

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-081**

**LAKISHA WITHERSPOON,  
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,  
Self-Insured Employer-Petitioner.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 OCT 7 AM 11 15

Appeal from an April 14, 2015 Order Awarding Attorney's Fee  
by Administrative Law Judge Fred D. Carney, Jr.  
AHD No. PBL 13-034, DCP No. 3008055636-001

(Decided October 7, 2015)

Harold L. Levi for Claimant  
Andrea G. Comentale for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

**DECISION AND REMAND ORDER**

This matter is an appeal of an attorney's fee award that was issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services on April 14, 2015. The award was made after issuance of a Compensation Order (CO) on January 12, 2015, in which Claimant's claim for temporary total disability benefits was denied, but his claim for reinstatement of medical benefits from December 1, 2012 to the present and continuing was granted.

Claimant's counsel thereafter filed a Fee Petition on February 12, 2015. Counsel requested an attorney's fee award in the amount of \$10,080.00 for 42 hours of work. Counsel conceded that Claimant, at that time, only had outstanding medical bills that totaled \$1,487.00, however, Counsel asked that an order approving fees provide that Employer pay 20% of the current medical expense of \$1,487.00 and 20% of any future medical expenses incurred as a result of the work injury as those expenses are incurred and paid. Counsel proposed Claimant's future medical benefits would include fusion surgery that would cost "at least \$30,000.00".

Employer filed an Opposition asserting Claimant's Counsel was not entitled to a fee award as Counsel failed to provide evidence of the actual benefit secured, citing *Jones v. University of the District of Columbia*, CRB No. 09-065, AHD No. PBL 06-112A (March 20, 2009). Employer asserted that because Claimant's health insurance paid for \$1457.00 of the medical bills incurred, Claimant's actual benefit secured is \$30.00 and 20% of the benefit secured is \$6.00. Employer further asserted Claimant's fee request based on a vague prediction of medical expenses for surgery that may or may not happen in the further was inappropriate.

AHD issued an Order Awarding an Attorney's Fee (OAF) on April 14, 2015. The ALJ ordered Employer to pay Counsel a fee in the amount of \$6,297.00 based on Claimant's projected estimate of her future medical expenses and the amount of medical expenses she incurred to date, \$1487.00.

Employer seeks review of the OAF because it is not in accordance with 7 DCMR § 1-623.27 (B)(2), as Employer asserts the ALJ erroneously included the \$30,000 prospective surgery that may never occur, therefore the award is premature. Employer further asserts that at the time the OAF was issued, Claimant had secured only \$1,487.00 in benefits therefore Counsel was entitled to \$298.00 in attorney's fees.

Claimant filed an opposition to the AFR of the OAF. Claimant did not challenge the reduction of Counsel's fee from \$10,000 to \$6,297.00. Claimant conceded that it would be premature for Employer to pay the full \$6,297.00 which the ALJ ordered without the surgery having been completed and the cost determined. Citing the CRB's decision *Martin v. District of Columbia Department of Corrections*, CRB No. 08-212, (April 14, 2009), (*Martin*), Claimant's counsel concedes that he did not request the immediate payment of the full \$10,080.00 which he sought. To the contrary, Claimant requested that the amount in excess of 20% of the benefits secured for Claimant be paid prospectively when and as payments are made to Claimant and until Counsel is paid the full amount of the fee to which he is entitled.

#### ANALYSIS<sup>1</sup>

Employer asserts and we agree the ALJ erred in relying on 7 DCMR §132.5(c) in support of his decision:

As for the \$30,000 expected surgical expense, 7 DCMR §132.5(c) states that in determining whether to approve a claim, the ALJ shall consider the amount of compensation accrued and potential future benefits.

OAF at 1; Employer's Brief at 5.

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<sup>1</sup> In the appeal of an Order which is not based upon an evidentiary record, the scope of review by the Compensation Review Board (CRB) is limited to making a determination as to whether the Order under review is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. *See* 6 Stein, Mitchell & Mezones, ADMINISTRATIVE LAW §51.03 (2001).

This Panel agrees with Employer that the regulation set forth in 7 DCMR §132.5 establishes a pathway to additional attorney's fees based on future benefits and not a current award of attorney's fees based on potential future benefits.

We disagree with Claimant's counsel's reliance on *Martin*<sup>2</sup> to support his request for payment of 20% of the benefits secured when the benefits are secured until counsel is paid the full amount of the fee to which he is entitled. Claimant's Brief at 2 (emphasis added).

While *Martin* does provide for fees on future benefits, it does not address payment of fees based on future medical expenses. Employer cannot be ordered to pay counsel 20% of medical expenses until Employer has had the opportunity to determine if the medical expenses requested are reasonable and necessary and causally related to the work injury. Moreover, even if future medical expenses do occur, the ALJ cannot base the amount of the attorney fee due Counsel on an estimated cost of medical procedures that may never occur.

Because the ALJ based his calculation of the fee Counsel was entitled to receive on \$30,000 surgery estimate and not based on the benefits actually secured, the \$6,297.00 award is vacated as it is not in accordance with the law. *Cf. Workcuff v. DC Housing Authority*, CRB No. 15-054, AHD No. PBL 12-022A, DCP No. 761001000200200006 (September 23, 2015).

#### CONCLUSION AND ORDER

The OAF awarding an attorney fee of \$6,297.00 be paid immediately is not in accordance with the law and the award is VACATED and the matter is REMANDED to AHD for the ALJ to consider the appropriate amount of attorney fee award in accordance with 7 DCMR § 1-623.27 (B)(2), without consideration of an estimate of further surgery that may or may not occur.

*So ordered.*

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<sup>2</sup> In *Martin* the CRB stated:

In the instant case, rather than limiting the attorney fee to 20% of the disability benefit award amount secured by Petitioner up to the date of the Compensation Order (the "accrued amount"), the ALJ should have additionally provided that with each future periodic payment of disability compensation paid to Petitioner an additional payment of attorney's fees be made in the amount of 20% of the periodic disability payment paid at that time, until such time as Petitioner's counsel had received the entire fee approved or Petitioner is no longer receiving compensation, whichever first occurs.