

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services



MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-076

KATHERINE DALEY
Claimant-Respondent

v.

CHILDREN'S NATIONAL MEDICAL CENTER and
YORK RISK SERVICES,
Employer/Insurer-Petitioners

Appeal from a May 9, 2016 Award of Penalty
by Claims Examiner Telita Estes
OWC No. 726564

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 NOV 10 PM 1 00

(Decided November 10, 2016)

Douglas K. Allston, Jr. for Claimant
Zachary L. Erwin for Employer

Before GENNET PURCELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

GENNET PURCELL, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL BACKGROUND

Katherine Daley (“Claimant”) was working as a staff member at Children’s National Memorial Hospital (“Employer”) when on December 4, 2014, she injured her right shoulder catching a falling patient. The claim was deemed compensable and Claimant underwent subsequent medical treatment and care for which Employer paid. Upon reaching maximum medical improvement, Claimant sought permanent partial disability workers’ compensation benefits for her right arm/shoulder.

Employer contested the nature and extent of Claimant’s disability but subsequently reached a full and final settlement of Respondent’s claim pursuant to which Employer would pay the Claimant sixty thousand dollars (\$60,000) in exchange for a full and final settlement foreclosing Claimant’s rights against Employer/Petitioner, to any future medical treatment and/or indemnity benefits arising from her workers’ compensation claim. Attorney’s fees in the amount of twelve

thousand dollars (\$12,000), plus forty three dollars and seventy five cents (\$43.75) for costs were also approved and were to be deducted from the final settlement amount.

On or about January 7, 2016, Claimant and Employer submitted a fully executed agreement entitled "Approval of Lump Sum Settlement Pursuant to Section 32-1508" to the Office of Workers' Compensation ("OWC") documenting their agreement to settle the claim fully and finally.

On January 28, 2016, a Claims Examiner ("CE") in OWC issued a "Compensation Order Approval of Lump-Sum Settlement Pursuant to 32-1508" ("Settlement Order") approving the parties' settlement as submitted. Employer, through counsel, received a copy of that Settlement Order on February 1, 2016.

On February 1, 2016, Counsel for Employer received the Settlement Order and on February 9, 2016, eight (8) days after receipt of the Settlement Order, Employer processed a check for Claimant in the amount of forty-seven thousand six hundred fifty-nine dollars and twenty-five cents (\$47,659.25). A package was mailed, via Fedex overnight service, to Claimant's counsel's office and allegedly included both Claimant's check and Claimant counsel's check for attorney's fees and costs. The package was received and signed for by Claimant's counsel on February 10, 2016. Claimant asserted that only one check was included in the package; that Claimant's check was not included in the package.

Subsequent to February 10, 2016, a dispute arose between the parties as to whether the Respondent's check was actually included in the February 10, 2016 package as Claimant asserted it was not. Claimant's counsel asserted upon noticing that Claimant's check was not included in the package, he contacted Employer requesting that a new check be processed and reissued to Claimant.

On February 25, 2016, Employer counsel sent an email communication to Claimant counsel indicating that a new check was "on the way". After a total of five (5) emails and one telephone call between the parties, on March 3, 2016, Claimant received a reissued check dated February 26, 2016 in the amount of \$47,659.25.¹ Immediately realizing the error, after sending an email notifying counsel of the error, a check for the difference was received by Claimant on March 14, 2016, more than one month late.

Claimant filed a Motion for Award of Penalties for Untimely Payment ("Motion") and on or about May 9, 2016, a CE granted Claimant's Motion stating Claimant was not timely paid pursuant to D.C. Code § 32-1515(f) which requires that compensation must be paid within 10 days from the date compensation becomes due, and assessing penalties against Employer in the amount of \$9,591.25 (20% of \$47,956.25) ("Award of Penalty").

¹ The reissued check was made payable in the incorrect amount and mailed to an incorrect address within the same office complex as Claimant's counsel's office. Recognizing the error, the Fedex delivery person nevertheless delivered the check to Claimant counsel's office. Employer's Brief also asserts that the reissued check mistakenly transposed the "6" and the "9" and issued the incorrect amount of money as a result. Further, that as soon as the mistake was brought to their attention, Employer rectified the shortage and issued a second check in the amount to make up the difference.

On June 7, 2016, Employer filed an Application for Review (“AFR”) of the Order with the Compensation Review Board (“CRB”) along with Employer’s Memorandum of Points and Authorities in Support of Employer’s/Insurer’s Application for Review (“Employer’s Brief”).

Attached to the filings made to the CRB was a copy of the Order and several exhibits referencing the details alleged herein. Employer asserts the CE ignored Employer’s evidence proving they made timely payment and acted arbitrarily and capriciously, and abused her discretion in issuing the Award of Penalty. Employer asserts the Award of Penalty should be reversed and vacated.

Claimant asserts the Award of Penalty is supported by substantial evidence and Employer’s request should be denied. We agree.

