

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-098(A)(3)

In Re: Application for Approval of an Attorney's Fee Assessment

**CONSTANCE WARE,
Claimant**

v.

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

AHD No. PBL 96-083E, DCP No. 761032-0001-1999-0003

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 OCT 8 PM 1 26

(Issued October 8, 2015)

Harold Levi for the Claimant
Erin Adam Huang for the Employer

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

HEATHER C. LESLIE for the Compensation Review Board.

ORDER DENYING RECONSIDERATION

Following a Formal Hearing, an administrative law judge ("ALJ") issued a Compensation Order awarding Claimant disability benefits and payment of medical benefits. *Ware v. District of Columbia Department of Corrections*, AHD No. PBL. 96-083E, DCP No. 761032-0001-1999-0003 (August 18, 2014). Employer appealed and the Compensation Review Board ("CRB") affirmed the Compensation Order. *Ware v. District of Columbia Department of Corrections*, CRB No. 14-098, AHD No. PBL. 96-083E (December 12, 2014). Employer appealed the CRB decision to the District of Columbia Court of Appeals. Said appeal was voluntarily withdrawn and dismissed.

On June 15, 2015 Claimant's attorney filed an application for an attorney's fee, requesting the CRB assess an attorney's fee against Employer in the amount of four thousand sixty six dollars (\$4,066.00) for 16.75 hours of work, billed at \$240.00 per hour that was asserted to have been performed by Claimant's counsel in the appeal before the CRB. Claimant was also requesting

reimbursement of costs in the amount of forty-six dollars (\$46.00). The request asserted Claimant was awarded approximately \$120,000.00 in back pay and causally related medical expenses which exceed \$20,000.00.

On June 23, 2015, Claimant's counsel resubmitted the fee petition, seeking a total of \$8,986.00, of which \$4,920.00 represented time spent before of the District of Columbia Court of Appeals from March 27, 2015 through May 15, 2015.

On July 6, 2015, Employer opposed the fee request, arguing that the fee request should be denied as 1) Claimant provides no evidence of the actual benefits secured; 2) there was not a successful prosecution of a claim at the District of Columbia Court of Appeals; and, 3) Claimant is actually requesting an award in excess of 20% of the benefits secured. On July 15, 2015, Claimant replied to Employer's opposition, contesting the payment information Employer submitted.

On July 22, 2015, the CRB dismissed the fee application because of the confusion caused by the various filings. On August 3, 2015, Claimant submitted another Fee Petition with Employer opposing. On September 23, 2015, the CRB denied Claimant's request for a fee, concluding that the statute did not authorize a fee to be assessed against the Employer on August 30, 2011, relying on *Abbott v. District of Columbia Public Schools*, CRB No. 13-130, AHD No. PBL 07-065B (February 10, 2014).

On September 30, 2015, Claimant filed a motion for reconsideration, arguing

[I]n denying the Ware attorney fees, the CRB blatantly ignores that the NOD was determined to be inadequate and void for the very purpose – fixing the date of issue – that the CRB now regards it. As we show, the Order further ignores that the City Council's purpose in approving the fee authorization in 2011 was to rescind the repeal of the fee authorization which the City Council regrettably enacted for a short time in 2010. Furthermore, the CRB ignores the date in which Counsel commenced to provide legal services before the CRB and for which he seeks an award as well as the date he concluded the services for which he seeks the fee.

Claimant's Motion at 2.

Employer has not responded to the motion.

Addressing Claimant's first argument, Claimant argues that it is the "law of the case" that the Notice of Determination (NOD) is "inadequate and void" based on prior Compensation Orders and that since service of the NOD was found to be inadequate and void, the date of the NOD is now inadequate and void for purposes of the fee petition. We decline to follow this rationale.

As we indicated in our September 23, 2015 Order,

Claimant did not receive the NOD until October 2011. While the late notice tolled the deadline to file for reconsideration or a formal hearing within 30 days,

the date of the NOD remained August 30, 2011. This date becomes problematic for issuing a fee award.

Order at 2.

As the prior Compensation Order states, the August 30, 2011 NOD was not properly served upon Claimant or her representative. *Constance Ware v. D.C. Department of Corrections*, OHA/AHD No. PBL 96-083D at 4 (March 4, 2014). The ALJ concluded the inadequate notice tolled the running of the thirty day period for Claimant to seek reconsideration or a formal hearing. The ALJ directed Employer to reconsider the August 30, 2011 Notice of Intent to Terminate. The ALJ did not conclude that the substance of the NOD was void, or the issuing date of the NOD needed to be changed.

While the ALJ determined that the failure to properly serve the NOD to Claimant tolled the time to appeal the NOD, the substance of the NOD remained the same, as well as the date of the NOD, August 30, 2011. On August 30, 2011, the Comprehensive Merit Personnel Act of 1978, as amended. D.C. Code §1-623.01 *et seq.*, (the Act) did not authorize an award of attorney's fees.

Claimant further argues the CRB ignored the purpose of the Council when it effectively repealed the law disallowing for fee awards and that the law should be applied retroactively, to cover the approximately 11 months the statute did not allow for a fee award. We disagree.

Claimant relies upon *Edwards v. Lateef*, 552 A.2d 1144 (1989) in support of her contention that the statute, as amended in 2011, should be applied retroactively. In *Edwards*, the court noted, as the Claimant quotes:

The rule favoring the prospective application of legislation applies where substantive rights are affected by a change in legislation. As this court stated in *Mendes v. Johnson*, 'statutes which amend settled law of substantive rights are to be applied prospectively only unless there is a clear expression of legislative intent to the contrary.

Id.

We cannot agree there is clear legislative intent to apply the amended statute to include the prior time period when the act did not allow for attorney's fees to be awarded. Claimant does not point to us to any language otherwise. Claimant's argument fails.

As we stated previously,

The CRB in *Abbott* concluded that the determinative date which controlled whether a fee was awardable under the Act was the date of the NOD, the necessary first event which led to the adjudication of the claim. The CRB explained,

In *Dixon-Cherry v. D.C. Public Schools*, CRB No. 12-138(A), AHD No. PBL 12-173 (January 23, 2013) the CRB held that the critical event for determining the applicable Code section is the “necessary first event” that led to the adjudication:

In *Rice*, the CRB analyzed whether § 1-623.02(b)(2) [now § 1-623.27(b)(2)] was meant to apply retroactively or prospectively and what the term "successful prosecution" encompassed. The CRB held in order for a successful prosecution to have occurred, there must first have been a denial of benefits outright, or an initial award followed by a reduction or termination thereof, which is in fact the case before us. Such a decision to terminate Petitioner's benefits was the necessary first event which led to the adjudication that was ultimately successfully prosecuted.

In this case, the action taken by Employer for which the claim was filed, i.e. the necessary first event, that led to the present adjudication was the issuing of the July 14, 2011 Notice of Intent. Therefore, the law in effect on July 14, 2011 applies. On that date, the Code did not authorize a fee assessment.

Abbott at 3.

Thus, utilizing the above rationale, the determinative date in the present case is August 30, 2011, the date the NOD was issued which then started the adjudication process. On that date, the Code did not authorize a fee assessment. The CRB is without authority to make a fee award in this case. Claimant's fee request is DENIED.

Order at 3-4.

Regardless of when Counsel's services commenced, the fact remains that the determinative date for an award of attorneys' fees, the NOD, issued on August 30, 2011 occurred when the Act did not allow for attorney's fee.

The Claimant's request for reconsideration is DENIED.

So ordered.