

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. 07-70

ORLANDA COVINGTON,

Claimant - Respondent

v.

D.C. WATER AND SEWER AUTHORITY AND PMA MANAGEMENT CORP.,

Employer/Carrier - Petitioner

Appeal from an Attorney's Fee Order of
Administrative Law Judge Leslie A. Meek
AHD No. 04-118A, OWC No. 578484

Harold L. Levi, Esquire for the Respondent

Douglas A. Datt, Esquire for the Respondent

Before LINDA F. JORY, JEFFREY P. RUSSELL, AND SHARMAN MONROE *Administrative Appeals Judges.*

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

DECISION AND ORDER TO VACATE

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.

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 20024, Title J, the 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. Official Code §§ 1-623.1 to 1.643.7 (2005),

BACKGROUND

This appeal follows the issuance of an Order Awarding an 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 March 1, 2007, the Administrative Law Judge (ALJ), awarded counsel's petition for an attorney's fee and costs pursuant to D.C. Code §32-1530.

Employer-Petitioner's (Petitioner) Petition for Review alleges as grounds for its appeal that pursuant to §32-1530(a-c), any fee awarded should be assessed against Respondent rather than Petitioner. Respondent asserts that the ALJ's assessment of an attorney fee is in accordance with the facts and the law and is fully supported by substantial evidence however Respondent asserts the ALJ should not have reduced the hourly rate from \$200.00 to \$150.00 simply because that was the prevailing rate when the Compensation Order issued.

ANALYSIS

As an initial matter, the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the Act and as contained in the governing regulations must affirm an Attorney's Fee Award issued by AHD or the Office of Workers Compensation (OWC) unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. CRB Rules of Practice and Procedure, Chapter 2, 7 D.C.M.R. §266.4; *see also* Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, §51.93 (2001). For reasons set forth below, the Panel finds the Attorney Fee Order is in accordance with the law; is neither arbitrary nor capricious and therefore must be affirmed.

The Application for Review presently before this Panel is an appeal of an Order which awarded attorney's fees and assessed payment against employer, following the issuance of a Compensation Order by AHD on December 7, 2006, which denied Petitioner's request for a modification of a prior Compensation Order pursuant to D.C. Official Code §32-1524.

Petitioner asserts the ALJ erred in assessing attorney' fees against the employer where Respondent's benefits were never terminated, therefore Respondent's counsel had not obtained any actual benefit for Respondent and was not entitled to a fee assessed against employer under §32-1530.

In support of the ALJ's award, Respondent takes one sentence out of §32-1530(c) and asserts that this sentence permits an attorney fee in the instant matter². The Panel concludes that this sentence is taken somewhat out of context. The sentence immediately preceding the sentence

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.

²The sentence from §32-1530(c) relied upon by Respondent is "if any proceedings are had before the Mayor or any court for review of any actions, award, order or decision, the Mayor or court may approve an attorney fee for the work done before him or it, as the case may be, by the attorney for the claimant

cited by the Respondent states, “In all cases, fees for attorneys representing the claimant shall be approved in the manner herein provided”. As the Court of Appeals held in *National Geographic Society v. D.C. Department of Employment Services*, 721 A.2d 618 (D.C.1998)(*National Geographic*) and *Providence Hospital v. D.C. Department of Employment Services*, 855 A.2d 1108 (D.C. 2004)(*Providence Hospital*) :

The statute is clear and unambiguous in setting forth the circumstances under which a claimant can be awarded attorney’s fees and costs only if it refuses after fourteen days to pay additional compensation as recommended by the Mayor in writing. See *C & P Tel. Co. v. District of Columbia Dep’t of Employment Servs.*, 638 A.2d 690 (D.C. 1994). Alternatively, the employer can, within the fourteen day period prescribed by statute tender the amount to which it believes the employee to be entitled. D.C. Code [32-1530(b)]. . . . The last sentence of D.C. Code §32-1530(b)] reads: ‘In all other cases any claim for legal services shall not be assessed against the employer or carrier’ *Id.* That language is the clearest expression of legislative intent to limit the circumstances under which the claimant may recover attorney fees to those outlined explicitly in the statute.

Thus, the Respondent’s interpretation is contrary to the Court’s interpretation of §32-1530(c) in *National Geographic* and *Providence Hospital*.

A review of the record indicates that D.C. Official Code § 32-1530(a) is not applicable to this case as there is no evidence that the Petitioner refused to pay compensation for a work-related injury within 30 days after receiving written notice of a claim from the Respondent. In order for a claimant to recover attorney’s fees under D.C. Official Code § 32-1530(b), an employer must pay or tender compensation without an award, a controversy must thereafter develop over additional compensation and an employer must reject the written recommendation of the Mayor or his agent to pay the additional compensation. Petitioner asserts and Respondent does not deny that it continued to pay temporary total disability benefits to Respondent consistent with the April 9, 2004 Compensation Order. Respondent even concedes that the situation that exists here is distinctly different from either of the situations in subsections (a) or (b) as this is not a situation dealing with an initial refusal to pay a claim for compensation and it is not a situation which the employer tenders payment without an award and a controversy develops thereafter.

As Respondent correctly asserts, this is a situation where a compensation award was made and thereafter the employer sought review of the compensation case pursuant to §32-1524(a), review, modification and termination of an award. Since review pursuant to §32-1524 is not included in the conditions for payment of attorney’s fees under D.C. Official Code §32-1530, attorney fees are not assessable against Petitioner and the March 1, 2007 Order Awarding Attorney Fee which specifically assessed said fee against Petitioner, must be vacated and set aside. See *Mardoqueo Machuca v. John Juennemann Painting*, CRB No. 06-21, AHD No. 87-250F, OWC NO. 107760 (April 6, 2006)

CONCLUSION

The Order Awarding an Attorney's Fee from the Administrative Hearings Division issued on March 1, 2007 is not in accordance with the law.

ORDER

The Order Awarding Attorney's Fees of March 1, 2007 is hereby **VACATED**.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

April 25, 2007

Date