

**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. 05-016**

**LINDA F. PALMERTON,**  
**Claimant - Petitioner**

**v.**

**PARSONS CORPORATION AND AIG INSURANCE CO.,**  
**Employer/Carrier - Respondent**

Appeal from an Attorney's Fee Order of  
Administrative Law Judge Malcolm J. Luis-Harper  
AHD No. 05-016, OWC No. 586530

Benjamin T. Boscolo, Esquire for the Petitioner

Michael S. Levin, Esquire for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE, *Administrative Appeals Judges* and E. COOPER BROWN, *Chief Administrative Appeals Judge*.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel; E. COOPER BROWN, *Chief Administrative Appeals Judge*, concurring.

**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).<sup>1</sup>

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<sup>1</sup> 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 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-

## BACKGROUND

This appeal follows the issuance of an Order Awarding Attorney Fees 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 October 14, 2005, the Administrative Law Judge (ALJ), reduced counsel for Petitioner's attorney fee request from \$10,662.50 to \$3,160.00 for 15.8 hours of work performed before the OHA @ \$200.00 per hour and 5.75 case manager hours @ \$50.00 per hour plus costs in the amount of \$1,116.54 pursuant to §32-1530(f).

Claimant-Petitioner's (Petitioner) Petition for Review alleges as its initial ground for its appeal that the Order awarding an attorney's fee in this matter is arbitrary, capricious, unsupported by substantial evidence in the record and not in accordance with the law and should therefore be reversed. To date, Respondent has not filed a response to Petitioner's Application for Review.

## 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 must be reversed and remanded to AHD for further consideration.

Petitioner contends the ALJ erred in not analyzing or applying 7 DCMR §224(A) or 7 DCMR §224(C) to the lodestar to determine whether or not the attorney's fee should be enhanced to an amount up to equal to 20% of the benefits secured through effort of counsel. More specifically, Petitioner argues neither the regulations nor the Act indicate that an attorney's fee for an attorney representing a claimant is to be limited to the "lodestar" which is a simple mathematical calculation in which the number of hours expended are multiplied by the reasonable hourly rate set by the Director.

Counsel does not rely on the May 12, 2005, Policy Directive Clarifying the Award of Attorney Fees in District of Columbia Workers' Compensation Cases issued by the Director, Department of Employment Services (the Director)<sup>2</sup>. Counsel instead asserts:

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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), 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.

<sup>2</sup> Effective May 12, 2005, the Director of the Department of Employment Services promulgated a policy Directive clarifying the Award of Attorney Fees in District of Columbia Workers' Compensation Cases. Pursuant thereto, the Director amended this agency's policy with respect to the award of attorney fees "to provide that in the evaluation, assessment and award of attorney fees under §32-1530, that the agency in addition to the factors set forth at 7

The plain language of the Act makes clear two things. First the sole limit on an award of attorney's fee is the 20% cap contained in both the Act and the implementing regulations. Second in determining whether a fee of 20% may be approved, the lodestar, the difficulty of the claim and the dollar value of the benefit secured must be considered in determining a reasonable attorney's fee.

Lastly, Petitioner asserts there is no language in the Act or implementing regulations to support the ALJ's conclusion that administrative work is not a compensable legal service within the meaning of the Act. Petitioner asserts, to the contrary, that 7 D.C.M.R §224.3 provides that work for which a fee can be charged includes all work performed by an attorney, paralegal, law clerk or other person assisting an attorney.

The ALJ has indicated that the factors utilized by this jurisdiction to enhance or reduce an attorney fee set forth at 7 D.C.M.R. §224.2 were considered, leading to the conclusion that in light of counsel's professed experience and expertise in workers' compensation law he would compensate counsel at a rate of \$200 per hour and compensate counsel's case manager at a rate of \$50.00 per hour. Accordingly, the Panel concludes that the ALJ's determination that counsel should be paid at a rate of \$200 and the case manager at a rate of \$50.00 is solely within the discretion of the ALJ and neither party has proffered any persuasive reason to support a determination that the ALJ abused his discretion.

