

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. 07-29

FLOYD LYLES,

Claimant – Petitioner,

v.

D.C. WATER AND SEWER AUTHORITY,

Employer/Carrier – Respondent.

Appeal from an Order of
Claims Examiner Marcel Monroe
OWC No. 554665

Paulette E. Chapman, Esquire, for the Petitioner

Christopher R. Costabile, Esquire, for the Respondent

Before: E. Cooper Brown, *Chief Administrative Appeals Judge*, FLOYD LEWIS and
JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

FLOYD LEWIS, *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, 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

BACKGROUND

This appeal follows the issuance of an Order of the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on December 20, 2006, OWC denied the request by Claimant-Petitioner (Petitioner) for a Supplemental Compensation Order awarding a 20% penalty for late payment. Petitioner now seeks review of that Order.

As grounds for this appeal, Petitioner alleges as error that the Order is not supported by substantial evidence and is not in accordance with the law.

ANALYSIS

In the review of an appeal from the Office of Worker's Compensation (OWC), the Compensation Review Board must affirm the Compensation Order or Final Decision 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, § 51.03 (2001).

Turning to the case under review herein, Petitioner alleges that the Claims Examiner's decision to deny his request for a penalty is erroneous, as the approved settlement payment was due on October 16, 2006, the payment was not received until October 23, 2006 and Employer-Respondent (Respondent) has not made a showing that the payment could not be timely paid due to conditions over which it had no control, citing *Hard Rock Café v. Dist. of Columbia Dep't. of Employment Servs.*, 911 A.2d 1217 (D.C. 2006). Respondent counters that the CE was correct in declining to declare a default under the circumstances and that the Order denying Petitioner's request for a penalty should be affirmed.

In this matter, Petitioner and Respondent entered into an agreement for a settlement of Petitioner's case. This agreement was approved by OWC on October 2, 2006 and mailed by certified mail to all parties. The Claims Examiner (CE) noted that OWC records show that Petitioner's counsel received a copy of the settlement on October 4, 2006, but Respondent did not receive its certified copy. On November 6, 2006, OWC received Respondent's certified copy from the U.S. Postal Service, with a sticker indicating that the letter was not deliverable as addressed and was unable to be forwarded.

On October 6, 2006, counsel for Petitioner forwarded by email to Respondent, a copy of the approval of the settlement and on October 10, 2006, Petitioner again forwarded the approval by email to Respondent. Respondent mailed Petitioner's checks (totaling

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.

\$180,000.00) on October 18, 2006 and they were received by Petitioner on October 23, 2006.

Petitioner asked the CE for an order consistent with D.C. Code § 32-1515(f) declaring Respondent in default of the October 2, 2006 agreement, seeking an additional amount of \$36,000.00, which represents 20% of \$180,000.00. However, the CE found that since the Respondent did not receive its certified copy of the approval from OWC, the facts warranted a waiver of the penalty in this matter, due to conditions over which Respondent had no control.

Petitioner asserts that OWC should not have waived payment of the penalty because Respondent had actual notice of the approval from Petitioner's counsel on October 6, 2006. As such, under D.C. Code § 32-1515(f), the award was due on October 16, 2006, and since the checks were not received until October 23, 2006, a penalty should have been awarded.

Respondent counters that since the settlement approval was not properly served in accordance with OWC regulations, Respondent's payment was not late. Respondent also asserts that there is no provision under the Act or regulations for OWC to delegate its authority to notify the parties of approval of a settlement to a party itself.

After reviewing the record in this matter, this Panel must agree with Respondent in this dispute. Since the approval of the settlement was returned to OWC as undeliverable, the Order approving the settlement agreement does not become due until it was properly received by Respondent. The regulations, in 7 DCMR § 228.1(a)(b), require that OWC notify the parties of approval of a settlement agreement by either hand delivery or certified mail. There is no mention or evidence as to when, or even if, OWC re-mailed the approval and when it was received by Respondent. In fact, it may have never been re-mailed by OWC, as when OWC received Respondent's letter back as undeliverable on November 6, 2006, Petitioner had already received payment under the settlement agreement on October 23, 2006. Petitioner requested that OWC issue an order awarding a penalty on November 7, 2006.

Payment under the settlement agreement could not have been late until ten days after Respondent received proper notice from OWC that the agreement had been approved.² The obligations and conditions of the agreement were not in effect until both parties received proper notice from OWC, as there is no authority under the Act or regulations for OWC to delegate its obligation to provide proper notice to Petitioner in this matter. Since payment was received by Petitioner before Respondent's letter was returned to OWC as undeliverable and there is no indication whether OWC ever properly notified Respondent of the approval, the CE's determination that the circumstances of this case warranted a waiver of the penalty should not be disturbed.

² In fact, if OWC has not again properly served Respondent in accordance with the regulations, payment under OWC's order approving the settlement is still not overdue.

Accordingly, there is no reason to disturb the CE's refusal to order a penalty in this matter, as the CE's decision is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

CONCLUSION

The Order of December 20, 2006, which denied Petitioner's Motion for a Supplemental Order Awarding a 20% penalty is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

ORDER

The Order of December 20, 2006, is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

A handwritten signature in blue ink, appearing to read "Floyd Lewis", is written over a horizontal line.

FLOYD LEWIS
Administrative Appeals Judge

May 29, 2007
DATE

APPEAL RIGHTS

Any party aggrieved by this Decision and Order may petition the D.C. Court of Appeals for its review. D.C. Ct. App. Rule 15 (a) requires that the Petition for Review be filed within thirty (30) calendar days of the mailing date shown on the Certificate of Service. The D.C. Court of Appeals is located at 500 Indiana Avenue, N.W., 6th Floor, Washington, D.C. 20001. The court is open from 8:30 a.m. to 5:00 p.m., Monday through Friday, except legal holidays.

In addition to filing a Petition for Review with the Court of Appeals, you must send a copy of the Petition and any motions, briefs, or other documents that you submit to the court, to the opposing party in this case, and also to:

Edward Schwab, Esquire
Deputy Attorney General
Office of the Attorney General,
Appellate Division
One Judiciary Square
441 4th Street, N.W., 6th Floor
Washington, D.C. 20001

and

Margaret Hackney, Clerk
Compensation Review Board
Labor Standards Bureau
Department of Employment Services
64 New York Avenue, N.E., 3rd Floor
Washington, D.C. 20002

CERTIFICATE OF SERVICE

I hereby certify that the attached **Decision and Order** was mailed, U.S. postage pre-paid, or hand-delivered, as noted, this 29th day of May, 2007 to the persons or organizations listed below:

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HAND DELIVERY

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D.C. Department of Employment Services
Washington, D.C.

HAND DELIVERY


Clerk of the Board