

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



ODIE A. DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-122

**WILLIAM LOPEZ,
Claimant-Petitioner,**

v.

**DIVERSIFIED ENVIRONMENTAL and BERKLEY MID-ATLANTIC GROUP,
Employer/Insurer**

Appeal from an August 17, 2016 Order Denying Attorney's Fees
by Administrative Law Judge Joan E. Knight
AHD No. 13-157A, OWC No. 676567

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2017 JAN 25 AM 11 07

(Decided January 25, 2017)

David M. Snyder for Claimant
Ashlee K. Smith for Employer

Before GENNET PURCELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

GENNET PURCELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This matter is an appeal of an Order ("Order") denying Claimant counsel's attorney's fees that was issued on August 17, 2016.

This matter arises procedurally after Claimant having prevailed at a formal hearing before an Administrative Law Judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Department of Employment Services via a Compensation Order ("CO") issued by the ALJ that awarded Claimant permanent total disability ("PTD") benefits. *Lopez v. Diversified Environmental*, AHD No. 13-157A (February 24, 2014). Employer timely appealed the CO to the Compensation Review Board ("CRB").

On July 24, 2015, the CRB issued a Decision and Remand Order ("DRO") affirming in part and denying in part, Claimant's claim for relief and remanding the CO to AHD.

On December 31, 2015, the ALJ issued a Compensation Order on Remand (“COR”) granting Claimant’s claim for relief. Employer again timely appealed to the CRB.

Notwithstanding Employer’s appeal, on March 4, 2015, counsel for Claimant and Claimant agreed that counsel was entitled to an award of attorneys’ fees and filed a Stipulation Between Claimant and Counsel Agreeing to an Award of Attorney’s Fees (“Fee Application”) with AHD requesting an order approving the payment of attorneys’ fee not to exceed 20% of the amount of Claimant’s award.

In an undated letter thereafter, the ALJ advised counsel that an award of attorneys’ fees would be premature due to Employer’s pending appeal with the CRB. The ALJ further advised that “At such time as the appeals process is resolved successfully in your favor, you may resubmit your request.” Undated Letter at unnumbered page 2.

On April 1, 2016, the ALJ issued an Order to Show Cause (“Show Cause Order 1”) ordering Employer to show cause why penalties should not be assessed for Employer’s failure to timely pay PTD benefits in accordance with the CO. On April 5, 2016, Employer filed a letter in response to the Show Cause Order 1 stating that payments to Claimant had been issued.

On June 23, 2016, the CRB issued a Decision and Order affirming the COR. *Lopez v. Diversified Environmental*, CRB No. 16-012 (June 23, 2016). Neither party filed a Petition for Review to the District of Columbia Court of Appeals. Claimant’s award as ordered in the COR became final as of July 26, 2016.

On or about August 10, 2016, counsel for Plaintiff re-filed the Fee Application requesting approval for the payment of fees, as amended and stipulated therein. On August 17, 2016, the Order which is the subject of this appeal was issued by AHD. The Order noted that the itemization for time and services listed in the Order improperly included work performed from September 19, 2011 through October 24, 2012, before the Office of Workers Compensation. The Order also concluded:

The Compensation Order on Remand (COR) was issued December 31, 2015. No further appeals have been taken by the parties and the COR became final on January 31, 2016. Counsel’s second fee petition was filed on August 10, 2016, well beyond the 6 month statutory period. As a result, the fee petitions filed on August 10, 2016 must be DENIED.

Order at 2.

On September 1, 2016, counsel for Claimant filed a copy of the previously-submitted Fee Application which reflected a corrected itemization for time and properly detailed services rendered before the AHD in accordance with the applicable regulation, 7 DCMR § 224. Counsel for Claimant stipulated that he was entitled to an award of attorney’s fees in the amount of \$9,093.03 and costs in the amount of \$4,128.80 to be paid directly by the Claimant.

The record reflects that on September 15, 2016, the ALJ issued an Order to Show Cause (“Show Cause Order”) ordering counsel for Claimant to provide supporting documentation justifying the \$4,128.80 in costs requested in the September 1, 2016, Fee Application within ten (10) business days from the service of the Show Cause Order. The record does not contain any additional filings from either party to AHD.

On September 16, 2016, counsel for Claimant timely filed Claimant’s Application for Review and Memorandum of Points and Authorities in Support of Application for Review (“Claimant’s Brief”) with the Compensation Review Board (“CRB”). Employer did not file an opposition to Claimant’s Brief.

ANALYSIS

As an initial matter, in our review of an appeal of an Order that is not based upon an evidentiary record, must be affirmed by the CRB 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 § 51.03 (2001).

