

**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)(2)**

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

**CONSTANCE WARE,  
Claimant**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,  
Employer.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 SEP 23 AM 11 19

(Decided September 23, 2015)

Harold L. Levi for the Claimant  
Erin Adam Huang for the Employer

Before HEATHER C. LESLIE, MELISSA LIN JONES and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

**ORDER**

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. That appeal was voluntarily withdrawn and dismissed.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 this appeal before the CRB. Claimant was also requesting

reimbursement of costs in the amount of forty-six dollars (\$46.00). Counsel's application also 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. The additional \$4,920.00 represented his fee for legal services for work at 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 because 1) Claimant provided 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 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. Claimant's counsel stated:

To the extent Claimant and Counsel overestimated the TTD benefit to which the Compensation Order entitled Claimant, it is because of the factors referenced herein. Claimant and Counsel respectfully apologize and note now that the difference between \$47,896.00 (equal to the sum of the \$39,000 amount requested from OHA and the \$8,896.00 requested here) and \$20,157.50 (20% of \$100,787.47, that is, the total benefit presently realized or owing (86,834.80 + \$13,952.67 = \$100,787.47), should be payable at this time, while the \$27,738.50 remainder of the OHA fees and CRB fees (\$47,896.00-\$20,157.50=\$27,738.50), should be paid at the rate of 20 percent of future wage loss and medical benefits paid to or for the benefit of Claimant.

Claimant's reply at 3-4.

On July 22, 2015, the CRB dismissed the fee application because of the confusion caused by the various filings. Specifically,

At this point in time, because of the multiple filings each requesting a different amount to be awarded, we feel it prudent to dismiss the application for an award of an attorney's fee payable by the Employer.

Order at 4.

On August 3, 2015, Claimant submitted another Fee Petition which Employer opposed.

Prior to addressing the merits of Claimant's fee petition, a review of the administrative record reveals that after paying temporary total disability benefits for a period of time, the Employer issued a Notice of Determination on August 30, 2011, terminating benefits. 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 in considering a fee award.

In *Abbott v. District of Columbia Public Schools*, CRB No. 13-130, AHD No. PBL 07-065B (February 10, 2014)(hereinafter *Abbott*), the CRB was presented with the question of whether there was authority to award a fee because of the multiple changes in the law governing attorney's fee awards in public sector cases. As we noted:

Authority for awarding attorney's fees against the government-employer is found in D.C. Code § 1-623.27(b)(2):

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 action, award, order, or decision, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee, not to exceed 20% of the actual benefit secured, which fee award shall be paid directly by the Mayor or his or her designee to the attorney for the claimant in a lump sum within 30 days after the date of the compensation order.

The significant dates relating to D.C. Code § 1-623.27(b)(2) are:

- March 8 2007 - Effective date of amendment for fee assessment against Employer;
- September 24, 2010 - Effective date of amendment eliminating fee assessment;
- September 14, 2011 - Effective date of amendment restoring fee assessment.

The issue before the CRB is whether there is authority to award a fee assessment against Employer. In light of the changes to Code § 1-623.27(b)(2), resolution of this issue requires determining the critical date for determining the applicable Code section.

*Id.* at 2.

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. 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.

*So ordered.*