GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2013 JAN 23 AM 10 01

COMPENSATION REVIEW BOARD

CRB No. 12-078

ANSONIA ANDERSON

Claimant-Respondent,

v.

WASHINGTON HOSPITAL CENTER and GALLAGHER BASSETT SERVICES, INC.

Employer and Third Party Administrator-Petitioners.

Appeal from an Order Awarding Attorney Fees by
The Honorable Leslie Meek
AHD No. 10-602A, OWC No. 652176

William Hopkins, Esquire for the Petitioner
Michael Kitzman, Esquire for the Respondent

Before HEATHER C. LESLIE,[1] HENRY MCCOY and MELISSA LIN JONES, *Administrative Appeals Judges.*

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

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the April 27, 2012, Order Awarding Attorney Fees (Order) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that Order, the ALJ awarded the Claimant an attorney fee of $2,424.02 and costs in the amount of $2,024.61 to be assessed against 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. 12-02 (June 20, 2012).

FACTS OF RECORD AND PROCEDURAL HISTORY

On August 7, 2008, the Claimant suffered injuries as a result of a work related injury. As a result of these injuries, the Claimant sought an award of 33% permanent partial disability to her left upper extremity, 33% to her right upper extremity and 20% to her right lower extremity. On November 28, 2011, the ALJ granted, in part, the Claimant's request, awarding 5% permanent partial disability to her left upper extremity and 5% to her right upper extremity. The ALJ denied the claim for relief to the right lower extremity.

On January 31, 2012, Claimant's attorney petitioned for an award of attorney's fees requesting a fee of $2,424.02 and costs in the amount of $2,024.61 to be assessed against the Employer. The Claimant asserted that an attorney fee was proper based upon §32-1530(b). The ALJ issued an order to show cause on March 13, 2012 to which the Employer responded.

On April 27, 2012, the ALJ found the Claimant was entitled to the fee and costs requested. The ALJ specifically rejected the Employer's argument that fees were improper pursuant to *National Geographic Society and American Motorists Insurance Company v. DOES*, 721 A.2d 618 (D.C. 1998).

On May 25, 2012 the Employer appealed. The Employer argues the award of attorney's fees and costs is not in accordance with the law and should be assessed against the Claimant. Specifically, the Employer argues §32-1530(b) mandates a rejection by the Employer of a recommendation issued by the Office of Worker's Compensation.

The Claimant did not respond to the Employer's application for review.

THE STANDARD OF REVIEW

In review of an appeal of an award of attorney's fees, which is not based 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

D.C. Code §32-1530(b) states,

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to this chapter, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the Mayor shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within 14 days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney-at-law, and if the

> compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Mayor, as authorized in §32-1507(e), and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Mayor or court in any such case, an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fees for claimant's counsel in accordance with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

The District of Columbia Court of Appeals discussed D.C. Code §32-1530(b) and when a fee can be assessed against an Employer.

> The statute is clear and unambiguous in setting forth the circumstances under which a claimant can be awarded attorney's fees. Under the plain language of § 36-330 (b), the employer is required to pay 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 § 36-330 (b). In that event, a claimant who succeeds thereafter in obtaining a greater award than offered by the employer is entitled to attorney's fees "based solely upon the difference between the amount awarded and the amount tendered or paid . . . ." *Id.* The last sentence of D.C. Code § 36-330 (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.
>
> The express language of the statute does not authorize the award of attorney's fees to Brown. Here, there was no recommendation from the Mayor or his agent to resolve the controversy as to the additional compensation which the Act requires as a precondition to an award of attorney's fees. Brown could have sought a resolution of the controverted additional claim through informal procedures established by regulations. *See* 7 DCMR § 219 (1986). That procedure is available prior to the filing of an application for a formal hearing. 7 DCMR § 219.23. Once an application for a formal hearing is filed, however, all informal procedures must be terminated. *Id.* Both parties acknowledge that National never received a "recommendation by the Mayor" to pay Brown's claim. Instead, Brown chose to commence formal proceedings, thereby eliminating the opportunity for an informal resolution of the claim. The Workers' Compensation Act was designed

> to provide aggrieved workers with an inexpensive mechanism to pursue claims against employers. When claimants decline to use that informal procedure in favor of the formal claims procedure, they do so at the risk of increased expense to themselves and to the system

National Geographic, 721 A.2d at 621.

As the Employer states without opposition, no informal conference was pursued by the Claimant on the issue of what, if any, permanent partial disability to either upper extremity or the right lower extremity the Claimant was entitled to under the Act. The Claimant directly proceeded to a Formal Hearing "at the risk of increased expense to themselves." The Employer is not liable for the requested attorney's fee or costs under D.C. Code §32-1530(b) and the accompanying rationale outlined by the DCCA in *National Geographic*. As such, the ALJ's award of an attorney's fee and costs was in error.

CONCLUSION AND ORDER

The April 27, 2012 Order Awarding Attorney Fees is VACATED.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

January 23, 2013
DATE