

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-152

**BERTRAN LONG,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Self-Insured Employer-Petitioner.**

Appeal from an August 20, 2015 Amended Order Awarding Attorney's Fee
by Administrative Law Judge Nata K. Brown
AHD No. PBL-08-087B, DCP No. 30091266863-0001

(Decided March 4, 2016)

Harold L. Levi for Claimant
Milena Mikailova for Employer

Before LINDA F. JORY, HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER AFFIRMING ATTORNEY'S FEE AWARD

This case is before the Compensation Review Board ("CRB") on the Self-Insured Employer's Application for Review ("AFR") of the August 20, 2015 Amended Order Awarding Attorney's Fee (Order) to be paid by the District of Columbia Department of Corrections (Employer). Because we find the entry of the Order was in accordance with the law, we AFFIRM it.

The underlying facts of Bertran Long's (Claimant) claim are not disputed, nor are they at issue now. Employer terminated Claimant's wage loss and medical benefits on January 7, 2012. Claimant requested a formal hearing after which an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES) issued the initial Compensation Order (CO) which reinstated Claimant's benefits, retroactively and prospectively. The CO held, *inter alia*, that Employer failed to meet its burden of proof to support the termination of Claimant's benefits. On November 12, 2013, the CRB issued a Decision and Order (DO) affirming the CO. Employer appealed the DO to the District of

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Columbia Court of Appeals (DCCA), which held that the CRB erred in upholding the application of the treating physician preference. The DCCA remanded the matter to the CRB which in turn vacated the CO and remanded the matter to AHD.

On June 9, 2015, AHD issued a Compensation Order on Remand (COR) which once again ordered the restoration of Claimant's wage loss and medical benefits, this time without consideration of the repealed treating physician preference. Relying on the DCCA's unpublished Order in *Middledorf-Kelly v. DOES*, DCCA No. 11-AA-1417, (April 29, 2015), Counsel included in his AHD fee petition the time he had spent on the DCCA matter.

On August 20, 2015, the ALJ awarded Counsel legal fees of \$19,140.00 in accordance with D.C. Code § 1-623.27(b)(1). Employer filed an Application for Review asserting that the plain meaning of § 1-623.27(e)(1) mandates that AHD only grant Counsel attorney's fees for legal services performed during proceedings before the AHD.

ANALYSIS

In our review of an appeal of an Order from the AHD which is not based upon an evidentiary record, the Board must affirm the Order 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 § 51.03 (2001).

In the case at bar, the ALJ entered an Order requiring Employer to pay Claimant's counsel an attorney's fee in the amount of \$19,140.00 representing 79.75 hours of legal services at an hourly rate of \$240.00. Twenty-four hours and fifteen minutes of the hours presented were for legal services provided to Claimant from December 13, 2013 to August 25, 2014 while the CO was on appeal to the DCCA.

Employer asserts:

Because D.C. Official Code § 1-623.27(e)(1) precluded ALJ Brown from granting attorney's fees for work done before a different tribunal, she did not act in accordance with the law when she granted Counsel a fee award based on 24.25 hours of legal services performed before the DCCA.

Moreover, even if it was within OHA's jurisdiction to award Counsel's attorney fees for work done before the DCCA, Claimant was still not entitled to these attorney's fees because he did not successfully prosecute his claim at the DCCA.

Employer's Brief at 4.

We disagree with Employer on both counts.

An award of an attorney's fee against employer is authorized upon the successful prosecution of a claim before AHD or as a result of a subsequent court appeal. D.C. Code § 1-623.27(b)(2) provides:

If a person utilizes the services of an attorney-at-law in the successful prosecution of his or her claim under § 1-623.24(b) *or before any court for review of any*

actions, award, order or decisions, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee . . . which fee award shall be paid directly by the Mayor or his or her designee to the attorney for the claimant. . . .

(emphasis added).

D.C. Code § 1-623.27(b)(1), defines what is meant by the "successful prosecution" of a claim:

For the purposes of this subsection, the term 'successful prosecution' means obtaining an award of compensation that exceeds the amount that was previously awarded, offered or determined. The term 'successful prosecution' includes a reinstatement or partial reinstatement of benefits which are reduced or terminated.

