

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**

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



**LISA M. MALLORY**  
**DIRECTOR**

**CRB No. 12-005**

**FRANKLYN BAKER,**

**Claimant–Petitioner,**

**v.**

**BERKEL & COMPANY CONTRACTORS and ZURICH AMERICAN INSURANCE COMPANY,**

**Employer and Insurer–Respondent.**

Appeal from “Supplemental Award of Attorney’s Fee” Orders of  
Claims Examiner Cathy Scruggs  
OWC No. 641418

Richard W. Galiher, Jr., Esquire, for the Petitioner

Mark Bertrand, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,<sup>1</sup> LAWRENCE D. TARR, AND HENRY W. MCCOY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

**DECISION AND ORDER**

**BACKGROUND**

Although the claimant, Franklyn Baker, is technically the Petitioner in this case, because in certain aspects of the matter this Decision and Order needs to refer to Mr. Baker distinctly and apart from his counsel, we will refer to Mr. Baker hereafter either by his name, or as Claimant, and shall refer to his counsel as Petitioner.

Mr. Baker sustained two injuries while working as a construction worker, one occurring on July 26, 2007 (OWC No. 641418), after which he returned to work, and a second occurring October 10,

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<sup>1</sup> Judge Russell was appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance Nos. 11-02 (June 23, 2011).

2007 (OWC No. 653078). The first injury primarily involved a fracture to the right ring finger, while the second involved the right wrist and hand more broadly.

His employer, Berkel, accepted both claims and paid benefits thereon. However, Berkel initially claimed that the second injury was limited to the right hand only, and that any wrist problems were unrelated to either accident.

An informal conference was requested to resolve the dispute, which centered on whether Mr. Baker would receive additional temporary total disability (TTD) benefits and vocational rehabilitation services. A Memorandum of Informal Conference was issued in which the Claims Examiner (CE) recommended that the TTD benefits be paid, and that vocational rehabilitation be explored.

Berkel rejected the recommendation and requested a formal hearing, which occurred August 3, 2010. By the time of the formal hearing, Berkel had voluntarily restored Mr. Baker's TTD and was continuing to pay TTD on an ongoing basis. The sole issue presented to the Administrative Law Judge (ALJ) in that proceeding was the nature and extent of permanent partial disability (PPD) to Mr. Baker's right arm, under the schedule. The only claim for relief presented by Mr. Baker at that time was for an award of 60% PPD to the right arm under the schedule. Following the formal hearing, the ALJ issued a Compensation Order (CO) on June 30, 2011, in which an award of 40% PPD to the right arm was made. That CO was not appealed.

Petitioner filed a petition with the CE seeking an assessment of an attorney's fee, to be paid by Berkel, which Berkel opposed. On December 7, 2011, the CE issued a "Supplemental Award of Attorney's Fee" (Fee Order I), in which the request for an assessment of a fee against Berkel was denied. Petitioner filed a request that the denial be reconsidered, which was denied in a "Supplemental Award of Attorney's Fee" (Fee Order II) issued on January 5, 2012.

Petitioner filed an appeal of Fee Order I and Fee Order II, to which Berkel has filed an opposition.

#### STANDARD OF REVIEW

As an initial matter, in its review of an appeal from OWC, the Board 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

From the Application for Review and supporting memorandum we glean that Petitioner avers that the CE's denial of an assessed attorney's fee award against Berkel is erroneous, because the CE incorrectly stated that the Claimant did not prevail in the formal hearing upon a claim that he had won before OWC but which victory the Employer rejected and did not honor. The CE's statement is incorrect, according to Petitioner, because a printout of payments provided by Employer to OWC which is referenced in Fee Order I does not cover the time frame mentioned in the Recommendation, which was characterized in that recommendation as "temporary total disability benefits from January 4, 2010 to present ...." Further, Petitioner argues that even if the denial of a fee assessment against the Berkel is proper, the CE erred by not assessing a fee against Claimant,

which would operate as a lien against ongoing benefit payments as they are being issued by Employer.