STANDARD OF REVIEW

Because the Order under review is not based on an evidentiary record produced at a formal hearing, the applicable standard of review by which we assess the determination reached by the CE in OWC is whether the decision is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. See 6 STEIN, MITCHELL & MEZINES, *Administrative Law*, § 51.03 (2001).

ANALYSIS

Employer asserts on appeal that the CE’s Award of Penalty in the amount of \$9,591.25 was an abuse of discretion as the CE provided no valid reason for disregarding Petitioners’ evidence proving the payment in question was made in a timely fashion; further, that the underlying decision for the CE’s Award of Penalty cannot be discerned from the Award. Lastly, that even if the CE found that Claimant did not timely receive her funds, the OWC abused its discretion by not waiving any applicable penalty as any delay in payment was owing to conditions over which Employer had no control.

Employer argues:

A court or administrative body abuses its discretion if no valid reason is given or can be discerned from the conclusion reached. *Punch v. United States*, 377 A.2d 1353, 1359 (D. C. Cir. [sic] 1977). Further, it is an abuse of discretion if the stated reasons for a conclusion, order or award do into rest upon a specific factual predicate. *Monroe v. United States*, 389 A.2d 811, 821 (D.C. Cir. [sic] 1978). In the present case, the Award of Penalty gave no reason for completely disregarding [Employer’s] evidence that timely payment was made. In fact, the Award of Penalty made no mention of [Employer’s] evidence or argument and merely stated it was made “after reviewing . . . the opposing counsel’s Response to the March 30, 2016 Order to Show Cause.” Ex. 5. That is the only reference in the Amended Award of Penalty to [Employer’s] argument and no reference is made what-so-ever to the copy of the check or the Fedex tracking documents submitted by [Employer].

Employer Brief at 8.

Employer also argues:

Despite stating that “the administrative file reflects the following,” Claims Examiner Estes and the [OWC’s] Award of Penalty made no absolutely no reference to Employer’s evidence, including the copy of the check dated February 8, 2016, the February 9, 2016 mailing, and the Fedex tracking documentation noting a delivery date of February 10, 2016. The timeline asserted by Claims Examiner Estes merely recounts the facts as alleged by [Claimant] and completely leaves out any fact or evidence submitted by [Employer].

* * *

. . . In fact, the Award of Penalty makes no mention of Petitioners [sic] evidence or argument against issuing the penalty and does not state any reason for disregarding or discrediting employer’s argument and evidence.

Employer’s Brief at 6.

Claimant’s counsel, in opposition to this argument, avers that procedurally speaking, Employer’s counsel’s failure to act once promptly notified of the missing check and subsequent disregard of the prompt payment intent of § 32- 1515 of the Act, was the basis for the penalty assessment by the CE. We agree. Specifically, Claimant’s counsel asserts:

Claimant believes that the [Employer] fully intended to mail the Claimant’s check along with the attorney’s check. Unfortunately, the Claimant’s check was not mailed. If the [Employer] had promptly reissued the check, no request for penalties would have been made. However the record clearly suggests that the [Employer] did not respect the clear intention of the statute. . . . It is quite likely that this mistaken belief that no penalty could be imposed was the reason it took more than a month for the Claimant to receive her check.

Claimant’s Brief at unnumbered page 5.

D.C. Code § 32-1515 (f), provides in relevant part:

“[i]f 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[.]”

Id.

Accordingly, Employer counsel had ten (10) days from receipt of the Settlement Order to issue payment to Claimant. The Settlement Order was entered on January 28, 2016. Claimant did not receive *any* check payment pursuant to the Settlement Order until March 3, 2016. Claimant was not fully compensated until receipt of the second settlement check, 20 days after compensation

became due pursuant to the payment period set forth in D.C. Code § 21-1515(f); thus Claimant was not timely paid. Employer's assertion that a package which should have contained the check (but did not) arrived within the mandated timeframe, and thus, no penalty should have been awarded is illogical and without merit as Claimant's check was not in that package.

We agree with Employer, that clerical mistakes and oversights do occur. The undisputed facts however, support the finding that Employer's counsel did not make it a priority to reissue a check to Claimant's counsel. Claimant made several efforts to communicate with Employer counsel once the compensation payment period had elapsed. Had Employer endeavored to reissue the missing check promptly after receiving notice of its disappearance perhaps a waiver of the penalty provision, if raised, would have been appropriate. This was not the case however.

Further, to the extent the misaddressed Fedex package, the transposed numbers on the check finally issued to Claimant, and the second check, sent to Claimant to address the shortage of the first check, were all overlooked by Employer as harmless errors, the overall delay in compensating Claimant cannot be. Notwithstanding Employer's insistence that the check was timely processed and timely mailed, Claimant was not fully compensated per the terms of the Settlement Order until March 14, 2016, more than one month after it was due. These facts are clearly discernable and supported by the evidence.

CONCLUSION AND ORDER

The Award of Penalty issued on May 9, 2016 was not an abuse of discretion on the part of the Claims Examiner and is supported by substantial evidence. The Employer/Insurer's Motion to Review the Award is hereby DENIED. The Award of Penalty is AFFIRMED.

So ordered.