

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

CRB 12-132

TYRONE McDONALD
Claimant-Respondent,

v.

THE GEORGE WASHINGTON UNIVERSITY AND AVIZEN/FRANK GATES,
Self-Insured Employer and Third-Party Administrator-Petitioners.

Appeal of a June 20, 2012, Final Order recommended by
Claims Examiner Antoinette Green
OWC No. 669153

Steven H. Kaminski, Esquire, for the Claimant
David M. Schoenfeld, Esquire, for the Employer and Third-Party Administrator

Before LAWRENCE D. TARR, MELISSA LIN JONES, and HEATHER C. LESLIE,¹ *Administrative Appeals Judges.*

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER
OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the employer and third party administrator, The George Washington University and Avizen/Frank Gates (hereinafter “employer”) for review of the June 20, 2012, Final Order issued by Claims Examiner Antoinette Green that ordered the employer to pay a 20% penalty for the late payment of final settlement. For the reasons stated, we must vacate that Order and remand this case.

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

On April 2, 2010, the claimant, Tyrone McDonald, injured his right shoulder while working for the employer as a maintenance mechanic. The employer accepted the claim and paid medical benefits. The claimant did not miss any compensable time so no indemnity benefits were paid. A dispute arose between the parties concerning the claimant’s entitlement to permanent partial disability benefits and the parties submitted a lump sum settlement that was approved by the Office of

¹ Judge Leslie has been appointed by the Director of the DOES as a CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

Workers' Compensation (OWC). The claimant received from the employer the money owed under the lump sum settlement on November 1, 2011.

On November 10, 2011, the claimant filed a request with OWC for an informal conference believing that the employer's payment was not timely made and that he was entitled to penalties,. The informal conference was held before OWC Claims Examiner Antoinette Green on December 8, 2011. The parties did not reach an agreement at the informal conference.

On April 20, 2012, the employer requested the claims examiner issue a Memorandum of Informal Conference. By letter dated May 14, 2012, the employer again requested a Memorandum. The claims examiner did not issue a Memorandum as requested. In June 2012, the claims examiner issued an Order to Show Cause to the employer ordering it to show cause why the requested penalty should not be assessed.

The employer responded by stating that it was the claimant's burden to prove the payment was late, that the claimant did not offer any evidence at the informal conference proving when the employer received the settlement, that the employer is not obligated to present any evidence to support claimant's claim, and therefore the claims examiner should issue a Memorandum denying the request.

The claims examiner did not issue a Memorandum. Instead, on July 10, 2012, she issued a Final Order. The Final Order stated:

This proceeding arises out of a claim for assessing a twenty percent (20%) penalty against the employer/carrier for untimely payment of a Settlement approved by this Office on October 13, 2011.

On June 20, 2012, the Office of Workers' Compensation issued an Order to Show Cause to determine why a twenty percent penalty should not be assessed against the employer/carrier for failure to pay benefits timely, due to the Lump-Sum Settlement being approved by the Office of Workers' Compensation.

On July 6, 2012, OWC received the response from the employer/carrier dated July 6, 2012, this revealed that the employer/carrier indicated that the Claimant failed to adduce the requisite evidence to prove his claim for relief.

The employer /carrier further maintain, it is not the employer's obligation to present any evidence to support the Claimant's claim for relief. If the Claimant has not presented sufficient evidence to support his claim, his request must be denied

The employer/carrier made no specific finding in support to the issuance of a check in the amount of \$15,500.00 to the Claimant until November 1, 2011.

Section §32-1515 (f)'s language is unequivocal, and because strict application of the

statute comports with its evident purpose to make the employer and its carrier responsible for timely payment in all circumstances within it control, we must apply it accordingly.

See *Hard Rock Café v. District of Columbia Department of Employment Services*, 911A.2d 1217, (2006).

The employer/carrier, in the opinion of the OWC, did not show that compensation could not be timely paid owing to conditions over which they had no control. Thus, the payment was not timely paid. OWC further fines[sic] and conclude [sic] that the certified mail was delivered the next day October 14, 2011; however, the check was not issued until November 1, 2011.

Therefore, it is hereby Ordered that the employer/carrier pay 20% penalty for late payment in the amount of \$3,100.00 to the Claimant and forward it to the Claimant's Counsel.

The employer timely requested review with the CRB. On review, in addition to challenging the Final Order, the employer also challenges the procedure used by the claims examiner in checking the United States Post Office's web site.

JURISDICTION AND THE STANDARD OF REVIEW

Pursuant to 7 DCMR § 230.04, the authority of the CRB extends over appeals from compensation orders, including final decisions or orders issued by OWC. The CRB's standard of review for appeals of OWC's order is that the CRB 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).

ANALYSIS

We first find that the Final Order is not in accordance with the law because it misapplies the burden of proof. The claimant had the legal burden to prove entitlement to penalties—in this case that the employer did not make payment within 10 days of receiving the settlement approved from OWC. See, D.C. Code §32-1515 (f).

The claims examiner, by assessing penalties because the employer “made no specific finding in support to the issuance of a check in the amount of \$15,500.00 to the Claimant until November 1, 2011” incorrectly put the burden on the employer.

Because the Final Order misapplied the burden of proof we must vacate the penalty imposed by the order and remand this matter to the claims examiner so that she can apply the correct legal burden.²

² The claims examiner's Final Order correctly stated that the employer had the burden to establish there were conditions over which it had no control so as to permit waiver of the penalty. D.C. Code §32-1515 (f). However, penalty waiver only becomes an issue after it is determined that the penalty is owed.

