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
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CRB (Dir.Dkt.) No. 05-262

REGINALD STEADMAN,

Claimant - Petitioner

v.

UNITED PARCEL SERVICE AND LIBERTY MUTUAL INSURANCE CO.,

Employer/Carrier – Respondent.

Appeal from an Attorney's Fee Order of
Administrative Law Judge Malcolm J. Luis-Harper
AHD No. 00-384A, OWC No. 538919

Benjamin T. Boscolo, Esquire for the Petitioner

Donald P. Maiberger, Esquire for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE, AND JEFFREY P. RUSSELL, *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 20024, 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 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 August 10, 2005, the Administrative Law Judge (ALJ), reduced counsel for Petitioner's attorney fee request from $21,224.00 to $5,380.00 for 22.9 hours of work performed before the OHA @ $200.00 per hour and 16 case manager hours @$50.00 per hour plus costs in the amount of $1,163.20 pursuant to §32-1530(f).

Claimant-Petitioner's (Petitioner) Petition for Review alleges as its initial ground for its appeal that the ALJ erred in not properly applying the Act and its implementing regulations in the disposition of his fee. Respondent asserts that the law was properly applied, and as such the fee award is not arbitrary, capricious or an abuse of discretion; was in accordance with the law; and 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 must be affirmed in part and reversed in part and remanded to AHD for further consideration.

Petitioner initially argues that the "lodestar" approved by the ALJ was calculated improperly, referring to the District of Columbia's Court of Appeals decision in *Federal Marketing Company v. Virginia Impression Products Company, Inc., et al*, 823 A.2d 513 (D.C. 2003) wherein the Court explained that a reasonable fee is computed by first determining the so-called lodestar which is the number of hours reasonably expended by counsel multiplied by a reasonable hourly rate. Petitioner's assessment is however incorrect as the $5,380.00 amount is actually the amount of attorney fee approved after the ALJ made his deductions and enhancement from the lodestar amount of $21,240.00. Nevertheless, Petitioner argues that the Act and regulations do not limit an award of attorney fees to a calculation of the hours invested multiplied by counsel's hourly rate. Specifically, Petitioner contends in determining whether a fee of 20% may be approved, the lodestar, the difficulty of the claim and the dollar value of the benefit secured must

be considered, in determining a reasonable attorney's fee, and that "5% of the benefit secured in a contested can never constitute a reasonable attorney's fee".

Petitioner further argues on appeal that there is simply no language in the Act or the implementing regulations which supports the ALJ's conclusion that an attorney's fee was not warranted for work performed prior to the February 6, 2003 Application for Formal Hearing filed by counsel for petitioner. Petitioner relies on the plain language of §32-1530(a) which states "when person seeking benefits thereafter utilizes the services of an attorney-at-law in the successful prosecution of his claim, there shall be awarded a reasonable attorney's fee against the employer or carrier" and argues that the Act is silent as to what services are to be considered other than those which are necessary to the successful prosecution of the claim. Petitioner contends that "all of the action which was taken at the AHD was necessary to the successful prosecution of his claim".

Lastly, Petitioner asserts there is no language in the Act or implementing regulations to support the ALJ's conclusion that administrative work is not a compensable legal service within the meaning of the Act. Petitioner asserts, to the contrary, that 7 D.C.M.R §224.3 provides that work for which a fee can be charged includes work performed by an attorney, paralegal, law clerk or other person assisting an attorney.

With regard to Petitioner's first argument, Respondent submits that the ALJ did consider each of the factors contained in 7 D.C.M.R. § 224.2 and that contrary to Petitioner's assertion, the fact that the award amounts to less than twenty percent of the benefits secured does not render the award arbitrary, capricious or an abuse of discretion[2].

