**M E M O R A N D U M**

**TO:** See Distribution List

**FROM:** Gregory P. Irish
Director, DOES

**DATE:** May 12, 2005

**SUBJECT:** **Policy Directive Clarifying the Award of Attorney Fees in District of Columbia Workers' Compensation Cases**

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The purpose of this policy directive is to clarify the standards to be utilized in awarding attorney fees in workers' compensation cases.

***Background*:**

D.C. Official Code §32-1530 provides for the award of a "reasonable" attorney's fee under the D.C. Workers' Compensation Act of 1979, as amended, in specified circumstances "in an amount approved by the Mayor," provided the fee award does not exceed 20% "of the actual benefit secured through the efforts of the attorney." In determining whether to award an attorney's fees, and the amount, the D.C. Department of Employment Services has been guided in the interpretation and application of the provisions of Section 32-1530 by the factors set forth at 7 DCMR § 224 requiring consideration of:

(a) The nature and complexity of the claim including the adversarial nature, if any, of the proceeding;
(b) The actual time spent on development and presentation of the case;
(c) The dollar amount of benefits obtained and the dollar amount of potential future benefits resulting from the efforts of an attorney;
(d) The reasonable and customary local charge for similar services; and
(e) The professional qualifications of the representative and the quality of representation afforded to [the] employee.

While the federal Longshore Act, and the jurisprudence which informed it, served as the basis for the process and procedures developed for the award of attorney fees under the D.C. Workers' Compensation Act, the factors codified at 7 DCMR § 224 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. The development of the "lodestar" approach was traced recently in *Gisbrecht v. Barnhart*, 535 U.S. 789, 122 S.Ct. 1817, 152 L.Ed.2nd 996 (2002). As the Court explained, the "lodestar" approach stemmed "from internal accounting practices adopted by lawyers in the 1940's to determine whether their fees were adequate." By 1992, the Court noted, the "lodestar" approach had clearly taken hold, achieved dominance in the Federal System, and become the guiding light of attorney fee award jurisprudence in the federal courts and before administrative tribunals, subject to the myriad statutory caps and conditional provisions contained in the more than 100 separate federal statutes providing for the award of attorney's fees. *See Gisbrecht*, 122 S. Ct. at 1824, 152 L.Ed.2d at 1006.

In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), 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 proved an objective basis on which to make "an initial estimate" of the value of a lawyers' services. In determining the reasonableness of the hours expended, hours that were "excessive, redundant, or otherwise unnecessary" were to be excluded. Yet, the court noted, this was not the end of the analysis. The "lodestar" approach recognizes other considerations that might lead to an upward or downward adjustment of the attorney fees, including the "results obtained." *Hensley*, 103 S.Ct. at 1940 n9, 76 L.Ed.2d at 51 n9. The Court cited with approval the additional factors recognized by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974), which recognized a total of twelve additional factors that serve as guidelines for trial courts in awarding attorney fees:

> (1) time and labor required (the judge should weigh the hours claimed against his or her own knowledge, experience, and expertise and, if more than one attorney is involved, scrutinize the possibility of duplication); (2) the novelty and difficulty of the questions (cases of first impression generally require more time and effort); (3) the skill required to perform the legal service properly; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent (fee agreed to by the client is helpful in demonstrating attorney's fee expectations, litigant should not be awarded a fee greater then that he is contractually bound to pay); (7) time limitations imposed by the client or circumstances (whether this was priority work); (8) the amount involved and the results obtained (court should consider amount of damages awarded but also whether a decision corrects across-the-board discrimination affecting a large class of employees); (9) experience, reputation, and ability of attorneys; (10) undesirability of the case (effect on the lawyer in the community for having agreed to take an unpopular case); (11) nature and length of professional relationship with the client; and (12) award in similar cases.

*See also, Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); *Pennsylvania v. Delaware Valley Citizens' Council,* 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986); and *Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 456 (1992).

***Revised DOES Policy on Attorney Fee Awards in Workers' Compensation Cases:***

In light of the foregoing, it is clear that current DOES policy with respect to the award of attorney fees, particularly the limit of the attorney fee rate to $150 per hour for all legal practitioners regardless of years of experience and demonstrated expertise, is in need of amendment. Consequently, consistent with the foregoing, and taking into consideration the underlying purpose and policy of the D.C. Workers' Compensation Act (as recognized in prior adjudicatory decisions of the Director and in decisions of the D.C. Court of Appeals), DOES policy with respect to the award of attorney fees is herewith amended 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. Additionally, and consistent with those factors, the reasonableness of the attorney's fee requested shall be assessed taking into consideration a reasonable hourly rate within a *range* of allowable hourly rates -- from a minimum of $120 per hour for attorneys with two (2) years or less of practice experience in workers' compensation law, to a maximum of $240 per hour for attorneys with twenty (20) or more years of practice experience in workers' compensation law. Finally, in recognition of the increasingly important role of paralegals to the practice of law in the D.C. area, including the practice of workers' compensation law before DOES, the payment of a reasonable paralegal fee, not to exceed $75 per hour, shall be afforded where appropriate.

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