

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

Labor Standards Bureau

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



**(202) 671-1394-Voice
(202) 673-6402-Fax**

CRB No. 05-23

TERRY BRINKLEY,

Claimant – Respondent

vs.

RTL ELECTRIC AND CNA INSURANCE COMPANY,

Employer/Carrier - Petitioner

Appeal from an Order of
Claims Examiner Robyn Abrams
OWC No. 580138

Mark L. Schaffer, Esquire, for the Respondent

Joseph C. Veith, Esquire, for the Petitioner

Before LINDA F. JORY, JEFFREY P. RUSSELL, SHARMAN J. MONROE, *Administrative Appeals Judges*.

LINDA F. JORY, *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 (1994), 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 20024, Title J, the 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, 32-1522 (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. Official Code §§ 1-623.1 to 1.643.7 (2005),

Pursuant to § 230.04, the authority of the Compensation Review Board 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 the public and private sector Acts.

BACKGROUND

This appeal follows the issuance by the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES) of a Compensation Order filed on August 31, 2004. In that Compensation Order, a Claims Examiner recommended and her Supervisor so ordered an award of a 20% penalty pursuant to § 32-1515 (f) equivalent to \$11,000 payable by Employer – Petitioner (Petitioner) to Claimant – Respondent (Respondent). As grounds for the penalty, OWC relied on the Court of Appeals' decision in *Orius Telecommunications v. Dist. Of Columbia Dept. of Employment Servs.* 857 A.2d 1061 (D.C. App. 2004) (*Orius*) and determined that Petitioner was one day late in delivering the lump sum settlement amount to Respondent.

Petitioner has appealed OWC's Order contending the entry of the Order to pay the 20% penalty is contrary to law as the method of calculation of the time for payment utilized in assessing the penalty was erroneous, therefore, the Order should be reversed and vacated. Petitioner concurrently filed a Motion for Reconsideration with OWC which was denied in an order issued on November 17, 2004 relying again on the Court of Appeals' decision in *Orius*. Respondent's position in his response is that he received his check on April 9, 2004 and therefore the payment was late under the Act.

ANALYSIS

In the 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). For the reasons set forth herein, the Board concludes herein, that the Claims Examiner's August 31, 2004 order awarding Respondent a 20% penalty is an abuse of discretion and is therefore in accordance with the law.

Despite Respondent's assertion on appeal that he did not receive the lump sum payment until April 9, 2004, the Panel finds this is contrary to the claims examiner's finding that Petitioner issued the payment on April 7, 2004 and sent it by overnight mail which Respondent received on April 8, 2004. The Claims Examiner accepted the evidence before her that the check was delivered to the claimant on April 8, 2004 and this Panel finds no reason to disturb that finding. Nevertheless, the Claims Examiner did conclude that the compensation payment exceeded the ten day time period provided for payment due under the term of an award pursuant to D. C. Official Code § 32-1515(f).

In support of this decision the Claims Examiner explained:

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.

The Act states the lump-sum settlement must be issued within 10 days. Further, the District of Columbia [Appellate] Court Decision, *Orius Telecommunications, Inc.* (cite omitted) established that the settlement is due no later than 10 days from the date of receipt of the employer/carrier or their representative. Therefore, no facts in the record warrant a waiver of the penalty in this case.

Review of the Act reveals the applicable section is D.C. Official Code §32-1515(f), which 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. . . .

As the Court outlined in *Orius*, the starting point in determining if compensation has been timely paid is to ascertain when the compensation became due. The Court in *Orius* acknowledged however, that the ALJ did not expressly state when the award became due and the ten day time limit began to run. Nevertheless, the Court cautioned that any indication that the award should become due on the date the order is issued would be contrary to the regulations under 7 D.C. M. R. §228.4 and prior administrative decisions. The Court referred to the Director's decisions in three specific cases where the award was found to become due and payable on the date it was received by the employer or carrier and the ten day period began on the following day with payment found to be late on the eleventh day after the *date payment was in fact found to be due*. See *Orius*, *supra* at 863; *Kevin Imes v. Georgia Brown's*, Dir.Dkt. 99-44, OHA No. 98123 June 27, 2000 (*Imes*); *Hill v. Greyhound Line Inc.*, Dir. Dkt. No. 96-39, OHA No. 87-759B (Jan. 31, 1997) (*Hill*); *Daniel Matysek v. WMATA*, Dir. Dkt. No.00-62, OHA No. 00-77 (April 11, 2002) (*Matysek*)². In *Orius*, because employer failed to pay claimant on the eleventh day, (August 12, 2002), or ten days after the payment became due, (August 2, 2002) the award of a penalty was affirmed by the Court of Appeals as it was undisputed the claimant in *Orius* did not receive payment of the awarded compensation until August 13, 2002.

Returning to the matter at hand, the Claims Examiner has accepted Petitioner's proffer that Respondent did receive Petitioner's check on April 8, 2002, which was issued on April 7, 2002 and sent to Respondent by overnight mail. Petitioner does not challenge this finding on appeal. Instead, Petitioner is challenging the Claims Examiner's and OWC's interpretation of *Orius* and its application to the D.C. Official Code §32-1515(f) and the implementing regulation at §228.4.

² In all three cases itemized by the Court of Appeals the Director determined, and the Court did not disturb the Director's determinations, that an award became due on the date of the receipt by employer and/ or the carrier and payment pursuant to the award was should be received by claimant on the tenth day after the date the award becomes due. In *Imes*, the Director found the award became due on July 14, 1998 and claimant should have received payment by July 28, 1998. In *Hill*, the Director found the employer received the Compensation Order on July 6, 21992, Therefore payment of benefits was due to claimant by July 16, 1992. In *Matysek*, the Director found the "undisputed facts" showed that the May 4, 2000 Compensation Order was received by claimant's counsel and employer's counsel on May 8, 2000and benefits were payable by May 18, 2000.

Inasmuch as the nothing in the Court's decision in *Orius* reduces the amount of time §32-1515(f) provides employers to get the awarded payment to the injured workers, i.e. *ten days after compensation becomes due*, it is unclear to the Panel how OWC's reliance on *Orius* justifies its award of a 32-1515(f) 20% penalty, in light of the facts agreed upon at the informal conference. Specifically, the parties agreed that the counsel for employer carrier, a.k.a., Petitioner, received the approved settlement via the U. S. Postal Service certified mail on March 29, 2004 and that Petitioner issued the compensation on April 7, 2004 and sent it by overnight mail to Respondent and that the check was in fact delivered to Petitioner on April 8, 2004.

In keeping with the rationale of the Court of Appeals in *Orius*, and having counted ten days after the date the order was received by Respondent on May 29, 2004, the Panel concludes compensation was not due until April 8, 2004. (May, 30, 31, April 1, 2, 3, 4, 5, 6, 7 and 8). The Panel, accordingly, cannot affirm OWC's determination that the payment on April 8, 2004 was untimely pursuant to § 32-1515(f) as OWC's conclusion is not in accordance with the law. Accordingly, OWC's order awarding the 20% penalty must be reversed and vacated.

CONCLUSION

The OWC Order of August 31, 2004 is not in accordance with the law pursuant to D. C. Official Code 32-1515(f) or the prevailing case law pursuant to *Orius Telecommunications, supra*.

ORDER

The Memorandum of Informal Conference issued on August 31, 2004 is hereby REVERSED and the penalty award is hereby VACATED.

FOR THE COMPENSATION REVIEW BOARD

LINDA F. JORY
Administrative Appeals Judge

July 20, 2005
DATE