

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 11-053**

**BARBARA RAGAN (WIDOW) ON BEHALF OF JESSE E. RAGAN (DECEASED),  
Claimant-Petitioner,**

v.

**RLR CONSTRUCTION CO. AND HARTFORD INSURANCE COMPANY,  
Employer/Insurer—Respondents**

Appeal from an Order Approval of Lump-Sum Settlement Reducing Attorney's Fee by  
The Office of Workers' Compensation  
OWC No. 504969

John C. Duncan, III, Esquire, for the Claimant/Petitioner  
Erin E. Pride, Esquire, for Respondents

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

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board;  
JEFFREY P. RUSSELL, *Administrative Appeals Judge*, concurring.

**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).

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<sup>1</sup> Judge Leslie has been appointed by the Director of DOES as an interim CRB member pursuant to DOES Policy Issuance No. 11-03 (June 13, 2011).

<sup>2</sup> Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

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## OVERVIEW

This appeal challenges that portion of the Office of Workers' Compensation (OWC) Order Approval of Lump-Sum Reducing Attorney's Fee (Order) issued on February 2, 2011 wherein the attorney's fee requested was reduced by \$23,209.50 from an initial request of \$44,000.00. Because the OWC's Order is in opposition to the CRB's prior rulings on lump-sum settlements where both parties are represented by counsel and because the decision to reduce the requested attorney's fee was made in the best interest of the claimant is deemed to be arbitrary and capricious, we reverse and remand.

## BACKGROUND FACTS OF RECORD

The basic facts underlying this matter are not in dispute. On January 25, 2011, the parties filed a joint petition for approval of a lump-sum settlement to the OWC. In the joint petition, the parties, each represented by counsel, requested approval of a lump-sum settlement in the amount of \$220,000.00 in full and final settlement of any claim for past or future death benefits payable under the Act. Upon receipt and paid out of the settlement amount, claimant's counsel was to receive \$44,000.00 as an attorney's fee.<sup>3</sup>

On February 2, 2011, the OWC approved the amount of the lump-sum settlement requested but reduced the requested attorney's fee. In making its determination, the OWC noted that the requested attorney's fee equated to \$550.70 per hour and thereby exceeded the maximum hourly rate of \$240.00 per hour; that it gave consideration to the rules and regulations set forth under D.C. Code § 32-1530, 7 DCMR § 226, and its fiduciary duty to conclude:

Accordingly, the interested parties in the above-referenced matter are informed that the lump-sum settlement petition received, in this office, on January 25, 2011 is hereby approved in the amount of \$220,000.00. An attorney's fee request in the amount of \$44,000.00 is now adjusted and reduced to \$20,790.50; this was based on the hourly time expended (74.7 hours plus 22.9 hours) by claimant's representative, which after calculation exceeded the maximum rate of \$240.00. The balance (\$23,209.50) of the attorney fees should be held in escrow until the administrative appeal process is exhausted.

OWC Order of February 2, 2011.

On March 4, 2011, claimant's counsel filed a motion for reconsideration of the OWC's Order Approval of Lump-Sum Settlement Reducing Attorney Fee. Several days later on March 7, 2011, claimant's counsel filed an Application for Review with the CRB seeking reversal of the OWC's Order but also requesting that the CRB stay any action on the appeal until its motion for reconsideration and request for informal conference before OWC had been acted upon. Accordingly, on March 17, 2011, the CRB dismissed the AFR without prejudice with the right to refile within 30 calendar days of the OWC's final action on the motion for reconsideration and

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<sup>3</sup> The detailed cover letter accompanying the joint petition included a signed and dated statement by the claimant attesting to the reasonableness of the fee and agreeing to have the amount deducted from her lump-sum settlement.

request for informal Conference. *Ragan v. RLR Construction Co.*, CRB No. 11-020, OWC No. 504969 (March 17, 2011).

On May 9, 2011, the OWC rendered a decision of claimant's counsel's Motion for Reconsideration entitled "Response to Motion for Reconsideration". After summarizing counsel's reasons in support of his motion, the OWC affirmed its prior ruling in its Order of February 2, 2011 and cited the following as its authority:

"(1) Policy Directive Clarifying the Award of Attorney Fees in District of Columbia Workers (sic) Compensation Cases issued May 12, 2005 by then DOES Director, Gregory P. Irish. (2) D.C. Municipal Regulations Chapter 2. Private Sector Workers' Compensation Program, Sections 224.2 and 224.3. (3) The fiduciary responsibility of the Office to act in the best interest of claimant."

*Response To Motion For Reconsideration*, p. 2 (May 9, 2011).

On June 8, 2011, claimant's counsel timely filed his Second Application for Review. In challenging the OWC's attorney's fee reduction, counsel argues that the Order is not supported by substantial evidence, is contrary to law, and is arbitrary and capricious.

#### STANDARD OF REVIEW

This appeal concerns an Order based not upon factual findings made on an evidentiary record, but rather upon the contents of the agency administrative record, and the filings of the parties. Accordingly, the CRB must affirm the order under review unless the order is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See*, 6 Stein, Mitchell & Mezones, *Administrative Law*, § 51.93 (2001).

