

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-185**

**JOSE ROMERO,  
Claimant-Petitioner,**

v.

**V & V CONSTRUCTION INC., and  
OHIO CASUALTY INSURANCE COMPANY,  
Employer/Insurer-Respondents.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 APR 19 PM 12 26

Appeal from an October 26, 2015 Compensation Order on Remand  
by Administrative Law Judge Mark W. Bertram  
AHD No. 10-267A, OWC No. 657345

(Decided April 19, 2016)

David M. Snyder for the Claimant<sup>1</sup>  
Christopher R. Costible for the Employer

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

HEATHER C. LESLIE for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

The procedural history pertinent to the current appeal is described by the Compensation Review Board (CRB) in a prior Decision and Remand Order (DRO),

After a full evidentiary hearing was held, a Compensation Order (CO) was issued on April 19, 2013 awarding in part the Claimant's claim for relief. The Claimant received a copy of the CO and emailed the Employer a copy of the CO on May

<sup>1</sup> Michael J. Kitman represented Claimant in prior proceedings.

10, 2013. Payment was issued by the Employer on May 14, 2013 but was sent to the wrong address. Payment was eventually reissued and received by the Claimant on June 17, 2013.

On May 20, 2013, the Claimant filed a Motion for Default. The motion was denied by the ALJ on June 7, 2013 because the Employer had not been properly served the CO by AHD.

On June 14, 2013, the Claimant filed a second Motion for Default as the Claimant still had not received payment. On October 8, 2013, an Order was issued denying the Claimant's motion. The ALJ denied the Claimant's motion as the Employer had never been served with the CO pursuant to 7 DCMR § 228.4.

The Claimant timely appealed. The Claimant argues the Order is in error as it is not supported by any factual basis and the ALJ erroneously inserted an element of intent that is not found in the Act or case law, relying on *Hard Rock Café v. DOES*, 911 A.2d 1217 (D.C. 2006). The Employer opposed, arguing the Order is supported by the substantial evidence in the record and should be affirmed. Further, the Employer argues that as the Claimant did not appeal the initial denial order issued on June 7, 2013, finding that the Employer is not liable for penalties is final and cannot be disturbed.

*Romero v. V&V Construction Inc.*, CRB No. 13-129 (February 27, 2014) (DO) at 2.

After considering the parties' arguments, the CRB determined that the agency had not properly served the Employer pursuant to 7 DCMR § 228.1. Thus, the CRB concluded:

In the instant appeal, neither party disputes that the Employer was never served a copy of the CO pursuant to § 228.1. While the Claimant did email a copy of the CO to the Employer, under the above regulations proper services was not effectuated. Thus, a determination cannot be made that the payment was not within ten days of employer's receipt as the employer was never properly served. See *Orius Telecommunications v. District of Columbia Department of Employment Services*, 857 A.2d 1061 (August 2004).

DO at 3.

The CRB affirmed the Supplemental Order Denying Default.

Claimant appealed to the District of Columbia Court of Appeals (DCCA). In a March 13, 2015 Memorandum and Opinion Order, the DCCA held:

...The CRB order does not identify the source of this "well settled" proposition, however, nor does it explain as an original matter why "actual receipt" a concept well known in the law, should be read in these circumstances to require receipt *in conformance with* § 228.1.

Apparently thinking it unnecessary to do so, the agency did not determine why the employer had an incorrect mailing address for Mr. Romero. The order does not address whether the resolution of this factual issue might establish grounds for the Mayor to waive the penalty pursuant to § 32-1515 (f).

*Romero v. DOES*, No. 14-AA-342, Mem. Op. & J. at 2 (D.C. March 11, 2015).

The DCCA vacated the CRB's decision "to allow the agency to make further factual findings and a reasoned articulation of its judgment." *Id.*

On April 22, 2015, the CRB, in a Decision and Remand Order (DRO2), concluded:

The remand from the DCCA asks for resolution of both factual and legal issues. The Court has asked for a legal determination whether the term "actual receipt" in 7 DCMR § 228.4 only means receipt in conformance with 7 DCMR §228.1, *i.e.* receipt from the Administrative Hearings Division or whether that term includes receipt from non-agency sources, such as from a claimant's attorney.

The DCCA also remanded this case for further factual findings regarding why Employer did not have Claimant's correct address. Such findings would be necessary if "actual receipt" includes receipt of the CO by non-agency means because, depending on the reason for the incorrect address, such reason may permit waiver of the late payment penalty under D.C. Code § 32-1515(f). That section states

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 by the payment.

