

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

CRB No. 13-082

**DONALD WATSON,
Claimant,**

v.

**THE WASHINGTON TIMES and HARTFORD INSURANCE COMPANY,
Employer and Carrier-Employer and Insurance Carrier.**

Appeal of an April 30, 2013 Compensation Order Approval of Lump-Sum Settlement,
Recommended by Karen Bivins, Claims Examiner and
Ordered by Jevan Edwards, Claims Supervisor.
OWC No. 662079

J. Brian Tansey, Counsel for Claimant
Kevin J. O'Connell, Counsel for the Employer and Carrier

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, with JEFFREY P. RUSSELL and
HENRY W. MCCOY, *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of Claimant's counsel, J. Brian Tansey, for review of the April 30, 2013, Order from the Office of Workers' Compensation (OWC) approving a lump-sum settlement but reducing the agreed-to attorney's fee from to \$59,000.00 to \$15,480.00.

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

On or about March 18, 2013, the claimant, by counsel, and the employer and its insurer, by counsel submitted to OWC an Agreed Petition For Approval of Lump Sum Settlement, in which Employer agreed to pay Claimant \$295,000.00 and be responsible for future reasonable, necessary and causally related medical treatment, either directly or through the purchase of a Medicare Set Aside, in exchange for Claimant releasing Employer from all responsibility for future compensation.

The petition further stated that claimant's attorney, J. Brian Tansey requested a fee of \$59,000.00 and costs in the amount of \$380.00, that the amount of the fee and costs had been discussed with the claimant, that the claimant understood the fee and costs would be deducted from the settlement, and that the claimant agreed "that the fee is fair and reasonable and consents to payment of said attorney's fee" and understood that he would receive a net payment of \$235,620.00.

On April 30, 2013, Claims Examiner Karen Bivins recommended approval of the settlement and her Supervisor, Jevan Edwards, ordered approval. However, OWC amended the settlement's attorney fee provision by ordering: "Attorney's Fee of \$15,480.00 for 64.5 hours at \$240.00 per hour is approved."

Claimant's attorney has timely appealed OWC's decision decreasing his attorney's fee.

DISCUSSION AND ANALYSIS

In this appeal, claimant's counsel primarily argues that the OWC committed reversible error when it approved the parties' settlement but reduced the agreed upon attorney's fee. We agree.

Claimant's counsel relies on the CRB's decision in *Atkins v. Rite Aid Corp.*, CRB 09-124, OWC No. 642482 (April 27, 2010), also known as *Atkins II*. The CRB recently reaffirmed its holding of *Atkins II* in *Ragan v. RLR Construction Co.*, CRB 11-053, OWC 504969 (January 26, 2012).

In *Ragan*, we held;

In *Atkins*, an order on remand issued by the OWC was vacated because it was inconsistent with the CRB's previous instructions. The appeal was before the CRB challenging an order on remand issued by the OWC, involving the same parties and issue, wherein the CRB held that because both parties were represented by counsel, the OWC must approve the settlement as submitted, pursuant to § 32-1508(8). *Atkins v. Rite Aid Corporation*, CRB No. 09-062, OWC No. 642482 (June 30, 2009) (*Atkins I*).

The circumstances in *Atkins I* and the instant matter under review are starkly similar. In both, the parties agreed to a lump-sum settlement and submitted it to the OWC for approval. The settlement in each case also included an attorney's fee that was to be paid out of the lump-sum. In *Atkins I*, the settlement amount was \$ 245,000.00 and the attorney's fee was \$ 40,000.00; representing 16% of the settlement. In the instant matter, the settlement amount was \$ 220,000.00 and the attorney's fee requested was \$ 44,000.00; representing 20% of the settlement. Also, in both cases, the OWC, while approving the settlement reached by the parties, also reduced the requested attorney's fee, citing its fiduciary responsibility to act in the best interest of the claimant.

In arguing for reversal of the OWC's February 2, 2011 Order, claimant's counsel asks that we adhere to our decision in *Atkins I* and subsequently upheld in *Atkins*

II. The *Atkins* cases stand for the proposition that where the parties agree to a settlement and both are represented by counsel, the OWC, pursuant to D.C. Official Code § 32-1508(8), must approve the settlement as submitted, including any requested attorney's fee, notwithstanding the fee would be considered excessive outside the context of the settlement agreement

In both of the *Atkins* cases and the matter under review here, the OWC approved the lump-sum settlement agreed to by the parties but reduced the requested attorney's fee essentially to an amount equal to the maximum hourly rate of \$ 240.00 times the number of hours expended on the claimant's behalf. In *Atkins I*, the CRB deemed this to be in error basically deeming the attorney's fee request to be an integral part of the settlement that the OWC was required to approve where both parties are represented by counsel.¹

Although not stated by OWC, we assume OWC was relying on the May 12, 2005, Policy Directive Clarifying the Award of Attorney Fees in the District of Columbia Workers' Compensation Cases issued by then Director Gregory P. Irish.

However, when applied to lump-sum settlements, the Policy Directive is inconsistent with the later passed amendment to the D.C Code §32-1508 (8). D.C. Code § 32-1508 (8) reads in pertinent part, (with the amendment in bold):

The Mayor may approve lump-sum settlements agreed to in writing by interested parties, discharging the liability of the employer for compensation . . . in any case where the Mayor determines that it is in the best interest of an injured employee entitled to compensation or individuals entitled to benefits pursuant to § 32-1509 [dependents of deceased workers whose deaths are work related]. **The Mayor shall approve the settlement, where both parties are represented by legal counsel who are eligible to receive attorney fees pursuant to § 32-1530.** These settlements shall be the complete and final dispositions of a case and shall be a final binding compensation order.

The statute is clear; the settlement shall be approved where both parties are represented by counsel.²

In reviewing an OWC Order issued under circumstances in which there is no evidentiary record, the 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).

¹ In *Ragan*, OWC cited its fiduciary responsibility to act in the best interest of the claimant as its reason for reducing the attorney's fee. We need not address that issue here because OWC did not state any reason for reducing the fee.

² As the concurring judge in *Ragan* noted, "The statute was modified with the clear and obvious purpose of providing that settlement agreements be approved where the parties are represented by counsel. The only exception to this would be where the settlement agreement exceeds 20% of the amount of the settlement." The requested fee in this case is 20% of the settlement.

Therefore, because OWC's decision is not in accordance with the law and the CRB cannot affirm it.

CONCLUSION AND ORDER

OWC's decision to reduce the attorney's fee from \$59,000.00 to \$15,480.00 is hereby REVERSED. This case is REMANDED to OWC with instructions to approve the attorney's fee submitted in the Agreed Petition For Approval of Lump Sum Settlement.

FOR THE COMPENSATION REVIEW BOARD:

/s/ *Lawrence D. Tarr*
LAWRENCE D. TARR
Chief Administrative Appeals Judge

October 16, 2013
DATE