PART VIII

ATTORNEY FEES

A. REVIEW OF ATTORNEY FEE AWARDS MADE BELOW

1. GENERAL OVERVIEW

The Department's attorney fee scheme prohibiting a contingent fee arrangement between counsel and claimant does not violate due process. ***Department of Labor v. Triplett,*** 110 S.Ct. 1428, 13 BLR 2-364 (1990).

Under the Act, a claimant's attorney is prohibited from charging a fee unless the fee has been approved by an agency of the Department or a court. 33 U.S.C. §928(c); 20 C.F.R. §725.365. The regulations also provide that "[n]o contract or prior agreement for a fee shall be valid." 20 C.F.R. §725.365.

ALJ's award of attorney's fee is discretionary, and will be upheld on appeal unless arbitrary, capricious, an abuse of discretion, or contrary to law. ***Kerns v. Consolidation Coal Co.***, 176 F.3d 802, 21 BLR 2-631 (4th Cir. 1999).

An attorney's fee may be enhanced to reflect the delay in payment. ***Kerns v. Consolidation Coal Co.***, 176 F.3d 802, 21 BLR 2-631 (4th Cir. 1999).

Statutory attorney's fees under 33 U.S.C. §928(a) are available for the costs associated with pursuing a petition for attorney's fees on appeal. ***Kerns v. Consolidation Coal Co.***, 247 F.3d 133, 22 BLR 2-283 (4th Cir. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.366(b), pertaining to attorney's fees, is consistent with the holding of the United States Supreme Court in ***Burlington v. Dague***, 505 U.S. 557, 562 (1992), that attorney fees be calculated according to the "lodestar" method, as the regulation requires consideration of no factors not already included in the lodestar analysis, and further does not supplant the lodestar method of calculating reasonable fees or enhance the lodestar fee once it is calculated. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 874-875, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The Sixth Circuit held that the "lodestar method" of calculating fees, *i.e.* where the fee amount equals the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate, is the appropriate starting point for calculating fee awards in

black lung benefits cases. In so holding, the court noted that there was no binding precedent on this issue in the 6th Circuit, but that this approach was consistent with the fee-shifting provision of the Longshore Act, and with other federal fee-shifting statutes, as well as with the Secretary of Labor's position in *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001), that the factors identified at Section 725.366(b) do not supplant or enhance the lodestar method but, rather, are already reflected in the lodestar method. ***B&G Mining, Inc. v. Director, OWCP* [*Bentley*]**, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

2. SUCCESSFUL PROSECUTION OF THE CLAIM

In reversing the Board's affirmance of an administrative law judge's award of attorney fees, court held that the "reasonable belief" of claimant, a Part B beneficiary, that he had a valid claim under Part C of the Act was inadequate to support the award under 33 U.S.C. §928(a) which requires a successful prosecution of the claim. ***Director, OWCP v. Baca,*** 927 F.2d 1122, 15 BLR 2-42 (10th Cir. 1991).

A fee may not be approved where the claimant does not prevail. ***General Dynamics Corp. v. Horrigan,*** 848 F.2d 321 (1st Cir. 1987), *cert. denied,* 109 S.Ct. 554 (1988).

Where claimant's counsel was awarded a fee but was not paid until six years later because various decisions in case prevented benefits award from becoming final until then, counsel properly requested supplemental fee to compensate him for delay in fee payment once court's decision affirming benefits award became final. ***Kerns v. Consolidation Coal Co.***, 176 F.3d 802, 21 BLR 2-631 (4th Cir. 1999).

Where counsel was successful in an appeal which sought to supplement statutory attorney fees awarded pursuant to 33 U.S.C. §928(a) to reflect delay in payment, the Fourth Circuit held that counsel was entitled to compensation for his attorney's fees and expenses incurred while pursuing statutory attorney's fees on appeal, even though the miner was not awarded enhanced black lung benefits as a result thereof. ***Kerns v. Consolidation Coal Co.***, 247 F.3d 133, 22 BLR 2-283 (4th Cir. 2001).

3. JURISDICTION

After determining that the proper forum for approval was the body before which the attorney's work was performed, the court, citing 33 U.S.C. §928(c), approved a fee settlement agreement for services before it, even though the final compensation order had not been entered. ***Eifler v. Peabody Coal Co.,*** 13 F.3d 236, 18 BLR 2-86 (7th Cir. 1993).

4. ISSUES ON APPEAL OF ATTORNEY FEE AWARDS

a. Opposition to Attorney Fees

b. Counsel's Appeal of Substantial Reductions in the Requested Fee

1). The Hourly Rate

It is not unreasonable or an abuse of discretion where the approved hourly rate is lower than the national average if the work was performed in a routine case not calling for special ability and effort. ***Esselstein v. Director, OWCP,*** 676 F.2d 228, 4 BLR 2-71 (6th Cir. 1982).

