

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402-Fax

CRB No. 06-21

MARDOQUEO MACHUCA,

Claimant – Respondent,

v.

JOHN JUENNEMANN PAINTING AND SAFECO INSURANCE CO.,

Employer/Carrier – Petitioner.

Appeal from an Order Awarding Attorney's Fees of
Chief Administrative Law Judge Malcolm J. Luis-Harper
OHA No. 87-250F, OWC No. 107760

Bonnie J. Brownell, Esq., for the Petitioner

Wayne Mansula, Esq., for the Respondent

Before LINDA F. JORY, FLOYD LEWIS and SHARMAN J. MONROE, *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).¹

¹ 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 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.

BACKGROUND

This appeal follows the issuance of an Order Awarding Attorney Fees 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 December 2, 2005, the Administrative Law Judge (ALJ) awarded \$3,600.00 in attorney's fees subject to the twenty percent (20%) limitation of D.C. Official Code § 32-1530(f). The Employer/Carrier-Petitioner (Petitioner) now seeks review of that Order.² As grounds for this appeal, the Petitioner alleges as error that the Order is not in accordance with the law, and contains mistakes of law and fact.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review 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. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained 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.

Turning to the case under review herein, the Petitioner alleges that there are only two (2) situations in which a fee is assessable against an employer: 1) when an employer refuses to pay compensation for a work-related injury within thirty (30) days of receiving written notice of a claim and the claimant retains counsel who successfully prosecutes the claim and 2) when an employer pays compensation without an award and later refuses to pay additional compensation claimed within fourteen (14) days after receiving a memorandum by the Mayor that claim is justified and the claimant retains counsel who successfully prosecutes the claim. The Petitioner maintains that neither situation is present in this case since it paid all compensation when due, there was no controversy about compensation being tendered and no refusal to pay additional compensation as awarded by the Mayor.

The record shows that the Petitioner requested a modification of a prior Compensation Order, which had awarded the Respondent temporary total disability benefits, to suspend benefits based an

² Along with its Application for Review, the Petitioner requested additional time to file its Memorandum of Points and Authorities in support thereof. By Order dated January 6, 2006, the Petitioner was afforded ten (10) days to file its Memorandum. On January 19, 2006, the Petitioner filed its Memorandum along with a Motion to File Memorandum In Support Of Application for Review Time Having Expired on the basis that it had not properly calendared the due date for its Memorandum. On February 3, 2006, the Claimant-Respondent filed an Opposition. After considering the arguments raised in both pleadings, the Petitioner's Motion is granted and Memorandum is accepted.

alleged failure to cooperate with vocational rehabilitation. After the Petitioner satisfied the requirements for a modification under *Snipes v. D.C. Department of Employment Services*, 542 A.2d 832 (D.C. 1988), the ALJ took evidence on the merits of the request and found, in a Compensation Order dated March 29, 2005, that the Respondent had not unreasonably refused to cooperate with vocational rehabilitation efforts.

The Respondent subsequently filed a request for attorney's fees. In awarding fees, then-presiding ALJ³ stated the two circumstances under which fees may be imposed upon an employer pursuant to D.C. Official Code §§ 32-1530(a) and (b). The ALJ, however, failed to indicate which circumstance was applicable to this case and to state the facts which met the applicable circumstance. Since this matter is before the Panel for review of the fee award, the Panel will examine the record evidence to determine whether D.C. Official Code § 32-1530(a) or § 32-1530(b) is applicable to this case. In doing so, the Panel is mindful that it is precluded from making findings of fact. Such action would require a remand to AHD. Nevertheless, the Panel is permitted to make a determination when the record lacks evidence which could arguably require a resolution of differing versions of the facts such that no purpose is served by remanding the case for further findings. *See St. Clair v. D.C. Department of Employment Services*, 658 A.2d 1040, 1044 (D.C. 1995).

A review of the record indicates that D.C. Official Code § 32-1530(a) is not applicable to this case as there is no evidence that the Petitioner refused to pay compensation for a work-related injury within 30 days after receiving written notice of a claim from the Respondent. The only remaining circumstance under which fees could be assessable against the Petitioner is D.C. Official Code § 32-1530(b).

In *Providence Hospital v. D.C. Department of Employment Services*, 855 A.2d 1108 (D.C. 2004), the D.C. Court of Appeals concluded that D.C. Official Code § 32-1530(b) "is clear and unambiguous in setting forth the circumstances under which a claimant can be awarded attorney's fees." *Providence Hospital*, at 1112-1113 (quoting *National Geographic Society v. D.C. Department of Employment Services*, 721 A.2d 618 (D.C. 1998)). The court further concluded that given the statute's specificity, there was no discretion to decide cases in which all the conditions are not met. *Providence Hospital*, at 1114. Thus, in order for a claimant to recover attorney's fees under D.C. Official Code § 32-1530(b), an employer must pay or tender compensation without an award, a controversy must thereafter develop over additional compensation and an employer must reject the written recommendation of the Mayor or his agent to pay the additional compensation.

On this record, it is not clear whether the Petitioner actually suspended the payment of benefits to the Respondent when it filed its Application for Formal Hearing.⁴ Regardless, there is no

³ ALJ Jeffrey P. Russell issued the March 29, 2005 Compensation Order. Due to ALJ Russell's reassignment to the CRB, Chief ALJ Malcolm J. Luis-Harper issued the Order Awarding Attorney's Fees.

⁴ *See generally Bemis v. Psychological Services*, Dir.Dkt.No. 01-22, OHA No. 00-269, OWC No. 67992 (March 4, 2002) wherein the Office of Workers' Compensation (OWC) awarded the claimant death benefits and the employer later terminated the payments and filed a Notice of Controversion. The OWC subsequently issued a Memorandum of Informal Conference recommending restoration of death benefits. The employer, however, filed an Application for Formal Hearing. The claimant prevailed and an attorney fee was found assessable against the employer.

evidence that the Petitioner refused to pay additional compensation based upon the recommendation of the Mayor or his agent. Since all the conditions for payment of attorney's fees under D.C. Official Code § 32-1530(b) are not met herein, attorney's fees are not assessable against the Petitioner. The December 2, 2005 Order Awarding Attorney's Fees must be vacated and set aside.

CONCLUSION

The Order Awarding Attorney's Fees of December 2, 2005 is not supported by substantial evidence in the record and is not in accordance with the law. As a matter of law, the Order is vacated and set aside. The Petitioner is not liable for attorney's fees in this case.

ORDER

The Order Awarding Attorney's Fees of December 2, 2005 is VACATED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

April 6, 2006
DATE