Moreover, 7 DCMR § 219.8 states

If at the close of an informal conference, the parties have not reached an agreement on all the disputed issues, [OWC] shall evaluate all the available information and prepare a Memorandum of Informal Conference containing recommendations.

Here, although the parties did not reach an agreement on the issue of claimant's entitlement to penalties at the informal conference, the claims examiner did not prepare a Memorandum of Informal Conference containing recommendations.

The failure to prepare a Memorandum deprived the parties of their substantive right to challenge the claims examiner's recommendations through the formal hearing process. See 7 DCMR § 219.22.³

Therefore, we must vacate the Final Order and remand this case so that the claims examiner can issue a Memorandum of Informal Conference.

The employer also asserts the claims examiner acted improperly in using the internet to check the USPS website.

Although there is no transcript, both parties acknowledged in their written statements that the claimant did not present any evidence at the informal conference that showed the specific date on which the employer received its copy of the settlement from OWC and that the employer did not volunteer this date.

This date is critical because the 10-day period in D.C. Code §32-1515(f) would begin to run when the self-insured employer received its copy of the approved lump sum settlement. See 7 D.C.M.R. § 228.4, *Orius Telecommunications Inc., v. DOES*, 857 A.2d 1061 (D.C. 2004), *Brinkley v. RTL Electric*, CRB No. 05-23, OWC No. 580138 (July 20, 2005).

The parties further acknowledged that after the informal conference, the claims examiner attempted to locate the USPS certified mail "green card" that would show the specific date on which the employer received a copy of the approved settlement. The claims examiner was not able to locate the green card, so she went online and searched the USPS web site. The claims examiner entered the certified mail number and received the following information, which she then printed and added to her file:

Your item was delivered at 5:06 pm on October 14, 2011 in WASHINGTON, DC 20036.⁴

³ In light of the employer's decision not to present any evidence or respond to inquires as to when it received the settlement and the claims examiner's failure to prepare a Memorandum, the parties were unable to request a formal hearing and utilize pre-hearing discovery such as deposing the employer or requesting a subpoena for the employer's records to discover information that could identify the date the settlement was received.

⁴ The office of employer's counsel is located in zip code 20036. We note however that contrary to claimant's counsel's representation in his written statement at page 2, this document does not show "delivery to Employer's counsel."

The employer argues that the claims examiner acted improperly by unilaterally researching this information. We disagree.

While we agree with the employer that it would be improper for an administrative law judge pursuant to a formal hearing to unilaterally research a web site for this information, we find the claims examiner's actions are consistent with OWC's mandate in conducting informal conferences that "Each controverted claim or medical benefits shall be investigated by [OWC]." 7 DCMR §§219.7.and 219.8

The employer further argues that even if the claims examiner acted properly in researching the USPS web site, the information on the web site "cannot form the foundation for ordering penalties against the employer for several reasons:

Next, a careful review of the document reveals that the document is nothing more than confirmation of delivery of something, to somewhere. There are no specific details and/or information on that document indicating that the document was delivered to/or received by the employer. The document merely gives a zip code and a date. It does not specifically certify that the Compensation Order was received by the employer on that date; it contains no signature that can be traced to the employer. In fact, if the only identifying factor is the zip code, arguably, this document could simply reflect that the document was received by claimant's counsel, as the zip code, matches the zip code for claimant's counsel as well.

Employer's memorandum at 7.⁵

The CRB will not address this argument. It would be improper to anticipate or predict whether the claims examiner will rely on the USPS web site information in reaching her decision.

We do note, however, that the claims examiner may make reasonable inferences from the information before her: that the Certificate states the settlement was mailed on October 13 2011, the envelope addressed to the employer was delivered to an address within the employer's zip code on October 14, 2011, and the claimant did not receive payment until November 1, 2011.

In his memorandum, claimant's counsel asserted that employer's counsel at the informal conference "refused to answer very simple and direct questions from the Claims Examiner as to when the Compensation Order [sic] was received by Employer" and in a footnote stated that the CRB "can decide whether Employer's counsel's behavior at the Informal Conference and the arguments advanced in its instant Brief on Appeal violate D.C. Rule of Professional Conduct 3.3" especially the provision of that Rule that says "There may be circumstances where failure to make a disclosure is the equivalent of an affirmative representative."

⁵ There is a question as to whether the claims examiner relied on this information since the Final Order was issued on July 10, 2012 and the copy of the USPS web site information in the OWC file is dated July 12, 2012. Since the CRB now vacates the Final Order this question is moot.

Certainly, the line between not proving an opponent's case and a legitimate ethical grievance under Rule 3.3 is a thin one. However, claimant's counsel has not cited any authority, and the CRB is not aware of any authority, that requires defense counsel at an informal hearing to respond to discovery-like requests from the claims examiner or opposing counsel.

CONCLUSION

The July 10 2012, Final Order is not in accordance with the law. This matter is remanded to the claims examiner with instructions to issue a Memorandum of Informal Conference with appropriate recommendations and which applies the proper burden of proof.

ORDER

The penalties assessed in the July 10, 2012, Final Order are VACATED. This case is remanded to the OWC for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

LAWRENCE D. TARR
Administrative Appeals Judge

November 5, 2012
DATE