Therefore, the CRB must remand this case to AHD so that an ALJ can make the required findings as to why Employer had an incorrect mailing address for Claimant, determine whether the term "actual receipt" only means receipt from AHD, and, if receipt of the CO from Claimant's counsel satisfies 7 DCMR § 228.4, whether payment of additional compensation is waived pursuant to D.C. Code § 32-1515(f).

*Romero v. V&V Construction Inc.*, CRB No. 13-129(R) (April 22, 2015) (DRO).

A Compensation Order on Remand (COR) was issued on October 26, 2015. The ALJ, relying on the DCCA's decision in *Daly v. DOES*, 121 A.3d 1257 (D.C. August 6, 2015) (*Daly*), determined that as Employer was not properly served by the agency, payment did not become due pursuant to D.C. Code § 32-1515 (f).<sup>2</sup> The ALJ concluded:

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<sup>2</sup> D.C. Code § 32-1515(f) states:

Employer was never served properly by the Administrative Hearings Division as required by 7 DCMR § 228.1 (a)-(b). The ten-day period for payment never began and therefore the compensation due and received by Claimant on June 17, 2013 was not untimely.

COR at 5.

The ALJ denied Claimant's request for a penalty.

Claimant timely appealed.

### THE STANDARD OF REVIEW

In review of an appeal which is based not upon factual findings made on an evidentiary record, but rather is based upon review of the administrative record, the filings of the parties, and the orders, 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, § 51.03 (2001).

### DISCUSSION AND ANALYSIS

*Daly*, decided after *Romero* was remanded, stated:

Preliminarily, we note that this is a statutory construction issue of first impression, as we recently remanded the same legal issue in another case back to the CRB to explain why the term "actual receipt," as defined under 7 DCMR § 228.4, should be read "in conformance" with the service provisions of the regulation, 7 DCMR § 228.1. *See Romero v. District of Columbia Dep't of Emp't Servs.*, No. 14-AA-342, Mem. Op. & J. at 2 (D.C. Mar. 11, 2015). However, because this court "remain[s] the final authority on issues of statutory construction," *Nunnally v. District of Columbia Metropolitan Police Dep't*, 80 A.3d 1004, 1011 (D.C. 2013) (citations and internal quotation marks omitted), and because this case hinges on the CRB's interpretation of the Act and associated regulations, we now decide to answer this question. We hold that, for purposes of when compensation becomes "due" under D.C. Code § 32-1515 (f), the ten-day period for payment shall begin to run from the date the employer is served with the compensation order by the OWC or the Hearings and Adjudication Section. This can be done either by hand delivery or via certified mail/registered mail, return receipt requested. *See* D.C. Code § 32-1515 (f); 7 DCMR § 228.1 (a)-(b). We explain our reasons below.

*Daly, supra*, 121 A.3d at 1260-1261.

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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.

Claimant first argues the COR contains both errors of law and fact. Claimant's argument at 4. However, Claimant does not point this panel to any of these alleged errors in argument, nor does Claimant argue the COR erred in its application of the DCCA's decision in *Daly*. Rather, Claimant takes issue with the DCCA's decision. Specifically, Claimant argues:

- "Interpreting the Act and regulations in this manner is not consistent with the humanitarian purpose and intention of the Act."
- "The decision in *Daly* is also inconsistent with the present operations of the Office of Hearings and Adjudication, in particular."
- "Furthermore, a determination that the only means of properly assuring service lies with the agency is inconsistent with the obligation of attorneys under the ethical rules of the District of Columbia."

Claimant's argument at 5-6.

Such review as urged by Claimant, whether the DCCA was correct in its analysis in *Daly*, is beyond our authority.

Suffice it to say, a review of the COR reveals the findings of fact and conclusions of law are supported by the substantial evidence in the record and in accordance with *Daly*. Because the agency did not properly serve the Employer pursuant to D.C. Code § 32-1515 (f), the time period for assessing a penalty did not begin to run. As we stated in our DRO,

... unless and until a Compensation Order is properly served on the employer, the clock for assessing a penalty does not start running. As a result, all of the other issues about a wrong address and a stop payment and intent and Employer's Counsel receiving a copy of the Compensation Order by fax (from AHD) or by email (from Claimant's Counsel) are red herrings, and although there is no requirement of intent when requesting a penalty, in this case, the ALJ's error in that regard is harmless precisely because Employer was never served with the Compensation Order.

DRO at 3.

#### CONCLUSION AND ORDER

The October 26, 2015 Compensation Order on Remand is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

*So ordered.*

CONCLUSION AND ORDER

The Order Regarding Fee Petition is not arbitrary, capricious, or an abuse of discretion. It is in accordance with established law and is affirmed.

*So ordered.*