

**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. 07-117**

**CHERYL MANLEY,**

**Claimant – Petitioner**

**v.**

**ABC IMAGING AND THE HARTFORD INSURANCE COMPANY,**

**Employer/Carrier – Respondent.**

Appeal from a Compensation Order of  
Claims Examiner Karen Bivins  
OWC No. 602935

Benjamin Boscolo, Esq., for the Petitioner

Lisa A. Zelenak, Esq., for the Respondent

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

SHARMAN J. MONROE, *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).<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  
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## BACKGROUND

This appeal follows the issuance of a Compensation Order from the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on May 10, 2007, the Claims Examiner (CE) denied the request of the Claimant-Petitioner (Petitioner) for attorney's fees. The Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the denial is not in accordance with the law and should be reversed.<sup>2</sup> The Respondent timely filed a response.<sup>3</sup>

## ANALYSIS

In the review of an appeal from OWC, 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).

Turning to the case under review herein, the Petitioner alleges that on June 16, 2004, she filed a Claim Application with the OWC and with the Employer-Respondent (Respondent), and that the Respondent failed to voluntarily pay the benefits sought within thirty (30) days of receipt of the Claim Application or timely file a Notice of Controversion as required by the Act. The Petitioner maintains that she is, therefore, entitled to attorney's fees pursuant to D.C. Official Code § 32-1530(a). The Petitioner argues that the Act does not indicate that benefits can be withheld if medical records are not provided within a certain timeframe. Citing *Tucker v. Baltimore American Ice*

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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 (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.

<sup>2</sup> In her Memorandum of Points and Authorities, the Petitioner references Exhibit No. 1. However, there were no exhibits attached to her appeal.

<sup>3</sup> The Respondent attached Exhibits A-D to its response. Pursuant to 7 DCMR § 266.1, the CRB's appellate jurisdiction is limited to a review of the record made before AHD or OWC, as applicable. It is not empowered to conduct a *de novo* review of matters appealed to it. Upon exercise of official notice, the Panel finds that Exhibit A, C and D are not part of the official file created before OWC in this case and will, therefore, not be considered in rendering this decision. Exhibit B is part of the official file and will be reviewed.

*Company*, Dir. Dkt. No. 03-43A, OWC No. 580402 (July 23, 2003), she maintains that an employer's obligation to pay compensation begins to run with the filing of a claim.<sup>4</sup>

The Respondent maintains the adjuster informed the Petitioner on June 3, 2004, the day following her work injury, that her claim was compensable and would be paid upon receipt of medical documentation. The Respondent asserts when it did not receive the requested medical documentation, it filed a Notice of Controversion on June 22, 2004, but later paid the compensation after it received the documentation. The Respondent maintains that it is not liable for fees under D.C. Official Code § 32-1530(a) because the Petitioner did not provide medical support with her claim form. It cites *Covington v. D.C. Water and Sewer Authority*, CRB No. 07-70, AHD No. 04-118A, OWC No. 578484 (April 25, 2007) and *McGrew v. Howard University*, CRB No. 04-090, OWC No. 591339 (September 26, 2006) in support of its position and the Compensation Order.

This matter was previously before the CRB pursuant to the Petitioner's appeal of the CE's August 11, 2006 denial of attorney's fees. After a review of the merits, the CRB remanded this matter to the CE to provide the bases or rationales for denying an assessment of fees against the Respondent under D.C. Official Code § 32-1530. See *Manley v. ABC Imaging*, CRB No. 06-81, OWC No. 602935 (October 19, 2006).

In the Compensation Order currently on appeal, the CE reasoned that the Act places the burden on the injured employee to file a notice of injury and supporting medical evidence showing an economic loss in order to obligate an employer to pay compensation benefits. The CE relied on D.C. Official Code §§ 32-1501(8), 32-1501(12), 32-1507(4) and 32-1513(a) as support for this reasoning. Based thereon, the CE determined that since the Petitioner did not provide all information she was required to provide, D.C. Official Code § 32-1530(a) was not applicable. The CE determined that D.C. Official Code § 32-1530(b) was applicable to this case and analyzed entitlement to fees pursuant to *National Geographic Society v. D.C. Department of Employment Services*, 721 A.2d 618 (D.C. 1998). The CE decided that the Mayor or his agent did not make a recommendation in this case to pay compensation which the Respondent declined to accept and denied an assessment of fees.

