GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 10-121

BURNICE STACKHOUSE,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS,
Self-Insured Employer-Petitioner

Appeal from an Order issued by
Administrative Law Judge Linda F. Jory
AHD PBL No. 09-016, DCP No. 761020001999-0037

Matthew Peffer, Esquire, for the Claimant
Pamela L. Smith, Esquire, For the Self-Insured Employer

Before LAWRENCE D. TARR, HENRY W. MCCOY, and MELISSA LIN JONES, *Administrative Appeals Judges*

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Compensation Review Board.

AMENDED DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request filed by the District of Columbia Department of Public Works (Employer) for review of the April 21, 2010, Order issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia's Department of Employment Services (DOES).

In that Order, the ALJ ordered the employer pay claimant's counsel an attorney's fee and costs. As will be discussed, we agree with the employer that the ALJ erred by assessing costs. Moreover, because it appears that claimant's counsel's initial fee application was not timely filed, we must remand this matter to the ALJ.

BACKGROUND FACTS OF RECORD

The claimant, Burnice Stackhouse, worked for the employer as a sanitation worker. He injured his right ankle and back on May 27, 1993 when he stepped into an open drain while leaving a

fast-food restaurant where he had stopped to take a bathroom break. The employer accepted his claim for workers' compensation benefits and paid the claimant disability benefits until December 1993.

In 2001, a hearing officer ordered the employer to reinstate the claimant's benefits. *Stackhouse v. D.C. Department of Public Works,* OHA No. PBL 98-046(A) OBA No. 352340, (April 6, 2001). On March 20, 2009, the employer issued a Notice of Determination advising the claimant that his disability benefits were ended. This action ultimately was reversed after an ALJ awarded the claimant reinstatement of his benefits, effective March 20, 2009. *Stackhouse v. D.C. Department of Public Works,* AHD PBL No. 09-016, DCP No. 7610200011999-0037 (September 29, 2009).

On January 6, 2010, the claimant, by counsel, filed a claim with AHD requesting that an attorney's fee of $1,737.28 and costs of $725.00 be assessed against the employer. The employer consented to an assessment for the attorney's fee but objected to any assessment for costs. On April 21, an ALJ determined that the employer was liable for an attorney's fee and for costs. The employer has appealed.

THE STANDARD OF REVIEW

Because the Order on review is not based on an evidentiary record produced at a formal hearing, the applicable standard of review to assess this determination is whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See,* 6 Stein, Mitchell & Mezines, *Administrative Law,* § 51.03 (2001).

ANALYSIS

In the Order, the ALJ acknowledged that the employer objected to the cost assessment because if costs were assessed, then the total amount awarded to claimant's counsel would exceed the 20% limit mandated by D.C. Code §1-623.27 (b) (2). On review, the employer argues that ALJ exceeded her authority because the Code does not authorize any assessment against it for costs. Claimant's counsel asserts the ALJ acted properly because the statute is ambiguous as to costs and the ALJ reasonably interpreted the statute in deciding to award claimant's counsel costs.

The issue presented by this case, whether the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq.*, ("Act") permits an assessment of costs against the employer was decided by the CRB in the case of *Johnson v. D.C. Office of Property Management*, CRB No. 09-068, AHD No. PBL 05-021B, DCP No. LTOCA006856 (February 18, 2011). There the CRB held the Act does not authorize cost assessment against this employer.

In *Johnson*, as here, at the time the fee request was filed the Act, in D.C. Code 623.27 (b) (2) stated:

> If a person utilizes the services of an attorney-at-law in the successful prosecution of his or her claim under § 1-623.24(b) or before any court for review of any action, award, order, or decision, there shall be awarded, in addition to the award

> of compensation, in a compensation order, a reasonable attorney's fee, not to exceed 20% of the actual benefit secured, which fee award shall be paid directly by the Mayor or his or her designee to the attorney for the claimant in a lump sum within 30 days after the date of the compensation order.

The CRB reasoned:

> The primary rule of statutory construction is that the intent of the legislature is to be found in the language used. *U. S. v. Goldenberg*, 168 U.S. 95, 102-03 (1897) Accordingly, the first step in determining whether the Act provides for the award of costs is to examine the language of the statute "to see if the language is plain and admits of no more than one meaning" *Davis v. U. S.*, 397 A.2d 951, 956 (D.C. 1979) because when the language of a statute is plain and unambiguous, the plain meaning of that language is binding. *James Parreco & Son v. D.C. Rental Housing Comm'n*, 567 A.2d 43, 45 (D.C. 1989).
>
> Although the Act explicitly authorizes an award of "a reasonable attorney's fee, not to exceed 20% of the actual benefit secured," the Act noticeably is silent as to an award of costs. This silence cannot be ignored because to do so would be to disregard a basic maxim of statutory construction, *i.e.* "when a legislature makes express mention of one thing, the exclusion of others is implied, because 'there is an inference that all omissions should be understood as exclusions.'" *McCray v. McGee*, 504 A.2d 1128, 1130 (D.C. 1986) (citing 2A Sutherland, Statutes and Statutory Construction § 47.23 (4th ed. 1984)). *See Smith v. DOES*, 548 A.2d 95, 100 (D.C. 1988) ("Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed.") (Citations omitted.) 2A SUTHERLAND STATUTORY CONSTRUCTION § 51.02 (4th ed. 1984). Thus, the Act's silence is unambiguous and is binding; the Act does not authorize an award of costs… (Footnotes added to text).

Therefore, in accordance with *Johnson*, we find the ALJ erred by assessing costs against the employer.

7 DCMR § 109.1 mandates that a claim for fees "shall be submitted… within thirty (30) days of the issuance of a decision…"[1] The ALJ's decision was issued on September 29, 2009. The fee petition was not filed until January 6, 2010, more than 30 days later. Therefore, it appears that the fee petition was not timely filed.

[1] 7 DCMR §109.1 provides:

> Claims for fees for representation of a claimant shall be submitted in writing to the ALJ, if a hearing has been requested, within thirty (30) days of the issuance of a decision under § 107.12 of this chapter.

CONCLUSION AND ORDER

This case is remanded to the ALJ to issue an order for claimant's attorney to show cause why the January 6, 2010, Application for Fees should not be dismissed as untimely filed.

Depending on the outcome of the Show Cause Order, the ALJ shall either dismiss the application or amend the April 21, 2010, Order Awarding an Attorney's Fee so that the employer shall pay claimant's counsel's fee for services rendered before AHD.

FOR THE COMPENSATION REVIEW BOARD:

_____
Lawrence D. Tarr
Administrative Appeals Judge

February 23, 2012
DATE