

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 14-048**

**ERIC DALY,**  
**Claimant-Petitioner,**

v.

**R.J. REYNOLDS**  
**and ACE ESIS, INC.,**  
**Employer and Insurer-Respondent.**

Appeal from an Order dated March 31, 2014 by  
Office of Workers' Compensation Claims Examiner Clyde Carrington  
OWC No. 655062

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 JUL 25 PM 12 52

Michael J. Kitzman for Petitioner  
Julie D. Murray for the Respondent

Before: JEFFREY P. RUSSELL, and HEATHER C. LESLIE, *Administrative Appeals Judges*, and  
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

**DECISION AND ORDER**

**BACKGROUND**

The parties entered into a Full and Final Lump Sum Settlement Agreement, which was approved by the Office of Workers' Compensation (OWC) on July 31, 2012. Claimant Eric Daly (Petitioner) received payment via overnight delivery on August 17, 2012.

Petitioner sought an assessment of a 20% penalty pursuant to D.C. Code § 32-1515 (f), alleging that the payment was not made within the 10-day period prescribed therein, arguing that Petitioner's counsel received his service copy of the Order on August 3, 2012, and faxed a copy thereof to Respondent's counsel that same day. Petitioner argued that under these facts, payment was due no later than August 13, 2012.

Employer R.J. Reynolds (Respondent) opposed the penalty request, asserting that the OWC order approving the settlement agreement that was mailed by OWC to its counsel was not received until August 7, 2012, and that therefore, payment was timely. Respondent provided the claims examiner with a date stamped copy of the approval order, bearing the date August 7, 2012.

Respondent also asserted that payment was delayed due to circumstances beyond Respondent's control, said circumstance being that Respondent's claims representative with responsibility for issuing the payment was unexpectedly and unavoidably out of the office from the time the approval order was issued because of a death in the family, and that the payment was made by overnight delivery on August 16, 2012, the day the representative returned to the office, and received by Petitioner the following day, August 17, 2012.

On March 31, 2014, a Claims Examiner (CE) from OWC issued an order entitled "Penalty Order" (the Order), in which the penalty request was denied.

Petitioner filed a timely appeal of the Order with the Compensation Review Board (CRB), asserting that the denial of the penalty request was an arbitrary and capricious decision which is not in accordance with the law.

Respondent filed a timely opposition to the appeal, in which response it repeats the arguments made to the CE and argues that the denial of the penalty request was in accordance with the law.

Because the CE's determination that the payment was timely is supported by the submissions made to the CE by Respondent, and Petitioner has proffered nothing to counter the showing by Respondent or its carrier that its counsel received the OWC issued approval order prior to August 7, 2012, we affirm the Order.

#### DISCUSSION AND ANALYSIS

In review of an appeal from OWC, 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).

Although Petitioner questions part of the logic expressed by the CE in the Order, it does not dispute the operative facts regarding when Respondent's counsel received the approval order from OWC that are contained in the Order and which are corroborated by the date stamped copy of the approval order. Nor does Petitioner provide any allegation or assertion, corroborated or otherwise, as to the date that Respondent's claims representative received the approval order.

7 DCMR § 228.1 provides that service by OWC shall be made by certified mail or registered mail, or by hand delivery with a signature confirming said delivery. The Order states that the United States Postal Service return receipt for the service copy mailed to Respondent cannot be located. Thus, the only evidence presented to the CE concerning the date the approval order was received is the date stamped copy provided by Respondent bearing the date August 7, 2012.

As the CRB has previously held, the time for payment of a Compensation Order does not begin to run until service of the order is made, which is the date of receipt by service of delivery from OWC or the Administrative Hearings Division. *Romero v. V & V Construction, Inc.* CRB No. 13-129, AHD No. 10-267A, OWC No. 657345 (February 27, 2014). *See also, Lytes v. District of Columbia Water and Sewer Authority*, CRB No. 07-029, OWC No. 554665 (May 29, 2007):

The obligations and conditions of the agreement were not in effect until both parties received proper notice from OWC, as there is no authority under the Act or regulations for OWC to delegate its obligation to provide proper notice to Petitioner in this matter. Since payment was received by Petitioner before Respondent's letter was returned to OWC as undeliverable and there is no indication whether OWC ever properly notified Respondent of the approval, the CE's determination that the circumstances of this case warranted a waiver of the penalty should not be disturbed.

*Id.*, at 2 – 3. *See also, Brown v. Davis Memorial Goodwill Industries*, CRB No. 07-161, OWC No. 568170 (October 10, 2007) and 7 DCMR § 228.1.

It is irrelevant if or when Petitioner provided a copy of the approval order to Respondent. The only relevant date is when the approval order was received by Respondent. On the evidence presented the CE, it was neither arbitrary nor capricious for the penalty request to be denied, as that is the only outcome that is proper on these facts.

#### CONCLUSION AND ORDER

The denial of the penalty request contained in the Order of March 31, 2014 is neither arbitrary nor capricious, is in accordance with the law, and is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Jeffrey P. Russell  
JEFFREY P. RUSSELL  
*Administrative Appeals Judge*

July 25, 2014  
DATE