

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

No. 06-34

VIRGINIA MILBURN,

Claimant – Respondent,

v.

GEORGETOWN UNIVERSITY HOSPITAL AND BROADSPIRE,

Employer/Carrier – Petitioner.

Appeal from an Order of
Claims Examiner Charles Watson
OWC No. 557744

Eric M. May, Esquire, for the Respondent

Joel E. Ogen, Esquire, for the Petitioner

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, LINDA F. JORY and SHARMAN MONROE *Administrative Appeals Judges*.

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 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005)¹. Pursuant

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 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

to § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

BACKGROUND

This appeal follows the issuance by the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES) of an Order issued by OWC on March 1, 2006 which granted Respondent's Counsel's Petition for an order awarding attorney fee against the Petitioner. Specifically, the Claims Examiner approved an attorney's hourly rate of \$200 per hour.

Petitioner has appealed OWC's Order contending that the maximum hourly rate in this jurisdiction at the time the Petition for Attorney Fee was filed was \$150.00, thus the award is not in accordance with the law. Respondent asserts that the CRB, allowing the \$200 per hour award to stand in *Palmerton v. Parsons Corporation*, AHD No. 05-016, CRB No. 05-016 (Jan. 5, 2006) "clearly expressed its understanding that the new maximum rate of \$240 per hour applied to all attorney fee orders used after the Directive regardless of when the legal services were rendered".

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). For the reasons set forth herein, the Board concludes herein, that the Claims Examiner's March 1, 2006 is not in accordance with the law as it existed when the attorney fee petition was filed.

The procedural history of this case is worth noting at this juncture. Specifically, that following AHD's issuance of a Compensation Order on January 24, 2005, Petitioner's counsel filed two separate petitions for assessments of attorney's fees: one before the ALJ issuing the Compensation Order and one with OWC. The ALJ considered the attorney fee petition presented to OHA and over objection by Petitioner approved an hourly rate of \$200 in an order issued on April 15, 2005.

On May 12, 2005, Petitioner sought review of the Order Awarding Attorney Fees with the Director which was transferred to the CRB. On June 1, 2005, the CRB issued a Decision and Order which reversed and remanded the order to AHD with instructions that a new award be issued not to exceed a fee calculated at an hourly rate of \$150.00. On or about May 12, 2005, the Director, Department of Employment Services (the Director) issued a Memorandum entitled "Policy Directive Clarifying the Award of Attorney Fees in District of Columbia Workers' Compensation Cases" wherein the Director agreed that the attorney fee rate of \$150.00 per hour for all legal practitioners in is in need of amendment. The Director indicated that "the reasonableness of 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

and Anti-Fraud Amendment Act of 2004.

to a maximum of @ \$240 per hour for attorneys with twenty (20) or more years of practice experience in workers' compensation law. The Memorandum bares a date of May 12, 2005.

With regard to the instant action, the Panel notes the OWC Claims Examiner did not take any action on the March 12, 2005 Petitioner for Attorney Fees until March 1, 2006. Citing the May 12, 2005 memorandum and counsel's experience in workers compensation law, the Claims Examiner entered an award for an attorney's fees at an hourly rate of \$200.

The Petitioner asserts that the amended hourly rate should not apply to the instant counsel's petition because the services were rendered prior to the Director's Memorandum. Having considered the retroactivity of the Director' Memorandum, the Board has agreed that the Memorandum shall not apply retroactively to Petitioner for Fees filed before the Memorandum issued. Thus, the cut off date is not when the services were rendered, but when the Petition is filed. Accordingly, the Panel must respond to Respondent's reliance of the CRB's decision in *Palmerton*. As Respondent asserts, the Compensation Order in *Palmerton* issued on January 6, 2005, however this Panel has no knowledge as to when counsel filed its Petition for attorney's fees and the retroactivity of the Director's Memorandum was not an argument presented to the *Palmerton* Panel. Accordingly, *Palmerton* shall not be read by this panel to set a cut-of date with regard to the retroactivity of the Director's Memorandum.

Nevertheless as stated above, inasmuch as the Petition for Attorney's fees was filed before the Director's Memorandum, the increased hourly rate does not apply to either of the Petitions filed in the instant matter on March 12, 2005 and the Order of OWC awarding \$200.00 an hour is accordingly not in accordance with the law.

CONCLUSION

The OWC Order of March 1, 2006 is not in accordance with the law that was in effect in March 2005 when the Petition for Attorney Fees was field with OWC.

ORDER

The OWC Order of March 1, 2006 is hereby REVERSED and this case is REMANDED to OWC for further proceedings consistent with the foregoing.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

April 24, 2006

DATE