

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 (Dir.Dkt.) No. 04-66

ANTONIO GUERRERO,

Claimant – Respondent,

v.

CLARK CONSTRUCTION AND ST. PAUL INSURANCE COMPANY,

Employer/Carrier – Petitioner.

Appeal from a Supplemental Award of Attorney Fee of
Claims Examiner Peggy Hendricks
OWC No. 592187

Christopher R. Costabile, Esq., for the Petitioner

Benjamin Boscolo, Esq., for the Respondent

Before FLOYD LEWIS, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *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 (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 responsibility for administrative appeals filed

BACKGROUND

This appeal follows the issuance of a Supplemental Award of Attorney's Fees from the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES). In that Supplemental Award, which was filed on June 4, 2004, the Claims Examiner (CE) assessed attorney's fees against the Employer/Carrier-Petitioner (Petitioner) in the amount of \$3,512.80 in addition to costs in the amount of \$45.00 pursuant to D.C. Official Code § 32-1530(a). The Petitioner now seeks review of that Supplemental Award.

As grounds for this appeal, the Petitioner alleges as error that the Supplemental Award of Attorney's Fees is not in accordance with the law or with the finding of facts made by the CE.

ANALYSIS

In the 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 & Mezones, ADMINISTRATIVE LAW, §51.93 (2001).

Turning to the case under review herein, the Petitioner alleges that D.C. Official Code § 32-1530(a) is not applicable to this case as it did not decline to pay compensation on the grounds that of no liability for compensation under the Act. The Petitioner maintains that its Notice of Controversion contested only the continuing disability of the Claimant-Respondent (Respondent), not the compensability of the claim. The Petitioner argues that as the CE found that it had made voluntary payments of compensation and later a dispute arose concerning additional benefits, D.C. Official Code § 32-1530(a) is clearly not applicable to this case. The Petitioner argues that since the payment of medical benefits was never contested, the payment of those benefits cannot be used to measure the "benefits secured" to the Respondent. Finally, the Petitioner argues there is no authority for the award of costs since the matter had not proceeded to a formal hearing.

The official OWC file shows that the Respondent sustained a work-related back injury on November 1, 2003. Nevertheless, the Respondent continued to work. The CE found that he worked until November 14, 2003. The official file further shows that the Respondent, through counsel, filed a Notice of Accidental Injury or Occupational Disease and a Claim Application on November 26, 2003.² The Petitioner subsequently filed a Notice of Controversion on December 12, 2003 citing continuing disability contested, voluntary limitation of income and failure to perform light duty work with the employer as the bases for the controversion. The Respondent filed a request for informal conference on December 29, 2003 requesting, *inter alia*, the payment of temporary total disability benefits from continuing November 1, 2003. The request was later withdrawn as the Petitioner accepted the claim; the withdrawal was memorialized in a Memorandum of Informal Conference dated February 4, 2004. The Petitioner filed a Memo of

prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

² Although filed on November 26, 2003, both documents were dated November 24, 2003.

Payment of Workers' Compensation on February 4, 2004 indicating that it made its first voluntary payment of compensation on February 2, 2004.

Herein, the CE concluded "this case was voluntarily accepted and a dispute arose after voluntary acceptance of the claim, which was resolved without the need for an informal conference." Supplemental Award at p. 4. After reviewing the official file, the Panel is unable to discern when, prior to February 2, 2004, the Petitioner made voluntary payments of compensation to the Respondent. While the CE indicated that the Respondent continued to work for the Petitioner after his injury or was in a pay status until November 14, 2003, the CE did not find that the monies the Respondent received while working or in a pay status were compensation payments or wages. It appears that the CE may have mistakenly thought that the voluntary acceptance of a claim is the same as the payment of compensation without an award. However, a reading of the Act shows that it is the timing of the payment of compensation which controls the payment of attorney's fees. Consequently, this matter must be remanded for an explanation as to if and when the Petitioner made voluntary payments of compensation before February 2, 2004.

On remand, the CE must be mindful that if the Petitioner made payments of compensation without an award, then the payment of attorney fees would be payable pursuant to D.C. Official Code § 32-1530(b). However, if the Petitioner declined to pay compensation after receiving a written notice of a claim for compensation, then the payment of attorney fees would be payable pursuant to D.C. Official Code § 32-1530(a).

CONCLUSION

The Supplemental Award of Attorney's Fees of June 4, 2004 is arbitrary capricious, an abuse of discretion, and not in accordance with the law. This matter must be remanded.

ORDER

The Supplemental Award of Attorney's Fees of June 4, 2004 is hereby REVERSED AND REMANDED for further proceedings consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

May 19, 2006
DATE