

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. 05-255

WANDA J. MCINTYRE,

Claimant – Respondent

v.

SAFEWAY STORES, INC.,

Self-Insured Employer – Petitioner.

Appeal from an Order Awarding Attorney's Fee of

Administrative Law Judge Fred D. Carney, Jr.

OHA No. 00-309, OWC No. 550033

John F. Ward, Esquire, for the Petitioner

Benjamin T. Boscolo, Esquire, for the Respondent

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

FLOYD LEWIS, *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, 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 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.

BACKGROUND

This appeal follows the issuance of an Order Awarding Attorney's Fee from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on July 7, 2005, the Administrative Law Judge (ALJ) ordered that Employer-Petitioner (Petitioner) pay Claimant-Respondent (Respondent) an attorney's fee of \$1,453.59 and \$40.60 in costs. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the Order Awarding Attorney's Fee is not in accordance with the law.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. D.C. Official Code §32-1522(d)(2). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, Petitioner alleges that the ALJ's decision is erroneous because the ALJ based the fee award on the amount of Respondent's claimed medical expenses/benefits rather than on the actual expenses secured, i.e. the actual amount of medical benefits Petitioner is to pay after the medical bills are reduced under the applicable fee guidelines and any credit for payments previously made. Respondent counters by arguing that the attorney's fee, based on the total of the medical bills incurred by Respondent, was properly awarded and should not be disturbed.

Respondent's counsel petitioned the ALJ for an award of attorney's fee in the amount of \$1,453/59 for legal services and costs of \$40.00 for representation of Respondent before AHD. According to Respondent, the total medical benefit awarded was \$4,617.37 and Petitioner raised concern before the ALJ that the Respondent included medical bills and costs which may be reduced or were previously paid. Thus, Petitioner argued that the \$4,617.37 figure is not the correct figure to use to calculate attorney's fees, as some of the medical bill may be reduced under the Office of Worker's Compensation's (OWC) Medical Fee Guide. Petitioner argued that

the secured benefit is the total of the medical expenses Petitioner is to pay after any adjustments under OWC's medical fee guidelines. Therefore, Petitioner contended that it would be erroneous to rely on the amount of \$4,617.37 to compute Respondent's attorney's fees.

The ALJ rejected Petitioner's argument, noting that Petitioner cited no authority for its interpretation of D.C. Official Code § 32-1530(f) and that after researching the issue, the ALJ found no regulation or case law to support Petitioner's position. However, it should be noted that in D.C. Official Code § 32-1507(a)(5), the Act provides that the Mayor establishes and sets medical fees and that the fee schedule should be based on 113% of Medicare's reimbursement amounts. Moreover, the regulations provide that medical care and services "shall be billed by the provider at 113% of Medicare's reimbursement amounts." 7 DCMR § 212.14. As such, this Panel agrees with Petitioner that medical services shall be billed at the rate established in the medical fee schedule adopted by the Mayor and based on 113% of Medicare's reimbursement amounts.

Thus, this Panel concurs with Petitioner's argument that Respondent's attorney's fee should not be based on the amount billed by Respondent's medical providers and should be limited to 20% of the value of the medical care under the fee schedule guidelines. However, although the value under the medical fee schedule is the proper amount upon which to base the fee award and not the amount billed by medical providers, in this case Petitioner has failed to demonstrate or establish that the amount billed by the medical providers is not in conformance with the fee guidelines. In response to the ALJ's Show Cause Order, to show why the amount of the fee Respondent sought should not be awarded, the burden was on Petitioner to establish that these submitted medical charges were not in conformance with the appropriate fee schedule and charges.

In this matter, Petitioner did not provide the ALJ with an analysis comparing these charges with the appropriate fees to make a record that the requested fee should not be based on the submitted charges. On appeal, there is no way for this Panel to know if the amount submitted was not in accordance with the fee guidelines or more than 113% of Medicare's reimbursement amounts. Thus, since Petitioner has not met its burden of establishing that the amounts submitted are not in accordance with the fee guidelines and schedule, this Panel upholds the attorney's fee award in this matter.

Accordingly, this Panel dismisses Petitioner's contention that the ALJ committed error in awarding Respondent attorney's fees based on \$4, 617.13 in medical expenses and the Order Awarding Attorney's Fee of July 7, 2005 is affirmed.

CONCLUSION

The attorney's fee award should not be based on the amount billed by Respondent's medical providers, as the 20% limitation on fees should be based on the appropriate amount under the fee schedule. However, since Petitioner did not meet its burden of establishing that the amount

billed was not, in fact, in accordance with the schedule, the attorney's fee awarded in this matter should not be disturbed.

ORDER

The Order Awarding Attorney's Fee of July 7, 2005 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

October 6, 2005
DATE