

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 (Dir.Dkt.) No. 05-48

SHANNON DUNAWAY,

Claimant - Petitioner

v.

POWELL, GOLDSTEIN, FRAZIER & MURPHY AND THE CHUBB GROUP,

Employer/Carrier – Respondent.

Appeal from an Attorney's Fee Order on Remand of
Administrative Law Judge Anand K. Verma
Dir. Dkt.04-4, OHA No. 02-014B, OWC No. 525245

Clifton M. Mount, Esquire for the Petitioner

Robert C. Baker, Esquire for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE, *Administrative Appeals Judges* and Floyd Lewis,
Acting Administrative Appeals Judge.

LINDA F. JORY, *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)¹.

¹Pursuant 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 2004, 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 32-1545 (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.

BACKGROUND

This appeal follows the issuance of an Attorney's Fee Order on Remand 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 January 14, 2005, the Administrative Law Judge (ALJ), reduced counsel for Petitioner's attorney fee request from \$38,018.10 to \$5,730 for 38.20 hours of work performed before the OHA @\$150.00 per hour from October 29, 2001 through April 25, 2002 and in addition ordered a fee of \$150.00 representing \$50.00 per hour for work performed by a non-attorney pursuant to §32-1530(f). The Order followed a Decision and Remand Order of the Director, issued by the Director, of the Department of Employment Services, (the Director) on September 15, 2004. Therein, the Director concluded the ALJ's prior fee award of \$6150.00 was not supported by substantial evidence and was not in accordance with the law².

Claimant-Petitioner's (Petitioner) Petition for Review alleges as its initial ground for its appeal that the ALJ erred in awarding Petitioner an attorney's fee without considering the dollar amount of benefits obtained resulting from the efforts of an attorney, relying on 7 D.C.M.R. §224.2©. Respondent asserts the ALJ's order contained findings of fact supported by substantial evidence in the record considered as a whole; that the law was properly applied, and as such is not arbitrary, capricious or an abuse of discretion; was in accordance with the law; and the Order on Remand should be affirmed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the Act and as contained in the governing regulations is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. D.C. Official Code § 32-1521.01(d)(2)(A). "Substantial evidence", as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this panel are bound to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

For reasons set forth below, the Panel finds the Attorney Fee Order on Remand (AFOR) does not comply with the Director's remand and order to provide the foundational findings to support his reduction of Petitioner's fee.

² The Director found the ALJ did provide the necessary bases for reducing the amount of costs requested and did not disturb the ALJ's reduction of costs which accordingly are not part of the matter on appeal to the CRB.

As stated in the background herein, Petitioner initially asserts the ALJ erred in awarding counsel an attorney's fee without considering the dollar amount of benefits obtained resulting from the efforts of an attorney. Respondent opposes this proposition and properly asserts the 20% figure (found at D.C. Official Code §32-1530(f)) is neither a mandate nor the sole criteria in awarding attorney's fees. Respondent also correctly asserts the 20% figure is a limitation or cap rather than "a blank 20% check".

Although included only in a footnote, the ALJ recited 7 D.C.M.R. §224.20 in the AFOR which lists the factors to consider in determining whether to award attorney fees and the amount, if any to be awarded. The five factors are:

- (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 employee.

Although the regulations promulgated to administer the Act specifically say "the dollar amount of benefits obtained and the dollar amount of potential future benefits resulting from the efforts of an attorney" shall be considered. However, the regulations fail to designate exactly how the ALJ is to consider the dollar amount secured on behalf of the injured worker.

In the instant case, the ALJ made no mention in the AFOR of the amount of benefits secured on Petitioner's behalf or counsel's expertise in the area of workers' compensation law. Nor has the ALJ discussed the complexity of the issues addressed in the Compensation Order.

The ALJ began his analysis with a determination of the period for which counsel was able to claim based upon OHA's Compensation Order. Therein, the ALJ stated "the amount of attorney's fee claimed by claimant's counsel for the period of January 11, 2001 through April 30, 2003 is disallowed. Based on the actual benefits secured for claimant subject to 20% limitation under §32-1530, the undersigned finds the counsel's services before the OHA commenced following the filing of [AFH, EX 3] on October 18, 2001". The ALJ found "counsel's work before OHA is deemed to begin on October 29, 2001". AFOR at 2.

The Panel can find no support in the Act or its implementing regulations for not starting the date of allowable fees on the date the employer, as in this case the Respondent, refuses to accept a written recommendation as per §32-1530 which transfers the matter from OWC to OHA. Consistent with 7 D.C. M.R §224.8, the ALJ did properly find the applicable fee period closed on April 25, 2002 when counsel received and reviewed OHA's Compensation Order.

