GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-064

FRANKLYN BAKER,
Claimant–Respondent,

v.

BERKEL & COMPANY CONTRACTORS and ZURICH INSURANCE COMPANY,
Employer/Carrier-Petitioner

Appeal from an Order Awarding Attorney's Fee by
The Honorable Joan E. Knight
AHD No. 10-271, OWC No. 641418

Krista N. DeSmyter, Esquire, for the Claimant/Petitioner
Todd S. Sapiro, Esquire, for the Employer-Carrier/Respondent

Before: HENRY W. MCCOY, HEATHER C. LESLIE,[1] AND JEFFREY P. RUSSELL,[2] *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq*., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

[1] Judge Leslie has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-04 (October 5, 2011).

[2] Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

OVERVIEW AND PROCEDURAL BACKGROUND

This appeal follows the issuance on March 28, 2012 of an Order Awarding Attorney's Fee from the Hearings and Adjudication Section, Office of Hearings and Adjudication in the District of Columbia Department of Employment Services (DOES). In that Order, the Administrative Law Judge (ALJ) granted Claimant's request for an attorney's fee plus costs and assessed a 20% penalty against Employer for non-payment of benefits pursuant to a June 30, 2011 Compensation Order.

Claimant sustained two injuries while working as a construction worker, the first a fracture of the right ring finger on July 26, 2007 and the second on October 10, 2007 to his right hand and wrist. Employer accepted and paid benefits on both claims while asserting the second injury was limited to the right hand only and any wrist problems were unrelated to either accident.

This disputed aspect of Claimant's injury went to an informal conference with the Claims Examiner (CE) recommending that temporary total disability (TTD) benefits be paid and vocational rehabilitation explored. While Employer rejected the recommendation from the informal conference and requested a formal hearing, by the time of the hearing on August 3, 2010, Employer had restored Claimant's TTD benefits and was paying TTD on an ongoing basis.

At the formal hearing, the only issue for resolution was the nature and extent of any permanent partial disability (PPD) to Claimant's right arm. Claimant requested a schedule award of 60% to the upper right extremity. In a June 30, 2011 Compensation Order (CO), the ALJ awarded 40% PPD. This CO was not appealed.

Following the issuance of the CO, Claimant filed, on September 6, 2011, a petition with the Office of Workers' Compensation (OWC) for the assessment of an attorney's fee against Employer, which Employer opposed, for services performed on Claimant's behalf before OWC. On December 7, 2011, the CE denied the petition and on January 5, 2012 denied the request for reconsideration. Claimant appealed to the CRB with Employer filing in opposition.

On March 6, 2012, the CRB affirmed both the CE's denial of Claimant's request for the assessment of fee award against Employer and the denial of Claimant's request for reconsideration.[3] On March 23, 2012, Claimant filed a petition for review with the District of Columbia Court of Appeals. That appeal is still pending.

Also on September 6, 2011, Claimant filed a separate petition with Hearings and Adjudication (H&A) for the assessment of an attorney's fee against Employer for services performed on Claimant's behalf before H&A. Claimant also sought payment of a 20% penalty for the late payment of the award ordered by the CO. On December 16, 2011, Claimant submitted a letter to the ALJ requesting action on each of the prior filings, whereupon the ALJ issued an order to show cause on December 23, 2011.

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[3] *Baker v. Berkel & Company Contractors*, CRB No. 12-005, OWC No. 641418 (March 6, 2012); *Baker v. Berkel & Company Contractors*, CRB No. 12-005, OWC No. 641418 (March 20, 2012).

On March 28, 2012, the ALJ issued an Order Awarding an Attorney's Fee granting Claimant's request for an attorney's fee of $5,256.00, costs in the amount of $2,176.75, and a 20% penalty, all assessed against Employer. It is this Order that Employer now timely appeals, with Claimant filing in opposition.

On appeal, Employer argues the ALJ had no jurisdiction to issue the March 28, 2012 Order and even if she did, the Order was based upon incorrect facts and therefore not based on substantial evidence. To the contrary, Claimant argues that jurisdiction was proper as the Order resolved a separate and distinct fee petition.

STANDARD OF REVIEW

Because the Order under review is not one based on an evidentiary record produced at a formal hearing, the applicable standard of review is whether the ALJ's decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See*, 6 Stein, Mitchell & Mezines, *Administrative Law*, § 51.03 (2001).

