

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. 05-234

VIRGINIA MILBURN,

Claimant–Respondent

v.

GEORGETOWN UNIVERSITY HOSPITAL AND SISCO INSURANCE COMPANY,

Employer/Carrier–Petitioner

Appeal from a Compensation Order Awarding Attorney's Fees of
Administrative Law Judge David L. Boddie
AHD No. 03-179B, OWC No. 557744

Joel E. Ogden, Esquire, for the Petitioner

Eric M. May, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, SHARMAN J. MONROE, *Administrative Appeals Judges*,
and FLOYD LEWIS, *Acting Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, 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. Official Code § 32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.*,

BACKGROUND

This appeal follows the issuance of a Compensation Order Awarding Attorney's Fees (the Compensation Order) 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 Compensation Order, which was filed on April 15, 2005, the Administrative Law Judge (ALJ) granted the attorney's fee requested by Respondent. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the amount of the attorney's fees awarded exceeds the hourly rate of \$150.00, which rate Petitioner maintains was the maximum allowable hourly for attorney's fee awards in workers' compensation cases at the time the work was performed, as established by the Department of Employment Services (DOES), through the Director thereof, in the case of *Portia Golding-Alleyene v. Washington Hospital Center*, Dir. Dkt. No. 97-68A, H&AS No. 96-466, OWC No. 258365 (February 25, 1999).

Petitioner seeks reversal of the award and remand to AHD for issuance of a new award consistent with an hourly rate of \$150.00.

ANALYSIS

As an initial matter, the scope 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, at §32-1522(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, Respondent was awarded an attorney's fee, assessed against Petitioner, in the amount of \$4,340.00, pursuant to a fee petition filed by Respondent's counsel. In that petition, counsel averred that he had expended 21.7 hours time in pursuing the compensation claim in proceedings pending before AHD, which proceedings were ultimately successful in obtaining benefits "in excess of \$46,000.00" (Compensation Order, page 4). Petitioner alleges that the ALJ's decision is erroneous in that the amount of the attorney's fees

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.

awarded exceeds the hourly rate of \$150.00, which rate Petitioner maintains was the maximum allowable hourly rate for attorney's fee awards in workers' compensation cases at the time the work was performed, as established by the Department of Employment Services (DOES), through the Director thereof, in the case of *Portia Golding-Alleyene v. Washington Hospital Center*, Dir. Dkt. No. 97-68A, H&AS No. 96-466, OWC No. 258365 (February 25, 1999).

Respondent maintains that the ALJ has discretion to award fees calculated at a rate in excess of \$150.00 per hour, where, considering the factors contained in 7 DCMR § 224, the regulations which govern consideration of attorney fee requests presented to DOES in connection with workers' compensation cases, such a fee is appropriate. Those factors are: (1) the nature and complexity of the claim, including the adversarial nature of the proceedings; (2) the actual time spent on development and presentation of the case; (3) the dollar amount of benefits obtained and the dollar amount of potential future benefits resulting from the efforts of the attorney; (4) the reasonable and customary local charge for similar legal services; and (5) the professional qualifications and the quality of the representation provided by the attorney.

It is noted that Petitioner does not challenge any aspect of the consideration that the ALJ undertook other than factor four, the "reasonable and customary local charge", and Petitioner maintains that said charge has been established by the Director, as noted above, in *Golding-Alleyene*.

In the order awarding the attorney's fee, the ALJ asserted that:

In considering the employer's objection and cases cited in support, while *Golding-Alleyene* ... established a maximum customary hourly rate of \$150.00, that was for work performed before the Director. ... I note that in *Miles v. Children's National Medical Center*, Dir. Dkt. No. 02-49, OHA No. 01-340, OWC No. 520268 (Director's Remand Decision, October 25, 2002), the emphasis in affirming the Administrative Law Judge's decision awarding attorney's fees was upon the limiting language of D.C. Code § 32-1530(f) that no award shall be made in excess of 20% of the actual benefits secured and there was no reference to hourly rate at all. ...

To date I am not specifically aware that any policy establishing a maximum local customary hourly rate in the OHA/AHD other than applying the limitations set forth in the statute and regulations. I note that the statute provides pursuant to subsection (c) of § 32-1530 that in proceedings before the Mayor or any court for review of any actions, award, order or decision, the Mayor or court may approve an attorney's fee for the work done before him or it, as the case may be, by the attorney for the claimant.

