GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
ACTING DIRECTOR

CRB No. 12-095(A)(1)

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

DONALD POOLE,
Claimant

v.

BENEDICT METAL WORKS
and CINCINNATI INSURANCE COMPANY,
Employer and Carrier

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 SEP 4 AM 11 22

Allen J. Lowe, for the Claimant
Joel E. Ogden, for the Employer

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*

HEATHER C. LESLIE for the Compensation Review Board.

ORDER ON MOTION FOR RECONSIDERATION OF ORDER DENYING ATTORNEY'S FEE

On July 11, 2014, Claimant's attorney filed an application for an attorney's fee, requesting the Compensation Review Board (CRB) assess an attorney's fee against Employer and Carrier in the amount of three thousand three hundred sixty dollars ($3,360.00) for 14 hours of work, billed at $240.00 per hour that was asserted to have been performed by Claimant's counsel in this appeal before the Compensation Review Board.

Employer filed an opposition to the Application for Attorney's Fee on July 25, 2014, arguing several points, notably that the assessment of a fee was not proper based upon the procedural history of the case.

The procedural history, as summarized in our recent Order Denying employer's Motion for Ruling on Balance of Previously Appealed Issues, CRB No. 12-095(R)(1), AHD No. 11-062 (June 17, 2014), is as follows:

On May 25, 2012, an Administrative Law Judge (ALJ) in the Hearings and Adjudication section of the District of Columbia Department of Employment Services (DOES) entered an award in behalf of the claimant providing for temporary total benefits from December 20, 2010, to the present and continuing and for causally related medical expenses.

The employer and carrier appealed the award asserting that the ALJ erred in her finding that Claimant provided timely notice of his injury and in her finding that Claimant credibly testified regarding his injury, his post-injury symptoms and the effect of the injury on his physical capabilities.

On July 25, 2012, the CRB issued a Decision and Order in which it held Claimant did not give timely notice. The CRB vacated the award of temporary total disability benefits while affirming the award of causally related medical benefits.

The CRB did not decide whether the ALJ correctly found Claimant's testimony credible:

> As notice was untimely, the Claimant cannot recover wage loss benefits under the statute. Thus, the Employer's other assignments of error are rendered moot.

CRB No. 12-095 at 5.

On October 10, 2013, the District of Columbia Court of Appeals (DCCA) reversed that part of the CRB's decision that vacated the ALJ's the award of temporary total disability benefits and remanded the case to the CRB with the following instruction:

> Accordingly, for the foregoing reasons, we reverse in part the order of the Compensation Review Board and remand the case for reinstatement of the ALJ's award of temporary total benefits.

77 A.3d 460, 469.

On November 1, 2013, the CRB entered an Order which stated in pertinent part:

> Therefore, consistent with the remand instructions from the District of Columbia Court of Appeals, the ALJ's award of temporary total benefits from December 20, 2010, to the present and continuing is hereby reinstated.

On May 28, 2014, [Employer] filed the present motion which acknowledged the entry of the award for temporary total disability benefits and further stated:

> Given the fact that only one issue has been addressed and resolved by the CRB and the Court of Appeals, it is appropriate for the CRB to issue a ruling on the remaining issue of credibility.

On June 9, 2014, the Claimant filed its Opposition to Employer's Motion for Ruling on Balance of Previously Appealed Issues.

On June 17, 2014, the CRB denied Employer's Motion for Ruling on Balance of Previously Appealed Issues for two reasons: It was it untimely filed and the remand instructions from the DCCA constrained the CRB from ruling upon the Employer's motion. *Id.*

On August 19, 2014, the CRB denied the Claimant's request for a fee, finding Claimant's fee application to be untimely. We held;

> We need not reach Employer's argument as we find the Application for Attorney's Fee to be untimely. In reaching this determination we note that 7 DCMR § 7-269.2 states,
>
> > An application to the Board for the award of an attorney's fee (including, where appropriate, request for reimbursement of costs) for legal work performed before the Board on behalf of a successful claimant shall be filed with the Board within ninety (90) calendar days after the claim for benefits becomes final and all appeals have been exhausted.
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> As with the CRB's Order Denying employer's Motion for Ruling on Balance of Previously Appealed Issues, the date the claim for benefits became final and any and all appeals exhausted was November 1, 2013, the date upon which the CRB reinstated temporary total benefits from December 20, 2010, to the present and continuing pursuant to the DCCA decision. Claimant had 90 days from November 1, 2013 to file an Application for Attorney's Fee. As Claimant filed Application for Attorney's Fee to be assessed against the Employer on July 14, 2014, well outside of the 90 day time limit, Claimant's request is untimely and is DENIED.

CRB No. 12-095(R)(1), AHD No. 11-062 (June 17, 2014)

On August 26, 2014, Claimant's attorney filed a Claimant's Motion for Reconsideration on Denying Assessed Attorney's Fees. Claimant's attorney argues that the CRB misapplied the 90 day rule and that Claimant is entitled to a fee based on its opposition to Employer's Motion for Ruling on Balance of Previously Appealed Issues. Counsel does not offer any statutory authority for such a fee, but points out that there is "no statutory authority that prohibits him from obtaining an assessed fee when he has been successful in seeing to it that benefits secured continue to be received by the claimant as was the case in the instant matter." We disagree.

D.C. Code § 32-1530, (a) and (b) provides:

> (a) If the employer or carrier declines to pay any compensation on or before the 30th day after receiving written notice from the Mayor that a claim for compensation has been filed, on the grounds that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits thereafter utilizes the services of an attorney-at-law in the successful prosecution of his claim, there shall be awarded, in addition to the award of

compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the Mayor, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final. (Emphasis added.)

(b) If the employer or carrier pays or tenders payment of compensation without an award pursuant to this chapter, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the Mayor shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within 14 days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney-at-law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. . . . *If the claimant is successful in review proceedings before the Mayor or court in any such case, an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accordance with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.*

(Emphasis added).

As the above italicized portion of the statute requires, any claim for legal fees that do not fall within (a) or (b) above, shall not be assessed against the employer or carrier. Claimant's argument that the statute does not expressly prohibit a fee to be awarded in the above case is in error because the matter for which fees is not a matter which falls under the scenarios outlined in (a) or (b). Therefore, in accordance with the statute, this is not a matter for which the CRB is authorized to assess a fee.

Claimant's request for an attorney fee to be assessed against the Employer is DENIED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Heather C. Leslie
HEATHER C. LESLIE
Administrative Appeals Judge

September 4, 2014
DATE