

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
INTERIM DIRECTOR

CRB No. 13-152

**PAULA BONAPARTE,
Claimant–Respondent,**

v.

**DISTRICT OF COLUMBIA OFFICE OF TAX AND REVENUE,
Employer–Petitioner.**

Appeal from a November 1, 2013 Order for Attorney Fees by
Administrative Law Judge Nata K. Brown
AHD No. PBL 12-047, DCP No. 30120156427-0001

Kevin J. Turner, for the Petitioner
Harold Levi, for the Respondent

Before JEFFREY P. RUSSELL, HEATHER C. LESLIE, and HENRY W. MCCOY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge* for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of The District of Columbia Office of Tax and revenue for review of a November 1, 2013 Order for Attorney Fees issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia Department of Employment Services (DOES). That Order was issued following an award of compensation issued in a Compensation Order by the ALJ on June 28, 2013, after a formal held for the purpose of determining Claimant’s entitlement to benefits under the D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, (the Public Sector Workers’ Compensation Act, or PSWCA).

BACKGROUND AND ANALYSIS¹

The facts underlying the claim for benefits under the PSWCA are not germane to this appeal, and thus will not be recited. Suffice it to say that a formal hearing was held November 15, 2012 at Respondent's request, following which a Compensation Order awarding benefits was issued on June 28, 2013. On July 25, 2013, within 30 days of the issuance of that Compensation Order, Respondent, through counsel, filed a Fee Petition with the ALJ in AHD who issued the Compensation Order. On July 29, 2013, Petitioner filed an appeal of the Compensation Order with the CRB, along with a motion to extend time within which to file a Memorandum in support of the appeal. The appeal itself contained no specific complaints of error beyond boilerplate assertions that the Compensation Order was unsupported by substantial evidence and not in accordance with the law. The CRB granted the motion for extension of time, giving Petitioner until August 5, 2013 to file its Memorandum.

On August 14, 2013, no Memorandum having been filed by Petitioner, Respondent filed a motion to dismiss the appeal. Petitioner did not respond to said motion, and on September 26, 2013, the CRB dismissed Petitioner's Application for Review.

On November 1, 2013, the ALJ in AHD issued an Order for Attorney Fees, assessing a fee against Petitioner. On December 2, 2013, Petitioner filed an Application for Review with the CRB, contesting the validity of the Order for Attorney Fees to which Respondent filed Respondent's Opposition to Petitioner's Application for Review on December 5, 2013.

Petitioner asserts that the fee petition was "premature", because it was filed during the time within which an appeal of the Compensation Order could be filed. Petitioner argues that "it cannot be disputed that the Fee Petition was premature" and that "the ALJ did not have jurisdiction to consider its merits". Petitioner's Memorandum of Points and Authorities in Support of Petitioner's Application for Review, page 3. Respondent disagrees, arguing that the PSWCA not only permits, but requires, that a Fee Petition be filed within 30 days of the issuance of the underlying Compensation Order.

The PSWCA does not contain any provisions regarding the time within which an attorney seeking either approval of an award of an attorney's fee to be paid by the claimant or approval and award of an attorney's fee against the employer is to be filed.²

¹ Where, as here, the Order appealed to the CRB originates from a matter for which no record was produced, the CRB must affirm the Order unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See, 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW § 51.03 (2001).

² Inasmuch as neither party raises any issue with respect to whether *any* assessment of a fee is appropriate given the timing of the dates of injury, notice of denial, Application for Formal Hearing, or otherwise, and the changing provisions of D.C. Code § 1-623.27(b)(2), we assume that this case presents no such question. See, *Abbott v. D.C. Public Schools*, CRB No. 13-130, AHD No. PBL 07-065B, DCP No. 984800 0667-0001 (February 10, 2014), for a succinct summary of the effective dates of the various changes in the attorney fee provisions.