ANALYSIS

Employer argues the ALJ's March 28, 2012 Order violates two basic principles of law and therefore should be vacated. The first is that the ALJ lacked jurisdiction on the issue of attorney's fees in this matter upon the filing by Claimant of a Petition for Review with the D.C. Court of Appeals (DCCA); and, second, that insofar as the CRB had previously rendered a decision and order on the same issue, the ALJ's Order was barred by *res judicata* and collateral estoppel. As the petition for attorney's fees for services rendered on Claimant's behalf before H&A constitutes a separate cause of action, we find no merit in either of Employer's arguments.

As Claimant correctly noted in his response to this appeal, the regulations require separate fee applications pursuant to 7 DCMR § 224.8, which states

> An application for attorney fees for work performed before the Office of Workers' Compensation shall be filed with the Office. An application for attorney fees for work performed before the Hearings and Adjudication Section shall be filed with the Section. An application for attorney fees for work performed before the Director shall be filed with the Director, DOES.

Claimant filed a fee application for work performed before the OWC, which was initially denied and subsequently denied again upon reconsideration. Claimant appealed these denials to the CRB, which affirmed the OWC's ruling denying the assessment of a fee against Employer and vacated the "implied" assessment of that fee against Claimant.[4] After Claimant's motion for reconsideration was denied, an appeal to DCCA ensued.

[4] *Baker v. Berkel & Company Contrators*, CRB No. 12-005, OWC No. 641418 (March 6, 2012).

Employer's arguments center on the contention the CRB's March 6, 2012 Decision and Order was on the issue of attorney's fees, and was a final judgment on the merits involving the same parties.[5] As such, Employer asserts that the ALJ's March 28, 2012 Order is precluded and should be reversed. We disagree. While the two orders share the generic issue of attorney's fees, the CRB addressed the assessment of those fees for services before the OWC and the ALJ's Order appealed here addressed the assessment of separate fees for services before H&A.[6]

The fee petition submitted to H&A does not constitute a re-litigation of the petition denied by the OWC. While the two petitions share the same parties and the same basic issue, they are separate causes of action filed in separate forums as required by the regulations seeking relief for separate and distinct services performed before those forums. Thus, the petition for attorney's fees filed with H&A was not barred by either *res judicata* or collateral estoppel.

Employer next assigns as error that contrary to the ALJ's statement in the Order that it did not respond to the show cause order, it did so on January 4, 2012.[7] Employer asserts that insofar as the Order under appeal is based in part on an incorrect fact, it is not supported by substantial evidence and should be reversed. Apart from an order that is not based on an evidentiary record not being subject to a substantial evidence review, we nonetheless have cause to call into question the ALJ's assertion that her decision was based upon "careful consideration of Counsel's fee petition."

In his fee petition letter dated and filed on September 6, 2011, counsel stated as part of the justification to the ALJ:

> Since the Claimant prevailed at the Informal Conference and has now prevailed with a final award filed in the Deputy Commissioner's (sic) office on June 30, 2011, for past and present and future permanency benefits, the undersigned is entitled to a Fee under 32-1528.(b) (sic) of the Act to be paid by the Employer-Insurer in addition to the benefits awarded by you..(sic) After the Informal Conference recommendation of 3/25/10 for continued temporary total benefits and rehabilitation was controverted and rejected by the Employer-Insurer and the Employer filed for a formal hearing, the carrier eventually paid benefits, but did not accept the Informal Conference Recommendation, and thus in rejecting same, Claimant is entitled to a fee for the successful prosecution of Claimant's claim which resulted in the aforementioned ALJ Compensation Order and award therein.

In the above referenced passage, Claimant has conflated his claim for continued temporary total benefits he prevailed upon at the Informal Conference with his claim for a schedule award that he prevailed upon at a subsequent formal hearing and memorialized in the CO of June 30, 2011. In

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[5] *Employer/Carrier's Memorandum In Support of Their Application for Review*, p. 10.

[6] See *Fluellyn v. DOES*, Nos. 10-AA-689 & 10-AA-1025 (D.C. 2012).

