

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**  
**Labor Standards Bureau**

**Office of Hearings and Adjudication**  
**COMPENSATION REVIEW BOARD**



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**CRB No. 08-038**

**MARVIA M. APPLEWHITE,**  
**Claimant–Petitioner,**

**v.**

**HAWK ONE SECURITY AND AIG CLAIMS SERVICES,**  
**Employer/Carrier–Respondent.**

Appeal from an Order of  
Administrative Law Judge Anand K. Verma  
AHD No. 07-218, OWC No. 608539

Matthew J. Pepper, Esquire, for the Petitioner

Leonard L. McCants, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY AND FLOYD LEWIS, *Administrative Appeals Judges.*

LINDA F. JORY, *Administrative Appeals Judge*, for the Compensation Review Panel:

**DECISION AND REMAND ORDER**

**JURISDICTION**

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).<sup>1</sup> Pursuant

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<sup>1</sup>Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for

to § 230.04, the authority of the CRB extends over appeals from compensation orders, including final decisions or orders granting or denying benefits, by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC), under public and private sector Acts.

#### BACKGROUND

This appeal follows the issuance of an "Order Declaring Default"<sup>2</sup> (Order) by the Administrative Hearings Division (AHD) in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on October 23, 2007, the Administrative Law Judge (ALJ) granted Petitioner's Motion for Order Declaring Default but denied Petitioner's request for a 20% penalty pursuant to D.C. Code §32-1515(f).

As grounds for this appeal, filed with the CRB on November 13, 2007, Petitioner alleges the record does not contain substantial evidence showing circumstances beyond the Respondent's control prevented them from paying Petitioner. Therefore, since Respondent has not shown any circumstances beyond its control which continue to preclude payment, the 20% penalty must be assessed against Respondent. Respondent has not filed any opposition to Petitioner's Application for Review. Because the Panel finds the ALJ failed to explain how Respondent showed that owing to conditions over which it had no control payment pursuant to an award could not be paid within the period prescribed for the payment, we reverse and vacate the award as being contrary to law, and remand the matter to AHD for further consideration.

#### ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the Act and as contained in the governing regulations is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. D.C. Official Code § 32-1521.01(d)(2)(A). "Substantial evidence", as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this panel are bound to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record

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administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

<sup>2</sup> As this Board has pointed out in prior orders dealing with defaults and penalties, there 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. In order to avoid confusion, we encourage counsel and others to avoid usage of this term in other contexts. In the instant matter, given that Respondent asserts that it did eventually make full payment, a ruling that it is in default would be moot as judgement enforcement procedures would be unnecessary. See *Millicent Brown v. Davis Memorial Goodwill Industries*, CRB No. 07-161, OWC NO. 568170 (October 10, 2007).

under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In review of an Order from AHD that does not contain Findings of Fact or Conclusions of Law, 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 & Mezones, ADMINISTRATIVE LAW, § 51.93 (2001).

D.C. Code § 32-1515 (f) states in pertinent part:

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. 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 this case, the ALJ has not provided any reason not to “apply §32-1515(f) as it is written and in accordance with its plain meaning”. See *Hard Rock Café v. District of Columbia Dep’t of Employment Services*, 911 A.2d 1217 (2006)(*Hard Rock Café*) (citing *National Geographic Soc’y v. District of Columbia Dep’t of Employment Services*, 721 A.2d 618 (D.C. 1908). The Court in *Hard Rock Café* held “By its terms, the statute is compulsory stating that ‘there shall be added’ the specified penalty for late payment unless the Mayor has waived it for the reason the statutes defines. The Court added:

DOES likewise has stressed that the statute was meant to require ‘prompt’ payment of compensation, stating in a 1989 decision that unless waiver has been granted, ‘either the compensation is timely paid and there is no penalty, or the compensation it is late and the penalty must be imposed if claimant seeks it’. *Dorsey v. ITT/Continental Baking*, Dir. Dkt. No. 86-19 ((D.C. 1989)

In the instant matter, the ALJ we conclude, made no specific finding as to whether AHD sent the Compensation Order to respondent via certified mail; when it was actually received; or whether a green card was returned to AHD indicating date of receipt. Nor did the ALJ explain that he was waiving 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, i.e., that he found Respondent had not received proper service of the Compensation Order as there was no evidence that a signed Certificate of Service “green card” had been filed with AHD. The ALJ merely repeated Respondent’s assertion that he did not receive a copy of the August 30, 2007 Compensation Order; he did receive a faxed copy of the order from Counsel for Petitioner, however it was received while Respondent’s counsel was hospitalized and he could not read the Compensation Order until approximately September 27, 2007. The ALJ further repeated Respondent’s argument that it made a good faith effort to satisfy the Compensation Order.

The Panel concludes that *whether a good faith effort was made* is not the same standard as 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 so concluding, we rely again on the language of the Court of Appeals in *Hard Rock Café* when faced with a similar set of facts :

The legislature, of course, could have written a statute different from §32-1515(f) – one, for example, that imposed a penalty for late payment only if the delay was “unreasonable” or that gave the agency discretion as to the proper penalty amount . . . . But §32-1515(f)’s language is unequivocal, and because strict application of the statute comports with its evident purpose to make the employer (and its carrier) responsible for timely payment in all circumstances within its control, we must apply it accordingly.

*Hard Rock Café*, supra at 1223.

As the ALJ did not make findings of fact or a conclusion that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment we must conclude that the ALJ’s denial of the 20% compulsory penalty is not in accordance with the law and must be reversed.

#### CONCLUSION

Therefore, the ALJ’s denial of a penalty for late payment of an award is not in accordance with the law.

**ORDER**

The Order Declaring Default, issued by the ALJ on October 23, 2007 is reversed and vacated. The matter is remanded to AHD for further consideration of the claim for a penalty and a determination as to whether Respondent has shown that owing to conditions over which it had no control, timely payment could not be paid within the period prescribed for the payment pursuant to §32-1515(F).

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY  
Administrative Appeals Judge

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January 17, 2008  
DATE