Prior to the issuance of the ALJ's Amended Attorney's Fee Order, the CRB addressed the term 'successful prosecution' in its detailed decision in *Gruenwald v. D.C. Housing Authority*. CRB No. 15-128, (October 1, 2016) (*Gruenwald*):

The CRB finds that the determination as to whether there has been a successful prosecution is a determination that is made when all appeals of the claim before the ALJ have been concluded. When that determination is made, a fee may be awarded for all adjudicatory levels.

We agree with, and adopt as our own, the holding of the United States Department of Labor:

In general, where there has been a successful prosecution of the claim, a claimant's attorney is entitled to compensation for all necessary work performed. Counsel is entitled to fees for all services rendered claimant at each level of the adjudication process, even if unsuccessful at a particular level, so long as counsel is ultimately successful in prosecuting a claim. However, where there has not been a successful prosecution, counsel is not entitled to a fee.

Clark v. Director, Office of Workers' Compensation Programs, 9 BLR 1-211 (1986),

The CRB acknowledges that our decision represents a departure from prior authority as set forth in *Atkins v. D.C. Department of Corrections, supra*, [CRB 15-052, (September 11, 2015)] and *Lyles v. D.C. Department of Mental Health*, CRB No. 11-099(A) (February 13, 2013).

We have considered the matter further, and have come to the conclusion that deciding whether there has been a "successful prosecution" must take into account the final outcome of a claim, not the result of litigation at any given stage prior to the final determination.

Were it otherwise, there would be the illogical situation where a claimant's attorney would be denied an attorney's fee when the claim for benefits was denied at both AHD and the CRB, but the denial of benefits was ultimately reversed by the District of Columbia Court of Appeals. Similarly, under the prior authority, an

attorney would be awarded a fee if a claimant prevails at AHD but the award of benefits is ultimately reversed by the CRB and the reversal is upheld by the Court of Appeals. The decision today avoids these incongruous outcomes.

Gruenwald at 4.

As neither party has indicated that the COR was appealed, the matter became final with the issuance of the COR and based on the award, Claimant achieved successful prosecution with the issuance of the COR.

As to whether AHD can award fees for work performed at the DCCA level, we note that the public sector regulations do not specifically state that only fees for work performed at the hearings level may be approved and awarded at the AHD level, as the private sector regulations purport to do. *See* DCMR § 7-224.8. However, as Claimant has stated repeatedly in his opposing Brief, the DCCA has specifically addressed and explained the rationale for the premise that it is not an abuse of discretion for an ALJ to award an attorney fee for work performed while the case at issue is on appeal to the DCCA or in the Court's words "...we think it desirable to review our precedents in order to identify the preferred method for presenting appellate fee petitions". *See District of Columbia Metropolitan Police Department v. Stanley*, 951 A.2d 65 (D.C. 2008) (*Stanley*).

The DCCA ultimately reached the conclusion that:

... we now hold that in cases where a party seeks to recover statutorily authorized attorney's fees for work completed on an appeal to this court, the request normally should be submitted to the trial court in which the proceeding arose.

Stanley at 68.

The Court explained:

Often, this court has denied a request for appellate attorney's fees without comment. In other cases, this court (or its predecessor) has either remanded the attorney's fee petition for the trial court to consider, or has weighed the merits of the petition itself when the panel determined it was 'best situated to appraise the worth of counsel's services in providing assistance in the salient decision making.' Recently, in *In re Estate of Green*, we held that the Superior Court had erred in concluding it lacked jurisdiction over a special master's fee petition for work done on appeal because, 'reviewing requests for attorney's fees is . . . a quintessential function of the trial court.' This echoes one of our predecessors that chose to 'place the responsibility on the trial court where the work begins and ends and the value of the entire service can be best estimated after it has been completed.' This rationale has also been approved by the United States Supreme Court and a majority of the federal circuit courts of appeal, including that of this circuit, which have concluded that fee petitions for work on appeal should generally be decided by the trial court.

Stanley at 66-67.

We conclude, pursuant to the DCCA holding in *Stanley*, that the ALJ did not abuse her discretion in awarding fees for work performed at the DCCA level and her award is in accordance with the law.

CONCLUSION

The August 20, 2015 Amended Order Awarding Attorney's Fee is **AFFIRMED**.

So ordered.