

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-098 (A)(1)

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

**CONSTANCE WARE,
Claimant**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Employer.**

AHD No. PBL96-083E, DCP No. 761032-0001-1999-0003

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JUL 22 AM 11 02

(Decided July 22, 2015)

Harold Levi for the Claimant
Erin Adam Huang for the Employer

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

HEATHER C. LESLIE for the Compensation Review Board.

ORDER DENYING ATTORNEY'S FEE

Following a Formal Hearing, an administrative law judge ("ALJ") issued a Compensation Order awarding Claimant disability benefits and payment of medical expenses. *Ware v. District of Columbia Department of Corrections*, AHD No. PBL. 96-083E, DCP No. 761032-0001-1999-0003 (August 18, 2014). Employer appealed and the Compensation Review Board ("CRB") affirmed the Compensation Order. *Ware v. District of Columbia Department of Corrections*, CRB No. 14-098, AHD No. PBL. 96-083E (December 12, 2014). Employer appealed the CRB decision to the District of Columbia Court of Appeals. This appeal was voluntarily withdrawn and dismissed.

On June 15, 2015 Claimant's attorney filed an application for an attorney's fee, requesting the CRB assess an attorney's fee against Employer in the amount of four thousand sixty six dollars (\$4,066.00) for 16.75 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.

Counsel was also requesting reimbursement of costs in the amount of forty-six dollars (\$46.00). The request asserted Claimant was awarded approximately \$120,000.00 in back pay and causally related medical expenses which exceed \$20,000.00.

On June 23, 2015, Claimant's counsel resubmitted the fee petition, seeking a total of \$8,986.00. Counsel stated that the additional \$4,920.00 represented time spent before the District of Columbia Court of Appeals from March 27, 2015 through May 15, 2015.

On July 6, 2015, Employer filed an opposition to the fee request, arguing that the fee request should be denied as 1) Claimant provides no evidence of the actual benefits secured; 2) there was not a successful prosecution of a claim at the District of Columbia Court of Appeals; and 3) Claimant is requesting an award in excess of 20% of the benefits secured.

On July 15, 2015, Claimant replied to Employer's opposition, contesting the payment information Employer submitted. Claimant's counsel stated:

To the extent Claimant and Counsel overestimated the TTD benefit to which the Compensation Order entitled Claimant, it is because of the factors referenced herein. Claimant and Counsel respectfully apologize and note now that the difference between \$47,896.00 (equal to the sum of the \$39,000 amount requested from OHA and the \$8,896.00 requested here) and \$20,157.50 (20% of \$100,787.47, that is, the total benefit presently realized or owing (86,834.80 + \$13,952.67 = \$100,787.47), should be payable at this time, while the \$27,738.50 remainder of the OHA fees and CRB fees (\$47,896.00-\$20,157.50=\$27,738.50), should be paid at the rate of 20 percent of future wage loss and medical benefits paid to or for the benefit of Claimant.

Claimant's reply at 3-4.

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.

Thus, Claimant's attorneys are required to submit a detailed time itemization as well as explanation of why an attorney fee should be assessed against an employer for work performed in front of the CRB. Claimant's attorneys are also required to submit proof of the benefits secured.

Based upon Claimant's counsel's reply quoted above, we cannot discern what amount is now being requested for legal services performed at the CRB. It appears that Counsel, after acknowledging evidence submitted with Employer's response to the resubmitted fee application, has combined the requests for work performed at AHD and CRB.

Because of this confusion, we find it prudent to dismiss the application for an award of an attorney's fee. Should he wish to pursue this matter, Claimant's counsel can resubmit a fee application within 30 days from the date of this Order that identifies the amount of fee requested for work performed before the CRB, and the basis for the award including a time itemization and proof of benefits secured. We also note that the Act does not allow for reimbursement of any costs and any requests for cost reimbursement would be denied.

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 and successful prosecution¹, and a time itemization outlining hours spent on the appeal that gives rise to the fee request.

So ordered.

¹ D.C. Code § 1-623.27(b)(2) authorizes assessing a reasonable attorney's fee against the government-employer when there has been a successful prosecution of a claim. Section 1-623.27 (b)(1) defines "successful prosecution of a claim" as:

Obtaining an award of compensation that exceeds the amount that was previously awarded offered, or determined. The term "successful prosecution" includes a reinstatement or partial reinstatement of benefits which are reduced or terminated.