

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-123 (A)

**REGINA MICHAEL,
Claimant – Petitioner,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF BEHAVIORAL HEALTH,
Employer– Respondent.**

On Consideration of Claimant’s Application for
an Assessment of an Award of Attorney’s Fees
AHD No. PBL 15-009, DCP No. 30101082290-001

(Decided March 8, 2016)

Harold L. Levi for Claimant
Andrea G. Comentale and Andrew V. Morris, III for Employer

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

JEFFREY P. RUSSELL for the Compensation Review Board.

ORDER AWARDING AN ATTORNEY’S FEE

On January 21, 2016, Claimant’s counsel filed a fee application requesting the Compensation Review Board (CRB) assess against the Employer an attorney’s fee of \$2,940.00, for 12.25 hours of work, asserted to have been performed by before the CRB in the appeal in this matter. The fee award is requested to be paid at the hourly rate of \$240.00.

Claimant’s counsel’s fee application contained no statement of the amount of benefits actually secured.

An Order to Show Cause (OSC) was issued January 27, 2016. The OSC contained the following:

Claimant’s counsel is directed to show cause why an order denying the fee application for this failure [to state the amount of benefits actually secured by Claimant though the efforts of counsel] ought not be issued.

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Claimant's Counsel's response to this Order, if any, shall be filed with the Compensation Review Board on or before Wednesday, February 12, 2016. Failure to respond shall result in denial of the Fee Application. Upon Claimant's counsel's filing a response, Employer shall respond to this Order to Show Cause why a fee in the amount requested ought not be awarded. Failure to file a response on or before February 29, 2016 may result in the issuance of an award in the amount requested. Said response shall include any allegation that any information contained in Claimant's Counsel's response regarding the benefits secured is inaccurate and shall state the amount Employer contends is accurate.

OSC at 1.

On February 8, 2016, Claimant's counsel filed a Response to Order to Show Cause (Claimant's Response). On February 29, 2016, Employer filed Employer's Response to Order to Show Cause and Opposition to Claimant's Fee Petition (Employer's Response).

Claimant's Response states as follows:

As a result of the COR [Compensation Order on Remand issued by the administrative law judge in the Administrative Hearings Division (AHD awarding benefits pursuant to the direction of the Compensation Review Board's (CRB) remand to AHD], Claimant is entitled to back pay for the work she missed as a result of her injury as well as to payment of her causally-related medical expenses. Claimant was injured on the night of November 13, 2014. According to pay records [not attached], Claimant is entitled to wage loss benefits for 1.5 months (200 hours) at a rate of \$42.33 totaling \$6,772.80 as a result of her injury. She also is entitled to the reimbursement/restoration of \$1,970.00 of causally related medical expenses. Total wage and medical benefits secured to date as a result of the successful prosecution of this claim are \$8,742.80. Counsel claimed \$2,940.00 for legal fees in connection with the CRB proceedings which resulted in the successful prosecution of Claimant's claim. The fees Counsel claimed exceed 20% of the benefit Counsel secured for Claimant. Claimant therefore is entitled to \$1,835.99 (20% of \$8,742.80) as well as 20% of any wage loss expense should they arise in the future.

Claimant's Response at 1 – 2.

On March 7, 2016, Claimant filed a Motion For Leave to File Reply to Employer's Response to Order to Show Cause. The motion contains no statement as to why the reply ought to be allowed. Further, the motion continues an argument between the parties concerning Continuation of Pay (COP). Nothing in the record, the transcript, the original Compensation Order, the Decision and Remand Order or the Compensation Order on Remand make any reference to COP. Accordingly there is no reason for the CRB to consider the proposed reply or any issues relating to COP, and the motion is denied.

Before discussing Employer's Response, we note that Claimant's counsel's assertion that additional attorney's fees may become due in the future for work already performed if Claimant should experience additional wage loss in the future is erroneous. The COR awarded wage loss benefits for a closed period of time, November 13, 2014 to December 17, 2014. There was no claim for or award of continuing wage loss benefits. Consequently, Claimant's counsel is not entitled to any additional fee based on future benefits that may be paid unless and until a dispute arises concerning entitlement thereto which leads to further litigation and results in a successful prosecution of a claim for such future benefits.

