

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-148

**FELIX ROMERO,
Claimant-Respondent,**

v.

**ROMERO CONSTRUCTION Co. and
COMMERCE & INDUSTRY,
Employer/Insurer-Petitioner.**

Appeal from a November 14, 2014 Supplemental Award of Attorney's Fee by
Claims Examiner Cathy A. Scruggs and Supervisor Jevan T. Edwards
OWC No. 657033

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 APR 6 AM 9 14

Manuel Rivera for Claimant
Thomas G. Hagerty for Employer

Before MELISSA LIN JONES, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On December 26, 2008, Mr. Felix Romero injured his right knee when he fell from a ladder while working for Romero Construction Company ("RCC"). Following a formal hearing, an administrative law judge ("ALJ") awarded Mr. Romero temporary total disability benefits from December 26, 2008 to September 11, 2009 and 15% permanent partial disability of the right leg based upon an average weekly wage of \$1,550. *Romero v. Romero Construction, Inc.*, AHD No. 10-115, OWC No. 657033 (August 23, 2010). RCC appealed that Compensation Order, and the Compensation Review Board ("CRB") remanded the matter for reconsideration of the nature and extent of Mr. Romero's disability. *Romero v. Romero Construction, Inc.*, CRB No. 10-167, AHD No. 10-115, OWC No. 657033 (October 31, 2011). On remand, the ALJ again awarded Mr. Romero temporary total disability benefits from December 26, 2008 to September 11, 2009 and

15% permanent partial disability for his right leg. *Romero v. Romero Construction, Inc.*, AHD No. 10-115, OWC No. 657033 (November 26, 2012).

On November 14, 2014, Claims Examiner Cathy A. Scruggs recommended and Supervisor Jevan T. Edwards awarded Mr. Rivera an attorney's fee of \$10,105.90 subject to the 20% cap found at § 32-1530(f) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code § 32-1501 to 32-1545. The fee was assessed against RCC.

RCC filed an appeal asserting that the Supplemental Award of Attorney's Fee is deficient as a matter of law because the claims examiner failed to rule on RCC's objections to the fee petition:

It is clear and beyond dispute that each and every one of Petitioners' objections to the fee petition submitted by Respondent's counsel created and constituted a contested issue of fact. It is also clear and beyond dispute that the Office of Workers' Compensation was legally obligated to address and rule on each and every one of the objections raised by Petitioners because each and every objection constituted a contested issue of fact. Furthermore, it is clear and beyond dispute that the Office of Workers' Compensation failed to address and rule on each and every contested issue of fact presented as an objection to the fee petition of Respondent's counsel and "assistant." The District of Columbia Court of Appeals has held that every decision and order of the Department of Employment Services which is adverse to a party to a workers' compensation case shall be accompanied by findings of fact and conclusions of law supported by and in accordance with reliable, probative, and substantive evidence. D.C. Code §2-509(e): *Velasquez v. District of Columbia Dep't. Empl. Servs.*, 723 A.2d 401 (1999).

Memorandum of Points and Authorities in Support of Application for Review, pp. 3-4. Regarding RCC's assertion that the contents of the Supplemental Award of Attorney's Fee are "not supported by and in accordance with any reliable, probative and substantial evidence" *Id.* at p. 4 RCC specifically contends

The fundamental flaw in the Supplemental Award is that it has given this Court no basis for determining whether the conclusion of law reached by the Office of Workers' Compensation follow rationally from the findings of fact rendered by the Office of Workers' Compensation. Generalized conclusory or incomplete findings of an administrative agency will not suffice as findings of fact, and there must be a finding on each material fact necessary to support each conclusion of law. [Citation omitted.] The Supplemental Award of the Office of Workers' Compensation cannot be permitted to stand because the Office of Workers' Compensation failed to render any findings of fact on any contested issue of fact. It cannot be argued that the Office of Workers' Compensation did not have to make findings of fact because the objections raised by Petitioners were collateral or immaterial. Petitioners' objections represent the very heart and basis of their response to the Show Cause Order. The Office of Workers' Compensation's complete disregard of Petitioners' objections violated the District

of Columbia Administrative Procedure Act and was arbitrary, capricious and not in accordance with the law. Therefore, this Court should vacate the Supplemental Award of Attorney's Fee and remand this case to the Office of Workers' Compensation with the specific directive that the Office make findings of fact and conclusions of law as to each and every objection posed by Petitioners to the assessment of an attorney's fee against them, and that each finding of fact and conclusion of law be supported by and in accordance with reliable, probative and substantive evidence.

Id. at p. 5-6. For these reasons, RCC requests the CRB vacate the Supplemental Award of Attorney's Fee.

In response, Mr. Rivera argues the claims examiner resolved all of the issues of law when awarding him a fee. Mr. Rivera requests the CRB affirm the award.

