

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 (Dir.Dkt.) No. 05-19

JEROME G. MCGINNIS,

Claimant – Petitioner,

v.

HARD ROCK CAFÉ AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Carrier – Respondent.

Appeal from a Supplementary Compensation Order Declaring Default
Claims Examiner Selwyn Johnson
OWC No. 258882

Matthew Peffer, Esq., for the Petitioner

Curtis B. Hane, Esq., for the Respondent

Before FLOYD LEWIS, SHARMAN J. MONROE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board 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).¹

¹ 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Supplementary Compensation Order Declaring a Default from the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES). In that Supplementary Compensation Order, which was filed on November 22, 2004, the Claims Examiner (CE) denied to the request of the Claimant-Petitioner (Petitioner) to impose a 20% penalty pursuant D.C. Official Code § 32-1515(f) although the Employer-Respondent (Respondent) sent the settlement check in this matter to the wrong address for the Petitioner causing the Petitioner to receive the check more than 60 days after the settlement was approved. The Petitioner now seeks review of that Supplementary Compensation Order Declaring a Default.

As grounds for this appeal, the Petitioner alleges as error that the Supplementary Compensation Order is not supported by substantial evidence.

ANALYSIS

In its review of an appeal from the Office of Workers' Compensation, the Board must affirm the compensation order or final 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).

Turning to the case under review herein, the Petitioner alleges that the CE's decision is erroneous and not supported by substantial evidence because the Respondent was aware of his correct address since October 31, 2002. As support for his position, the Petitioner references the certificate of service that listed his correct address as "7709 Random Run Lane, Apt. 102, Falls Church, Virginia 22042", which was attached to the October 31, 2002 Compensation Order² issued in this case. The Petitioner states that the Respondent timely paid the benefits awarded in that Compensation Order. The Petitioner also disputes the finding the OWC was not notified of his correct address. Claimant Memorandum at pp. 2-3.

In its Opposition, the Respondent asserts that the Petitioner did not file any formal notice with the OWC and/or it at any time to advise of any new address for him. The Respondent asserts that the counsel for the Petitioner informed it, via his Application for Informal Conference that the Petitioner's address was "2324 Grove Avenue, Falls Church, Virginia 22046". The Respondent notes that the Petitioner's address is listed as "6619 Fisher Avenue, Falls Church, Virginia 22046" as his April 14, 2000 Application for Formal Hearing, and that his address is listed as "7833 Enola Street, Apt. 211, McLean, Virginia 22102" on his April 10, 2001 Notice of Informal Conference.³ Employer Memorandum at p. 2. It maintains that a paralegal

² *McGinnis v. Hard Rock Café*, OHA No. 00-287, OWC No. 258882 (October 31, 2002).

³ It should be noted, and the Panel recognizes, that a Notice of Informal Conference is prepared and issued by the OWC, not a party to a case. *See* 7 DCMR § 219.

employed by the counsel for the Petitioner first advised its claims adjuster, Carmelo Deogracias, that the Petitioner's correct address was "7709 Random Run Lane, Apt. 102, Falls Church, Virginia 22042" on September 2, 2004, after the settlement check had been mailed on August 19, 2004 to the Grove Avenue address. The Respondent maintains it informed the paralegal that it would request a stop-payment order on the check and issue a new check, mailed to the correct address, upon clearance of the stop-payment order, and that the paralegal agreed to this course of action but did not indicate that such action would result in a demand for penalties. The Respondent indicates that once the clearance was received, a new check was promptly issued and mailed. Employer Memorandum at p. 3.

D.C. Official Code § 32-1515(f) states:

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 by the Mayor or court. 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.

The issue of penalty assessment under the Act was addressed by the Director in *Dorsey v. ITT/Continental Baking*, Dir.Dkt.No. 86-19, H&AS No. 85-353A, OWC No. 0009588 (May 9, 1989). Therein, the Director stated that "...as for discretion, either the compensation is timely paid and there is no penalty, or the compensation is late and the penalty must be imposed if claimant seeks it." The Director then footnoted that the Act excuses a late payment "if the payment were [sic] late due to circumstances beyond the employer's control." *Dorsey* at p. 3. The Director determined that the excuse was not applicable to the facts as the employer therein should have allowed more than one day for delivery via the U.S. Postal Service. The question of excusing an employer from the assessment of penalty was addressed by the Director again in *Sailer v. Donohue Construction Company*, H&AS No. 89-97, OWC No. 0139217 (February 1, 1990), *Imes v. Georgia Brown's Restaurant*, Dir. Dkt. No. 99-44, H&AS No. 98-123, (June 27, 2000).

In *Sailer*, the parties entered into a lump sum settlement agreement on April 24, 1989. A check was mailed on April 28, 1989 directed to the claimant's counsel but at the address of the employer's counsel. The claimant did not receive the check until June 12, 1989. In response to a request for an assessment of penalties, the employer argued, citing *Buckley v. Wells Fargo Guard Services*, H&AS No. 85-33(A), OWC No. 55502 (February 21, 1989) that the lateness was due to circumstances beyond its control, specifically, clerical errors. The hearing examiner⁴ rejected the argument pointing out that the employer's adjuster addressed the check incorrectly and that the check was then sent by the adjuster to the address of adjuster's counsel where apparently nothing was done. As support, the hearing examiner cited *Jenner v. Premium*

⁴ The position of administrative law judge in AHD was previously called hearing examiner.

