

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. 04-21

RAYMOND SCHAFFER,

Claimant - Petitioner,

v.

THE WASHINGTON POST AND GALLAGHER BASSETT SERVICES,

Employer/Carrier – Respondent.

Appeal from an Attorney's Fee Order of
Administrative Law Judge Fred D. Carney, Jr.
AHD No. 94-360A, OWC No. 266216

Leonard P. Buscemi, Esquire, for the Petitioner

John F. Ward, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, LINDA F. JORY and FLOYD LEWIS,
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, 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 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

BACKGROUND

This appeal follows the issuance of an Order Denying an Attorney's Fee 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 20, 2004, the Administrative Law Judge (ALJ), denied counsel's petition for an attorney's fee and costs pursuant to D.C. Code §32-1530.

Claimant-Petitioner's (Petitioner) Petition for Review alleges as grounds for its appeal that D.C. Code §32-1530 (b) and *National Geographic Society v. Dept. of Employment Services*, 721 A.2d 618 (1998) (*National Geographic*) support an assessment of fees and costs against employer where a controversy develops over additional compensation and employer declines to use the informal process, and by declining to use that informal process, declines to accept any recommendation from the Mayor. Respondent has filed a response to Petitioner's Application for Review asserting the Court in *National Geographic*, in interpreting §32-1530, held attorneys fees can be assessed against employer/insurer only where the preconditions of §32-1520 (a) or (b) are met and they have not been met in the instant matter.

ANALYSIS

As an initial matter, the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the Act and as contained in the governing regulations must affirm an Attorney's Fee Award issued by AHD or the Office of Workers Compensation (OWC) unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. CRB Rules of Practice and Procedure, Chapter 2, 7 D.C.M.R. §266.4; *see also* Stein, Mitchell & Mezines, *ADMINISTRATIVE LAW*, §51.93 (2001). For reasons set forth below, the Panel finds the Attorney Fee Order is in accordance with the law and neither arbitrary nor capricious, and therefore must be affirmed.

In support of Petitioner's primary argument that *National Geographic* supports an assessment of fees and costs against employer where a controversy develops over additional compensation, Petitioner asserts that Respondent "declined" to use the informal process and by declining to use that informal process it declined to accept any recommendation from the Mayor. This argument is rejected by the Panel. Respondent was continuing to pay wage loss benefits to Petitioner due to the existing Compensation Order and any attempt to modify the existing Order must be made pursuant to §32-1524 of the Act, therefore it is precluded from utilizing the informal conference option.² The panel accordingly rejects Petitioner's argument that he could not file for an informal conference because employer "took away any right to an informal conference or recommendation from the Mayor."

and Anti-Fraud Amendment Act of 2004.

² Although not related to the issue at hand, the Panel acknowledges Respondent's challenge to Petitioner's statement in his Procedural History that he "requested an informal conference, a recommendation was issued and thereafter claimant filed an application for a formal hearing". Review of the administrative file at the OWC level reveals Respondent did not file a request for an informal conference until October 17, 2000, more than two years after the existing Compensation Order was issued. The request for the informal was based upon Petitioner's request for permanent total disability benefits.

In accepting Respondent's argument that "there is no statutory authority to support an award against employer for an attorney's fee", the ALJ agreed that under D.C. Code §32-1530, there are only two instances in which attorneys fees can be assessed against the employer/insurer:

The first instance is under [§32-1520] subsection (a) where employer refuses to pay any compensation benefits within thirty days after receiving notice of a work-related claim and claimant thereafter utilizes the services of an attorney in successful prosecution of the claim. The second instance under subsection (b), is where employer pays compensation without an award but thereafter refuses to pay additional benefits claimed by the claimant within fourteen days of receiving a recommendation by the Mayor that the claim is justified and claimant thereafter uses an attorney's services to successfully recover the full amount claimed.

Order at 2; *See* D.C. Code §32-1530(a)(b).

The ALJ found Petitioner had provided no persuasive reason for ignoring the plain language of D.C. Code §32-1530 (a) and (b), which specifies the circumstances under which an award of attorney's fees is authorized and which expressly denies such fees "in all other circumstances and §32-1530(d) which provides that where fees are assessed against an employer, certain costs may further be assessed.

In affirming the ALJ's denial of an attorney fee and costs, the Panel rejects Petitioner's argument that *National Geographic* should be read to require *employers* use the informal process when it is engaged in ongoing payments of benefits and attempts to modify an award. Contrary to Petitioner's assertion, the Panel agrees with Respondent that the Court in *National Geographic* was clear and unambiguous in its interpretation of the last sentence of §32-1530(b) "in all other cases any claim for legal services shall not be assessed against the employer or carrier" by stating "That language is the clearest expression of legislative intent to limit the circumstances under which the claimant may recover attorney fees to those outlined explicitly in the statute". *National Geographic, supra* at 621.

Based upon the foregoing, the Panel can discern no reason to disturb the ALJ's conclusion that Respondent is not liable for attorney's fees or costs in this matter.

CONCLUSION

The ALJ's Order Denying an Attorney's Fee from the Administrative Hearings Division is neither arbitrary nor capricious; and is in accordance with the law.

ORDER

The January 20, 2004 Order Denying an Attorney's Fee is hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

April 13, 2006

DATE