

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB 13-131

**ANTONIO THOMPSON,
Claimant-Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY and CRAWFORD & COMPANY,
Self-Insured Employer and Third Party Administrator-Respondents,**

Appeal of a September 27, 2013 Order issued by
Administrative Law Judge David L. Boddie
AHD No. 99-217, OWC No. 533461

Antonio Thompson, Petitioner
Alan D. Sunberg, for the Respondents

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

LAWRENCE D. TARR, *Chief Administrative Appeals Judge* for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND, FACTS OF RECORD, AND PROCEDURAL HISTORY

Antonio Thompson (Claimant) has appealed the September 27, 2013 Order Denying Supplementary Compensation Order for Award of Penalties and Declaring a Default that was 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 determined that Claimant's request for penalties and a declaration of default was moot. For the reasons stated, we affirm the decision of the ALJ.

On May 8, 2001, Claimant was awarded temporary total disability benefits from October 5, 1998 to January 10, 1999 and temporary partial disability benefits from January 11, 1999 to May 8, 2001. The employer was ordered to pay the temporary total benefits at a rate equal to Claimant's pre-injury average weekly wage because of its bad faith failure to pay compensation and temporary partial benefits based upon Claimant's partial wage loss. This decision ultimately was

affirmed by the Director (who at that time decided appeals) on May 22, 2002. *Thompson v. WMATA*, Dir. Dkt. No. 01-52, OHA No. 99-217, OWC No. 533461 (May 22, 2002).

Claimant filed his first Motion for an Order Declaring Default on June 7, 2001.¹ The ALJ's September 27, 2013 Order stated that no ruling was issued on Claimant's June 7, 2007 Motion.

The ALJ's Order noted that there are no records from two proceedings relating to two Employer's Applications for Formal Hearing—its January 31, 2002, Application and its April 25, 2002 Application. The Order further stated that on November 29, 2002 an ALJ issued a Compensation Order (CO) which denied an award of compensation to Claimant, that Claimant's appeal of the CO to the Director was dismissed because it was not timely filed and that the Director's dismissal of the CO was affirmed by the District of Columbia Court of Appeals.

Of significance to the present appeal, on February 12, 2003, an ALJ issued a CO that ended Claimant's May 8, 2001 award of benefits, finding Claimant did not have any wage loss after March 22, 2000 because he returned to work at a wage that was greater than his pre-injury wage. The ALJ also granted Employer a credit against future workers' compensation indemnity liability. *Thompson v. WMATA*, OHA No. 99-217C, OWC No. 533461 (February 13, 2007).

Claimant appealed the February 12, 2003, decision ending his benefits to the Director. While that appeal was pending, Claimant filed an Application for Formal Hearing on April 10, 2003, seeking reinstatement of his disability benefits. This application was dismissed by an ALJ because his appeal of the February 12, 2003 CO had not been decided.

Claimant's appeal of the February 12, 2003 CO to the Director was dismissed because it was not timely filed. *Thompson v. WMATA*, Dir. Dkt. No. 03-40, OHA No. 99-217C, OWC No. 533461 (May 30, 2003).

On October 28, 2004, Claimant filed an Application for Hearing seeking reinstatement of the benefits that were awarded him on May 8, 2001. On March 31, 2005, an ALJ denied Claimant's Application.

Claimant filed the present matter, his second Motion for an Order Declaring Default, on May 20, 2008. In his motion, Claimant asserted Employer failed to comply with the May 8, 2001 award and argued that Employer owed him more than \$ 200,000.00.

Employer filed its Opposition to Claimant's motion. The ALJ held a status conference on October 27, 2009 and that day issued an Order titled "Supplementary Compensation Order Awarding Penalties and Declaring a Default" that found Employer owed Claimant \$ 136,650.33 in compensation and \$27, 330.07 in penalties, or a total of amount of \$ 163,980.39.

¹ Claimant's first motion for default order alleged Employer owed him \$14,310.18 plus penalty because Employer had not fully and timely paid the awarded temporary total and partial benefits and that Employer failed to pay \$2,895.00 for causally related medical expenses.

On November 3, 2009, Employer filed a motion with the ALJ to stay the October 27, 2009, Supplementary Order. The ALJ issued a Stay on November 5, 2009 and reconsidered his decision. On September 27, 2013, the ALJ issued the Order that is the subject of this appeal.

In the Order the ALJ denied Claimant's motion. Significantly, in the Findings of Fact section of the CO, the ALJ found:

The Employer made payments of workers' compensation benefits pursuant to the May 8, 2001 Compensation Order until February 2003, when benefits were terminated by a subsequent compensation order.

CO at 6.