It therefore appears that within the limitations set forth by the statute and the factors for consideration in the regulations accompanying D.C. Code § 32-1530 the amount of fees to be awarded and hourly rate applied is within the discretion of the deciding authority. And while the Director may have seen fit to apply a more simplistic approach to its [sic] determining attorney fee awards those

decisions may be considered as guidance and persuasive but non-binding authority. Of the cases cited by the employer the only one that appears to imply the OHA/AHD should adopt a similar policy as that of the Director's office regarding a maximum hourly rate is *White v. Bank of America*, Dir. Dkt. No. 02-79A, OHA No. 02-232, OWC No. 563111 (Director's Decision, January 8, 2003).

The ALJ's analysis of the regulatory and statutory language is certainly not unreasonable. However, he cited a case, *White*, in which the Director reversed an award of attorney's fees calculated at a rate of \$125.00 per hour by an ALJ in OHA, with the following language:

In her order, the ALJ asserted that the customary hourly rate of pay for representation of claimant's in workers' compensation cases is \$125.00 per hour in accordance with *Michelle Stuart v. Washington Hospital Center*, Dir. Dkt. No.-59 [sic] (1998). However, the customary hourly rate of pay for representation of claimant's in workers' compensation cases was increased to \$150. *Golding-Alleyene v. Washington Hospital Center*, Dir. Dkt. No. 97-67A (1999).

White, supra, page 2. Further, it is noteworthy that the case cited in *White*, being *Michelle Stuart, supra*, Dir. Dkt. No. 95-59, H&AS No. 93-576, OWC No. 244140 (June 16, 1998), was a case in which the Director reversed an attorney's fee award based upon a Hearing Examiner's applying a rate of \$175.00 per hour, and substituting a rate of \$125.00 per hour, with the following words: "In his opposition to Employer's Application for Review, the Attorney listed specifics about his qualifications and experiences which he believes justify his hourly rate for services in this case being raised from \$125.00 per hour to \$150.00 per hour. Nonetheless, the Director has historically held that \$125.00 per hour is just compensation for representation of claimant's in workmen's compensation cases, particularly where the issues in the case are not complex". *Stuart, supra*, page 2 – 3.

Thus, while it might be reasonable and appropriate to interpret the statutory provision as differentiating between the trial level, or AHD, and the appellate level, previously being the Director, and now being this Board, the term "the Mayor" is also amenable to mean the undifferentiated levels or offices within DOES. Further, the Mayor's statutory authority has been delegated to the Director. Mayor's Order 82-126, D. C. Reg. 21-43 (1982). See also, *Snipes v. District of Columbia Department of Employment Services*, 542 A.2d 832 (1988).

It is clear from both *White* and *Stuart* that the Director has held and ruled that the Director is empowered to establish a maximum reasonable hourly rate for awards of attorney's fees for work done at any level of the agency, and that the Director has established that rate at the \$150.00 per hour level for work performed before both the Director and the hearings level at the time relevant to this attorney's fee dispute.

Further support for this determination comes when one considers the recently issued "Policy Directive Clarifying the Award of Attorney Fees in District of Columbia Workers' Compensation Cases", issued by the Director on May 12, 2005. In that directive, the Director established a range of allowable fees to be awarded, taking into consideration not only the regulatory factors previously discussed, but also including a minimum and maximum allowable

hourly rate pegged to years of experience handling workers' compensation cases in this jurisdiction. What is notable for the purpose of this case is that the policy does not differentiate between the Office of Workers' Compensation (OWC), AHD or the CRB in its application. Thus, while the statute is amenable to the interpretation that each separate office within DOES considers attorney fee requests for work performed before it, the factors to be considered, including any maximum and minimum hourly rates, are now, and have been at least since *White, supra*, uniform within the agency.

CONCLUSION

The Compensation Order Awarding an Attorney's Fee of April 15, 2005 is not in accordance with the law, in that it awarded an attorney's fee based upon an hourly rate in excess of that established by the Director, as the maximum allowable hourly rate for work performed before the agency in pursuit of a workers' compensation claim.

ORDER

The Compensation Order Awarding an Attorney's Fee of April 15, 2005 is hereby REVERSED and REMANDED with instructions that a new award be issued consistent with the foregoing decision, with the award not to exceed a fee calculated at an hourly rate of \$150.00.

FOR THE COMPENSATION REVIEW BOARD

JEFFREY P. RUSSELL
Administrative Appeals Judge

June 1, 2005

DATE