On Petitioner's second argument, Respondent conceded that after an informal conference, the claims examiner recommended that Respondent pay Petitioner temporary total disability benefits from January 19, 1997 to February 19, 1998 and temporary partial disability benefits from February 12, 1998 to January 19, 2000 and that Respondent controverted the recommendation and filed an Application for Formal Hearing. Without further explanation, Respondent proffers that the Office of Hearings and Adjudications dismissed the Application for Formal Hearing without prejudice on September 19, 2002. Although Respondent notes in a footnote that they voluntarily paid Petitioner wage loss benefits from September 12, 1996 to January 19, 1997, Respondent makes no mention as to whether they paid benefits pursuant to the Memorandum of Informal Conference, specifically, temporary total disability benefits form January 19, 1997 to February 19, 1998 and temporary partial disability benefits from February 12, 1998 to January 19, 2000 which OWC awarded Petitioner. Review of the Compensation Order reveals

[2] The Panel notes that Respondent cites the portion of the Court of Appeals decision in *Baghini v. District of Columbia Dep't of Employment Services*, 525 A.2d 1027, 1030 (1987)(*Baghini*) wherein the Court said "the Council of the District of Columbia, while authorizing the payment of reasonable attorney fees in subsection (A) never lost sight of its primary objective of reducing employer and carrier expenses and that subsection (f)was designed to meet that objective". *Baghini, supra* at 1032. The Panel must note that the Court in the same decision stated that the same committee enacted D.C. Code §1520(a) to ensure that claimants would be able to obtain competent counsel and to discourage dilatory action by insurance companies which had the effect of forcing an injured employee to settle for less than the statutory rate of compensation. Citing, the Council of the District of Columbia, Committee on Public Services and Consumer Affairs, Report on Bill No. 3-106 at 17 (January 16, 1980), *Id.*

Respondent had not paid these benefits even after its AFH had been dismissed by AHD without prejudice in September 2002.

Addressing Petitioner's rejection of the ALJ's administrative reduction, Respondent asserts no evidence has been provided regarding the case manager's identity, let alone the case manager's professional qualifications and claims it would contest the award of any hourly rate based on such lack of information and the nature of tasks performed by the claims manager. Respondent asserts the ALJ's reduction of the hourly fee for the case manager to $50 per hour was not arbitrary, capricious or an abuse of discretion.

The Panel adopts the Court of Appeals' point of view regarding the ALJ's discretion in awarding attorney fees as is expressed in *Hampton Courts Tenants Association v. District of Columbia Rental Housing Commission*, 599 A.2d 1113 (D.C. June 11, 1991) (*Hampton Courts*), notwithstanding the fact the instant matter was not heard by this ALJ. In this District of Columbia Government agency decision, the Court held:

> A request for attorney's fees should not result in a second major litigation. Therefore, the determination of the reasonableness of attorney's fee amounts is clearly a matter within the trial judge's discretion. The same discretionary standard applies to attorney fees determinations by an administrative agency. This is appropriate in view of the trial court's or agency's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matter.

The parameters used in this jurisdiction to enhance or reduce an attorney fee are found at 7 D.C.M.R. §224 and were properly identified in the Order. The ALJ stated he had considered said parameters and found that in light of counsel's professed experience and expertise in workers' compensation law he would compensate counsel at a rate of $200 per hour which is more than the hourly rate originally charged by counsel and $40 less per hour than counsel asked for in his amended fee petition. Accordingly, the Panel concludes that the ALJ's determination that counsel should be paid at a rate of $200 and the case manager at a rate of $50.00 is solely within the discretion of the ALJ and neither party has proffered any persuasive reason to support a determination that the ALJ abused his discretion.

The ALJ eliminated the remaining attorney and case manager time because the time claimed was "unnecessary, redundant or of an administrative nature". Having accorded the ALJ liberal discretion as the Court in this jurisdiction finds appropriate, the Panel does not agree that a determination that an attorney's time is "necessary" is within the purview of an ALJ's discretion, when the ALJ did not preside over the formal hearing. Nor does the Panel agree that the Act precludes all administrative charges. Accordingly, while the Panel agrees those hours billed by counsel for his instruction to his case manager are not reasonable billable hours, the ALJ shall, on remand, reconsider the if time billed by the attorney or case manager receiving and faxing various correspondences was reasonably charged[3].