Turning to Employer's Response, Employer disputes the amount of wage loss benefits claimed as having been secured by counsel's efforts. Employer asserts:

Here, Claimant asserts that the total amount of wage loss and medical benefits secured is \$8,742.80. Claimant's amount is based on alleged lost wages for 200 hours at \$43.33^[1] per hour and medical expenses of \$1,970.00. However, Claimant offers no documents to support these assertions, and without such documentation, the CRB will be unable to ascertain the true amount of the benefits secured to ensure that the calculation of attorney's fees does not exceed the statutory restrictions imposed by D.C. Code § 1-623.27 (b)(2). Thus, since Claimant has provided no evidence of the amount of actual benefit [sic] secured, other than her attorney's unsupported assertions, Claimant has effectively not responded to the Order to Show Cause and Claimant's Petition should be denied.

Employer's Response at 3.

In response to this argument, we note that consideration of the amount of a fee award is a multi-step process, and determination of the amount of benefits secured is relevant for purposes of assessing the significance of the size of recovery and not just for the purpose of the 20% cap on allowable fee awards. All fee awards are subject to that cap, regardless of the amount of benefits actually secured. However, the value of the attorney's efforts includes consideration of the amount of benefits secured.

Nonetheless, Employer's argument that Claimant's counsel has not supplied any documentation of the claimed amount of recovery is not without merit, where, as here, that amount is subject to dispute. In this regard, Employer argues:

Further, the actual records indicate that Claimant was paid Continuation of Pay (COP) from November 19, 2014 through December 8, 2014. *See* Attachment 2. Given this information, Temporary Total Disability (TTD) benefits are only owed from December 9, 2014 through December 16, 2014, (7) days. A review of Claimant's paystub shows an annual salary of \$88,057.00, which translates to an average weekly wage of \$1,128.98. Thus, the amount of Claimant's wage loss benefits secured as a result of the COR is \$1,128.98.

¹ Employer's assertion in regard to the amount of the hourly wage Claimant earned is inaccurate. The asserted hourly pay rate set forth in Claimant's Response is \$42.33.

Additionally, Claimant has only provided documentation of medical bills in the amount of \$460.00 (See Claimant's Exhibit 7 submitted at the June 18, 2015 formal hearing). Together with the aforementioned TTD benefits, the total amount of actual benefit [sic] secured is \$1,588.98. Therefore, Claimant's attorney's fees are not to exceed 20% of \$1,588.98 or \$317.80.

Employer's Response at 3 – 4.

The document comprising Attachment 2 are not Claimant's paystubs. While they appear to be printouts from Employer's automated payroll system, PeopleSoft, they are not self-authenticating, they were not made part of the record in AHD, and they contain terminology and phraseology² that makes interpretation of their contents problematic.

Inasmuch as there is a dispute in this fee application proceeding concerning whether and how much Claimant was paid during the time period in question, and how any such payments were categorized, we are left with no alternative but to resort to the contents of the administrative record available to us and, where discernible, the mutually agreed upon facts.

The most useful starting point is the original Compensation Order, in which the Claim for Relief is set forth as follows:

CLAIM FOR RELIEF

Claimant seeks an award of temporary total disability benefits from November 13, 2014 until the time she returned to work on December 17, 2014, and medical benefits from November 13, 2014, to the present and continuing.

ISSUES

Whether Claimant sustained an injury arising out of and in the course of employment? [sic]

There is nothing in the Compensation Order suggesting that there was a dispute as to the claim for relief. The sole dispute identified was compensability. In the Compensation Order on Remand, the Claim for Relief was granted without limitation or modification, and Employer did not appeal.³

² For example, the 3rd page of Attachment 2 purports to document that between November 19 and November 29, 2015, Claimant or whoever entered the data used a "Time Reporting Code" (TRC) for COP of 64 hours, plus a TRC for "night differential" pay (NITP) for 48 of those hours, and "Sunday Pay" (SUNP) 16 of those hours, 8 of which are on a Sunday and 8 of which are on a Saturday. Further, the document includes two seemingly contradictory notations, one reading "Reported Hours: 144.00 Hours", and "Scheduled Hours: 0 Hours". And, there is a cryptic notation stating "Reported time on or before 01/09/2014 is for a prior period."

³ Employer acknowledges that "Upon remand to AHD, a Compensation Order on Remand (COR) was issued December 31, 2015, granting Claimant's claim for relief." Employer's Response, at 2.