Under the Act, a person may be entitled to recover attorney's fees 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 the claimant consequently uses the services of an attorney to prosecute successfully his or her claim, D.C. Official Code § 32-1530(a);<sup>5</sup> 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

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<sup>4</sup> The Petitioner maintains that the findings of fact in the Compensation Order are supported by substantial evidence. See Claimant's Memorandum of Points and Authorities at p. 4. However, the CRB has previously pointed out in appeals of decisions issued by OWC, "there is no oath administered, no opportunity for cross-examination under oath, and no transcript of proceedings, hence there is no "testimony" or "evidence of record." *Spriggs v. Washington Metropolitan Area Transit Authority*, CRB No. 06-017, OWC No. 579885 (Feb. 23, 2006).

<sup>5</sup> Formerly D.C. Code § 36-330 (a).

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. D.C. Official Code § 32-1530(b).<sup>6</sup> See *C & P Telephone Co. v. D.C. Department of Employment Services*, 638 A.2d 690, 693 (D.C. 1994).

Based upon the documentation in the official OWC file, the Petitioner sustained a work-related injury on June 2, 2004.<sup>7</sup> On or about June 16, 2004, the Petitioner retained counsel.<sup>8</sup> She filed an Employee's Notice of Accidental Injury and Occupation Disease and the Employee's Claim Application, both dated June 17, 2004, with the OWC on June 23, 2004. The Respondent filed the Employer's First Report of Injury or Occupational Disease and the Notice of Final Payment of Compensation dated July 24, 2004 with the OWC on June 15, 2004 and August 10, 2004, respectively. The Respondent's Notice of Final Payment of Compensation indicates that the payment of compensation was made on July 22, 2004, covering the period June 3, 2004 to July 6, 2004, it does not indicate when the first payment was made.<sup>9</sup> The file does not contain a Notice of Controversion, denying benefits, from the Respondent. The file contains neither a request for informal conference nor a Memorandum of Informal Conference dated before July 22, 2004, the date of the Respondent's Notice of Final Payment of Compensation.

The official OWC file also contains a request for informal conference from the Petitioner dated December 21, 2004 which indicates that payment of medical bills, authorization to treat with Dr. Eric Dawson, nature and extent of disability and causal connection were at issue. The file further contains a Memorandum of Informal Conference for a conference held April 14, 2005 that recommends the payment of medical bills and authorization to treat with Dr. Dawson. The Petitioner's fee petition requested attorney fees for work performed from June 16, 2004 to June 25, 2004.<sup>10</sup>

After a review, the Panel determines that the CE's application of D.C. Official Code § 32-1530(b) and of *National Geographic Society, supra* are misplaced. In *National Geographic Society*, the employer voluntarily paid temporary total disability benefits pursuant to worker's initial claim for compensation, but later stopped payments based upon its contention that the worker was able to return to work. The worker then filed a request for formal hearing for benefits and received an award of thirty-five percent (35%) permanent partial disability to his left leg. The Court of Appeals overturned the award of attorney fees because the worker did not proceed first to an informal conference and receive a recommendation from the Mayor, *i.e.* OWC, to pay additional benefits. The Court also pointed out that D.C. Official Code § 32-1530(a) is not applicable to an initial

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<sup>6</sup> Formerly D.C. Code § 36-330 (b).

<sup>7</sup> Neither party disputes the date of injury or the work-relatedness of the injury.

<sup>8</sup> The Respondent does not dispute that the Petitioner retained counsel about this date.

<sup>9</sup> In the Compensation Order, the CE referenced an amended Notice of Final Payment dated September 24, 2004. However, the Panel was unable to find such a document in the official file.

<sup>10</sup> The ending date on the fee petition appears as "6/25/03". Given the circumstances of this case, it is reasonable to assume that the year shown was a typographical error.

claim for benefits. *See National Geographic Society*, 721 A.2d at 621 n.2. Herein, a review of the fee petition reveals that the Petitioner is seeking fees for work relating to her *initial* claim for compensation, not for work relating to the December 21, 2004 informal conference request. Therefore, the Panel determines that the CE's decision that D.C. Official Code § 32-1530(a) was not applicable is erroneous as a matter of law.