Claimant’s counsel asserts he is entitled to an attorney’s fee based on 20% of Claimant’s benefits as a result of his successful claim and affirmation on appeal. Claimant’s counsel asserts further that because the request for an award of attorney’s fees was filed within the appropriate time frame; the ALJ’s denial on the ground that the request was untimely was in clear error and should be reversed.

Specifically, Claimant asserts:

Here, the ALJ denied the agreement entered into between Mr. Lopez and counsel because she believed that no further appeals had been taken following the December 31, 2015 Compensation Order on Remand. However, as this Honorable Tribunal is aware, this is factually incorrect. The Employer/Insurer appealed that Compensation Order on Remand and, on June 23, 2016, this Honorable Tribunal issued a Decision and Order affirming it in CRB No. 16-012. Neither party noted a Petition for Review to the D.C. Court of Appeals within the statutorily-prescribed time period and, as such, Mr. Lopez’s claim for relief became final as of July 26, 2016 and the CRB’s Decision and Order became the controlling order in the case. As a result, the agreement that was filed on August 10, 2016 requesting an award of attorney’s fees, was well within the 6-month time frame allotted for such a request by the Act and Regulations.

Claimant’s Brief at 8.

Indeed the law is clear with regard to the award of attorney’s fees in this jurisdiction. An attorney fee award may not exceed 20% of the actual benefit secured. D. C. Code § 1-623.27 (b)(2). Conversely however, the law also requires that in denying the award of attorney’s fees, an ALJ must give analytical consideration or make foundational findings with respect to the Fee

Application or with regard to Employer's opposition. *Carter v. D.C. Department of Corrections*, CRB Nos. 10-084 and 10-023 (September 14, 2011).

In response to Claimant's counsel's Application for Review, we note that Section 7 DCMR 224 governs the award of attorney's fees in proceedings before the AHD. 7 DCMR § 224.7 states that "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."

Noting only "immaterial exceptions", none of which apply to the case *sub judice*, the Court of Appeals has held:

Normally, an order or judgment is deemed to be final 'only if it disposes of the whole case on its merits so that the court has nothing remaining to do but to execute the judgment or decree already rendered.'" *Id.* at 745-46 (quoting *In re Estate of Chuong*, 623 A.2d 1154, 1157 (D.C. 1993) (en banc)). The requirement that the trial court proceeding be concluded in its entirety before an appeal may be taken "serves the important policy goals of preventing the 'unnecessary delays resultant from piecemeal appeals' and 'refraining from deciding issues which may eventually be mooted by the final judgment.'" *Rolinski*, 828 A.2d at 745 (quoting *Crown Oil & Wax Co. v. Safeco Ins. Co.*, 429 A.2d 1376, 1379 (D.C. 1981)). The requirement discourages "the harassment and cost of a succession of separate [interlocutory] appeals" and fosters "efficient judicial administration." *Rolinski*, 828 A.2d at 745 n.8 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374, 66 L. Ed. 2d 571, 101 S. Ct. 669 (1981) (internal quotation marks and citations omitted)).

Galloway v. Clay, 861 A.2d 30, 32 (D.C. 2004)

Indeed a single final judgement serves the purpose of efficient administration both judicially and administratively. What appears to be at issue in this case however is a simple misapprehension on the ALJ's part of the procedural status of the case when the Order was issued. Claimant's counsel argues the ALJ denied the Fee Application because she believed that no further appeals had been taken following the December 31, 2015 COR. It does appear that an oversight was made on the part of the ALJ with regard to the status of the pending appeal of the COR with the CRB and that the Order denying Claimant counsel's Fee Application was in error. We vacate the Order issued on this matter.

Upon Claimant counsel's correction and refiling of the Fee Application however, on September 15, 2016, the ALJ, ostensibly in recognition of her error, issued Show Cause Order 2 ordering Claimant's counsel to provide supporting documentation justifying the \$4,128.80 in costs requested in the amended Fee Application. The record does not contain any response to the ALJ's Show Cause Order 2 however. Instead, Claimant counsel filed an Application for Review with the CRB the following day.

As it appears the September 15, 2016, Order to Show Cause remains outstanding and no subsequent Order denying the September 1, 2016 Fee Application has been issued, we remand

this matter and order Claimant's counsel to submit supporting documents justifying the \$4,128.80 in costs as ordered by the ALJ and for the ALJ to grant or deny Claimant's counsel's Fee Application.

CONCLUSION AND ORDER

The August 17, 2016 Order denying Claimant the award of stipulated attorney's fees is hereby VACATED, and the matter is REMANDED to the Administrative Hearings Division for Claimant counsel's submission of the supporting documents as ordered by the ALJ and for reanalysis and determination on Claimant counsel's request.

So ordered.