

From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: When an overpayment is declared due to fraud on the part of the claimant, is the BWC obligated to pay a claimant's attorney fees before applying a compensation award to the overpayment?

In most cases where a determination is made that a claimant has received excess compensation, either due to a mistake of by way of fraud, the BWC does not attempt to collect the money directly from the claimant. Instead, the Ohio Revised Code authorizes the BWC to declare an overpayment, and to recoup the overpaid amounts from future awards of compensation. Unfortunately, most claimant's attorneys are paid by taking a percentage of compensation, including permanent partial compensation (PPD.) Recently, the Supreme Court of Ohio was presented with a case involving a finding of fraud, a declared overpayment, and whether a claimant's attorney is entitled to be paid from a subsequent award of compensation before the award is applied to reduce an overpayment.

State ex rel. Baker v. Indus. Comm., Slip Opinion No. 2015-Ohio-1191, concerned an employee who was injured in 1995. A workers' compensation claim was filed, which was allowed for both psychological and physical injuries, and the claimant sought and received temporary total disability (TTD) compensation for a period of several years. In 2008, following an investigation, the BWC Fraud Unit determined that the claimant had been working from 2002 to 2007 while she was receiving TTD, and sought a declaration of an overpayment of \$63,479.77, which was granted by the Industrial Commission. In 2010, the claimant, by and through her attorneys, sought and received a substantial increase in PPD of \$24,649.50. The BWC promptly credited the entire amount of the new award to the overpayment, prompting a motion from the claimant's attorneys seeking payment of their fee (\$8,216.50) for representing the claimant and securing the award. The motion was referred to the Industrial Commission, which concluded that the BWC was entitled to apply the full amount to the overpayment. The full Industrial Commission granted an appeal, and concluded that it lacked jurisdiction to review a "fee dispute" between counsel and the BWC, or the jurisdiction to order the BWC to pay counsel's fee. The law firm brought an action in *mandamus* against the Industrial Commission, but the Tenth District concluded that a writ should be denied because the law firm had no "clear legal right" to receive payment of the fee from the BWC, and the BWC had no "clear legal duty" to pay the fee. The 10th District also agreed that it lacked jurisdiction to adjudicate a fee dispute between an attorney and the BWC. An appeal as of right to the Supreme Court followed.

The Supreme Court affirmed, finding that the BWC had no "clear duty" to pay the attorneys their fee. First, the Court disposed of the argument that OAC 4123-3-10(A), which permits payments to attorneys so long as a release authorizing the payment is filed, and requires that the check be issued to the attorney because the authorization was executed by the claimant. There is no clear legal duty on the part of the BWC to pay attorney's fees in lieu of satisfying an overpayment, and the Court refused to invoke the extraordinary relief of a writ of mandamus to find such a duty. The Court also distinguished certain situations (child support orders, subrogation) where parties or counsel are granted a preference by statute. The Court rejected the argument that counsel had a "lien" on a portion of the PPD award, and that it was unlawful to apply the award to the overpayment without paying the fee. R.C. 4123.511 authorizes the BWC to use any lawful means to recover compensation that has been overpaid due to fraud, and the statute contains no language excepting the payment of attorney's fees. The Court concluded that this is a fee dispute between the law firm and the BWC, and the Industrial Commission had no jurisdiction to adjudicate it. Because the statute does not create a clear legal duty on the part of the BWC to pay the fee, the Supreme Court refused to create one.

The Court in *Baker* further pointed out that the attorneys had an adequate remedy at law – a lawsuit against the claimant. *Baker* seems on its face to be unfair, in light of the fact that the law firm goes uncompensated for achieving what could be argued was a spectacular result. The firm can at least be consoled by the fact that the State of Ohio is recouping some of the tens of thousands of dollars in compensation their client fraudulently obtained from the BWC.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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