RCC filed a reply. In that reply, RCC reasserts that the claims examiner failed to make findings of fact on each contested issue and insists

Respondent's mistaken classification of Petitioner's numerous objections to the Respondent's fee request as being issues of law appears to stem from his ignorance of the District of Columbia Administrative Procedure Act.

* * *

[Respondent] has failed to realize that the two step process envisioned by the D.C.A.P.A. requires any agency to make findings of fact on each and every contested issue of fact, followed by conclusions of law.

Reply Memorandum, pp. 2-3.

ISSUES ON APPEAL

1. Does the Administrative Procedure Act's requirement that written decisions in contested cases must include findings of fact and conclusions of law apply to written decisions issued by the Office of Workers' Compensation?
2. Is the November 14, 2014 Supplemental Award of Attorney's Fee arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law?

ANALYSIS¹

In support of its position that the Supplemental Award of Attorney's Fee is deficient as a matter of law, RCC asserts

The District of Columbia Court of Appeals has held that every decision and order of the Department of Employment Services which is adverse to a party to a workers' compensation case shall be accompanied by findings of fact and conclusions of law supported by and in accordance with reliable, probative, and substantive evidence. D.C. Code §2-509(e): *Velasquez v. District of Columbia Dep't. Empl. Servs.*, 723 A.2d 401 (1999).

Memorandum of Points and Authorities in Support of Application for Review, p. 4. RCC's argument is misplaced.

Section 2-509(e) of the Administrative Procedures Act states

Every decision and order adverse to a party to the case, rendered by the Mayor or an agency in a contested case, shall be in writing and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Findings of fact and conclusions of law shall be supported by and in accordance with the reliable, probative, and substantial evidence. A copy of the decision and order and accompanying findings and conclusions shall be given by the Mayor or the agency, as the case may be, to each party or to his attorney of record.

Importantly, this provision applies to contested cases which are defined as "proceeding[s] before the Mayor or any agency in which the legal rights, duties, or privileges of specific parties are required by any law (other than this subchapter), or by constitutional right, to be determined after a hearing before the Mayor or before an agency," D.C. Code § 2-502(8), but the Office of Workers' Compensation does not conduct hearings; the Office of Workers' Compensation conducts informal conferences, and at those proceedings, there is no oath administered, no testimony, no cross-examination under oath, no transcription of proceedings, and no evidence of record. Consequently, in the absence of a hearing, the APA's requirement for written decisions including findings of fact and conclusions of law does not apply to decisions issued by the Office of Workers' Compensation.

Furthermore, in its Application for Review, RCC does not include any arguments regarding particular objections that the claims examiner allegedly failed to appropriately address. In other words, on appeal, RCC has not argued legal error directly as a result of the purported deficiencies it raised before the claims examiner; RCC restricted its appeal to the legal argument that the Supplemental Award of Attorney's Fee is defective because it does not comport with the requirements of the APA, and on those grounds, the CRB finds no reason to disturb the award.

¹ Upon review of an appeal from the Office of Workers' Compensation, the Compensation Review 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 & Mezones, ADMINISTRATIVE LAW, §51.93 (2001).

Nonetheless, the CRB cannot agree that the claims examiner did not address RCC's objections. After summarizing RCC's objections to Mr. Rivera's fee petition, Mr. Rivera's response to those objections, and the applicable law, the claims examiner wrote:

Thus, having carefully considered the aforementioned, I find that counsel's hourly rate of \$240.00, is reasonable since it appears counsel has over 20 years of experience in workers [sic] compensation. (*See Policy Directive Clarifying the Award of Attorney Fees in District of Columbia Workers' Compensation Cases*)

Further, given the nature, complexity[,] adversarial nature, actual time spent on the development of the claim and considering the customary local charges and the dollar amount of benefits obtained for the claimant, I find counsel's hourly rate conforms to the policy directives and the billable hours listed on the Statement of Account and is reasonable and consistent with the guidelines set forth in Section 224.2 of the DCMR.

Accordingly, having considered counsel's years of experience, along with the time expended on the claim (hours) and the benefits secured in this instant matter, I find that counsel is entitled to an attorney's fee of \$10,105.90 at an hourly rate of \$240.00. Said fee has been reduced to conform with the provisions under Section 32-1530(f) of the D.C. Workers [sic] Compensation Statute. (Said fee is assessed against the employer/carrier and will continue to be subject to twenty percent (20%) of the actual benefits secured by counsel).

Because the claims examiner provided sufficient explanation for the CRB to review the reasoning of the decision, the CRB cannot agree that the Supplemental Award of Attorney's Fee is not based upon a fair and proper application of the law.

CONCLUSION AND ORDER

The Administrative Procedure Act's requirement that written decisions in contested cases must include findings of fact and conclusions of law does not apply to decisions issued by the Office of Workers' Compensation. The November 24, 2014 Supplemental Award of Attorney's Fee is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; therefore, it is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES
Administrative Appeals Judge

April 6, 2015
DATE