Neither does the PSWCA contain any provisions providing for the filing of an opposition to a fee petition, either by a claimant where the award is sought to be assessed against the claimant, or the employer where the award is sought to be assessed against the employer.

The regulations governing the PSWCA, however, do provide that “Claims for representation of a claimant shall be submitted in writing to the ALJ, if a hearing has been requested, within 30 days of the issuance of a decision under subsection 130.12. “ 7 DCMR § 132.1.

7 DCMR 130, including § 130.12, governs the hearing process before DOES ALJs. Section 130.12 provides that, following a formal hearing, “the ALJ shall then issue an order to reverse, modify, affirm or remand a determination rendered by the claims examiner”. Thus, under the regulations, a claim for an attorney’s fee must be filed within 30 days of the *issuance* of a Compensation Order. There is no provision either permitting or requiring the extension of that time period. There is no regulatory or statutory provision permitting or requiring that the fee petition be filed upon the expiration of the time for filing an appeal, nor is there any provision in the PSWCA or the regulations permitting or requiring that the time for filing a request for an attorney’s fee be made only after the Compensation Order becomes final.

However, where a fee is sought to be assessed against the employer following the “successful prosecution of a claim” that has been denied initially by the Public Sector Workers’ Compensation Program (PSWCP), but granted ultimately by an ALJ following a formal hearing, D.C. Code § 1-623.27 provides:

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) [the formal hearing process before an ALJ], 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 attorneys fee, not to exceed 20% of the actual benefit secured, which shall be paid directly by the Mayor or his designee to the attorney for the claimant in a lump sum within 30 days after the date of *the compensation order*. (Italics added).

This language is somewhat ambiguous, inasmuch as it refers to not one but two “compensation orders”, the first being “the award of compensation” following the formal hearing, and the second being “a compensation order” for the attorney’s fee award itself. While there is no time period set forth in which a fee petition is required to be filed, it is mandated that the fee itself be paid within 30 days of “the compensation order”. Despite the fact that the D.C. Code § 1-623.27 (c) makes acceptance of a fee that is not first approved as part of “an order” a criminal misdemeanor, the procedural details as to how such an order is obtained are largely left unstated. Obviously, to not run afoul of the law, a request for such an award of an attorney’s fee is a necessity. Since the mandate of payment of the attorneys fee award requires that it be made “within 30 days of the compensation order”, the most sensible meaning of the “the compensation order” is the separate “compensation order” awarding the fee.

Although there is no statutory requirement that an initial fee request be made at any particular time, there is a regulatory requirement that such a request be made within 30 days of the issuance

of the compensation order, as set forth above. There are no provisions in the PSWCA or the regulations specifying whether and within what time period any opposition to the fee petition must be filed, whether filed by the employer or by a claimant who might have some objection to the amount of a fee that he or she may become liable to pay.

One thing that is certain is that the regulation mandates that the initial fee petition be filed within 30 days of the issuance, not the finalization, of the compensation order which results from the formal hearing. Any natural party objecting to the imposition of a fee against him or her, as a matter of due process, must be afforded an opportunity to respond in some fashion. The award of an attorney's fee against a claimant which can become "a lien against the compensation due under an award" as provided by D.C. Code § 162.27 (e)(2), in the absence of such an opportunity to object to the amount of the award would be an undeniable violation of the person's right to due process.

In such an instance involving a natural person, an argument could be made that due process requires we impose some rationally based time period for such a response, presumably under the authority of 7 DCMR § 261.4, which provides "Where a procedural issue coming before the Board is not specifically addressed herein or by section 258, the Board may rely upon the Rules of the District of Columbia Court of Appeals, and the Rules of Civil Procedure of the D.C. Superior Court, where appropriate."

