00 a month and thus avoid the imposition of a penalty, and such a rule would be absurd, we have two responses:

First, such a "payment" would in all likelihood be deemed to be *de minimis*, to the point of having no legal effect. Secondly, it would be equally absurd to argue that an unintentional and unrecognized underpayment of \$1.00 a month that Employer discovers and corrects on its own would subject Employer to the substantial statutory penalty.

⁴ In the "Supplemental Order Declaring a Default", the ALJ erroneously assessed a penalty of "12 times Claimant's monthly wage", rather than monthly "compensation". This error was corrected in the "Reconsideration of Order Declaring Default".

In normal instances, we view the appropriate remedy for an unintentional underpayment to be a request for interest on the amount paid late for the period of the delay.

The orders on appeal contain no factual findings concerning the amounts in question as they relate to the underpayments. We note, however, that the ALJ erroneously asserted that interest on accrued or unpaid benefits is not allowed under the act. That is not the case. *See Mitchell v. D.C. Public Schools*, CRB No. 11-007, AHD No. PBL 08-100A, DCP No. 30080441654-001 (October 5, 2011).

Although the ALJ did not premise the erroneous award of 12 months of penalties upon a theory of underpayment, since we are remanding the matter for entry of a penalty award consistent with the foregoing Decision and Remand Order, if, on remand, the record contains sufficient evidence to establish the amount of interest to which Claimant may be entitled for such underpayments, the ALJ may consider that claim, provided Employer has the opportunity to contest the claimed amount of interest.

CONCLUSION AND ORDER

The award of a penalty for late payment is supported by substantial evidence and is in accordance with the law. The award of 12 month's compensation as the amount of the penalty is not supported by substantial evidence, is not in accordance with the law, and is VACTAED.

The matter is remanded for entry of an award of a penalty equal to four month's compensation, and for further consideration of any claims for interest on the amount of underpayments as are supported by the record evidence, subject to Employer's being provided the opportunity to contest the amount of interest for which it may be liable.

So ordered.