The ALJ eliminated 5.15 hours of attorney time and 45 hours of case manager time explaining that these hours were disallowed because the time claimed was found to be either excessive, unnecessary, redundant or of an administrative nature. The ALJ specifically explained that 17 hours of requesting or receiving letters, faxes, reports and e-mails are administrative in nature and do not constitute compensable legal services within the meaning of the Act. The ALJ added, "Further, counsel has claimed as compensable 4 hours for attending the formal hearing on January 6, 2005, however, the transcript of the formal hearing indicates that the hearing began at 8:39 a.m. and concluded at 10:25 which is less than 2 hours . . . In addition, on October 21, 2004 counsel claimed 45 minutes for receiving and notifying Petitioner about the Scheduling Order". However, according to the ALJ, an examination of the file revealed that the order was not signed and mailed until October 22, 2004. In addition the ALJ discovered that an additional 45 minutes

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D.C.M.R. §224, take into consideration, where and as appropriate, the full panoply of 'lodestar' factors enunciated by the federal courts".

These factors, cited by the Director were first articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714 (5<sup>th</sup> Cir.1974) and have been since been adopted by the D.C Court of Appeals, in *Frazier v. Franklin Investment Co.*, 468 A.2d 1338 (D.C. 19893). They include:

- (1) the time and labor required;
  - (2) the novelty and difficulty of the questions;
  - (3) the skill requisite to perform the legal service properly;
  - (4) the preclusion of other employment by the attorney due to acceptance of the case;
  - (5) the customary fee;
  - (6) whether the fee is fixed or contingent;
  - (7) time limitations imposed by the client or circumstances;
  - (8) the amount involved and the results obtained;
  - (9) experience, reputation, and ability of the attorneys;
  - (10) the 'undesirability' of the case;
  - (11) nature and length of the professional relationship with the client and
  - (12) awards in similar cases.
- 468 A.2d at 1341.

was spent receiving a fax from AHD that the ALJ found no indication in the file that a fax had been transmitted on that date.

As stated in the matter of *Steadman v. United Parcel Service*, CRB No. 05-262, AHD No. 00-384A, OWC No. 5389191, (December 14, 2005), the Board does not agree that the Act precludes all administrative charges. To the contrary, administrative tasks could be necessary as part of the development and presentation of a case, *see* D.C.M. R. §224(b) and therefore compensable legal services within the meaning of the Act. Moreover, the Panel finds 7 D.C.M.R. §224.3(A) clearly contemplates the payment of more than legal services. Accordingly, the Panel finds the ALJ's exclusion of the 17 hours on this basis without more explanation to be an abuse of the ALJ's discretion and reversible.

Similarly, the Panel finds no preclusion in the Act or regulations for attorney's time spent traveling to or from the Formal Hearing and the Panel is not persuaded by the ALJ's reliance on D.C. Code §§32-1526 and 1527 which govern the payment of witness fees and mileage. That the Act includes a provision for reimbursement for witness attendance or mileage does not exclude payment for an attorney to attend a formal hearing on behalf of his/her client. The Panel must accordingly reverse the ALJ's reduction of attorney's fee by 2 hours for his travel time as this reduction is not within the ALJ's discretion.

Lastly, while the Panel acknowledges the Supreme Court has stated that in determining the reasonableness of the legal hours expended, hours that are excessive, redundant or otherwise unnecessary are to be excluded<sup>3</sup>, the Panel notes the standard still utilized by the Court of Appeals of this jurisdiction is one of reasonableness. Specifically, the court in *Hampton Courts Tenants Association v. District of Columbia Rental Housing Commission*, 599 A.2d 1113 (D.C. June 11, 1991) (*Hampton Courts*), stated "Because the question whether attorney hours are unreasonably charged obviously depends on the individual facts of the case, the task of attending to each claimed category of hours is uniquely the agency's and the results of such review singularly within the ken and the discretion of the agency". *Hampton Courts, supra* at 1120.

As to the remaining 3.15 in attorney's time and 26.50 hours of case manager's time deleted by the ALJ, the Panel is unable to ascertain on what basis these hours were found unreasonable as the ALJ provides no further explanation for excluding them. Accordingly, the Panel cannot find the ALJ acted within in his discretion or in accordance with the law in doing so.

