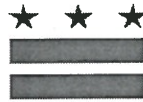


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-127(A)(1)

HENRY GLOVER,
Claimant,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer.

On Consideration of Claimant's Amended and Resubmitted Fee Petition
AHD No. PBL 12-015, DCP No. 30101082290-0001

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 NOV 2 PM 1 58

(Issued November 2, 2016)

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

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

JEFFREY P. RUSSELL for the Compensation Review Board.

ORDER GRANTING AN ATTORNEY'S FEE AWARD

The matter pending before the Compensation Review Board ("CRB") is an application for an award of an attorney's fee, styled as Claimant's Amended and Resubmitted Fee Petition (the "Application").

A formal hearing was held before an administrative law judge ("ALJ") on November 19, 2012, and a Compensation Order was issued by the ALJ on June 24, 2014 (the "CO"). In the CO, the ALJ entered an award for right shoulder surgery and reinstated Claimant's temporary total disability benefits from February 10, 2012 to the date of the hearing and continuing.

Employer appealed the awarded medical and indemnity benefits to the Compensation Review Board ("CRB"). Claimant appealed the ALJ's failure to award an attorney's fee and costs to the CRB.

In a Decision and Remand Order (the “DRO”), the CRB vacated the ALJ’s decision authorizing surgery because it was not in accordance with the law, inasmuch as Employer had not issued a Notice of Determination denying that surgery. The CRB vacated the decision reinstating benefits because it was not supported by substantial evidence in the record. The CRB affirmed the ALJ’s failure to award an attorney fee. The matter was remanded to AHD for further consideration of the claim under the protocol established in *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004 (November 12, 2014).

On July 14, 2015, the ALJ issued a Compensation Order on Remand (the “COR”) in which the ALJ granted Claimant’s claim for reinstatement of temporary total disability benefits, finding that the first two prongs of *Mahoney* had been met, and that Employer failed to meet its burden under the third prong.

Employer appealed the COR to the CRB by filing Employer’s Application for Review and memorandum of points and authorities in support thereof.

At this point, Claimant’s prior counsel, Johnnie L. Johnson, III, was replaced by Claimant’s current counsel, who filed Claimant’s Opposition to Employer’s Application for Review and memorandum of points and authorities in support thereof.

The CRB affirmed the COR, which Employer appealed to the District of Columbia Court of Appeals (“DCCA”).

Thereafter, Employer filed a Consent Motion to voluntarily dismiss the appeal to the DCCA, which the court granted, remanding the matter to the District of Columbia Department of Employment Services (“DOES”).

On August 3, 2016, Claimant, by Counsel, filed the Application, in which counsel sought an award of attorney’s fees for work he performed in connection with his representation of Claimant before the CRB and the DCCA. The Application avers that Claimant has obtained a lump sum of \$58,050.63 in back pay and ongoing temporary total disability benefits (“TTD”) in the amount of \$1,291.00 biweekly. Counsel also avers that, as of the date of the Application, an additional payment for back pay in the amount of \$23,238.00 was also due but not yet paid.

In the Application, Counsel avers that between July 30, 2015 and January 15, 2016, he expended 31 hours providing representation to Claimant before the CRB, and that between January 28, 2016, he expended an additional 13.75 hours providing representation to Claimant before the DCCA. Counsel requests an award based upon \$240.00 per hour for this work in the amount of \$7,440.0 for work before the CRB and \$3,300.00 for work before the DCCA, or a total fee of \$10,740.00, to be assessed against Employer.

On August 15, 2016, the CRB issued an Order to Show Cause (“OSC”) directing Employer to file any objection it has to the requests as set forth in the Application, including any objection or dispute concerning the amount of benefits obtained through counsel’s efforts, the amount of time for which an assessment was sought to be based, and/or the hourly rate at which the fee calculation was requested be made.

On August 22, 2016, Employer filed Employer's Response to Order to Show Cause Re: August 3, 2016 Amended and Resubmitted Fee Application ("Employer's Response"). Employer raises no objection to any aspect of the fee assessment sought for work performed before the CRB. Further, Employer raises no objection to the hourly rate sought to be used in calculating any fee award that is made.

Employer raises three objections to the portion of the award concerning work performed before the DCCA.

First, Employer argues that "Claimant did not secure any benefits before the Court of Appeals", reasoning as follows:

D.C. Code § 1-623.27(b)(2) authorizes the assessment of a reasonable attorney's fee against Employer/the Public Sector Workers' Compensation Program when there has been a "successful prosecution" of a claim. "Successful prosecution" of a claim is defined as:

Obtaining an award of compensation that exceeds the amount that was previously awarded, offered, or determined. The term 'successful prosecution' includes a reinstatement or partial reinstatement of benefits which are reduced or terminated.

D.C. Code § 1-623.27 (b)(1) (2008 Pocket Part). Based on this definition, an attorney's fee against the government may only be assessed "when there has been an order for an award of compensation." *Carry v. Department of Mental Health*, CRB No. 10-066 [...] (March 19, 2010) citing *Watson v. D.C. Department of Public Works*, CRB No. 09-019 [...] (February 9, 2009).

No such order affirming the award of compensation by the January 15, 2016 Decision and Order was issued by the DCCA in the instant case. Because the Employer voluntarily withdrew the appeal [...] resulting in the dismissal of the appeal, this is not a "successful prosecution of a claim" as contemplated by D.C. Code § 1-623.27 (b)(1). At the time of the Employer's voluntary withdrawal, no parties had filed any briefs yet. Further, the dismissal was not procured through any efforts of Claimant's Counsel. While work may have been done by Counsel, the statute focuses on a "successful prosecution" before fees may be assessed. Accordingly, based upon the procedural posture of this case, this tribunal does not have jurisdiction to award attorney's fees for work performed before the DCCA, as the prerequisite "award of compensation" cannot be satisfied.