However, the same can not be said of the employer under the PSWCA, which is the Government of the District of Columbia. Unlike natural persons, it can not be said that the government has due process "rights" in the sense that a natural person does. Put another way, whatever "rights" the governmental entity that is the employer under the Act chooses to give itself are within its unfettered power to create by statute or regulation, so long as they do not infringe upon the due process rights of the natural party, the employee claimant. Inasmuch as the "rights" of the employer are prescribed by the Government of the District of Columbia, the Council of the District of Columbia has authority to establish a system whereby it may object to a fee petition if it deems such a system to be appropriate, or it can construct a system in which it, as the employer, has no "right" to respond to a fee petition. The silence of the statute and the failure of the regulations to provide for a mechanism or time frame within which such an objection can be lodged render us powerless to construct a system whereby objections may be raised "as a matter of right".

Petitioner relies upon *Hines v. WMATA*, CRB No. 07-004(A)(1) (September 11, 2013) for the proposition that "a petition for attorney fees that is filed before a compensation order becomes final should be dismissed without prejudice." Petitioner's Memorandum, page 2. However, we must point out that *Hines* was a private sector workers' compensation case and the attorney fee provisions of that act are not the same as the provisions of the Act governing this case. Specifically, unlike the Act and regulations applicable here, private sector attorney fee petitions are governed by 7 DCMR § 200 *et seq.*, including § 224.7, which provides "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". There is no such corresponding provision in the regulations governing the PSWCA.

Petitioner also relies upon *Abbott v. District of Columbia Public Schools*, CRB No. 12-066, AHD PBL 07-065B (May 30, 2012) for the proposition that “it cannot be disputed that the Fee Petition was premature.” However, *Abbott* vacated an *award* of an attorney’s fee which had been issued while the case was pending before the CRB on appeal. It was the *award* that *Abbott* deemed premature, not the fee petition. In this case, the award was not made until after the CRB had dismissed Petitioner’s appeal, and the time to appeal that dismissal to the D.C. Court of Appeals had also expired.

That is not to say that there is any prohibition against the PSWCP filing such objections as it may have in response to a fee petition, including an opposition seeking a stay or non-prejudicial dismissal of a fee petition pending the outcome of an appeal that has been filed. What we do determine, though, is that the only statutory or regulatory time limits created by the Act as they relate to fee petitions require that a claimant’s attorney file a fee petition within 30 days of the issuance of a compensation order, and that any assessment made against the employer for such an assessment be paid within 30 days of the compensation order making the assessment.

In this case, the fee petition was filed in a timely fashion. Had the employer filed an opposition prior to the ALJ acting upon the petition, we have no doubt that the ALJ could have, in the exercise of reasonable discretion, dismissed the petition without prejudice to its being re-filed at a later date, perhaps most logically upon the award made becoming final, but we also see no reason why an ALJ would be required to have done so under the scheme as it now exists. Had an appeal been filed prior to the fee petition having been filed, it is arguable that AHD would no longer have jurisdiction over the matter. However, that is not the fact pattern that is presented here, and we decline to decide at this time whether the filing of an appeal divests AHD of jurisdiction over consideration of fee petitions in public sector cases.

While such an undefined procedure for the employer to object to a fee award against it may not be optimal, nothing in the statute or the regulations limits the speed with which an ALJ may act upon a properly filed, timely fee petition. Nothing in the statute or regulations mandates that the government/employer be given an opportunity to lodge an objection.

While we can see great benefit in regularizing the process in a more formalized and clearly defined process, the CRB is without the power to construct such a process. These are statutory and regulatory matters beyond our statutory authority.

The fee petition herein was timely filed, and the ALJ’s award is not alleged in this appeal to be otherwise out of conformity with the Act. That is, there is no argument in this appeal by Petitioner that the award exceeds statutorily established limits, either based upon the amount of the benefits said to have been obtained through counsel’s work, or is excessive for any reason.

CONCLUSION AND ORDER

The fee petition was filed in a timely fashion in accordance with the governing statute and regulations, and the award contained in the Order For Attorney Fees issued November 1, 2013 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

February 12, 2014
DATE