

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 10-158

**CARROLL THOMAS,
Claimant–Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer-Respondent.**

Appeal from an July 26, 2010 Order Awarding Attorney Fees by
The Honorable Leslie A. Meek
AHD No. 10-030, OWC No. 649470

Sarah O. Rollman, Esquire for the Petitioner
Ryan J. Foran, Esquire for the Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE,¹ *Administrative Appeals Judges* and LAWRENCE
D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.²

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In May 2008, Mr. Carroll Thomas injured his left knee while working as a bus driver for the Washington Metropolitan Area Transit Authority (“WMATA”).³ More than a year later, the parties proceeded to an informal conference, and in the resulting Memorandum of Informal Conference, a

¹ Judge Leslie has been appointed by the Director of the Department of Employment Services (“DOES”) as a temporary Compensation Review Board (“CRB”) member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

² Jurisdiction is conferred upon the CRB pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, (“Act”), 7 DCMR §250, *et seq.*, and DOES Administrative Policy Issuance 05-01 (February 5, 2005).

³ *Thomas v. Washington Metropolitan Area Transit Authority*, AHD No. 10-030, OWC No. 649470 (February 25, 2010).

claims examiner recommended WMATA pay Mr. Thomas for a 19.5% permanent partial disability to his left leg.

On October 26, 2009, Mr. Thomas rejected the Memorandum of Informal Conference and filed an Application for Formal Hearing. In a Compensation Order dated February 25, 2010, an administrative law judge (“ALJ”) granted Mr. Thomas an award of 20% permanent partial disability to his left leg.

Following the issuance of the Compensation Order, Mr. Thomas’ attorney filed a petition for an award of an attorney’s fee, and he requested his fee be assessed against WMATA. In an Order Awarding Attorney Fees dated July 26, 2010, the ALJ granted an attorney’s fee on the amount awarded in the Compensation Order and assessed that fee against WMATA because WMATA had not paid Mr. Thomas pursuant to the Memorandum of Informal Conference.

On appeal, WMATA contends that because Mr. Thomas (not WMATA) rejected the Memorandum of Informal Conference and requested a formal hearing, WMATA is not responsible for payment of the attorney’s fee. On the other hand, Mr. Thomas argues that because WMATA did not pay pursuant to the Memorandum of Informal Conference he rejected, it is responsible for payment of the attorney’s fee.

ISSUE ON APPEAL

Is the July 26, 2010 Order Awarding Attorney Fees arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law?

ANALYSIS⁴

In the District of Columbia, a claimant’s attorney is entitled to recover attorney’s fees from the employer in only two situations:

first, if the employer refuses to pay “any compensation” for a work-related injury within thirty days of receiving written notice from the Mayor of “a claim for compensation,” and the claimant consequently uses the services of an attorney to prosecute successfully his or her claim, D.C. Code §36-330(a); [footnote omitted] and second, if an employer “pays or tenders payment of compensation without an award” but later refuses to pay the additional compensation claimed by the claimant within fourteen days of receiving a recommendation by the Mayor that the claim is justified, and the claimant uses the services of an attorney to recover the full amount claimed. D.C. Code §36-330(b). [Footnote omitted.]^[5]

⁴ Because the Order on review is not one based on an evidentiary record produced at a formal hearing, the applicable standard of review by which we assess the determination reached by the Office of Hearings and Adjudication is whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See, 6 Stein, Mitchell & Mezines, *Administrative Law*, §51.03 (2001).

⁵ *C&P Telephone Company v. DOES*, 638 A.2d 690, 693-394 (D.C. 1994). Since the issuance of this decision, the Act has been recodified, but the substance of the provisions referred to remained the same.

Section 32-1530(b)⁶ is implicated in this case, and the plain language of that section only permits an assessment of an attorney's fee against an employer when "payment of compensation is compelled by the agency."⁷ If a claimant rather than the employer rejects the Memorandum of Informal Conference, the employer is not responsible for payment of the attorney's fee:

Upon reviewing this matter, this Panel notes that the District of Columbia Court Appeals has addressed the concerns raised in this matter and the awarding of attorney's fees under D.C. Official Code §32-1530(b). The Court held that under this section of the Act, for an employer to be obligated to pay a claimant's attorney's fees, that employer must refuse to pay compensation in accordance with the OWC's recommendation within 14 days of receipt of the recommendation. *National Geographic Soc'y. v. Dist. of Columbia Dep't. of Employment Servs.*, 721 A.2d 618, 621 (D.C. 1998). Moreover, in *Providence Hosp. v. Dist. of Columbia Dep't. of Employment Servs.*, 855 A.2d 1108, 1113 (D.C. 2004), the Court made it clear that for an award of attorney's fees to be made against an employer, that employer must have rejected the Memorandum of Informal Conference.

In this case, Petitioner did not reject the Memorandum of Informal Conference, as it was Respondent (Claimant), who rejected the Memorandum. Since an employer did not reject the Memorandum, the requirements under D.C. Official Code §32-1530(b) and the *Providence Hospital* case, for awarding fees were not met.^[8]

⁶ Section 32-1530(b) of the Act states

If the employer or carrier pays or tenders payment of compensation without an award pursuant to this chapter, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the Mayor shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within 14 days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney-at-law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Mayor, as authorized in §32-1507(e), and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Mayor or court in any such case, an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accordance with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

⁷ *Fluellyn v. DOES*, ___ A.3d ___ (D.C. 2012).

⁸ *Foy v. Washington Metropolitan Area Transit Authority*, CRB No. 05-40, OWC No. 560276 (July 8, 2005).

That WMATA did not tender payment after the issuance of the Memorandum of Informal Conference is of no consequence. Mr. Thomas rejected the Memorandum of Informal Conference by filing an Application for Formal Hearing, and by doing so, Mr. Thomas rendered the Memorandum of Informal Conference null and void.⁹ WMATA had no obligation to pay Mr. Thomas pursuant to a void Memorandum of Informal Conference.

CONCLUSION AND ORDER

Mr. Thomas rejected the Memorandum of Informal Conference by filing an Application for Formal Hearing which rendered the Memorandum of Informal Conference null and void. WMATA was under no obligation to pay benefits pursuant to a void Memorandum of Informal Conference nor is it under any obligation to pay attorney's fees thereafter. Because the July 26, 2010 Order Awarding Attorney Fees is arbitrary, capricious, an abuse of discretion, and not in accordance with the law, it is VACATED.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

December 25, 2012
DATE

⁹ *Travelers Indemnity Co. of Illinois v. DOES*, 975 A.2d 823, 825 (D.C. 2009).