

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-060

RAYMOND SCHMITZ,

Claimant – Respondent,

v.

D.C. WATER AND SEWER AUTHORITY AND LIBERTY MUTUAL

Employer/Carrier – Petitioner.

Appeal from an Order Awarding Attorney's Fee
Claim Examiner Jahi Greene
OWC No. 669938

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2011 SEP 21 AM 10 48

Danny R. Seidman, Esquire, For the Respondent
Christopher R. Costabile, Esquire, For the Petitioner

Before HEATHER C. LESLIE¹, JEFFREY P. RUSSELL², and LAWRENCE D. TARR, *Administrative Appeals Judges.*

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer of the July 5, 2011, Order Awarding an Attorney's Fee (Order) issued by a Claims Examiner in the Office of Workers' Compensation (OWC) of the District of Columbia Department of Employment Services (DOES). In that Order, the Claims Examiner awarded the Claimant an attorney's fee of \$1,000.00 to be paid by the Employer.

¹ Judge Heather C. Leslie is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

² Judge Russell has been appointed by the Director of the DOES as a Interim CRB Member pursuant to DOES Administrative Policy Issuance No. 11-03 (June 23, 2011).

BACKGROUND

On April 30, 1998, the Claimant suffered an injury to his ears, specifically hearing loss as a result of his employment of over 30 years as a waste water treatment plant operator. The Claimant alleged his hearing loss was a result of exposure to high noise levels while at work.

On May 20, 2011, the Claimant requested an informal conference before OWC seeking authorization for medical treatment and approval for replacement hearing aids. Documentation submitted in support of the Claimant's claim included an Employer's first report of injury filed on May 1, 1998 and a check from the Employer dated October 21, 1998 to the Waldorf Hearing Center, presumably for treatment of the Claimant's hearing loss. On August 13, 2010, the Claims Examiner recommended that the Employer pay for the recommended treatment and replacement hearing aids.³ The Employer timely rejected the recommendation and requested a Formal Hearing. The parties later resolved the outstanding issues resulting in the Employer voluntarily paying for the replacement hearing aids.

The Claimant, through counsel, petitioned OWC for an attorney's fee to be paid by the employer based upon the value of the hearing aids, \$6,000.00. On June 13, 2011, an Order Awarding An Attorney's Fee was issued by a Claims Examiner in the Office of Workers' Compensation. In that Order, the Claim Examiner awarded the Claimant an attorney's fee of \$1,000.00 to be paid by the Employer. The Claims Examiner cited D.C. Code § 32-1530(a) as authority for awarding the requested attorney's fee.

The Employer appealed. While not contesting the amount of the fee, the Employer maintains that hearing aids are not covered under the statutory definition of compensation and that the Employer voluntarily accepted payment for the hearing aids at issue. The Employer argues that an award of an attorney's fee was not in accordance with the statute.

The Claimant did not participate in the appeal.

THE STANDARD OF REVIEW

In review of an appeal, such as an award of attorney's fees, which is based not upon factual findings made on an evidentiary record, but rather is based upon review of the administrative record, the filings of the parties, and the orders, 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 & Mezines, ADMINISTRATIVE LAW, § 51.93 (2001).

DISCUSSION AND ANALYSIS

Under the Act, a person may be entitled to recover attorney's fees from an employer in only two situations: first, if the employer refuses to pay "any compensation" for a work-related injury within thirty days of receiving written notice from the Mayor of "a claim for compensation," and

³ At issue at the Informal Conference was also whether Sedgwick Insurance Company or Liberty Mutual was the carrier of record on the date of injury. The recommendation found Liberty Mutual was the carrier. This finding was not appealed.

the claimant thereafter uses the services of an attorney to prosecute successfully his or her claim and obtain an “award of compensation in a Compensation Order”, D.C. Official Code § 32-1530(a); and second, if an employer “pays or tenders payment of compensation without an award” but later refuses to pay the additional compensation claimed by the claimant within fourteen days of receiving a recommendation by the Mayor that the claim is justified, and the claimant uses the services of an attorney to recover the full amount claimed through an award of compensation. D.C. Official Code § 32-1530(b). *See C & P Telephone Co. v. D.C. Department of Employment Services*, 638 A.2d 690, 693 (D.C. 1994); *National Geographic v. D.C. Department of Employment Services*, 721 A.2d 618 (D.C. 1998).

The Employer argues primarily that hearing aids are not covered under the definition of compensation pursuant to D.C. Code § 32-1501(6). The Employer further argues that since it did not decline to pay compensation, an award of an attorney’s fee against the Employer is not applicable under D.C. Code § 32-1530(a).

D.C. Code § 32-1501(6) defines compensation as “the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided herein.” In *C & P Telephone*, *supra*, the District of Columbia Court of Appeals addressed whether or not medical benefits are to be considered compensation. After acknowledging the statutory definition of compensation enunciated in D.C. Code § 32-1501(6), the Court recognized that D.C. Code § 36-1505(a)⁴ specifically referred to medical benefits as being encompassed within the meaning of compensation.⁵ Furthermore, the Court noted D.C. Code § 36-1507 made it the responsibility of the Employers to provide medical services to the injured employees. *Id.* at 694. Medical benefits can be considered as compensation.

