

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
Administrative Hearings Division



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IN THE MATTER OF,)	
)	
MILDRED B. STEWART,)	
)	
Claimant,)	
)	AHD No. PBL 06-088
v.)	OWN No. 761032
)	
DISTRICT OF COLUMBIA DEPARTMENT OF)	
CORRECTIONS)	
)	
Employer.)	

ORDER ON REMAND

On September 30, 2008, the Compensation Review Board (hereinafter "CRB") remanded the Order of March 28, 2008 of Administrative Law Judge Terri Thompson Mallet¹ for reconsideration of the award of attorney's fees in accordance with the provisions of Subchapter XXIII of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann., § 1-623.1 *et seq.* (2001), (hereinafter, the Act).

The right for claimants under the Act to have the employer pay their attorney's fees did not become law until March of 2007, and this case predates this enactment. Therefore, the reconsideration must be done under the provision of the Act as it stood prior to March 8, 2007. D. C. Official Code § 1-623.27 (2001) provided:

- (a) A claimant may authorize an individual to represent him or her in any proceeding under this subchapter before the Mayor.**
- (b) A claim for legal or other services furnished on behalf of a claimant in respect to a case, claim, or award for compensation under this subchapter is valid only if approved by the Mayor.**

The existence of a fee agreement between neither the parties nor the request for 20% of the award appears to be relevant under the Act. The claim for legal services is valid only if approved.

In *Cornelious v. District of Columbia Employees' Compensation Appeal Board, 704 A.2d 853 (D.C. 1997)*, the court upheld the Employment Compensation Appeals Board's (ECAB) denial of the claimant's attorney's fee request. The claimant had agreed to a 20% contingency fee, and after receiving a \$96,243.60

¹Administrative Law Judge (hereinafter "ALJ") Mallet is no longer with the division. The matter on remand has been reassigned to ALJ Belva D. Newsome.

lump sum the attorney sought approval of a \$19,248.72 fee. ECAB staff requested itemization of the work performed, including dates, time, and hourly rate charged. The attorney refused to provide this, and the board denied the fee, stating it had no authority to approve a contingency fee, and that contingency fees are invalid. On appeal the attorney argued that the statute and regulations governing fees violated the Due Process Clause of the Fifth Amendment. The court rejected the argument, observing that the Supreme Court has upheld similar statutes and regulations governing attorney's fees in federal programs.

In the matter under consideration, the attorney began representing Mildred A. Stewart (hereinafter, "Claimant") on July 13, 2006 for termination of a disability claim arising out of an injury in August 1985. The Final Determination on Reconsideration was dated June 23, 2006, and Claimant timely filed an application for formal hearing. An *ex parte* hearing was held on October 19, 2006, and Claimant's benefits were ordered reinstated to date of termination with reimbursement of all causally related medical expenses and continuation of medical treatment on October 1, 2007.

Counsel for Claimant filed his first attorney fee petition on October 17, 2007, seeking the retroactive application of the March 8, 2007 amendments to this matter. Retroactive application would have had the District government pay \$8,550.00 in fees and \$124.50 in costs. The fee petition was amended on October 25, 2007 to include an October 18, 2007 statement by the Claimant that found counsel's fees reasonable and to comply with a recent ruling of this division. This fee petition was denied on November 13, 2007.

On December 13, 2007, counsel for Claimant filed a revised fee petition seeking \$10,550.00 in fees and \$149.50 in costs from the Claimant. The additional fees consisted of matters that occurred after the October 1, 2007 issuance of the Compensation Order, and appear to concern the appeal of that order by the District Government. This division would have no jurisdiction over those hours. See *Teal v. Washington Gas Light Co.*, H&AS No. 86-403, OWC No. 0090338 (May 20, 1987). All fees after November 4, 2007, are related to an appeal to the CRB, and beyond the jurisdiction of the undersigned ALJ. A total of \$3,240.00 in attorney's fees should be applied for before the CRB.

In *Steadman v. United Parcel Service and Liberty Mutual Insurance Co.*, CRB No.05-262, AHD No. 00-384A, OWC No. 583919 (December 14, 2005), the CRB adopted the Court's holding 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. 1991) ("*Hampton Courts*"). 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 approach adopted by the CRB allows the ALJ to reduce hours and hourly rate on the basis of "reasonableness" and "far in excess of what a reasonably skilled attorney in the specific area of law for similar work." *Hampton Courts, supra* at p. 1116.

In counsel for Claimant's revised fee petition, counsel seeks 17.25 hours in preparation for an *ex parte* hearing where he submitted 6 exhibits, presented one witness, and that lasted less than one hour. Counsel has been doing extensive workers' compensation for ten years at both the Federal and District of Columbia administrative levels. The number of hours charged are far in excess of what a reasonably

skilled attorney in workers' compensation would need for similar work. The hours are reduced to 10 hours, and the fee charged is reduced by \$1450.00.

On December 12, 2006, the hearing ALJ in this matter issued an Order requiring the Employer to make available to the Claimant and the ALJ all the records within 30 days. Counsel for Claimant and the hearing ALJ were served with counsel for Employer's response on January 10, 2007. Counsel for Claimant responded in 5 pages on January 18, 2006. Counsel seeks 8.75 hours for the preparation of this document when the same documents were received on January 10, 2007 that were received on October 10, 2006, and were part of the basis for the hearing being held *ex parte*. The number of hours charged are far in excess of what a reasonably skilled attorney in workers' compensation would need for similar work. The hours are reduced to 5 hours, and the fee charged is reduced by \$750.00.

Counsel for Claimant entered into a fee agreement with Claimant that was not approved by the Mayor as required by § 1-623.27(b) (2001). The record reflects that Claimant paid counsel \$1,000.00 on February 26, 2008. The record further reflects that the official check indicates "paid in full." A fee dispute exists because both the fee agreement and a fee petition have been filed in the matter under consideration. The undersigned ALJ only has jurisdiction to decide the fee petition as prescribed in § 1-623.27(b) (2001) and the case law developed under that subsection. Counsel cannot be paid twice for the same work, and Claimant receives credit for the payment of \$1,000.00.

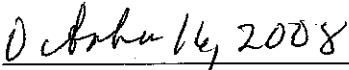
Based upon the above reductions in hours and credit for payment, counsel for Claimant is entitled to 33 hours at \$200.00 per hour, \$6,600.00 less the \$1,000.00 credits, for a total of \$5,600.00. With respect to costs, counsel for Claimant is not entitled to Claimant paying for his costs associated with the attorney's fee petition. The costs found in his original fee petition are assessed against Claimant, \$124.50.

Accordingly, counsel for Claimant's fee petition is **GRANTED, in part** and **DENIED, in part**.

IT IS SO ORDERED.



BELVA D. NEWSOME



DATE

PARTIES SERVED:

Mildred B. Stewart, Claimant
Harold Levi, Esquire

cc: Michael Perritt, AHD