Computation by the Panel of the fees billed by Petitioner's counsel for the period of October 18, 2001 through April 25, 2002 results in a total of 135.60 hours of time spent which includes 3.25 hours of time assessed by someone who's initials are not counsel's. 7 D.C.M.R §224.3 requires

that the application for attorney fees contain a particular description as to the professional status (e.g. attorney, paralegal, law clerk or other person assisting an attorney) of each person performing the work and the normal billing rate in the area for the work. Inasmuch as the fee application does not contain any identification as to who has the initials NM, pursuant to the regulations the Panel can find no reason to disturb the ALJ's award of the inferior rate of \$50.00 per hours for 3 hours.

As to remaining 132.35 hours, the ALJ made three deductions for a total of 25 hours which the Panel concludes would leave 107.35 hours. The ALJ reduced this figure to 38.20 hours based on the ALJ's finding that counsel's itemized list "seems inflated and therefore warrants appropriate diminishment". AFOR at 3.

After a thorough review of the ALJ's analysis and reasoning for the deductions of 25 hours, the Panel can find a reasonable basis for the ten hour deduction for Counsel's fee for drafting proposed findings of fact and conclusions of law. The ALJ found this charge to be unverifiable because the "the case file does not contain claimant's proposed findings and conclusions of law". Inasmuch as Petitioner has not challenged this conclusion or explained its failure to submit said proposed findings, the Panel agrees that the ten hours assessed for the drafting should accordingly be deducted from the 132.35 hours.

The ALJ noted that counsel included a fee for 12 hours for his trip to Philadelphia, PA for a deposition of a witness. The ALJ opined that "the reasonable amount of time in a round trip to Philadelphia by train is 5.00 hours and considered two hours additional time to be reasonable for the purpose of taking the deposition and determined counsel was entitled to "no more than 7.00 hours for his trip to Philadelphia". AFOR at 3. The ALJ provided no basis for this deduction, *i.e.*, an assertion by counsel for Respondent that the deposition only took he (or she) 7 hours. Given the amount of time needed today to travel by plane or train and without any information as to how much time counsel may have had to use to travel to the witness's location from the train station or wait for the witness to begin the deposition, or the travel time from counsel's home to the train station, the Panel finds the ALJ's unfounded deduction to be without any sound basis and accordingly arbitrary.

The ALJ further objected to counsel's entries for formal hearing preparation on three separate days for a total of 15 hours as the ALJ found this unreasonable formal hearing preparation time. This too, the panel finds unsupported and arbitrary given that the Compensation Order lists five issues for resolution including (1) determination of Petitioner's average weekly wage, (2) the nature and extent of disability (3) whether Petitioner voluntarily limited her income, (4) whether a surgical procedure requested by Petitioner is reasonable and necessary and (5) and whether Respondent is liable for late payment of compensation and acted in bad faith under the Act. Without a discussion with regard to counsel's legal expertise or the complexity of the case the ALJ's reduction was without any sound legal basis, contrary to the Director's order and, in the Panels view, an arbitrary deduction.

As noted above the Director in his Remand order advised the ALJ that merely quoting employer's position as what a reasonable fee should be is not a foundational finding and remanded the matter absent the ALJ's deduction of counsel's costs to the ALJ, "for foundational

findings, i.e., the bases, supporting his ultimate finding and reduction of fee”. Decision and Remand Order of the Director at 4. Nevertheless, the ALJ reduced the remaining 107.35 hours to 38.20 because the ALJ found the fee to “seem inflated”. The panel is in agreement that the ALJ’s basis as seeming inflated is not the foundational finding the Director was urging the ALJ to provide in his remand order.

Although never mentioned by the ALJ in his Order, the Panel must acknowledge that Respondent has not opposed Petitioner’s assertion that as a result of counsel’s representation in securing authorization, Petitioner underwent additional back surgery and the cost of surgery together with associated treatment and hospitalization was \$154,801.83. Compared to the medical benefit secured alone, the Panel finds the reduction of attorney fee hours to 38.20 to be arbitrary and not in accordance with the law. The Attorney Fee Order on Remand must therefore be vacated.

CONCLUSION

The ALJ’s Attorney Fee Order on Remand is arbitrary and in contravention of the Director’s order and the Act. The Attorney Fee Order on Remand is accordingly vacated.

ORDER

The Attorney Fee Order on Remand of January 14, 2005 is hereby VACATED. The matter is remanded to OHA for an appropriate Attorney Fee Award assessed against employer based upon 122.35 hours of work performed before OHA at the prevailing rate of \$150.00 per hour.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

August 12, 2005
DATE