

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-095 (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

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

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

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 APR 9 AM 9 28

ORDER DENYING ATTORNEY'S FEE

Following a Formal Hearing, an administrative law judge ("ALJ") issued a Compensation Order awarding Claimant medically causally related expenses for treatment to the left shoulder. *Poole v. Benedict Metal Works*, AHD No. No. 11-062(A), OWC No. 673724 (July 3, 2014). Employer appealed and the Compensation Review Board ("CRB") affirmed the Compensation Order. *Poole v. Benedict Metal Works*, CRB No. 14-095, AHD No. 11-062(A) (January 26, 2015).

On March 12, 2015, Claimant's attorney filed an application for an attorney's fee, requesting the CRB assess an attorney's fee against Employer and Carrier in the amount of two thousand one hundred ninety six dollars (\$2,196.00) for 9.15 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. The request was silent as to what statutory authority was relied upon as well as what benefits were secured.

Employer opposes Claimant's counsel's petition, arguing that as counsel has failed to identify what benefits counsel secured for his client, a fee award is premature pursuant to 7 DCMR § 224.2. Employer also argues that four hours identified in the time itemization submitted by counsel have previously been denied and have nothing to do with the appeal giving rise to the fee application.

7 DCMR § 224.2 provides:

In determining whether to award attorney fees and the amount, if any, to be awarded, the following factors shall be considered:

- (a) The nature and complexity of the claim including the adversarial nature, if any, of the proceeding;
- (b) The actual time spent on development and presentation of the case;
- (c) The dollar amount of benefits obtained and the dollar amount of potential future benefits resulting from the efforts of an attorney;
- (d) The reasonable and customary local charge for similar services; and
- (e) The professional qualifications of the representative and the quality of representation afforded to employee.

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.

While *Jones* is a public sector case, we believe the reasoning enunciated in that case can be applied here, especially in light of the language of § 224.2(c). We agree with Employer that without proof of the benefits secured, Claimant's counsel's request for a fee award is insufficient at this time. We also agree with Employer that the first four entries totaling four hours of attorney's fees is not proper, having been denied by the CRB on September 4, 2014. See *Poole v. Benedict Metal Works* CRB No. 12-095(A)(1) (September 4, 2014).

Claimant's counsel's petition is DENIED WITHOUT PREJUDICE. Counsel has 30 calendar days from the date of this order to re-file his fee petition with proof of the actual benefit secured as a result of his representation, a time itemization outlining hours spent on the appeal that gives rise to the fee request, and the statutory authority that supports said request.

FOR THE COMPENSATION REVIEW BOARD:

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

April 9, 2015
DATE