

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB No. 05-40

DONALD FOY,

Claimant – Respondent

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY AND THE SHAFFER COMPANIES,

Employer/Carrier – Petitioner

Appeal from an Order of
Claims Examiner Letitia Settle
OWC No. 560276

Sarah O. Rollman., Esquire, for the Petitioner

Joseph H. Koonz, Jr., Esquire, for the Respondent

Before: LINDA F. JORY, SHARMAN MONROE, *Administrative Appeals Judges* and FLOYD LEWIS,
Acting Administrative Appeals Judge.

FLOYD LEWIS, *Acting 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, § 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. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including

BACKGROUND

This appeal follows the issuance of a Supplemental Attorney Fees Award from the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on January 6, 2005, the Claims Examiner ordered that Employer-Petitioner (Petitioner) pay Claimant-Respondent (Respondent) attorney's fees in the amount of \$2, 900.00. Petitioner now seeks review of that Order.

As grounds for this appeal, Petitioner alleges that the award of attorney's fees 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 & Mezines, ADMINISTRATIVE LAW, § 51.03 (2001).

Turning to the case under review herein, Petitioner states that D.C. Official Code § 32-1530(b) authorizes an award of attorney's fees after the development of a controversy only if certain conditions exist, one being that the employer refuses to accept the Memorandum of Informal Conference within 14 days of receipt of the recommendation. Petitioner specifically alleges that since it did not reject the Memorandum of Informal Conference, but instead Respondent rejected the Memorandum, Respondent has no right to receive attorney's fees. Moreover, Petitioner argues that even after using the services of an attorney, the compensation that was awarded to Respondent after further proceedings before the Office of Hearings and Adjudication (OHA) was not greater than the amount tendered by Petitioner following the receipt of the Memorandum of Informal Conference. As such, Petitioner contends that another condition precedent to an award of attorney's fees was not met.

Respondent counters by arguing that it was not until he sought an informal conference, the conference was scheduled and a recommendation was made, that Petitioner made payments and as such, an award of attorney's fees was appropriate.

Under D.C. Code § 32-1530(b), an employer can be ordered to pay a claimant's attorney's fees when an Informal Conference is held in an attempt to resolve the controversy; a Memorandum of Informal Conference is issued; the employer rejects the Memorandum and does not pay benefits in accordance with the recommendation; the claimant uses an attorney; and the compensation subsequently awarded is greater than the amount tendered by the employer within

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.

14 days of receipt of the recommendation. This section of the Act states that “In all other cases any claim for legal services shall not be assessed against the employer or carrier.”

In the instant matter, after Respondent suffered an accidental work injury, Petitioner made voluntary payments of temporary total disability and temporary partial disability for wage loss. After reaching maximum medical improvement, Respondent filed an Application for Informal Conference seeking an award under the schedule for loss of use of his left arm. An Informal Conference was held, the Memorandum of Informal Conference was issued on May 16, 2002 and Petitioner made payment in accordance with the recommendation on May 25, 2002.

Respondent then rejected the Memorandum of Informal Conference and filed an Application for Formal Hearing. The hearing was held on August 2, 2002 and a Compensation Order was issued on November 29, 2002 that granted Respondent the same benefit that was awarded at the Informal Conference level. Respondent then filed a petition for attorney’s fees that was granted by OWC.

Upon reviewing this matter, this Panel notes that the District of Columbia Court Appeals has addressed the concerns raised in this matter and the awarding of attorney’s fees under D.C. Official Code § 32-1530(b). The Court held that under this section of the Act, for an employer to be obligated to pay a claimant’s attorney’s fees, that employer must refuse to pay compensation in accordance with the OWC’s recommendation within 14 days of receipt of the recommendation. *National Geographic Soc’y. v. Dist. of Columbia Dep’t. of Employment Servs.*, 721 A.2d 618, 621 (D.C. 1998). Moreover, in *Providence Hosp. v. Dist. of Columbia Dep’t. of Employment Servs.*, 855 A.2d 1108, 1113 (D.C. 2004), the Court made it clear that for an award of attorney’s fees to be made against an employer, that employer must have rejected the Memorandum of Informal Conference.

In this case, Petitioner did not reject the Memorandum of Informal Conference, as it was Respondent (Claimant), who rejected the Memorandum. Since an employer did not reject the Memorandum, the requirements under D.C. Official Code § 32-1530(b) and the *Providence Hospital* case, for awarding fees were not met. Moreover, as also pointed out by Petitioner, even after Respondent rejected the Memorandum, the compensation that was awarded by formal adjudicatory process in OHA was not greater than the amount tendered by Petitioner after receipt of the Memorandum of Informal Conference. As such, this Panel must agree with Petitioner that the award of attorney’s fees by OWC in the instant matter was erroneous, as it was not in accordance with the law.

CONCLUSION

The Supplemental Attorney Fees Award of January 6, 2005 is not in accordance with the law. Since Petitioner did not reject the Memorandum of Informal Conference, under D.C. Official Code § 32-1530(b), Respondent was not entitled to an award of attorney’s fees.

ORDER

The Supplemental Attorney Fees Award of January 6, 2005 is hereby REVERSED.

FOR THE COMPENSATION REVIEW BOARD

FLOYD LEWIS
Acting Administrative Appeals Judge

July 8, 2005
DATE