Thus, under the law of the case as it now stands, Counsel's efforts have resulted in an award of TTD benefits from November 13, 2015 through December 16, 2015.

In Employer's Response, it is asserted that Claimant's average weekly wage is \$1,693.00, premised upon an assertion that Claimant's paystubs reveal an annual salary of \$88,057.00. Employer's Response at 3 – 4.

The Public Sector Workers' Compensation statute (PSWC) contemplates and requires that material facts that are in dispute be raised by the parties and decided by the administrative law judge in AHD. If a party fails to raise an issue that is or may be of consequence to the outcome of the case, including the amount of any attorney's fee that may be awarded, the CRB has no mechanism for and no power to make factual determinations beyond that which appears in the record created in AHD, as is contained in the compensation orders resulting from the AHD proceedings, or as established by law.

Neither the Compensation Order, the COR, nor the hearing transcript set forth any stipulation concerning Claimant's wage rate or compensation rate for TTD.⁴

The PSWC statute has a specific provision for determining the compensation rate payable for disability, D.C. Code § 1-623.05 (a). That section provides that compensation for total disability shall be 2/3 of the monthly salary payable to the employee.

D.C. Code § 1-623.12 provides maximum and minimum compensation rates. Subsection (a) governs employees hired on or before December 31, 1979, and establishes that the maximum payable compensation rate shall be based upon 75% of the federal government's rate of pay for a GS-15, and a minimum compensation rate of 75% of the monthly pay for a GS-2.

Subsection (b) governs employees hired after that date, and sets a maximum rate of 73% (not 75%) of the monthly pay for District of Columbia employees at a DS-12, Step 10 pay grade, and a minimum of 75% of the monthly pay for a DS-2, Step 1.

In the original July 28, 2015 Compensation Order, the ALJ found that Claimant has been employed by Employer for 14 years, or since 2001. Thus subsection (b) applies.

On the date of injury, November 13, 2014, the annual rate of pay for a DS-12, Step 10, was \$82,357.00, or \$6,863.08 monthly, 73% of which is \$5,010.05, which is equivalent to \$1,165.13 weekly (dividing the monthly rate by 4.3) or \$166.45 daily (\$1,165.13 divided by seven).

Employer concedes that, at the time of her injury, Claimant was earning at least \$88,057.00 annually. Employer's Response at 4. Thus, Claimant's TTD rate is the maximum compensation rate for 2014, being \$5,010.05 monthly.

⁴ It is for situations such as this that Administrative Law Judges in AHD have long followed the practice of setting forth basic, undisputed and/or stipulated facts such as the date of injury and average weekly wage. We do not know why this was not done in this case.

For the purpose of this fee application, we conclude that as a matter of law the amount of benefits obtained was that which was granted in the COR, being TTD from November 13, 2015 through December 16, 2015. That is a period of one month and three days. Thus, the award made in the COR was for one month (\$5,010.05) plus three days (\$499.34) of TTD, or \$5,509.39. Employer further concedes it was held to be responsible for at least \$460.00 in medical benefits. Employer's Response, at 4. These combined amounts total \$5,969.39, 20% of which is \$1,193.89. This is the maximum fee to which counsel is entitled to be compensated for his services in this case at all levels of the Agency combined.

Employer objects further to 5 hours of time entered in the time sheet submitted in support of the fee application. One complaint is to a 4 hour entry on July 31, 2015 for "research and review of the record", which Employer posits is excessive since "Counsel tried the case in AHD himself and is very familiar with the record." We are not persuaded that 4 hours of review and research is excessive, and the objection is rejected, particularly since on that same date Counsel met with his client.

The other objection is to a 1 hour entry submitted for "review of CO and conference with client" on July 31, 2015. The basis of the objection is that in the fee petition filed with AHD, an entry appears for 1.75 hours for "review of CO and conference with client" on July 20, 2015. Employer argues that "nothing changed" in the 11 days between these two events, and thus one or the other of them is excessive. Again, we are not persuaded that spending an hour reviewing the file and conferring with the client is excessive or duplicative merely because two such events occurred within 11 days of each other.

Accordingly, an attorney's fee in the amount of \$1,193.89 is assessed against Employer for work performed before the CRB, subject to the limitation that the total fee payable for work performed in AHD and the CRB not exceed that amount.

So ordered.