

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

**VINCENT C. GRAY**  
**MAYOR**



**LISA MARÍA MALLORY**  
**DIRECTOR**

**COMPENSATION REVIEW BOARD**

**CRB No. 12-113**

**KHAMERERENEBI U. RASHEED,**  
**Claimant–Petitioner,**  
**v.**

**WINGS ENTERPRISES/ORCPG,**  
**Self-Insured Employer–Respondent.**

Appeal from an July 11, 2012 Order  
by Amelia G. Govan, Administrative Law Judge  
AHD No. 11-289, OWC No. 678987

Michael J. Kitzman, Esquire, for the Petitioner  
Barry D. Bernstein, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,<sup>1</sup> HEATHER C. LESLIE,<sup>2</sup> and HENRY W. MCCOY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**BACKGROUND**

Petitioner Khamererenebi U. Rasheed filed a claim for workers' compensation benefits pursuant to D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act), alleging that he had sustained a work related injury while employed by Respondent Wings Enterprises/OCRPG (Wings Enterprises). Wings Enterprises denied compensability of the claim, asserting that Mr. Rasheed had not sustained an accidental injury, and that if he had, it did not arise out of or occur in the course of his employment. They further contended that the medical treatment he sought was not medically causally related to any work injury that may have been sustained, that Mr. Rasheed failed to give timely notice of the injury to Wings Enterprises, and that Mr. Rasheed was not disabled for the period for which he sought wage loss benefits.

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<sup>1</sup> Judge Russell was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

<sup>2</sup> Judge Leslie was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

Mr. Rasheed sought to have his claim resolved informally by requesting an informal conference with Wings Enterprises and a Claims Examiner in the Department of Employment Services (DOES) Office of Workers' Compensation (OWC). Following the informal conference, the Claims Examiner issued a recommendation in which it was recommended that the claim be denied.

Mr. Rasheed timely rejected that recommendation and filed a timely Application for Formal Hearing (AFH) with the hearings section of DOES. A formal hearing was conducted before an Administrative Law Judge (ALJ), who issued a Compensation Order awarding the requested benefits, with which Wings Enterprises complied.

Mr. Rasheed, through his attorney,<sup>3</sup> filed a fee petition, seeking that fees and costs be awarded and assessed against Wings Enterprises, which opposed the petition.

On July 11, 2012, the ALJ issued an Order in which she denied the petition, and relying upon three decisions of the District of Columbia Court of Appeals (DCCA), *Fluellyn v. DOES*, 54 A.3<sup>rd</sup> 1156 (D.C. 2012), *Providence Hospital v. DOES*, 855 A.2d 1108 (D.C. 2008) and *National Geographic v. DOES*, 721 A.2d 618 (D.C. 1998), held that the fact that it was Mr. Rasheed, and not Wings Enterprises, that rejected the OWC recommendation precluded an assessment of fees and costs against Wings Enterprises.

Mr. Rasheed appealed the Order to the CRB, and Wings Enterprises filed an opposition to that appeal. We reverse the denial and remand for further consideration of the fee petition.

#### STANDARD OF REVIEW

As an initial matter, in its review of an appeal of an Order issued under circumstances in which there is no evidentiary record, the Compensation Review Board (CRB) must affirm said decision unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See*, 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW § 51.03 (2001).

#### DISCUSSION AND ANALYSIS

Attorneys fee awards are governed by D.C. Code § 32-1530, which reads in pertinent part:

(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.

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<sup>3</sup> The record before does not make clear whether Mr. Rasheed was represented at the informal conference.

(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. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Mayor, as authorized in § 32-1507(e), and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. 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.

In an oft-cited passage, the District of Columbia Court of Appeals has held:

The D.C. Workers' Compensation Act authorizes a claimant to recover attorney's fees in only two situations. First, "if the employer refuses to pay 'any compensation' for a work-related injury within thirty days of receiving written notice from the Mayor of 'a claim for compensation,' and the claimant consequently uses the services of an attorney to prosecute successfully his or her claim." *C & P Tel. Co. v. District of Columbia Dep't of Employment Servs.*, 638 A.2d 690, 693 (D.C. 1994) (quoting D.C. Code § 36-330 (a) (1981), recodified at D.C. Code § 32-1530 (a) (2001)). Second, a claimant may recover attorney's fees if an employer voluntarily pays or tenders compensation without an award "but later refuses to pay the additional compensation claimed by the claimant within fourteen days of receiving a recommendation by the Mayor that the claim is justified, and the claimant uses the services of an attorney to recover the full amount claimed." *C & P Tel. Co.*, 638 A.2d at 693.

*Providence Hospital, supra.*, at 1111 – 1112.

The facts of this case are such that a fee request in which the fee is sought to be assessed against the employer is not governed by subsection (b), because there had been no acceptance of liability for the claim at any time prior to the Compensation Order. It is undisputed that Wings Enterprises contested virtually every aspect of liability for this claim. As such, this case is governed by the provisions of subsection (a): Wings Enterprises "decline[d] 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.” Mr. Rasheed “thereafter utilize[d] the services of an attorney-at-law in the successful prosecution of his claim”. Therefore, in the plain language of the statute, “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.”

The cases cited by the ALJ in the Order (and by Wings Enterprises in this appeal) requiring the rejection by an employer of an OWC recommendation as a prerequisite to an attorney fee assessment against an employer are all explicitly acknowledged by the DCCA, in each case, to arise under subsection (b), and not subsection (a). See, *Fluellyn, supra*, at 1160; *Providence Hospital, supra*, at 1110; and *National Geographic, supra*, at 621.

The statutory scheme envisions that attorney’s fees be assessed against the employer when the employer denies compensability, a claimant hires an attorney, and they successfully prosecute the claim. A rejection by the employer of an OWC recommendation is a prerequisite for such an assessment only where a claim has been accepted as compensable and benefits are provided voluntarily, and a dispute arises as to a claimant’s entitlement to additional benefits. This case is the former situation, and is not the latter.

The denial of the assessment of attorney’s fees and costs is not in accordance with the law. The matter must be remanded for further consideration of the amount of the fees and costs that are appropriate in this case.

#### CONCLUSION AND ORDER

The denial of a fee assessment against Wings Enterprises is not in accordance with the law. The denial is vacated and reversed. The matter is remanded for further consideration of the fee petition.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
*Administrative Appeals Judge*

\_\_\_\_ February 11, 2013 \_\_\_\_  
DATE