[7] See *Employer/Carrier's Memorandum, supra*, at 11, fn. 2. Not only does Employer assert that it filed a response to the show cause order on January 4, 2012, it also claims that Claimant filed a reply to that response on January 10, 2012 and that the ALJ failed to reference either filing.

addition, Claimant continued under the misapprehension that a claim for permanent partial disability benefits was presented at the informal conference on February 1, 2010 when it was not. As the CRB noted in addressing the petition for attorney's fees before OWC:

> Indeed, the closest thing to error that we detect is the CE's statement that a claim for permanent partial disability benefits had even been presented to OWC at the informal conference: no such claim is identified in the Application for Emergency Informal Conference/Mediation, or in the notice setting the matter in for informal conference, or in the "Issues" identification portions of the Memorandum itself. Further, to the extent permanent partial disability under the schedule was presented as an issue at the informal conference, Mr. Baker lost, and Berkel prevailed. In no sense did the employer in this case ever reject the recommendation of the Mayor concerning an award under the schedule to the claimant's right arm. Hence, there can be no assessment against the employer for an attorney's fee with regard to such an award.[8]

In the instant case, contrary to Claimant's representation to the ALJ below, he prevailed at the informal conference only on his claim for continuing temporary total disability benefits.[9] When the parties convened for a formal hearing, the claim was for a schedule award for impairment to the upper right extremity. Insofar as the claim for permanent partial disability benefits was never presented at an informal conference and Claimant bases his fee petition on § 32-1530(b)[10] of the Act, the question becomes whether the facts of the instant case meet the circumstances of that provision to allow an attorney's fee to be assessed against Employer. This question shall be resolved on remand.

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[8] *Baker v. Berkel & Company Contractor*, CRB No. 12-005, at 5-6 (March 6, 2012).

[9] See *Memorandum of Informal Conference* (March 25, 2010).

[10] D.C. Code § 32-1530(b) states:

> 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 his petition to have a fee award assessed against Employer under the facts of the instant case, Claimant basically asserts in his petition that § 32-1530(b) warrants that assessment. The ALJ ordered the assessment of the requested fee pursuant to § 32-1530, without specifying the exact provision. The CRB has previously opined that in order to prevail under § 32-1530(b) a claimant must prevail on a claim at the informal level, the employer must reject that outcome and seek a formal hearing, and the claimant must again prevail on that same claim at the formal hearing.[11] That scenario did not occur here.

Section 32-1530 of the Act specifically provides for an attorney's fee to be assessed against the employer when the employer declines to pay compensation or when the employer pays or tenders payment of compensation after an award.[12] In all other cases, any claim for legal services shall not be assessed against the employer or carrier.[13] In addition, to the extent Claimant seeks to have the assessment made pursuant to § 32-1530(b), the plain language of that provision authorizes an award of attorney's fees only when the express conditions of the statute are met.[14]

In the March 28, 2012 Order Awarding An Attorney's Fee, the ALJ stated that the fee was assessed against Employer after giving "careful consideration" to the fee petition and Employer's failure to respond to the order to show cause. However, in granting the petition pursuant to § 32-1530 without specifying the specific provision, the ALJ has not satisfied the requirement to show how the express conditions of the statute were met. This makes the Order arbitrary and not in accordance with the law and requires that it be remanded for further consideration.[15]

At the same time Claimant filed his response to Employer's appeal on May 3, 2012, he also filed "Claimant's Motion for Expedited Consideration" to have the attorney's fee and costs awarded placed in escrow pending a final order by the CRB or if the matter is remanded to be held as a lien against compensation pursuant to § 32-1530(c).[16] As this provision is predicated upon there being "an approved attorney's fee" and there being none given the instant remand, the motion is denied.

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[11] [11] *Baker v. Berkel & Company Contractorsl*, CRB No. 12-005, at 5-6 (March 6, 2012), citing *National Geographic v. DOES*, 721 A.2d 618 (D.C. App. 1998).

[12] D.C. Code § 32-1530(a) and § 32-1530(b).

[13] D.C. Code § 32-1530(b).

[14] *Fluellyn, supra*, at 15, citing *Providence Hospital v. DOES*, 855 A.2 1108, 1114 (D.C. 2004).

[15] Upon remand, the ALJ shall also determine the validity of Employer's assertion that it responded to the order to show cause.

[16] D.C. Code § 32-1530 (c) provides:

> In all cases, fees for attorneys representing the claimant shall be approved in the manner herein provided. If any proceedings are had before the Mayor or any court for review of any actions, award, order or decision, the Mayor or court may approve an attorney's fee for the work done before him or it, as the case may be, by the attorney for the claimant. An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award, and the Mayor or court shall fix in the award approving the fee such lien and manner of payment.

CONCLUSION AND ORDER

The March 28, 2012 Order Awarding An Attorney's Fee to be assessed against Employer pursuant to § 32-1530 does not state how the circumstances of this case meet the express conditions of § 32-1530(b), the provision upon which an attorney's fee assessed against Employer is allowed to be made. As such, the Order is arbitrary and not in accordance with the law. Accordingly, the Order is REVERSED AND REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

July 24, 2012
DATE