The Panel accordingly remands the Attorney Fee Award in its entirety with instructions to consider both the provisions set forth in 7 D.C.M.R. §224 and in addition to take into consideration the factors enunciated by the federal courts, specifically those factors delineated in

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<sup>3</sup> *See Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), in which the Supreme Court explained that under the "lodestar" approach, the calculation of the number of hours reasonably expended by legal counsel on a case multiplied by a reasonable hourly rate provided an objective basis on which to make "an initial estimate" of the values of a lawyers' services. The Court also noted that determining if the fee was reasonable was not the end of the analysis as the lodestar approach recognizes other considerations that might lead to any upward or downward adjustment of the attorney fees including the results obtained. The court provided 12 additional factors that serve as guidelines for trial courts in awarding attorney fees found by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.* 488 F. 2d 714 (5<sup>th</sup> Cir. 1974).

and adopted by the D. C. Court of Appeals in *Frazier v. Franklin Investment Co.*, *supra*, and in particular to provide an explanation for any amounts found not to be reasonable.

The ALJ is free to conduct such further evidentiary proceedings as he may deem necessary to carry out the additional attorney fee award required under this order.

#### CONCLUSION

The ALJ's unexplained exclusion of 3.15 hours of attorney time and 26.50 hours of case manager time for work performed before AHD is arbitrary and not in accordance with the law and the ALJ's exclusion of attorney's fees and case manager fees for administrative charges and travel time is an abuse of discretion.

#### ORDER

The Attorney Fee Award is hereby REVERSED AND REMANDED to AHD for further review of the hours claimed and an appropriate award assessed against employer, consistent with the forgoing discussion, based upon the previously awarded rate of \$200.00 per hour attorney fee rated and \$50.00 case manager rate.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY  
Administrative Appeals Judge

January 5, 2006  
Date

**E. COOPER BROWN, *Chief Administrative Appeals Judge*, concurring:**

I concur in the opinion of the majority, and write separately to more fully explain:

Effective May 12, 2005, the Director of the Department of Employment Services promulgated a *Policy Directive Clarifying the Award of Attorney Fees in District of Columbia Workers' Compensation Cases*. Pursuant thereto, the Director amended DOES policy with respect to the award of attorney fees "to provide that in the evaluation, assessment and award of attorney fees under Section 32-1530, that the agency, in addition to the factors set forth at 7 DCMR § 224, take into consideration, where and as appropriate, the full panoply of 'lodestar' factors enunciated by the federal courts."

The Director acknowledged that in approving the award of attorney's fees under the D.C. Workers' Compensation Act, the Department has been guided in the interpretation and application of the provisions of Section 32-1530 by the factors set forth at 7 DCMR § 224. These factors, the Director noted, "constitute, in effect, the regulatory adoption of the 'lodestar' approach utilized by the federal courts for assessing and awarding attorney fees under various

federal statutory provisions similar to that of the D.C. Workers' Compensation Act." Citing the Supreme Court's explanation in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), the Director further noted that the calculation of the number of hours reasonably expended by legal counsel on a case multiplied by a reasonable hourly rate provides "an objective basis on which to make 'an initial estimate' of the value of a lawyers' services," but that it is nevertheless but the first step in assessing the merits of a lawyer's request for an award of legal fees. In fact, the "lodestar" approach recognizes other considerations that are to be taken into account that might lead to an upward or downward adjustment of the attorney fees, including the "results obtained." These factors, cited by the Director, were first articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5<sup>th</sup> Cir. 1974), and have since been adopted by the D.C. Court of Appeals, see *Frazier v. Franklin Investment Co.*, 468 A.2d 1338 (D.C. 1983). As the majority notes, they include:

(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) nature and length of the professional relationship with the client; and (12) awards in similar cases.

468 A.2d at 1341.

As the D.C. Court of Appeals has recently explained, not all of these potentially relevant factors are pertinent in every case. *Federal Marketing Co. v. Virginia Impression Products Co.*, 823 A2d 513, 530 (D.C. 2003). And while "a precise analysis" by the trial court "utilizing each of the *Frazier* factors is not required," nevertheless the trial court is obligated to explain "how it arrived at its award of attorneys' fees." *Id.* Because "the failure to articulate the reasons for a particular fee award renders the trial court's determination effectively unreviewable," in many cases such failure "has been held to constitute an abuse of discretion warranting reversal." *Id.*, citing *Frazier*, 468 A.2d at 1341.

