

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. 07-161

MILLICENT BROWN,

Claimant-Respondent,

v.

DAVIS MEMORIAL GOODWILL INDUSTRIES AND PMA MANAGEMENT CORPORATION,

Employer/Carrier-Petitioner.

Appeal from an Order of
Claims Examiner Edith Tyler and Claims Supervisor Larry Barron
OWC No. 568170

Jane J. Gerbes, Esquire, for the Petitioner

Jessica Bhagan, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY, *Administrative Appeals Judges*, and E. COOPER BROWN, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) 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 Pursuant

¹Pursuant 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive

to § 230.04, the authority of the CRB 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 public and private sector Acts.

BACKGROUND

This appeal follows the issuance of an "Order Declaring [sic] Default"² (Order) by the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on June 21, 2007, the Claims Examiner awarded a 20% penalty for late payment of an approved settlement agreement. In so deciding that payment was late, the Claims Examiner wrote:

A settlement petition was submitted to the Office of Workers' Compensation for approval on 11/3/04. The settlement was approved on 11/15/04 *and was sent to all parties 12/16/04*. The original was received by the Law Firm of Chasen & Boscolo on 11/17/04. The employer/carrier copy was signed for by Adjuster Andry Cheek.

The checks were issued and processed for an over night delivery to the claimant on 11/30/04. The 10 day period expired on 11/28/04, a Sunday. The claimant received her check four days late on 12/2/04.

[...]

Counsel for the employer/carrier asserts that the delay in payment was not an intentional default. By forwarding the order to the Richmond Office and not to the Maryland Office where both Ms. Fluornay and Ms. Beauchemin are located, this clearly delayed the claims representative [sic] ability to timely pay the award.

[...]

The law is clear [sic] the employer must show that (conditions over which he had no control) [sic] such installment could not be paid within the time prescribed.

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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

² We note that the order under review herein is not an "Order Declaring Default", as that term is used in the Act. Rather, it is a determination that a penalty should be awarded because a payment of compensation was made late, not a determination that that a payment has not been made. This is a significant and important distinction, given that an order declaring a default is a specific statutory creation under D.C. Code §32-1519, which has numerous requirements which differ from those associated with a penalty for late payment of compensation due. It exists for the purpose of permitting persons "to whom compensation is payable" to avail themselves of the judgment enforcement procedures available through resort to the D.C. Superior Court. In order to avoid confusion, we encourage counsel and others to avoid usage of this term in other contexts.

I find that the order *being forwarded* to the Richmond Office and not to the Maryland Office is not justifiable grounds for delay of the settlement not being paid timely [sic].

“Order Decaring Default” [sic], unnumbered page 1 -2 (*italicized emphasis added*).³

As grounds for this appeal, Petitioner alleges as error that the delay and supposed late payment was the result of an unintentional delay brought about by the fact that Respondent’s counsel faxed a copy of the approval to Petitioner’s claims office in Richmond, Virginia when counsel was aware that the adjusters handling the claim, and thus responsible for initiating the process of issuing checks in payment of the settlement, were located in Maryland and/or Pennsylvania. Petitioner argues that it is the intent of the statute to punish only intentionally or negligently delayed payments which result in payment being late, not late payments caused by delays resulting from errors on the part of a claimant’s attorney.

Respondent opposes the appeal, and asserts that the fact that Respondent’s counsel sent the facsimile copy of the approval to Richmond rather than Maryland and/or Pennsylvania is immaterial, because (1) it is in Respondent’s estimation “clear” that Petitioner “did receive the approval by mail”, and (2) it is “not reasonable that upon receipt of the fax on November 18, 2007 [sic] in the Richmond, VA office, it took over ten days for the carrier to [make payment].”

Because the claims examiner appears to have based her determination as to when Petitioner received a copy of the order which approved the settlement agreement, and hence when the ten day payment period commenced, on the date that Respondent faxed a copy thereof to Respondent’s Richmond office, and not upon the date that Petitioner actually received the approval order from OWC, we reverse and vacate the award as being contrary to law, and remand the matter to OWC for further consideration.

ANALYSIS

In 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).

The Act provides for payment of a 20% penalty where compensation is not paid within ten days of its becoming due. See, D.C. Code § 32-1515 (f). We take it as established by the District of Columbia Court of Appeals that, assuming that the employer, which includes the employer’s insurer, has actual proper legal notice of an award of compensation, it is immaterial if a failure to pay within ten days of such notice is unintentional, or is not the result of culpable negligence; the only excusing circumstance for a late payment is the inability to make such a timely payment due to circumstances over which the employer has no control. See, *Hard Rock Café v. District of Columbia Dep’t of Employment Services*, 911 A.2d 1217 (2006).

³ We wish to point out that the ten day period did not “expire” on the November 28, 2004. Rather, ten days had elapsed between November 17, 2004 and November 28, 2004. The time for payment does not expire on the 10th day, if that day falls on Sunday.

However, although the Claims Examiner (in the Order) and Respondent (in her Opposition) assert that a claims adjuster received the approval order by mail (which we presume means by mail from OWC), neither of them demonstrates or asserts the date of that receipt.

Further, it is apparent from the language employed by the Claims Examiner in the Order that her calculation was based upon the “forwarding” date, which we can only assume refers to the date of the facsimile from Respondent’s counsel.

The CRB has previously addressed this issue in *Lytes v. District of Columbia Water & Sewer Authority*, CRB No. 07-29 (May 29, 2007), writing:

[Payment pursuant to an] Order approving the settlement agreement does not become due until it was properly received by [an employer or insurer]. 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. Payment under the settlement agreement could not have been late until ten days after [the employer] received proper notice from OWC that the agreement had been approved. [...] 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 [claimant’s counsel] in this matter.

Lytes, at 2 – 3. Thus, the “forwarding” date is irrelevant to the question of the date upon which payment is due.

Lastly, while it may well be (and in all likelihood is) an error by the Claims Examiner, the date that the settlement approval order was “sent” (again, presumably by OWC and presumably by mail) is given in the Order as “12/16/04”. Given that all parties agree that payment had been made before that date, by the explicit terms of the Order, payment was not late.⁴

In any event, because the Order fails to identify the correct operative date from which to commence the ten day period, it lacks a necessary factual basis, and is therefore arbitrary, capricious, an abuse of discretion, and contrary to law.

CONCLUSION

The Order lacks an adequate and necessary factual basis, is internally inconsistent, and by its own explicit terms finds that payment was made prior to OWC giving notice of the approval to Petitioner by providing a copy of the approval order to Petitioner. Therefore, the award of a penalty for late payment of an award is arbitrary, capricious, an abuse of discretion, and contrary to law.

⁴ We note that the Claims Examiner is not alone in making an apparent error regarding one of the central facts in this case: Respondent’s counsel at one point asserts that the faxed copy of the approval was sent on November 18, 2007. See, “Claimant’s Opposition to Employer’s Application for Review”, unnumbered page 2.

ORDER

The "Order Decaring [sic] Default", executed by the Claims Examiner on June 15, 2007, approved by the Claims Supervisor on June 18, 2007, and certified as being mailed to the parties on June 21, 2007, is reversed and vacated. The matter is remanded to OWC for further consideration of the claim for a penalty based upon the date that Petitioner received the order approving the settlement agreement.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

October 10, 2007

DATE