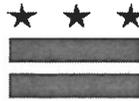


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-183

**MARIE SMITH,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF FIRE AND EMERGENCY SERVICES,
Employer/Insurer-Petitioner.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 APR 11 PM 1 34

Appeal from an October 23, 2015 Order Awarding an Attorney’s Fee
by Administrative Law Judge Gwendolyn D’Souza
AHD No. PBL 15-011, DCP No. 0468-WC-15-0500765

(Decided April 11, 2016)

Harold L. Levi for Claimant
Andrea G. Comentale and Milena Mikailova¹ for Employer

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

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This matter is an appeal of an Amended Order Regarding Fee Petition (the Amended Order) making an attorney’s fee award² that was issued in the above noted case on October 23, 2015. The Order was made following Claimant’s having prevailed at a formal hearing before an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services. That hearing resulted in the issuance of a Compensation

¹ Ms. Mikailova is appearing pursuant to Rule 49(c) of the District of Columbia Court of Appeals.

² An “Order Regarding Fee Petition” was issued October 9, 2015 in connection with the same fee petition at issue here. Comparison of that order to the amended order under review reveals that the ALJ inadvertently failed to make an award based upon the benefits accrued as of the date of the fee petition, and the amended order corrects that omission. No issue has been presented in this appeal concerning that procedural anomaly.

Order (CO) on August 18, 2015, in which Respondent's claim for relief was granted. The CO was not appealed.

On September 11, 2015, Claimant filed an Application for Attorney's Fees to be assessed against Employer. Employer filed an opposition on October 5, 2015. In that opposition, Employer raised one objection, that the award of ongoing fees into the future as additional benefits become payable to Claimant pursuant to the CO, up until the amount of the fee amount that was approved is paid in full, is contrary to the language of the fee statute.

Employer filed Petitioner's Application for Review of Amended Order on November 23, 2015, to which Claimant filed an Opposition on December 2, 2015.

ANALYSIS

Employer's sole objection to the Amended Order is that, in addition to awarding a fee in the amount of 20% of benefits accrued as of the date of the Amended Order, the ALJ further directed that as future benefits are paid to Claimant pursuant to the CO (which awarded continuing benefits which Employer would not have otherwise been required to pay but for the successful prosecution of the claim) until such time as the entire amount of the earned fees are paid, or until Claimant is no longer receiving benefits, is not in accordance with the fee provisions of the Act.

This issue is identical to that raised by Employer in its appeal from an attorney's fee award which we affirmed in *Janet Hill v. D.C. Department of Mental Health*, CRB No. 15-164 (March 23, 2016).³ Therefore, we shall merely repeat here what we ruled in *Hill*:

In a fee order which we feel compelled to laud as a model of clarity, conformance to the regulations and statutes governing fee awards, the ALJ assessed a fee against Employer.

The ALJ considered these objections, and reduced the number of allowable hours billed by 3.75 hours, and determined that Claimant's Counsel was entitled to a fee based upon 64.50 hours, at an hourly rate of \$240.00 per hour. The resultant amount of attorney's fees earned based upon the hours approved and the hourly rate applied is \$19,029.82.

The ALJ further determined that the amount of the benefits secured as a result of Claimant's Counsel's efforts accrued as of the date of the fee award was \$43,270.01. 20% of the accrued benefits secured is therefore \$8,654.00.

The operative portion of the fee award reads as follows:

Having given due and sufficient consideration to Counsel's Petition for Attorney's Fee [and] Employer/Insurer's objections thereto, as well as the Act, its implementing regulations and applicable case law, the

³ In *Hill*, Employer interposed additional objection to certain time entries for services rendered, which the ALJ ruled upon in the fee order and which the CRB addressed in the Decision and Order affirming the award. No such objections have been interposed in this case.

January 20, 2015 Fee Petition is hereby **GRANTED** in part and **DENIED IN PART**. It is hereby **ORDERED** that Claimant's counsel is awarded an attorney's fee in the amount of \$15,480.00, which is payable as follows. It is further **ORDERED** that Employer shall pay Claimant's counsel the attorney's from 20% of the gross benefit received. It is further **ORDERED** that Employer shall pay Claimant's counsel the balance of the attorney's fee award from 20% of the gross amount of any future payment of compensation up to and until the balance of [the attorney fee award is paid].

IT IS SO ORDERED.

Order Regarding Fee Petition, at 4 – 5.

Employer filed an Application for Review and memorandum of points and authorities in support thereof (Employer's Brief) with the Compensation Review Board, asserting that the portion of the fee order awarding ongoing attorney's fees as additional benefits are secured by Claimant is contrary to law and ought to be vacated.

Claimant file an Opposition to Application for Review and memorandum of points and authorities in support thereof, asserting that the award is in all respects supported by the law and regulations, is within the proper discretion of the ALJ, is not arbitrary or capricious, and should be affirmed.

Because the award is in accordance with established precedent concerning payment of additional attorney's fees as additional benefits secured through an attorney's efforts in the successful prosecution of a claim, we affirm the fee award.

ANALYSIS

As an initial matter, in our review of an appeal of an Order from the Administrative Hearings Division which is not based upon an evidentiary record, the Board 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).

Employer takes no issue with any aspect of the fee award except the portion awarding payment of additional fees in the future as additional benefits are secured on Claimant's behalf as they become payable, until such time as the total amount of the earned fee approved has been paid. That is, Employer does not contest the approval of the number of hours expended, the hourly rate at which the fee is sought to be paid, the amount of the benefits secured to date as a result of Counsel's successful prosecution of the claim, or that that prosecution was indeed successful under the law.

Employer's legal argument is premised solely upon the language in D.C. Code § 1-623.27(b)(2) requiring that an attorney's fee award shall be made in the form of a Compensation Order, and that it be paid within 30 days of that Compensation Order. 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.

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 also 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 by extrapolation, the length of time it takes a CRB panel to consider and rule upon an award for services rendered in connection with a successful appeal) to consider and rule upon an application and opposition. A quickly issued award would lower the amount paid, while a delayed award would increase it. There is no suggestion by Employer that the legislature intended that attorney's fee awards be based at all upon the length of time it takes an ALJ consider and act upon the application.

Turning to Claimant's response, reliance is placed upon a number of cases in which the CRB has enunciated the principle underlying the award in this case.

For example, 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 obvious 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 in what can be a daunting battle against a large, bureaucratic organization. The system designed by the legislature to accomplish that goal has essentially two parameters: 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. Then, the attorney is awarded that amount, but subject to a 20% limit. There is no conceptual reason why the 20% limit should arbitrarily be determined by how long it takes an ALJ to reach either the initial decision or a decision on a fee application.

To rule otherwise would discourage and undermine the availability of legal counsel to injured workers, a path we decline to endorse.

CONCLUSION AND ORDER

The Order Regarding Fee Petition is not arbitrary, capricious, or an abuse of discretion. It is in accordance with established law and is affirmed.

Hill, supra at 2 - 5.

As we noted in *Hill*, Employer does not argue that the Amended Order is inconsistent with established law regarding attorney fee awards. Employer has raised no new arguments in favor of its position beyond those made in *Hill*. Employer is again asking us to change established law.

We again decline to do so, for the same reasons as are enunciated in *Hill*.

CONCLUSION AND ORDER

The Amended Order Regarding Fee Petition is not arbitrary, capricious, or an abuse of discretion. It is in accordance with established law and is **AFFIRMED**.

So ordered.