Review of the OWC file reveals the following documents and pertinent information:

1. Claimant's "Application for Emergency Informal Conference/Mediation" (OWC) filed January 14, 2010, in which the "issue" is identified as "Payment of TTD and medical and consolidation with 7/227/07 [sic] (same hand)". There is no reference to any request that a schedule award be considered;
2. OWC's "Notice of Informal Conference" issued January 14, 2010, setting in an informal conference on February 1, 2010, and identifying the issue(s) as "Payment of temporary total and medical";
3. OWC's "Memorandum of Informal Conference" dated March 25, 2010,<sup>2</sup>, in which the positions of the parties are described as "Employee's Claim: Temporary total disability benefits from January 4, 2010 (subject to credit) to present and continuing and authorization for continuing medical treatment", and later "Employer's Position: The employer/carrier contends there was no mention of any wrist injury until one year later and that claimant's alleged wrist condition is not related to the employment." In describing Claimant's submissions, the CE makes reference to the report of Claimant's treating physician, Dr. Pyfrom, dated March 2010, and that it contained a permanent partial disability rating of 60% to the right arm. However, neither party is described in the Memorandum as having raised the issue of permanency at the informal conference;
4. In the "Conclusion" portion of the Memorandum, the CE stated that "I find the impairment ratings are premature and temporary total disability benefits should be reinstated. Additionally, it appears vocational rehabilitation should be explored in order to return the claimant to gainful employment";
5. In the "Recommendations" section of the Memorandum, the CE wrote "It is hereby recommended that the employer/carrier pay temporary total disability benefits from January 4, 2010 to present (subject to any benefits paid during this period) and continue until vocational rehabilitation efforts have been initiated or until a change in conditions have been demonstrated";
6. Berkel's letter (via its counsel) to OWC dated April 14, 2010, filed April 22, 2010, rejecting the recommendations contained in the Memorandum;
7. "Application for Formal Hearing" (AFH) of the same date filed by Berkel identifying the issues to be presented for resolution at the formal hearing as "Nature and Extent; Whether the claimant is disabled as a result of the injuries suffered on July 26, 2007 and October 20, 2010; whether the injuries to the claimant's right wrist is causally related to the July 26, 2007 and October 10, 2010 accidents."

The formal hearing was held on August 3, 2010. However, for reasons that are not evident from anything that we have seen in the administrative file, or to which either of the parties to this appeal has directed our attention, by the time the formal hearing occurred, there was no longer any claim

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<sup>2</sup> March 25, 2010 is the date that the CE signed the Memorandum. The Certificate of Service is dated March 26, 2010, and were the date an issue in this proceeding that is the date that we would use to identify the document. However, for clarity and consistency with the usage of the parties in their filings in this matter

being presented for temporary total disability benefits, medical care, or vocational rehabilitation services, and there was no claim by Berkel that the wrist injury was unrelated to the work injuries.

Rather, review of the CO issued following the formal hearing that ultimately resulted from the Berkel's application reveals that in the "Background" portion, it is recited that "Employer provided temporary total disability benefit payments from July 26, 2007 until October 4, 2007 and *October 11, 2007 until the present and continuing.*" CO, page 2 (emphasis added). Further, in the "Findings of Fact", it is stated that among the stipulations was a stipulation that "Claimant received voluntary payments of temporary total disability payments from July 26, 2007 until October 4, 2007 and October 11, 2007 until the present and Claimant reached maximum medical improvement (hereinafter MMI) on March 1, 2010". *Id.*, "Findings of Fact". The facts relating to the voluntary payment dates are recited as stipulations in the hearing transcript (HT) of the August 3, 2010 formal hearing proceedings. HT 6. Further, the only claim for relief presented at the formal hearing by the Claimant was for "a schedule award under the Act, of permanent partial disability of 60% to his right upper extremity." CO, page 2, "Claim for Relief". Mr. Baker's claim for a schedule award to the right arm was granted to the extent of 40% thereof. *Id.*, "Order".

Thereafter, by letter dated September 6, 2011, Petitioner filed a fee petition with OWC, seeking assessment of a fee against Berkel for work performed before OWC, to which request Berkel filed an opposition. There was no request in the petition for any fee assessment to be made against the Claimant. In denying the assessment against Berkel, the CE wrote as follows:

The [District of Columbia Court of Appeals] held in *National Geographic v. Department of Employment Services*, 721 A.2d 618 (D.C. App. 1998), that the employer's rejection of the Mayor's written recommendation is a prerequisite to the claimant recovering attorney fees. If the employer agrees with the Mayor's Recommendation and acts accordingly with the recommendation the claimant is barred from recovering attorney fees.

The circumstances in the instant case are as follows. The claimant presented a claim for temporary total disability benefits and permanent partial disability benefits. The employer/carrier disputed causal relationship of the wrist and nature and extent of claimant's fingers. The OWC found that the wrist was causally related and recommended temporary total disability benefits but found the claim for permanent partial disability benefits were premature. The employer/carrier rejected the recommendation and filed for a formal hearing. The employer/carrier continued to pay temporary total disability benefits to the claimant.

Based on the foregoing this office finds that the circumstances, in the instant case, do not meet the preconditions for assessing attorney fees against the employer/carrier.

