

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-049(A)

**DEIDRE BERRY,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS,
Employer/Insurer-Petitioner.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 FEB 3 AM 10 54

In Re: Application for Approval of an Attorney's Fee Assessment

Lindsay M. Neinast for the Employer/Insurer
Harold L. Levi for the Claimant

Before MELISSA LIN JONES, JEFFREY P. RUSSELL, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board.

ORDER DENYING ATTORNEY'S FEE

Following a formal hearing, an administrative law judge ("ALJ") issued a Compensation Order awarding Ms. Deidre Berry temporary total disability benefits and medical benefits as a result of her compensable right hand injury. *Berry v. D.C. Department of Public Works*, AHD No. PBL13-012, PSWCP No. 3012048291-0001 (March 31, 2014). The District of Columbia Department of Public Works ("Employer") appealed, and the Compensation Review Board ("CRB") affirmed the Compensation Order. *Berry v. D.C. Department of Public Works*, CRB No. 14-049, AHD No. PBL13-012, PSWCP No. 3012048291-0001 (December 12, 2014).

On January 6, 2015, Harold L. Levi (Ms. Berry's attorney) filed a fee petition. Mr. Levi requests the CRB approve a fee in the amount of \$3,120.00 for 13.0 hours of work at a rate of \$240.00 per hour.

Employer opposes Mr. Levi's petition on the grounds that because Mr. Levi has not provided proof of the actual benefit secured, he has requested an award of attorney's fees in excess of 20%

of those benefits. Specifically, Employer argues that despite Mr. Levi's assertion that he secured approximately \$35,000 in indemnity benefits and approximately \$20,000 in medical benefits,

Claimant's Petition does not provide any explanation or evidence to support that the actual benefit secured for Claimant totals \$35,000.00 in back pay and \$20,000.00 in medical treatment. Without evidence of the amount of the actual benefit secured, the CRB will be unable to ensure that a calculation of attorney's fees does not exceed the statutory restrictions imposed by D.C. Code §1-623.27(b)(2).

Employer's Opposition to Fee Petition, p. 3. Employer also objects to the fee Mr. Levi has requested as exceeding 20% of the estimated amount of benefits he secured and to some "unreasonable and unjustified claims for fees" in Mr. Levi's itemized billing statement. *Id.*

Pursuant to §1-623.27(b)(2) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code §1-623.1 *et seq.*, an assessed attorney's fee cannot exceed 20% of the actual benefit secured. In *Jones v. University of the District of Columbia*, CRB No. 09-065, AHD No. PBL06-112A, DCP No. 761039-8001-2003-0003 (September 9, 2009), the CRB held that when assessing an attorney's fee for time spent before the Office of Hearings and Adjudication, Administrative Hearings Division ("AHD"), an administrative law judge must know the amount of actual benefit secured, and it is the petitioning attorney's responsibility to prove this amount:

We also disagree with Petitioner that the ALJ erred by placing the burden on her to produce evidence of the actual benefit secured. Petitioner cited no authority for her assertion that "it is simply more in line with our justice system to require the party opposing the fee to offer evidence in support of its opposition." (Memorandum at 6).

To the contrary, the ALJ's decision is more inline [*sic*] with our justice system. The ALJ, in dismissing the action, placed the burden of proof on the proponent of the motion. As the respondent correctly points out, placing the burden on the proponent is consistent with the District of Columbia's Administrative Procedures Act, which states in §2-509 (b):

In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof. Any oral and any documentary evidence may be received, but the Mayor and every agency shall exclude irrelevant, immaterial, and unduly repetitious evidence. Every party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Where any decision of the Mayor or any agency in a contested case rests on official notice of a material fact not appearing in the

evidence in the record, any party to such case shall on timely request be afforded an opportunity to show the contrary.

Petitioner is the requesting party. The ALJ's determination that she has the burden of proving the requisite statutory elements is neither arbitrary, capricious, nor an abuse of discretion, and is in accordance with the law.

Id.

Mr. Levi's reply to Employer's opposition parallels the arguments made (and rejected) in *Jones*, and the CRB sees no reason that the same requirement that applies to fee petitions brought before AHD should not apply to fee petitions brought before the CRB; therefore, Mr. Levi's petition is DENIED WITHOUT PREJUDICE. Mr. Levi has 30 calendar days from the date of this order to refile his fee petition with proof of the actual benefit secured as a result of his representation.

The remaining issues are moot.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Melissa Lin Jones

MELISSA LIN JONES

Administrative Appeals Judge

February 3, 2015

DATE