In the instant matter, the ALJ has indicated that the factors set forth at 7 DCMR § 224.2 were considered, leading to the conclusion that the work performed by Claimant's attorney and the case manager was to be compensated at specified hourly rates. In addition, the ALJ disallowed a number of hours proposed for payment because they were found to be "either excessive, unnecessary, redundant, or of an administrative nature," explaining by example why such hours were disallowed. While the basis for the establishment of the hourly rates is thus clear and supportable, as the majority in the instant case holds, the examples cited do not fully explain the basis for the ALJ's disallowance of a considerable number of hours billed either by the attorney or the case manager. Absent explanation or other indicia in the record that the factors set forth at 7 DCMR § 224.2 or otherwise set forth in *Frazier* were taken into consideration in disallowing these hours, the ALJ's determination with regard thereto is effectively unreviewable, thus constituting with respect to that portion of the ALJ's decision identified by the majority an abuse of discretion warranting reversal and remand.

I further concur in the majority's reversal and remand of that portion of the ALJ's decision disallowing the 17 hours identified by the ALJ as "requesting or receiving letters, faxes, reports and e-mails," labeled as "administrative in nature" and thus "not compensable legal services within the meaning of the Act." 7 DCMR § 224.3(a) clearly contemplates the payment of more than "legal services".<sup>4</sup> However, in the instant case the issue on appeal warranting reversal, in my opinion, is that neither the disallowed hours nor the actor (whether an attorney, paralegal or case manager) can be identified from either the record or the ALJ's decision, thus effectively rendering the ALJ's determination with regard to this matter unreviewable,<sup>5</sup> which as previously noted necessarily renders the ALJ's decision an abuse of discretion as a matter of law. *See Federal Marketing, supra*, 823 A.2d at 530.

I also join in the reversal and remand of that portion of the ALJ's decision disallowing counsel's travel time to and from the formal hearing held in this matter, as constituting an abuse of discretion. To disallow such time is to ignore the very nature of the legal representation required of counsel in the instant case (or for that matter, in any case before the Office of Hearings and Adjudication). Like the majority, I am not persuaded by the ALJ's reliance upon D.C. Official Code §§ 32-1526 and 1527, which govern the payment of witness fees and mileage.<sup>6</sup> I do not consider the statutory requirement that a witness's attendance fee and mileage be paid a sufficient legal basis upon which to conclude, in turn, that the Act does not afford payment for an attorney's time necessarily required in order to appear at a formal hearing on behalf of one's client.

Finally, in joining with the majority in ordering the remand of this matter to the Administrative Hearings Division for further assessment, I note that the application submitted to AHD by Claimant's counsel which served as the basis for the ALJ's decision scarcely complies with the requirements of 7 DCMR § 224.3.<sup>7</sup> Absent compliance upon remand with the showing required of Claimant's counsel by subsection 224.3, supportable grounds would appear to exist for a rejection of counsel's fee application, if not in its entirety certainly in major regard.

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E. Cooper Brown  
Chief Administrative Appeals Judge

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<sup>4</sup> 7 DCMR § 224.3(a) requires, as part of the attorney's fee application, "[a] complete statement of the extent and character of the necessary work done, described with particularity as to the professional status (e.g. attorney, paralegal, law clerk, or other person assisting an attorney) of each person performing the work."

<sup>5</sup> For example, requesting or receiving letters, faxes, reports or e-mails might be allowable if undertaken by an attorney, whereas the same activity by a secretary obviously would not be allowable.

<sup>6</sup> Neither provision expressly provides, as the ALJ suggests, for the payment of a witness's travel time. Section 1526 requires payment of "lawful mileage and fee for 1 day's attendance" where the witness is required to travel "more than 25 miles" to the hearing. Section 1527 merely requires payment of "the same fees and mileage" as witness in D.C. Superior Court.

<sup>7</sup> 7 DCMR § 224.3 requires that the fee application contain: "(a) A complete statement of the extent and character of the necessary work done, *described with particularity as to the professional status* (e.g. attorney, paralegal, law clerk, or other person assisting an attorney) *of each person performing the work*; (b) The normal billing rate in the area of work; and (c) The hours devoted *by each person* to each category of work." (emphasis added)