Employer's Response at 2 – 3.

Claimant responded to this argument by filing a Reply to Employer's Response to Order to Show Cause Re: August 3, 2016 Amended and Resubmitted Fee Application ("Claimant's Reply"). In it, he urges that we reject Employer's argument, asserting as follows:

Employer's argument that because it dismissed its appeal there was no successful prosecution of Glover's claim at the DCCA level is simply wrong. Clearly there was a successful prosecution of that claim at the CRB level which Employer concedes. The dismissal of the Employer's DCCA appeal affirmed, confirmed and finalized the successful prosecution award and does not diminish the award of compensation by OHA, as affirmed by [sic] CRB which successfully restored Glover's benefits.

In the context of attorney's fees the CRB stated in Gruenwald v. District of Columbia Housing Authority, CRB No. 15-128 [...] (October 1, 2015),

"The CRB finds that the determination as to whether there has been a successful prosecution is a determination that is made when all appeals of the claim before the ALJ have been concluded. When that determination is made, a fee may be awarded at all adjudicatory levels.

We agree with, and adopt as our own, the holding of the United States Department of Labor:

'In general, where there has been a successful prosecution of the claim, a claimant's attorney is entitled to compensation for all necessary work performed. Counsel is entitled to fees for all services rendered claimant at each level of the adjudication process, even if unsuccessful at a particular level, so long as counsel is ultimately successful in prosecuting a claim. However, where there has not been a successful prosecution, counsel is not entitled to a fee. *Clark v. Director, Office of Workers' Compensation Programs*, 9 BLR 1-211 (1986).'"

The CRB further stated—

"We have considered the matter further, and have come to the conclusion that deciding whether there has been a 'successful prosecution' must take into account the final outcome of a claim, not the result of litigation at any given stage prior to the final determination."

Claimant's Reply at 4.

In essence, Employer's argument is that because it threw in the towel before the DCCA decided the merits of the appeal, Claimant's counsel should not be compensated at all for acting to protect his client's interests prior to the concession of the case by Employer.

We disagree with this view. An attorney is obligated to look after a client's best interests, and that does not change retroactively when it turns out that the other side eventually concedes the claim. We reject Employer's first argument, and agree with Claimant's Reply.

Employer's second objection is that "The number of hours billed for the DCCA appeal is not reasonable." Employer's Response at 3.

The thrust of Employer's argument is not that the time billed is unreasonable for the services listed, but rather that, because the services related to preparatory work on Claimant's to-be-filed opposition brief, which was ultimately rendered unnecessary, it should not be compensated. In Employer's words:

While counsel may have chosen to begin work on his opposition brief to a brief that had not yet been filed, he certainly did not necessarily have to begin work on such an opposition. Further, as noted above, any such preliminary work had no effect on the dismissal of Employer's appeal as Employer chose to voluntarily dismiss its appeal.

Employer's Response at 4.

Again, we must reject Employer's argument. It is not for us or Employer to decide when an attorney chooses to commence work on a legal matter that is pending and upon which the attorney must exercise professional judgment regarding how best to allocate time and resources, taking into account many factors into which we will not delve, such as the pendency of other matters for other clients, the availability of time to devote to a matter which may be available later, or other legal and practical considerations.

Employer's final objection is to a specific time entry for a half an hour billed on July 12, 2016 for a "conference and correspondence with J. Johnson." Again, in Employer's words:

J. Johnson is Johnnie Louis Johnson, III, Claimant's former counsel who was discharged in July of 2015 [sic] when current counsel was retained. Any conference and/or correspondence with Claimant's former counsel had absolutely nothing to do with the DCCA appeal that Employer moved to voluntarily dismiss on July 11, 2015 [sic].

Employer's Response at 4.¹

Again, we must reject Employer's argument. It is apparent from the timing of that entry that the call was prompted by the dismissal motion that was filed the day prior. Not all actions that are required of an attorney are necessarily related directly to dealing with a court, one's client, witnesses or opposing counsel. Cases often have ancillary matters that nonetheless require an attorney to expend time to see to it that the client's interests are protected. In this case, we need not speculate as to the details of relationship between Claimant, his prior attorney, or his current counsel, except to note that matters pertaining to legal fees, releases from claims on files or for

¹ Employer's Brief misstates the year of the motion. It was filed July 11, 2016, not 2015.

services rendered by a former attorney cannot be ignored, and resolving them are, as a legal and practical matter, all part of prosecuting a claim. Accordingly, the time is allowed.

Claimant's counsel spent 44.74 hours in the successful prosecution of this claim. At a rate of \$240.00 an hour, the total is \$10,740.00, an amount less than 20% of the benefits secured. Thus, it hereby is ordered that, subject to the condition that the total attorney fee awarded and payable for all work performed before the Office of Hearings and Adjudication's Administrative Hearings Division, CRB and the DCCA is limited to and does not exceed twenty percent (20%) of the actual benefits secured as a result of counsel's efforts with respect to the issues arising from AHD No. PBL 12-015A and DCP No. 30101082290-0001, an award of a reasonable attorney's fee in the amount of \$10,740.00 is assessed against Employer and is payable directly to Claimant's counsel, Harold L. Levi.

So ordered.