

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-051

**GEORGE W. BARKSDALE,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT,
Employer-Petitioner.**

Appeal from a March 2, 2015 Order
by Administrative Law Judge Fred Carney, Jr.
AHD PBL No. 11-016, DCP No. 301101307895-0001

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 AUG 11 AM 11 26

(Decided August 11, 2015)

Andrea Comentale for the Employer
Richard J. Link for the Claimant

Before HEATHER C. LESLIE, MELISSA LIN JONES, 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 March 2, 2015 Order which granted Claimant's counsel's request for an award of an attorney's fee of \$1,550.00 to be paid by the Employer.

The significant dates related to the appeal are as follows:

- December 10, 2010 – Date of work accident;
- March 16, 2011 – Employer issued a Notice of Determination (NOD) denying Claimant's compensation claim;
- March 31, 2011 – Claimant filed an Application for Formal Hearing;
- September 11, 2012 – A full evidentiary hearing occurred;

- January 31, 2012 – A Compensation Order was issued granting Claimant’s request for disability and medical benefits.

The January 31, 2012 Compensation Order was not appealed. On July 2, 2012, after several filings, an Order was issued awarding Claimant’s counsel a fee of \$1,550.00 to be paid by the Employer. Employer did not pay pursuant to the Order. On or about October 15, 2013, Claimant filed a Petition for Rule to Show Cause, requesting Employer’s representative be ordered to appear to explain why the award of attorney’s fee had not been paid. An Errata Order was issued on January 16, 2014, again ordering the Employer to pay Claimant’s attorney fee in the amount of \$1,550.00 or to show good cause within thirty days why Employer had failed to pay the awarded fees. Employer, after requesting an extension of time, responded on February 28, 2014 indicating it had not received the July 2, 2012 order and further, the Act did not provide for payment of attorney’s fees on March 16, 2011 by the Employer.

A status conference was scheduled for August 22, 2014. Employer did not appear for the status conference and the March 2, 2015 Order was issued. The Order stated:

Despite Employer’s belief that the attorney fees should be paid by Claimant, no legal authority was provided to support this assertion. The relevant portion of the Act indicates that an attorney who is instrumental in the “successful prosecution” of an employee’s claim, “shall be awarded a reasonable attorney’s fee.” Such a fee “shall be paid directly by the Mayor or his/her designee...within 30 days after the date of the compensation order.” See, D.C. Code § 1-623.27 (2015). Counsel was Claimant’s attorney at the time the case was before AHD, and the professional services he rendered to Claimant did result in an award of compensation. Consequently, Employer’s argument that they have no responsibility for payment of an attorney’s fee in this case is not persuasive.

Order at 2.

On appeal, Employer argues that on March 16, 2011 the Act did not allow for a fee to be sought against the government, thus the award of an attorney’s fee is erroneous as a matter of law.

STANDARD OF REVIEW

As an initial matter, in its review of an appeal from an Order when there is no evidentiary record, the Compensation Review Board (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 & Mezones, ADMINISTRATIVE LAW § 51.03 (2001).

ANALYSIS

Due in large part to the uncertainty created by multiple changes in the law governing attorney’s fee awards in public sector cases, the CRB was presented with the same question of whether on a certain date Employer could be liable for payment of an attorneys fee, in *Abbott v. District of*

Columbia Public Schools, CRB No. 13-130, AHD No. PBL 07-065B (February 10, 2014) (*Abbott*). 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 Notice of Determination (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 [v. D.C. Dep't of Motor Vehicles]*, CRB No. 08-027, AHD No. PBL 06-104, PBL/DCP Nos. 761019-0003-2004-0002 (December 20, 2007)], 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 March 16, 2011, the date the NOD was issued which then started the adjudication process. On that date, the Code did not authorize a fee assessment. We agree with Employer the award was erroneous as a matter of law.

CONCLUSION AND ORDER

The March 2, 2015 Order awarding an attorney's fee in the amount of \$1,550.00 to be paid by Employer is hereby VACATED.

So ordered.