GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

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DIRECTOR

COMPENSATION REVIEW BOARD

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 NOV 23 PM 1 16

CRB No. 15-143

CONSTANCE WARE,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Employer-Petitioner

Appeal of a July 30, 2015 Order by
Administrative Law Judge Gwenlynn D'Souza.
AHD No. PBL 96-083E, DCP No. 761032-0001-1999-0003

(Decided November 23, 2015)

Andrea G. Comentale for Employer
Harold L. Levi for Claimant

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

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Employer appeals the July 30, 2015 Order which granted Claimant's counsel's request for an award of an attorney's fee of $37,080.00 to be paid by the Employer.

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 (DCCA). That appeal was voluntarily withdrawn and dismissed.

Claimant's counsel filed two fee petitions, the first on August 18, 2014 and the second on January 7, 2015 seeking an award of an attorney's fee of $39,000.00 to be paid by Employer for services performed in the successful prosecution of Claimant's case. After the DCCA dismissed the appeal and after further filings, the ALJ issued an Order Regarding Fee Petition (Order) on July 30, 2015. The ALJ stated:

> It is hereby **ORDERED** that Claimant's Counsel is awarded an attorney's fee in the amount of $37,080, which is subject to a credit for any payments made towards attorney's fees, and payable as follows. It is further **ORDERED** that Employer shall pay Claimant's counsel the attorney's fee award from 20% of the gross benefit received. It is further **ORDERED** that Employer shall pay Claimant's counsel the balance of the attorney's fee award from 20% of the gross amount of any future payment of compensation up to and until the balance of attorney fee award is paid.

Order at 5.

Employer appealed the Order on August 31, 2015 and filed its arguments on September 8, 2015.[1] On appeal, Employer argues that the ALJ miscalculated the amount of benefits Claimant received to date and an award of attorney's fees against future benefit payments in contrary to the statute.

Claimant's counsel opposed the appeal on September 11, 2015, arguing the Order is in accordance with the law and the appeal should be denied or dismissed. On November 16, 2015, Claimant filed an Addendum to Opposition to Employer's Application for Review of Order Regarding Fee Petition.

STANDARD OF REVIEW

As an initial matter, in its review of an appeal from an Order when there is no evidentiary record, the CRB must affirm said decision 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).

[1] Employer requested an extension to file is memorandum out of time, which was granted by the Chief Administrative Appeals Judge of the CRB on September 1, 2015. Claimant was directed to file any opposition by September 23, 2015.

ANALYSIS

Preliminarily, we address Claimant's filing of an addendum to his opposition on November 16, 2015. 7 DCMR § 258.8 states:

> Any response in opposition must be filed with the Clerk of the Board within fifteen (15) calendar days from the date of filing of the Application for Review.

Further, 7 DCMR § 258.10 reads:

> Within five (5) calendar days of receipt of a memorandum filed in opposition to an Application for Review, the petitioner may file a reply memorandum (original and three copies) with the Board, and serve copy of same upon the respondent. *No further submissions by the parties shall be permitted*, unless requested by the Review Panel to which the appeal is assigned or as provided under section 258.11 dealing with a cross-appeal.

(Emphasis added.)

On November 12, 2015, Claimant's counsel sent to a staff of the CRB, as an attachment to an email, an unsigned electronic document titled "Addendum to Fee Petition". On November 16, 2015, Claimant's counsel filed an identical, signed copy of the same document with the CRB. Because 7 DCMR § 257.3 expressly prohibits filings by e-mail or facsimile, the November 12, 2015 submission cannot be deemed as having been filed. Moreover, even if it were properly filed, since that document and the November 16, 2015 filed addendum were not received on or before September 23, 2015, as directed by the CRB Order of September 1, 2015, and were not requested by the Review Panel, they would not be considered.

Claimant's November 16, 2015 Addendum to Opposition to Employer's Application for Review of Order Regarding Fee Petition will not be considered as it was filed untimely and because no further submissions were requested by the Review Panel.

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 Intent to Terminate (NOI) on August 30, 2011, terminating benefits. Claimant did not receive the NOI 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 NOI 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) (*Abbott*), the CRB was presented with the same question of whether on a certain date Employer could be liable for payment of an attorneys fee due to uncertainties created by 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 NOI, 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.

We do take this time to point out that the term Notice of Determination, referred to as an NOD, and a Notice of Intent to Terminate, referred to as an NOI, are two legally different documents. In the history of the case at bar, NOD and NOI have been used interchangeably to identify the August 30, 2011 NOI. We have rectified that error now. However, this does not change the outcome of our decision as the NOI is the necessary first event which led to the present adjudication, per *Abbott*.[2]

Thus, utilizing the above rationale, the determinative date in the present case is August 30, 2011, the date the NOI was issued which then started the adjudication process. On that date, the Code did not authorize a fee assessment. As the Code did not authorize a fee assessment on that date, the Order awarding an attorney's fee to be assessed against Employer was erroneous as a matter of law.

CONCLUSION AND ORDER

The July 30, 2015 Order awarding an attorney's fee in the amount of $37,080.00 to be paid by Employer is hereby VACATED.

So ordered.

[2] Compare *Dixon-Cherry*, where the necessary first event which led to the adjudication in that case was an NOD which denied Claimant's claim.