Supplemental Award of Attorney's Fees, December 12, 2011, (Fee Order I) page 2. Although it is true that elsewhere in Fee Order I the CE did mention the payment printout that had been submitted by Berkel covering a different period of time than the TTD period at issue at the informal conference, she did not rely upon it as a basis for denying the fee award against Berkel. Rather, by

its explicit terms, Fee Order I was based upon “the circumstances in the instant case” as recited above.

In a letter dated December 15, 2011 and filed December 19, 2011, Petitioner filed “Claimant’s Motion for Reconsideration and Assessment of Attorney’s Fees Against the Claimant as a Lien Against His Weekly Indemnity Benefits in the ALJ’s Compensation Award Limited By Statute to 20% of Benefits Obtained”, which we will denominate Petitioner’s “Motion for Reconsideration”, with OWC. In that motion, Petitioner did not actually seek reconsideration of the denial of the assessment against the Berkel; rather, Petitioner sought an award against Claimant in the alternative.

In an order issued January 5, 2012, also entitled “Supplemental Award of Attorney’s Fee” (Fee Order II) the CE responded to the Motion for Reconsideration, and wrote:

On December 19, 2011 claimant’s counsel motioned for reconsideration of the December 7, 2011 Supplemental Order of Attorney fees denying assessment of attorney fees against the employer/carrier or alternatively counsel requested that his attorney fees be made a lien against claimant’s weekly indemnity benefits.

Based on the foregoing this office finds that no new evidence has been presented in support of claimant’s motion for reconsideration of the December 7, 2010 Supplemental Order of Attorney Fees; however, this office finds that counsel is entitled to recover attorney fees from his client.

Fee Order II.

Neither Fee Order I nor Fee Order II approved a specific fee amount.

As the CE correctly noted in Fee Order I, under *National Geographic*, in order to prevail upon a request that a fee award be assessed against an employer, 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.<sup>3</sup> That did not occur in this case.

We find no error or abuse of discretion by the CE in denying the assessment against Berkel in Fee Order I, or in the CE denying reconsideration of that denial in Fee Order II. The CE was correct in noting that the formal hearing and the ensuing CO did not award Claimant any benefits that had been recommended by OWC but were unpaid as a result of Berkel’s failing to heed the recommendation. While the circumstances surrounding the voluntary payment of benefits that had been rejected initially are not part of this record, those benefits were, as established by undisputed stipulation, voluntarily paid<sup>4</sup>. 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

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<sup>3</sup> There are other circumstances, not germane to this case, in which a fee award can be assessed against the employer, such as where the employer contests compensability of a claim *ab initio*.

<sup>4</sup> Thus, it should be noted that an employer might change its position after initially rejecting a recommendation, and resume payment of benefits. In such a case, if that change of heart occurred under circumstances that result in a claimant experiencing a delay in receipt of benefits, the Act provides a remedy, in the nature of late payment penalties as set forth in D.C. Code § 32-1515 (e) or (f), as the case may be.

Conference/Mediation, or in the notice setting the matter in for informal conference, or in the “Issues” identification portions of the Memorandum itself. Beyond this, 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.

Further, inasmuch as there was no request in the initial Fee Petition for consideration of an award against Mr. Baker, the failure determine the amount of a proper fee award against him in Fee Order I was not erroneous.

Nonetheless, Petitioner did make such a request in the Motion for Reconsideration. However, we note that the document itself and the Certificate of Service attached thereto do not reflect that the Motion for Reconsideration was consented to by or served upon Mr. Baker. In this instance the Motion for Reconsideration is the only fee petition seeking an assessment against Mr. Baker, and it does not appear that he had notice of its pendency.

While we affirm the denial of reconsideration of the denial of the assessment against Berkel, we strike the portion of Fee Order II in which the CE, impliedly at least, granted (albeit without determining an amount) an award against Mr. Baker, as being an abuse of discretion. Ordering that a claimant is liable for a fee without the claimant being on notice of the request is an impermissible lapse in the notice safeguards required by considerations of a claimant’s due process rights to respond to the request.

#### CONCLUSION

The denial of the request for a fee award assessed against Berkel in Fee Order I and Fee Order II is neither arbitrary, capricious, an abuse of discretion or contrary to law. The implied award of an attorney’s fee assessed against Mr. Baker contained in Fee Order II is an abuse of discretion and is contrary to law.

## **ORDER**

Fee Order I is affirmed. The denial of reconsideration of Fee Order I contained in Fee Order II is affirmed. The implied award of an attorney's fee assessed against Mr. Baker contained in Fee Order II is stricken, without prejudice to being renewed upon proper notice to Claimant.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
Administrative Appeals Judge

March 6, 2012  
DATE