

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB No. 07-15

KESETE GEBREMESIH,

Claimant – Petitioner

v.

INTERPARK AND CHUBB GROUP OF INSURANCE COMPANIES,

Employer/Carrier - Respondent

Appeal from an Order of
Claims Examiner Linda May
OWC No. 589533

Jessica G. Bhagan, Esquire, for the Petitioner

Robert C. Baker, Jr., Esquire, for the Petitioner

Before LINDA F. JORY, AND FLOYD LEWIS *Administrative Appeals Judges*, and E. COOPER BROWN, *Chief Administrative Appeals Judge*.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

DECISION AND ORDER ON REMAND

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 32-1521.01 and 32-1522 (2004), 7 DCMR § 230 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005)¹.

¹Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C.

Pursuant to § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

BACKGROUND

This appeal follows the issuance by the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES) of an Order issued by OWC on October 27, 2006 which denied Petitioner's Counsel's Petition for an order awarding attorney fee against the Respondent. Specifically, the Claims Examiner found the attorney fee petition was untimely filed pursuant to the Act's regulations.

Petitioner has appealed OWC's Order contending that the denial is arbitrary, capricious unsupported by substantial evidence in the record and not in accordance with the law and should, therefore, be reversed. Respondent has not filed a response to the Application for Review.

ANALYSIS

In the review of an appeal from OWC, the Board must affirm the order under review 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, §51.93 (2001). For the reasoning set forth herein, the Board concludes herein, that the Claims Examiner's October 27, 2006 is in accordance with the law and is neither capricious nor arbitrary.

Petitioner asserts that since Respondent did not issue the final payment of Petitioner's benefits until May 3, 2006, Petitioner's September 18, 2006 fee petition was well within the 6 month period allowed by the Act. In support thereof, Petitioner asserts in his brief: that more than three months passed without payment of benefits as recommended by the claims examiner. Thereafter, the employer and insurer commenced the payment of worker's compensation benefits. Per Petitioner, Respondent argued that the fee petition was time barred by D.C.M.R. §224.7. The claimant did not receive 'full' payment of his benefits per the recommendation until May 3, 2006; therefore the time to file the fee petition did not begin to run until that date.

On May 9, 2006, the Court of Appeals in *Parrish v. DOES and Eagle Legal Services* vacated an order of the CRB in *Parrish v. Eagle Legal Services*, CRB No. 03-131, OWC No. 568017 (August 15, 2005) which affirmed a denial of an attorney fee assessment by OWC as the CRB agreed it was not timely filed. The Court of Appeals found that the CRB's affirmance was in conflict with the Director's decision in *Probey v. T.A. Beach*, Dir. Dkt. NO. 02-09A, OWC No. 269082 (July 30, 2002)(*Probey*). The Court found the CRB does not mention *Probey* nor did it provide an opinion or analysis indicating that the standard is being changed and not ignored. The Court directed the CRB to provide an analysis which "at a minimum" required an explanation of when "a claim for benefits has become final" pursuant to §224.7

The instant Panel notes *Probey* has not been cited by Petitioner in his appeal. Moreover, a case law search on Lexis has revealed that neither the Director, in subsequent decisions nor OHA or OWC has cited to *Probey* in subsequent orders involving untimely attorney fee requests. A review of *Probey* reveals that unlike the circumstances of the instant matter, there was a Compensation Order issued in *Probey* however the Director, in affirming a denial by OWC of an untimely attorney fee petition provided no analysis as to why he determined that because the employer was making ongoing weekly permanent partial disability benefits, the claim was not final and the fee petitioner was not untimely.

Pursuant to the Court's order, the CRB analyzed the Director's decision in *Probey* in an attempt to square the rationale with the language of the regulations contained at 7 DCMR §219 and concluded:

In furtherance of the express intent that the provisions of 7 DCMR §224 are to apply to "all proceedings under the Act", the language of the second proviso of section 224.7 is meant to apply in those instances where an OWC recommendation becomes a final order awarding benefits or where an order approving a settlement is issued. In either case, the claim for benefits will have been rendered "*final*" within the meaning of section 224.7, thus enabling a determination as to the actual benefits secured for purposes of assessing the total amount of legal fees to which Petitioner is entitled under D.C. Official Code § 32-1530(f).

In light of the foregoing analysis, we reject the Director's holding in Probey that permitted the filing of a petition for the award of an attorney's fee as long as awarded benefits were ongoing. We hold, instead, that the second proviso of 7 DCMR § 224.7 is not applicable where, as in the instant case, the awarded benefits are not the result of an OWC final order awarding same, or an OWC order approving a settlement.

(emphasis added) *See Parrish v. Eagle Legal Services*, CRB No. 03-131, OWC No. 568017 (February 27, 2007).

7 DCMR §224.7 states:

An application for attorney fees shall be filed within six (6) months after the compensation order is issued, or a claim for benefits has become final, or all appeals have been exhausted.

The benefits awarded the instant Petitioner were the result of an OWC order and not the result of an AHD Compensation Order, accordingly the CRB concludes the second provision of §224.7 is controlling. Pursuant to 7 DCMR §219.22, an OWC Memorandum of Informal Conference becomes final by operation of law, and thus subject to conversion to a Final Order upon the lapse of the 34 day period. Nevertheless, as the CRB acknowledged in *Gooden v. National Children's Center*, CRB No. 03-137, OWC No. 529469 (April 14, 2006, "The Memorandum only acquires

the force of law if it is either accepted by the parties, or where it is rejected by one of the parties but one party fails to timely file an AFH with the AHD”, citing *Banks v. Greater S.E. Community Hospital*, Dir. Dkt. No. 90-86, OWC NO. 198514 (Sept. 29, 1985). Thus, the Panel concludes that if the adverse party fails to reject or accept the Memorandum or OWC fails to issue a final order, the time period in which to request an attorney fee shall not begin to run. Accordingly, while Petitioner’s argument that the six month time period does not begin to run until payments have been made is rejected, the Panel concludes that the denial of an attorney fee as untimely in the instant matter is not in accordance with the law. *See Parrish, supra*.

CONCLUSION

The Memorandum of Informal Conference issued by OWC was not formally rejected, nor was an Application for Formal Hearing filed within the 34 working day period mandated by 7 DCMR §219.22 and no subsequent Final Order was issued by OWC. Accordingly, Petitioner’s claim for benefits has not become final and the Supplemental Award of Attorney’s Fee which denied Petitioner’s request for an award, as it was found to be untimely pursuant to 7 DCMR §224.7, is not in accordance with the law.

ORDER

The OWC Order of October 27, 2006 is hereby Reversed and Remanded to OWC for consideration of Petitioner's Attorney Fee Petition on its merits.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

February 28, 2007 _____
DATE