

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-063

RONALD KOHNHORST,  
Claimant-Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,  
Employer/Insurer-Petitioners.

Appeal from an May 8, 2014 Order Granting Attorney Fees by  
Administrative Law Judge Amelia G. Govan  
AHD No. 12-516, OWC No. 672562

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 SEP 4 PM 9 36

Mark Dho for the Petitioner  
Rebekah A. Miller for the Respondent

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

HEATHER C. LESLIE for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

On October 10, 2013, a Compensation Order (CO) was issued awarding Claimant 37% permanent partial disability to his left lower extremity. This CO was not appealed.

On January 14, 2014, Claimant's counsel filed an Application for an Attorney's Fee requesting a fee be assessed against Employer in the amount of \$18,150.00. Said fee request relied upon D.C. Code §32-1530(a). Employer opposed the Fee Application, stating the requested fee was excessive and not supported by prevailing law.

On February 14, 2014, Claimant rescinded the prior fee request and submitted an Amended Application for Attorney's Fee. Counsel stated the prior fee request "incorrectly referenced reliance upon D.C. Worker's Compensation Code §32-1530(a) and did not address the factors set forth in D.C. Municipal Regulation 224." The Amended Application requested a fee of \$16,100.00 to be paid by the Employer.

On February 21, 2014 Employer filed an opposition to the Amended Application reiterating its earlier arguments that the fee was excessive and not supported by prevailing law.

An Order to Show Cause was issued on March 6, 2014 directing Claimant's counsel "submit to AHD not only the type of work performed for Claimant before AHD and the amount of hours used to complete such work, but Counsel must indicate when the work was performed for Claimant and the hourly rate for work."

Claimant's Counsel responded to the March 6, 2014 Order on March 14, 2014. Counsel represented that the March 14, 2014 response would integrate the February 14, 2014 Amended Application along with additional information requested by the Order to Show Cause. Counsel again reiterated the January 13, 2004 Application for Attorney's Fee was rescinded.

On May 8, 2014, an Order Granting Attorney Fees was issued, awarding a fee of \$16,100.00 assessed against the Employer.

On May 16, 2014 Employer appealed the award of attorney fees. Employer argues the Order is arbitrary, capricious, and an abuse of discretion as a matter of law as the Order relied upon three different time itemizations submitted by counsel. Employer argues the different time itemizations call into question the veracity of the itemizations and that a fee of \$8,150.00 is more appropriate. Claimant opposes the appeal, arguing the May 8, 2014<sup>1</sup> order is not arbitrary or capricious, is not an abuse of discretion, and is in accordance with the law.

#### THE STANDARD OF REVIEW

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).

#### DISCUSSION AND ANALYSIS

As both parties correctly note, 7 DCMR § 244.2 outlines what factors are to be considered when awarding attorney fees.<sup>2</sup> They are:

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<sup>1</sup> In the conclusion section, Claimant refers to a May 8, 2013 Order. As the Order on appeal is May 8, 2014, we will treat any reference to an earlier order as a typographical error.

<sup>2</sup> While there was some confusion created by Claimant's first request for an attorney's fee, it is now undisputed that the determination of attorney's fees in this case is governed by D.C. Code § 32-1530(b). The statute provides:

If the employer or carrier pays or tenders payment of compensation without an award pursuant to this chapter, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the Mayor shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within 14 days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney-at-law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The

- a. The nature and complexity of the claim including the adversarial nature, if any, of the proceeding;
- b. The actual time spent on development and presentation of the case; the dollar amount of benefits obtained and the dollar amount of potential future benefits resulting from the efforts of an attorney;
- c. The reasonable and customary local charge for similar services; and
- d. The professional qualifications of the representative and the quality of representation afforded to employee.

In argument, Employer questions the veracity of the time itemizations submitted by Claimant's counsel, pointing out that each itemization differed from each other and that the fee order failed to address the discrepancies pointed out by the Employer. Specifically, Employer argues "the Fee Order's blanket acceptance of the third petition and the apparent inclusion of previously unreported billable hours is arbitrary, capricious, and an abuse of discretion." Employer's argument at 6-7.

A review of the Order shows that the ALJ acknowledged the prior filings but noted, as Claimant's counsel contends in its Opposition that the first Application and time itemization were rescinded and that the March 14, 2014 document reflected not only the February 14, 2014, Amended Application, but also additional information requested by the Order to Show Cause. These filings delineated Claimant counsel's work pursuant to 7 DCMR § 244.2. The ALJ's decision was based on Claimant's representations in the March 14, 2014 response and not a "blanket acceptance" of the prior submissions, as Employer urges.

We note that our charge is to defer to the ALJ's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law even though we may have reached another conclusion. Cases decided under the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 901 et seq. (*Longshore*)<sup>3</sup> have held that an ALJ is to be accorded broad discretion

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foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Mayor, as authorized in § 32-1507(e), and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Mayor or court in any such case, an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accordance with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

<sup>3</sup> The District of Columbia Workers Compensation Act, D.C. Code § 32-1501, *et seq.*, was taken from its predecessor the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 901 et seq. (*Longshore*). Therefore it has been consistently held that decisions construing the *Longshore* are persuasive authority in construing the Act as the Act was modeled utilizing the *Longshore Act*. See *Joyner v. D.C. Department of Employment Services*, 502 A.2d 1027 (D.C. 1986).

in the award of a reasonable attorney's fee. *See General Dynamics Corporation v. Horrigan*, 848 F.2d 321 (DC 1988), *Westerman, Inc. v NLRB*, 749 F.2d 14, 17 (6th Cir. 1984).

The ALJ took into consideration the history of the multiple filings and Claimant's March 14, 2014 Response and concluded that Claimant's counsel was entitled to the fee sought. The ALJ stated:

Counsel's argument is persuasive and she has submitted documents indicating that she worked on this case 80.5 hours at the hourly rate of \$200.00 per hour. Thus, Counsel should be paid \$16,100.00 in attorney fees for services Counsel rendered to Claimant in this case. Based on the over \$92,000.00 Claimant received as a result of Counsel's efforts, the amount requested as payment of attorney fees is less than the 20% limit the relevant statute places on such fees. Employer must make this payment.

Order at 2.

While the multiple filings reflecting different time itemizations could be a reason to deny or reduce an award, the ALJ was not persuaded. We affirm the Order Granting Attorney Fees.

**CONCLUSION AND ORDER**

The May 8, 2014 Order Granting Attorney Fees is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Heather C. Leslie  
HEATHER C. LESLIE  
*Administrative Appeals Judge*

September 4, 2014  
DATE