[3] In so finding the Panel notes the standard still utilized by the Court of Appeals is one of reasonableness. Specifically the court in Hampton Courts stated "Because the question whether attorney hours are unreasonably charged obviously depends on the individual facts of the case, the task of attending to each claimed category of

The Panel further does not find the ALJ's exclusion of 30.15 hours of attorney time and 24.75 hours of case manager time because the hours were incurred prior to the February 6, 2003 filing of Petitioner's Application for Formal Hearing to be supported by any language in the Act, Regulations or existing case law in this or any District agency. The ALJ acknowledged that an application for formal hearing had been filed on June 1, 2000 but had been dismissed on October 10, 2000, therefore the ALJ determined that since no benefits were secured for claimant at that time, counsel was not entitled to attorney's fees for this work.

To the contrary, the Panel notes that the Act never mentions a requirement of a filing of an Application of Formal Hearing in order to be entitled to a fee. As Petitioner properly points out, there is no statutory authority to support the ALJ's exclusion of hours spent after Respondent rejected OWC's award of compensation. §32-1530 (a) provides:

> If the employer or carrier declines to pay any compensation on or before the 30th day after receiving written notice form the Mayor that a claim for compensation has been filed, on the grounds that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits thereafter utilizes the services of an attorney-at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order a reasonable attorney's fee against the employer or carrier in an amount approved by the Mayor, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

Although Respondent believes it falls within §32-1530 (b) as it made a voluntary payment (TTD from September 12, 1996 to January 9, 1997), the Panel notes the voluntary payment covers a period which precedes that amount awarded by OWC (TTD from January 19, 1997 to February 19, 1998 and temporary partial disability benefits from February 12,1998 to January 19, 2000) which led to the first filing of the AFH and based on the information provided to the Panel, Respondent refused to pay. Moreover, as noted above there is nothing in the Attorney Fee Award which explains what exactly happened when the first AFH was dismissed. There is certainly no evidence that employer actually paid the amount awarded in the rejected Memorandum of Informal Conference. Without more information the Panel cannot find that the work performed after employer rejected the memorandum of informal conference by the filing of a AFH was not work performed before the AHD and not work performed in the pursuit of counsel's successful prosecution of the injured worker's claim.

The Panel accordingly must remand that portion of the Attorney Fee Award which excludes the hours expended before Petitioner's AFH to the ALJ to ascertain what services were rendered by counsel during the period of time in question and given the absence of law to the contrary, to reconsider the amount of hours submitted by counsel. Inasmuch as the amount awarded is surprisingly low, there is ample room to increase the award as the awarded amount. $5380.00, is

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hours is uniquely the agency's and the results of such review singularly within the ken and the discretion of the agency". *Hampton Courts, supra* at 1120.

less than 8%, of $71,557.34[4], the actual amount paid to Petitioner by Respondent, thus any increase in the fee award should not violate §32-1520(f).

The ALJ is free to conduct such further evidentiary proceedings as he may deem necessary to carry out the additional attorney fee award required under this order.

CONCLUSION

The ALJ's exclusion of 30.15 hours of attorney time and 24.75 hours of case manager time for work performed before Petitioner's Application for Formal Hearing was filed is not in accordance with the law. The ALJ's exclusion of 5 hours for time spent sending correspondence is also not in accordance with the law. The remaining exclusions and modifications to the attorney fee requested are in accordance with the law and are not an abuse of the ALJ's discretion.

ORDER

The exclusion of 30.15 hours of attorney time and 24.75 hours of case manager time from Petitioner's attorney fee petition and the additional exclusion of 5 hours for time spent sending correspondences is hereby VACATED. The matter is remanded to OHA for further review of these hours and an appropriate Attorney Fee Award assessed against employer based upon the previously awarded rate of $200.00 per hour.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY
Administrative Appeals Judge

December 14, 2005
DATE

[4] The Panel confirmed that Respondent issued a check in this amount after review of Petitioner's attorney fee petition which includes a copy of Respondent's check.