Distributors, H&AS No. 84-114, OWC No. 35540 (June 4, 1985), which held that failure to timely pay compensation based upon a misfiling of a compensation order by a clerk for employer's counsel was not beyond employer's control. The hearing examiner also rejected the employer's reliance on *Buckley*, in which no penalty was assessed against the employer because the delay was due to a mailing error made by the OWC when it mailed a compensation order to the wrong address, a circumstance over which the employer had no control.

In *Imes*, the parties entered into a Settlement Agreement which was approved by OWC on July 9, 1998. The employer received the Approval of Lump Sum Settlement on July 14, 1998, prepared a check for the claimant, and mailed it, via the U.S. Postal Service, to his attorney. The envelope containing the check was postmarked July 23, 1998. The claimant's attorney received the check on July 27, 1998. The OWC denied the assessment of penalties. The Director, applying the holding of *Dorsey*, held that the claimant should have received his payment on July 24, 1998, ten (10) days after July 14, 1998, that the envelope postmarked July 23, 1998 was irrelevant and that "there is no room for discretion" on the timeliness of the payment of compensation. The OWC's denial was reversed.

In the recent case of *Spratley-Edwards v. Howard University Hospital*, CRB (Dir.Dkt.) No. 03-125, OWC No. 545466 (October 14, 2005), the Panel adopted the standard set forth in prior cases on the issue of penalty assessment under the Act.

Herein, the record shows, and the CE stated, that the settlement was approved and mailed to the parties in August 16, 2004. The record shows that the settlement was mailed to the counsel for the Respondent and to the carrier for the Respondent. The CE indicated, and the record reflects, that the counsel received it on August 18, 2004 and carrier received it on August 19, 2004. In this jurisdiction, it is well settled that service upon counsel of record for a party is equivalent to service upon the party. See *Greenwood's Transfer & Storage Co. v. D.C. Department of Employment Services*, 553 A.2d 1246 (D.C. 1989). Therefore, the Respondent received the approved settlement on August 18, 2004 and the Petitioner should have received his settlement check by August 28, 2004. The record shows that the check was mailed to the Petitioner on September 15, 2004.

In response to the CE's Order to Show Cause (OSC) why it should not be assessed a penalty for late payment, the Respondent asserted it was not notified that the Petitioner's correct address was "7709 Random Run Lane, Apt. 102, Falls Church, Virginia 22042" until September 2, 2004 when a paralegal in the office of the counsel for the Petitioner so informed its claims adjuster, Carmelo Deogracias. Basically, the Respondent asserted that, due to circumstances beyond its control, *i.e.*, lack of knowledge of the Petitioner's correct address, it paid the Petitioner late. On November 2, 2004, the Petitioner filed a reply to the Respondent's assertions its response to the OSC. The Petitioner argued that the Respondent knew his current address since February 17, 2004 based upon his Application for Informal Conference filed on that date. After a review of the OWC file, the CE determined that the Petitioner did not submit an official notice change of address to either the OWC, or the counsel for Respondent or the carrier for the Respondent and, therefore, an assessment of penalties was not warranted. On examination of the record, the Panel concludes that the CE's determination is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

The record reveals that on February 17, 2004, the Petitioner, through counsel, filed an Application for Informal Conference wherein the Petitioner's address was listed as "7709 Random Run Lane, Apt. 102, Falls Church, Virginia 22042". The Petitioner's counsel also sent a copy of the application to the counsel for the Respondent and to the claims adjuster for the Respondent, Carmelo Deogracias. Contrary to the CE's determination, this application constituted official notice to OWC, to the counsel for Respondent and the carrier for the Respondent.⁵ The Panel notes that the certificate of service attached to the Memorandum of Informal Conference, which resulted from the application, shows the Petitioner's address as "7709 Random Run Lane, Apt. 102, Falls Church, Virginia 22042"; this certificate shows that the Memorandum with the certificate attached thereto was sent to the counsel for the Respondent and to the claims adjuster for the Respondent, Carmelo Deogracias. Further, the Panel notes that the draft certificate of service attached to the draft of the settlement signed by the counsel for the parties and the Petitioner, which was approved by OWC, listed the Petitioner's address as "7709 Random Run Lane, Apt. 102, Falls Church, Virginia 22042".

Upon application of the law to the facts of this case, the late payment of compensation was due to clerical error on the Respondent's part. Such an error is not considered a circumstances beyond the Respondent's control and the Respondent is liable for a 20% penalty pursuant to D.C. Official Code § 32-1515(f).⁶

CONCLUSION

The Supplementary Compensation Order Declaring a Default of November 22, 2004 is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

⁵ The Panel is of the opinion that sending a copy of the Application for Informal Conference reflecting the Petitioner's correct address to the counsel for the Respondent was notice to the Respondent. *See Greenwood's Transfer, supra*. It is not dispositive to this case that the application was also sent to the claims adjuster.

⁶ A remand in this case to the CE is not required given that there is no evidence in the record supporting a contrary result upon application of the law. *See Clair v. D.C. Department of Employment Services*, 658 A.2d 1040, 1044 (D.C. 1995).

ORDER

The Supplementary Compensation Order Declaring a Default of November 22, 2004 is hereby REVERSED. The Respondent is liable for a 20% penalty pursuant to D.C. Official Code § 32-1515(f).

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

October 21, 2005
DATE