

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-193

**LARRY LEWIS,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer-Petitioner.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 MAY 4 PM 1 58

Appeal from a November 3, 2015 Order Awarding an Attorney's Fee
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 12-044A, PSWCP No. 761020-0001-1999-0039

(Decided May 4, 2016)

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

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

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This matter is an appeal of an Order Awarding an Attorney's Fee (the Order) making an attorney's fee award that was issued in the above noted case on November 3, 2015. The award was made following Claimant having prevailed at a formal hearing before an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services. That hearing resulted in the issuance of a Compensation Order on Remand (COR) on June 30, 2015 in which Respondent's claim for relief was granted.

The COR was not appealed.

On July 13, 2015, Claimant filed an amended application for attorney's fees before the ALJ in AHD, seeking an attorney's fee to be assessed against Employer. Employer filed an opposition on September 18, 2015. In that opposition, Employer raised numerous objections, but in this

appeal it raises but one: that the award of ongoing fees into the future as additional benefits become payable to Claimant pursuant to the COR, up until the amount of the fee award that was approved is paid in full, is contrary to the language of the fee statute.

On December 3, 2015, Employer timely filed an Application for Review of the November 3, 2015 Order, and Claimant filed Respondent's Opposition to Application for Review of Order Awarding an Attorney's Fee on December 7, 2015.

ANALYSIS

Employer's sole objection to the Order in this appeal is that the ALJ directed that as future benefits are paid to Claimant pursuant to the COR (which awarded continuing benefits which Employer would not have otherwise been required to pay but for the successful prosecution of the claim) until such time as the entire amount of the earned fees are paid, or until Claimant is no longer receiving benefits, is not in accordance with the fee provisions of the D.C. Code.

This issue is identical to that raised by Employer in several prior appeals, including its appeal from an attorney's fee award which the Compensation Review Board (CRB) affirmed in *Janet Hill v. D.C. Department of Mental Health*, CRB No. 15-164 (March 23, 2016)¹.

We shall repeat here what the CRB ruled in *Hill*:

Employer only takes issue with the portion of the Fee Order that awards payment of additional fees in the future as additional benefits are secured on Claimant's behalf as they become payable, until such time as the total amount of the earned fee approved has been paid. That is, Employer does not contest the approval of the number of hours expended, the hourly rate at which the fee is sought to be paid, the amount of the benefits secured to date as a result of Counsel's successful prosecution of the claim, or that that prosecution was successful under the law.

Employer's legal argument is premised solely upon the language in D.C. Code § 1-623.27(b)(2) requiring that an attorney's fee award shall be made in the form of a Compensation Order, and that it is to be paid within 30 days of that Compensation Order. Employer argues that this language limits the fee to 20% of the amount of the benefits secured as of the date of the award of the fee, because benefits paid thereafter could not possibly be paid within those 30 days.

Before discussing Claimant's response, we note that Employer is not asserting that the ALJ misapplied existing case law or precedent. Without explicitly stating it, Employer asks that we change existing law and restrict fees to 20% of benefits secured as of the date of the award of the fee.

¹ In *Hill*, Employer interposed additional objection to certain time entries for services rendered, which the ALJ ruled upon in the fee order and which the CRB addressed in the Decision and Order affirming the award. No such objections have been interposed in this case.

We note that this approach would render all awards subject to a limitation not found in the regulations or the statute -- the length of time it takes an ALJ in AHD, or a CRB review panel to dispose of a claim, an appeal or an application for an attorney's fee. A quickly issued award may lower the attorney fee to be paid, while a delayed award may increase it. There is no suggestion by Employer that the legislature intended that the amount of an attorney's fee award depend on the time it takes to consider and dispose applications for a formal hearing, for review of an award, or for an attorney's fee.

Claimant responds by relying upon a number of cases in which the CRB has enunciated the principle underlying the ongoing nature of the award.

Claimant points out that the CRB ruled in *Martin v. District of Columbia Department of Corrections*, CRB No. 08-212 (April 14, 2009), as follows:

[R]ather than limiting the attorney fee to 20% of the disability benefit award amount secured by Petitioner up to the date of the Compensation Order (the "accrued amount"), the ALJ should have additionally provided that with each future periodic payment of disability compensation paid to Petitioner an additional payment of attorney's fees be made in the amount of 20% of the periodic disability payment at that time, until such time as Petitioner's counsel had received the entire fee approved or Petitioner is no longer receiving compensation, whichever first occurs....

The ALJ's decision to cap Petitioner's attorney's fee award at a total amount not to exceed 20% of the temporary total disability benefits as of the date of the Compensation Order awarding benefits is not in accord with applicable law.

Claimant's Brief at 3, 4.

Similarly, Claimant points to our decision in *Lee v. District of Columbia General Hospital*, CRB No. 09-053 (June 29, 2009), quoting as follows:

[The] virtually identical ... attorney fee provisions of the D.C. Workers' Compensation Act ... which has been interpreted by this agency "from time immemorial" to permit "recovery of 20% of post-judgment compensation received by a claimant as a lien against future payments, up to the maximum allowable fee recovery to which the claimant's attorney is otherwise entitled. ... The Board in *Martin* similarly interpreted Section 1-623.24(g). As the CRB therein stated, "We discern nothing within the public sector act that dictates following any other course than that endorsed under the private sector act.... [A]ttorney's fee awards are to be calculated as a percentage of the entire amount of [the] benefits award received by the claimant.... In order to effectuate this

goal in situations where the total fee award exceeds the benefits secured by the claimant up to the issuance of the fee award, the ALJ is to enter an award for 20% of the actual benefits paid. Further, according to the Board's directive the ALJ is to order that employer pay counsel an amount equal to 20% of each future payment of compensation (in addition to the amount paid to the injured worker) until such time as counsel has received the entire fee approved or claimant is no longer receiving compensation, whichever comes first.

Claimant's Brief at 4.

It is the clear intent of a statute that awards attorney's fees in addition to compensation for an injury is to promote the availability of counsel to claimants. The attorney fee provisions enacted by the legislature accomplish that goal through two parameters. First, the objective value, in terms of time expended, expertise of counsel, the complexity of a case, and the amount of the outcome at stake, are considered to arrive at what the value of the attorney's services are, as a professional matter. Second, an attorney can be awarded that amount, but subject to a 20% limit of the benefits awarded. There is no reason why the 20% limit should arbitrarily be determined by how long it takes an ALJ or a CRB review panel to dispose of a claim, appeal or a fee application.

CONCLUSION AND ORDER

The Order Regarding Fee Petition is not arbitrary, capricious, or an abuse of discretion. It is in accordance with established law and is affirmed.

So ordered.

Hill, supra at 3, 4.

As was noted in *Hill*, Employer does not argue that the Order is inconsistent with established law regarding attorney fee awards. Employer has raised no new arguments in favor of its position beyond those made in *Hill*. Employer is again asking for a change of established law.

We again decline to so, for the same reasons as are enunciated in *Hill*.

CONCLUSION AND ORDER

The Order Awarding an Attorney's Fee is not arbitrary, capricious, or an abuse of discretion. It is in accordance with established law and is affirmed.

So ordered.