Following the rationale enunciated in *C&P Telephone*, DOES has traditionally considered the value of medical care obtained through the efforts of an attorney to represent compensation in considering the amount to be awarded as an attorney’s fee.⁶ For instance, in *McIntyre v. Safeway*,

⁴ “No compensation shall be allowed for the first 3 days of disability, except the benefits provided for in § 32-1507.”

⁵ The Court of Appeals found persuasive the federal Longshore and Harbor Workers Act. *See* 33 U.S.C. § 928 (a) and (b) (1989). “The federal statute addresses the issue somewhat more directly, providing that employers shall be liable for payment of compensation in the form of monetary allowances as well as medical services. *See* 33 U.S.C. § 904 (a) (“every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907 [medical services and supplies], 908 [compensation for disability] and 909 [compensation for death] of this title”). Nevertheless, there is no relevant, material difference between the statutes. Thus, the rationale of the Fifth Circuit, in reaching the conclusion that compensation includes medical services and that section 928 (b) applied, would appear to be no less applicable here. In both instances, the legislature has used the term compensation to include medical services. *See Oilfield Safety & Mach. Specialties, Inc. v. Harmon Unlimited, Inc.*, *supra*, 625 F.2d at 1257; 33 U.S.C. § 904 (a).” *C & P Telephone Co*, *supra* at 694.

⁶ We will note, however, medical benefits are sometimes not considered to be compensation for analytic purposes *See, i.e., McIntyre v. Safeway*, Dir. Dkt. No. 01-41; OHA No. 00-309; OWC No. 550033 (April 23, 2002), where the CRB found that medical benefit entitlement does not expire as does entitlement to compensation where untimely notice is given to an employer; *Tagoe v. Howard University Hospital*, CRB NO. 08-817, AHD No. 03-287, OWC No. 568310 (February 13, 2009), wherein medical benefits are not compensation for the purpose of declaring defaults or awarding penalties, until a determination has been made that a claimant has gone out-of-pocket in a specific dollar amount and is then entitled to an award of reimbursement in that amount, and that only then is the

CRB No. 05-255, OHA No. 00-309, OWC No. 550033 (October 6, 2005), the CRB agreed that it is the value of medical care obtained under the fee schedule for such care, and not the amount billed by a provider, that should be considered when assessing the value of the benefits obtained for attorney fee purposes, but also that it was the employer's burden to present that evidence where the employer sought to argue that a fee award was excessive because the medical expenses upon which they were based exceeded that schedule.⁷ Thus, contrary to the Employer's argument, medical benefits can be considered compensation and can be the basis for a claim for an attorney's fee. A fee based on the amount of the hearing aid replacements can be proper and recoverable under the Act.

We do, however, agree with the Employer that an award of attorney's fee under D.C. Code § 32-1530(a) is in error. Based upon the administrative file, it is apparent the Employer has paid benefits in the past in the form of a payment to the Waldorf Hearing Center in 1998. Accordingly, the award of medical benefits in the case before us is not the *initial* claim for compensation nor was a Compensation Order issued which is necessary for an award under D.C. Code § 32-1530(a). The Employer appealed the Recommendation, thus divesting OWC of any jurisdiction to issue a final order. An award under D.C. Code § 32-1530(a) is not in accordance with the law.

Moreover, an award under D.C. Code § 32-1530(b) is not proper under the fact pattern in the case *sub judice*. The Claimant requested authorization for medical treatment which was denied by the Employer. An informal conference was requested which the parties attended. A recommendation was issued in the Claimant's favor. The Employer rejected that recommendation and applied for a Formal Hearing. The parties later resolved their dispute with the Employer voluntarily paying for the hearing aid replacements. No Formal Hearing was held and no Compensation Order was issued awarding medical benefits. Thus, no compensation was awarded which would implicate an additional award of attorney's fee under D.C. Code § 32-1530(b).

Consistent with the above discussion, we are constrained to vacate the Order Awarding An Attorney's Fee as based upon the administrative record before us, an award is not proper under D.C. Code § 32-1530.

value of medical care considered compensation for the assessment of a penalty if not paid in 10 days, and declaration of default if not paid in 30 days. See also *Lazarus v. Chevron*, 958 F.2d 1297, (5th Cir. 1992).

⁷ See also *Logan v. FedEx*, CRB No. 02-081(A), OHA No. 00-404, OWC No. 285314 (February 7, 2008) wherein the CRB directed that a \$4,500 amount that the employer paid in medical bills after claimant prevailed in regard to a reasonableness and necessity dispute be included in the value of compensation obtained for the purpose of establishing the 20% cap on fees.

CONCLUSION AND ORDER

The award of attorney fees as contained in the Order Awarding An Attorney's Fee issued June 13, 2011 D.C. Code § 32-1530(a) is in error and not in accordance with the law.

The Order Awarding An Attorney's Fee issued June 13, 2011 is **REMANDED** and **VACATED**.

FOR THE COMPENSATION REVIEW BOARD:

A handwritten signature in black ink, appearing to read 'Heather C. Leslie', written over a horizontal line.

HEATHER C. LESLIE
Administrative Appeals Judge

September 21, 2011
DATE