The ALJ determined that the February 12, 2003 CO, in effect, modified the May 8, 2001 such that there was no default or penalties. The ALJ held

However, having now reviewed the substance of the past compensation orders issued in this case, the conclusion is inescapable, that the February 12, 2003 Compensation Order ... that determined the Claimant was not entitled to any workers' compensation benefits retroactively, after March 22, 2000, a date prior to the issuance of the initial May 8, 2001 Compensation Order, that awarded compensation benefits from October 8, 1998 to May 8, 2001, and to the present and continuing, and which was appealed, and affirmed, had effectively reversed that determination and became the law of the case, and rendered the Claimant's Motion for a Supplementary Compensation Order awarding penalties and declaring a default moot.

Order at 9.

Claimant timely appealed and Employer timely filed its Opposition.

DISCUSSION

D.C. Code § 32-1515 (f) imposes a 20% penalty if awarded compensation "is not paid within 10 days after it becomes due." D.C. Code 32-1519 states that if the employer defaults paying awarded compensation, upon motion, a supplementary order declaring the amount of default can issue.

However, in order for Claimant to be eligible for penalties and a declaration of default, it must be shown that Employer did not timely pay benefits to which Claimant was entitled. Here, Claimant's entitlement to temporary total and partial benefits ended on March 22, 2000 and Employer paid benefits through February 2003. Therefore, we agree with the ALJ that Claimant is not entitled to penalties or a declaration of default.

In his memorandum, Claimant argues that the decision that held he no longer was entitled to temporary total and partial benefits, the February 12, 2003 CO, was wrongly decided. Claimant's

appeal of that decision was dismissed. Therefore, the CRB does not have any authority to review the February 12, 2003 CO now and its holding is the law.

Claimant also asserts that he is entitled to penalties and a default order because Employer reneged on its obligation to pay his medical insurance payment, his medical travel expenses, and several unpaid medical bills.

As to the health insurance claim, the Code, in § 32-1507(a-1), states, in part “Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter.”

This section, enacted in 1991, seems to require employers who provide health insurance coverage for their employees to provide equivalent health insurance to workers eligible for workers' compensation benefits.

Although this section still appears in published copies of the D.C. Code, the United States Supreme Court, in *District of Columbia v. Greater Washington Board of Trade*, 113 S. Ct. 580, 506 U.S. 125, 121 L. Ed 2d 513 (1992), ruled that this section of the District of Columbia Workers' Compensation Act cannot be enforced because it was pre-empted by ERISA, the Employee Retirement Income Security Act of 1974 (29 USC 1001 *et seq.*). As the CRB held in *Alexander v. Sibley Memorial Hospital*, CRB No. 08-151, and AHD No. O8-40, OWC No. 629349 (July 31, 2008):

[I]t is noted that the obligation to continue to pay an injured employee's health insurance premiums imposed upon employers by Section 32-1507 (a-1) (4) was preempted by the federal Employee Retirement Income Security Act of 1974 (“ERISA”) Section 514 (a) 29 U.S.C. § 1144 (a) and thus this provision is of no force or legal effect.

With respect to the remaining items for which a default order was requested, medical travel expenses and several unpaid medical bills, we find no error in the ALJ's decision.

The CRB has held that these items can be “compensation” and subject to a default order. *Tagoe v. Howard University Hospital* CRB No. 10-007, AHD No. 03-287; OWC No. 568310, CRB No. 10-009, AHD No. 03-286; OWC No. 568310 (July 30, 2010). However, before a default order can issue, a claimant must obtain (usually by evidentiary hearing) an order that identifies the specific medical expenses that have not been paid. After obtaining this order, if the specific bills remain unpaid, a claimant may seek a default order. *Id.*

To date, Claimant has not obtained an order identifying the specific unpaid medical expenses. Any decision on whether a default order are appropriate must wait until after Claimant files the appropriate claim and receives a determination that Employer is liable for specific medical travel expenses and specific unpaid medical bills (or bills paid by Claimant for which reimbursement is sought).

Therefore, we find no error that the ALJ did not issue an order of default with respect to medical travel expenses and unpaid medical bills.

CONCLUSION AND ORDER

The ALJ's September 27, 2013 Order Denying Supplementary Compensation Order for Award of Penalties and Declaring a Default is AFFIRMED.²

FOR THE COMPENSATION REVIEW BOARD:

/s/ *Lawrence D. Tarr*

Lawrence D. Tarr

Chief Administrative Appeals Judge

January 29, 2014

DATE

² In its memorandum, Employer questions whether 7 DCMR 271.1 divests the CRB of jurisdiction to hear appeals involving default orders. See, *Hensley v. DOES*, 49 A 3d 1195, 1205 (D.C. 2013). We will not consider this issue in light since Employer did not file a cross appeal.