In her decision, the CE found D.C. Official Code § 32-1530(a) inapplicable because the Petitioner failed to provide medical support along with her Notice of Accidental Injury and Occupation Disease thereby, in essence, excusing the Respondent from paying compensation benefits within the timeframe set under this section. The CE created an additional condition not required under the D.C. Official Code § 32-1530(a). For the reasons stated below, the Panel rejects for this additional condition.

It is well established in this jurisdiction that decisions construing the Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, are persuasive authority in construing our Act since it was modeled after the Longshore Act. *See Safeway Stores, Inc. v. D.C. Department of Employment Services*, 832 A.2d 1267, 1270 (D.C. 2003); *Joyner v. D.C. Department of Employment Services*, 502 A.2d 1027 (D.C. 1986).

D.C. Official Code §32-1530(a) is substantially similar to 33 U.S.C. § 928(a).<sup>11</sup> In *Craig et. al v. Avondale Industries, Inc.*, 35 BRBS 164 (May 23, 2002), the Benefits Review Board, sitting *en banc*, examined the requirements for a "claim for compensation" in § 928(a) in response to the employer's contention that some sort of evidence was necessary to substantiate the allegations in a claim form and until evidence of a character to meet the statutory presumption is received, the 30-day time period is not triggered. Therein, the BRB rejected the employer's contention and held that a claimant need not establish a *prima facie* case under 33 U.S.C. § 920(a)<sup>12</sup> before the requirements of § 928(a) are triggered. The rationale behind the Board's holding was that neither 33

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<sup>11</sup> 33 U.S.C. § 928(a) states:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this Act, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

<sup>12</sup> 33 U.S.C. § 920(a) states:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary--

(a) That the claim comes within the provisions of this Act . . .

U.S.C. § 913<sup>13</sup> nor its implementing regulation require an injured employee to submit any evidence of a disability with his claim form. The Board cited *Jones Stevedoring Co. v. Director, Office of Workers Compensation Programs*, 133 F.3d 683, 691 (9th Cir. 1997) and *Pool Co. v. Cooper*, 274 F.3d 173, 183 (5th Cir. 2001) as support for its decision.

Under the Act, the language of D.C. Official Code §§ 1513 and 1521(a) are substantially similar to the language of 33 U.S.C. §§ 913 and 920(a). As under the LHWCA, neither D.C. Official Code § 1513 nor its implementing regulation found at 7 DCMR § 207 necessitate that an injured worker submit any evidence of a disability with his claim form. The Panel finds the reasoning of *Craig* persuasive and herein adopts it. Thus, under the Act, a claimant is not required to submit evidence of a character to satisfy the presumption of D.C. Official Code § 1521(a) in order to trigger the 30-day time frame of D.C. Official Code §32-1530(a).

Nevertheless, the Panel upholds the denial of attorney's fees, but for reasons not cited by the CE. In *Coulson v. SI International*, CRB No. 07-125, OWC No. 632998 (August 29, 2007), the Panel vacated an attorney fee award because the employer made voluntary payments of compensation without a Memorandum of Informal Conference or an Order from AHD. The Panel reasoned that no "award of compensation" existed within the meaning of the Act to trigger an assessment against the employer pursuant to either D.C. Official Code §32-1530 (a) or (b). Likewise, in the instant case, for the period for which the Petitioner is seeking an assessment of fees against the Respondent, the Respondent paid benefits voluntarily and there was "no award of compensation". The Respondent voluntarily paid compensation to the Petitioner.

#### CONCLUSION

The Compensation Order of May 10, 2007 is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

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<sup>13</sup> 33 U.S.C. § 913 sets out the requirements for filing a claim under the LHWCA.

**ORDER**

The Compensation Order of May 10, 2007 is, albeit for reasons different from those articulated by the CE, AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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SHARMAN J. MONROE  
Administrative Appeals Judge

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September 6, 2007  
DATE