

**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. 03-125**

**ELLEN SPRATLEY-EDWARDS,**

Claimant – Petitioner

v.

**HOWARD UNIVERSITY HOSPITAL AND SEDGWICK CLAIMS MANAGEMENT,**

Employer/Carrier – Respondent.

Appeal from a Final Order of  
Claims Examiner Jevan T. Edwards  
OWC No. 545466

Eric M. May, Esq., for the Petitioner

Melissa Lin Klemens, Esq., for the Respondent

Before SHARMAN J. MONROE, FLOYD LEWIS 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).<sup>1</sup>

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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 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 Final Order<sup>2</sup> from the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES). In that Final Order, which was filed on October 2, 2003, the Claims Examiner (CE) denied the Claimant-Petitioner's request to assess the statutory ten (10) percent penalty. The Claimant-Petitioner (Petitioner) now seeks review of that Final Order. The Respondent did not file an Opposition.

As grounds for this appeal, the Petitioner alleges as error that the Final Order is not in accordance with the law.

## 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 failed to apply the law as it relates to the assessment of the ten (10) percent penalty. Specifically, the Petitioner asserts that Respondent failed to show, and the CE failed to determine, that the delay in the payment of compensation was due to circumstances out of the Respondent's control. The Petitioner maintains that the recitation of events which the CE rendered was not equivalent to clear showing that the delay was due to circumstances out of the Respondent's control.

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

If any installment of compensation payable without an award is not paid within 14 days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid installment an amount equal to 10% thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the Mayor 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 D.C. Official Code § 32-1515(e), then D.C. Code § 36-315(e), 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

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<sup>2</sup> A Memorandum of Informal Conference in this matter was issued on October 2, 2003. There is no indication in the record that a formal hearing was requested after the issuance of the Memorandum. Consequently, pursuant to 7 DCMR § 219.22, the Memorandum became a Final Order.

“...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 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 examiner<sup>3</sup> 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 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.

The Panel, upon an examination of the plain language of the Act, adopts the standard set forth in prior cases on the issue of penalty assessment under D.C. Official Code § 32-1515(e).

Herein, CE indicated, and the record shows, that a copy of the approved settlement was sent, via certified mail on October 2, 2003, to the attention of the counsel for the Respondent, but at the address for the insurance carrier. The CE also indicated that the counsel for the Respondent did not receive the approved settlement until September 11, 2003 when he faxed it her and that a

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<sup>3</sup> The position of administrative law judge in AHD was previously called hearing examiner.

check was mailed to the Petitioner on September 24, 2003. The CE held that the circumstances did not warrant an assessment of the ten (10) percent penalty. However, in denying the penalty, the CE failed to determine whether the delay in the payment of compensation to the Petitioner was due to circumstances beyond the Respondent's control, thereby excusing the Respondent from timely payment. The Panel agrees with the Petitioner's position that a recitation of the facts is not tantamount a determination of circumstances beyond the Respondent's control. This matter must be remanded for an application of the law.

#### CONCLUSION

The Final Order of October 2, 2003 is vacated and remanded as it is not in accordance with the law. On remand, the CE shall apply the "circumstances beyond its control" test to the facts of this case and determine anew whether the Respondent should be assessed a ten (10) percent penalty pursuant to D.C. Official Code § 32-1515(e).

#### ORDER

The Final Order of October 2, 2003 is VACATED AND REMANDED for further proceedings consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

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SHARMAN J. MONROE  
Administrative Appeals Judge

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October 13, 2005  
DATE