

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-187

**ANGELA ASHTON,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES,
Self-Insured Employer-Petitioner.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 APR 19 PM 1 17

Appeal of an October 27, 2015 Order Awarding Attorney's Fee
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 13-045, DCP No. 30081122563-0001

(Decided April 19, 2016)

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

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 MODIFYING AWARD OF ATTORNEY FEES

FACTS OF RECORD AND PROCEDURAL HISTORY

Employer appeals the October 27, 2015 Order which granted Claimant's counsel's request for an award of an attorney's fee of \$20,880.00 to be paid by the Employer.

Following a Formal Hearing, an administrative law judge ("ALJ") issued several Compensation Orders. Ultimately, and for purposes of this order, a Compensation Order on Remand was issued on August 26, 2015 which awarded Claimant disability and medical benefits. *Ashton v. District of Columbia Department of Motor Vehicles*, AHD PBL. 13-045, DCP No. 3008-1122-563-0001 (August 26, 2015).

Claimant's counsel filed a fee petition on September 11, 2015 seeking an award of an attorney's fee in the amount of \$20,880.00 to be paid by Employer for services performed in the successful prosecution of Claimant's case. Claimant's counsel requested that \$14,939.80 of the requested fee be paid upon the granting of an award, with the rest payable as future wage loss was paid. Employer opposed Claimant's fee petition.

The Administrative Law Judge (ALJ) issued an Order Awarding Attorney's Fee (the Order) on October 27, 2015 awarding Claimant "an immediate attorney fee of \$14,939.80 with the remainder of his fees, up to \$20,880.00, due and payable when and as future wage loss and medical benefits are paid or accrued for the benefit of Claimant." Order at 2.

Employer appealed the Order. On appeal, Employer argues: 1) the ALJ erred in not addressing Employer's argument that the 11.25 hours characterized as "client conferences" is insufficient in describing the nature of the services rendered and is excessive; 2) the ALJ erred in awarding fees for services performed in front of the Compensation Review Board (CRB); and, 3) the award of attorney's fees against future benefits is contrary to the plain language of the statute.

Claimant's counsel opposed the appeal, arguing the Order is in accordance with the law.

STANDARD OF REVIEW

As an initial matter, in its review of an appeal from an Order which is not based on an 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 & Mezines, ADMINISTRATIVE LAW § 51.03 (2001).

ANALYSIS

We note preliminarily that Employer does not raise any issue in this appeal concerning the amount of the "actual benefits secured" through counsel's efforts, or to counsel's entitlement to a fee in general.

Employer argues first the ALJ erred in not addressing the argument that Claimant's counsel's request for fees based on 11.25 of client conferences is excessive and unjustified. In a footnote, Employer expounds its argument, stating "Employer asserts that it is insufficient to merely write 'conference with client' and expect Employer to pay for 11.25 hours for general conferences with a client while the parties are waiting for a decision." Employer's argument at 4.

Claimant's counsel, in opposition to this argument, avers that the ALJ did address Employer's argument, relying on language in the Order. We agree with Claimant.

In the Order, the ALJ stated:

Furthermore, Attorney suggest that claimant's itemized billing statement includes unreasonable and unjustified claims for fees. With regard to this issue the CRB held:

After filing the opposition, Mr. Levi conferenced with his client and reviewed the decisions issued in this matter; ethically, an attorney would be remiss if he simply ceased working on a matter because an opposition had been filed. The CRB finds no merit to Employer's argument that Mr. Levi should not be compensated for his time spent after May 6, 2014. *Deidre Berry v. District of Columbia Department of Public Works*, CRB No. 14-049(A)(2) (March 16, 2015).

Employer argues the description of "conference with Ashton" does not sufficiently describe the nature of the service rendered. We disagree. A general definition of the word conference is "a meeting of two or more persons for discussing matters of common concern." Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/conference> (accessed April 12, 2016). Counsel met with his Client numerous times, or as many times as his client requests, to discuss her case. As we stated in *Berry, supra*, Claimant's counsel is ethically required to meet with his client. The ALJ's award of 11.25 hours for conferences with Claimant is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

Employer next argues the ALJ erred in awarding fees for services performed before the CRB. We agree. A review of the administrative file reveals that the CRB awarded an attorney's fee on December 8, 2015, in part, relying on the same time entries from July 28, 2015 through August 19, 2015. Thus, we agree with Employer that the ALJ's award based upon these 12.5 hours is duplicative and not allowed as they represented work performed before the CRB. See *Workcuff v. District of Columbia Housing Authority*, CRB No. 15-054, AHD No. PBL 12-022A, DCP No. 761001000200200006 (September 24, 2015).

Finally, we address Employers argument that an award of attorney's fee against future benefits is contrary to statute, specifically D.C. Code § 1-623.27 (b)(2). 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. We disagree with Employer's argument.

We point Employer to the following discussion in *Hill v. District of Columbia Department of Mental Health*, CRB No. 15-164 (March 23, 2016) (*Hill*) which addressed the same argument in the case sub judice:

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.

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.

Hill, supra, at 3-4. *See also Smith v. District of Columbia Dept. of Fire and Emergency Services*, CRB No. 15-183, (April 11, 2016).

We again decline to accept Employer's argument.

CONCLUSION AND ORDER

The October 27, 2015 Order awarding an attorney's fee is AFFIRMED in part and VACATED in part. That part of the award which granted an attorney fee based on work done before the CRB (12.5 hours) is VACATED. The award of an attorney fee based on the remaining work done before the ALJ (84.5 hours) is AFFIRMED, subject to the proviso that the total fee for which Employer is liable for all services rendered before AHD and CRB shall not exceed the 20% limitation set forth in D.C. Code § 1-623.24 (b)(2).

So ordered.