#### DISCUSSION AND ANALYSIS

In this appeal, claimant's counsel primarily argues that the OWC committed reversible error when it approved the parties' settlement, where both parties were represented by counsel, but reduced the agreed upon attorney's fee. Counsel cites D.C. Official Code § 32-1508(8)<sup>4</sup> and the CRB's decision in *Atkins v. Rite Aid Corporation*, CRB No. 09-124, OWC No. 642482 (April 27, 2010) (*Atkins II*), in support of his argument.

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

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<sup>4</sup> D.C. Official Code § 32-1508(8) reads in pertinent part: 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.

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.

The CRB's decision in *Atkins I* was a majority decision with the one dissenting panel member advocated the position that the OWC had the responsibility to examine what was in the claimant's best interest in those instances where those interests diverge from those of his counsel, as in the case of a fee petition. This position also was espoused in a concurring opinion by one of the panel members in *Atkins II*.

While we see no reason in the instant matter to disturb the holding in *Atkins*, we also acknowledge the underlying issue of how the OWC is to balance its responsibility to review settlement agreements impartially to insure that it makes a decision that is in the best interest of the claimant. However, it is not enough for the OWC merely to cite its fiduciary responsibility to the claimant. It must announce the reasons underlying the exercise of that responsibility so as not to have the action taken deemed arbitrary and capricious. Such is the situation in the case under review.

In the January 21, 2011 cover letter accompanying the settlement agreement submitted to the OWC, Mrs. Ragan signed and dated a brief statement agreeing to pay counsel a fee of \$44,000.00 plus \$260.96 in costs for a total of \$44,260.96 that was to be deducted from the gross settlement amount of \$220,000.00, which would leave her with a net recovery of \$175,739.04. In a March 3, 2011 letter on her personal stationary and which was submitted along with counsel's

motion for reconsideration to the OWC, Mrs. Ragan provided a detailed testimonial in support of counsel's fee request.

Claimant's counsel included in the submitted settlement agreement an attorney's fee request that, while in excess of \$240.00 maximum of the Director's Policy Directive, did adhere to the 20% limit imposed by D.C. Official Code § 32-1530(f). In addition, counsel addressed all the factors to be considered in awarding an attorney's fee delineated by 7 DCMR § 224.2.

In his Second Application for Review, counsel proffers that in response to his motion for reconsideration and request for an informal conference, the informal conference was held before Claims Examiner Clyde Carrington on April 8, 2011 and that Mrs. Ragan was present and available for questioning by the Claims Examiner. However, there is nothing in the administrative file from the OWC that the informal conference was scheduled and held.

Accepting counsel's proffer that the informal hearing was held and that Mrs. Ragan was present and available for questioning, it begs the question why the Claims Examiner did not use this opportunity to query her regarding the attorney's fee she had agreed to pay out of the proceeds of her settlement. The case would be different if all the Claims Examiner had before him was the brief statement attested to by Mrs. Ragan that was appended at the end of the January 21, 2011 cover letter.

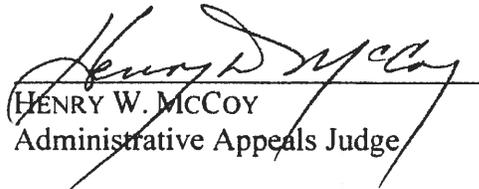
Insofar as Mrs. Ragan had authored and submitted to the OWC a letter detailing the reasons why she support payment of the requested attorney's fee and had taken the time to appear at the informal conference in further support, it was incumbent upon the Claims Examiner to delve into those reasons in order to ascertain whether she fully understood the ramifications of her decision.

The action by the OWC to reduce the requested fee ostensibly in the claimant's best interest in the face of the claimant's declarations in support of it was both arbitrary and capricious, in addition to not being in accordance with the law, and therefore warrants reversal and remand. On remand, the OWC shall state how its decision to reduce the requested fee is in claimant's best interest when she has declared her support for paying the full amount. To accomplish this, we encourage the OWC to query claimant directly in order to assess claimant's understanding of her actions so as to justify making a decision that is in her best interest.

#### CONCLUSION AND ORDER

The OWC's decision to reduce the requested attorney's fee that was included in settlement agreement that it approved and where the parties were both represented by counsel was arbitrary and capricious and not in accordance with the law. The Order of February 2, 2011 is REVERSED and REMANDED for further consideration and the issuance of an order on remand that is consistent with this decision.

FOR THE COMPENSATION REVIEW BOARD:

  
HENRY W. MCCOY  
Administrative Appeals Judge

January 26, 2012

DATE

JEFFREY P. RUSSELL, *concurring*:

I concur in the outcome. However, I think it is enough to cite the statute and *Atkins, supra*. 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 violates some other provision of the Act, such as where an attorney's fee in the agreement exceeds 20% of the amount of the settlement.

  
JEFFREY P. RUSSELL  
Administrative Appeals Judge