The attorney's risk of loss and the delay in payment can be reflected in the hourly rate charged by claimant's attorney. ***Velasquez v. Director, OWCP,*** 844 F.2d 738, 739 (10th Cir. 1988); ***Thompson v. Potashnick Construction Co.,*** 812 F.2d 574, 577 (9th Cir. 1987).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.366(b), pertaining to attorney's fees, is consistent with the holding of the United States Supreme Court in ***Burlington v. Dague***, 505 U.S. 557, 562 (1992), that attorney fees be calculated according to the "lodestar" method, as the regulation requires consideration of no factors not already included in the lodestar analysis. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 874-875, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The Sixth Circuit held that in determining an appropriate hourly rate, as a general proposition, rates awarded in other cases do not set the prevailing market rate--only the market can do that. Rates from prior cases can, however, provide some inferential evidence of what a market rate is, just as state-bar surveys of rates provide evidence of a market rate, but themselves do not set the rate. Thus, the Court held that while reliance on awards in earlier cases might not be warranted in all cases, in some circumstances, such as where there is no clear market rate against which to compare the attorney's requested rate, an adjudicator can look to prior awards for guidance in determining a prevailing market rate. ***B&G Mining, Inc. v. Director, OWCP* [*Bentley*]**, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

The Sixth Circuit held that in determining the appropriate hourly rate, it is reasonable for an adjudicator to consider factors such as an attorney's professionalism, experience, and the complexity of the case to determine the appropriate lodestar rate. Mere reference to these factors is not necessarily "double counting" factors already taken into account by the lodestar rate. ***B&G Mining, Inc. v. Director, OWCP* [*Bentley*]**, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

The Sixth Circuit held that differing hourly rates awarded by the district director ($200), the ALJ ($250), and the BRB ($225), on the same case, do not indicate that the adjudicators abused their discretion. In this case, the Board was reviewing the awards of both the district director and the ALJ for an abuse of discretion, as well as making its own award *de novo*. Where different adjudicators are awarding the fees for work before them, reasonable differences in opinion about what constitutes the appropriate rate can be expected. ***B&G Mining, Inc. v. Director, OWCP* [*Bentley*]**, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

The Sixth Circuit held that in determining the appropriate hourly rate, the adjudicators did not abuse their discretion by failing to comment upon employer's evidence that attorneys performing legal work for insurance companies typically earn $125/hr. The court noted that insurance-defense cases are not necessarily comparable to black lung cases, where there can be a significant delay in getting paid that can justify a higher hourly rate. ***B&G Mining, Inc. v. Director, OWCP* [*Bentley*]**, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

The Sixth Circuit held that it is error for an adjudicator to consider risk of loss in determining a reasonable hourly rate. Compensation for the risk of loss is already factored into any reasonable hourly rate. ***B&G Mining, Inc. v. Director, OWCP* [*Bentley*]**, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

In vacating an award of attorney fees, the United States Court of Appeals for the Fourth Circuit held that because the administrative law judge rejected evidence submitted by claimant's counsel to establish his prevailing rate for his work (the Altman Weil Survey), she erred in determining a reasonable rate on her own, taking into account, among other factors, the low rates of success for claimants in black lung cases and the contingent nature of attorney fees. Citing ***Robinson v. Equifax Information Services, LLC***, 560 F.3d 235, 245 (4th Cir. 2009), the court stated that the administrative law judge must base an award of attorney fees on "specific evidence of the prevailing market rates" and that risk of loss is not a separate factor to be considered, as it is presumed to be incorporated into the hourly rate charged by counsel. The court noted that a reasonable prevailing rate may be derived from evidence of the types of fees received in the past or "affidavits of other lawyers, who might not practice black lung law, but who are familiar both with the skills of the fee applicants and more generally with the type of work in the relevant community." The court also indicated that an administrative law judge does not have to limit his or her consideration to fees charged in black lung cases, as "other administrative proceedings of similar complexity would also yield instructive information." ***Westmoreland Coal Co. v. Cox***, 602 F.3d 276, BLR (4th Cir. 2010).

2). Attorney Fees-Review of Attorney Fee Awards Made Below-Issues on Appeal

of Attorney Fee Awards-Counsel's Appeal of Substantial Reductions in the Requested Fee-The Number of Hours

The Sixth Circuit held that the adjudicators had acted within their discretion in striking hours considered excessive or primarily clerical. The court stated that while reviewing correspondence can constitute legal work, receiving and filing the correspondence is presumably clerical work. ***B&G Mining, Inc. v. Director, OWCP* [*Bentley*]**, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

The Sixth Circuit held that adjudicators may approve billing in quarter-hour increments. The court concluded that as long as the total number of billable hours is reasonable in relation to the work performed, the award should be affirmed. ***B&G Mining, Inc. v. Director, OWCP* [*Bentley*]**, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

5. LIABILITY FOR ATTORNEY FEES

Withdrawal is a concession of liability; therefore, the party withdrawing controversion is liable for claimant's attorney fee under 20 C.F.R. §725.413(b). ***Bethlehem Mines Inc. v. Director, OWCP*** [***Markovich***], 854 F.2d 632, 11 BLR 1-105 (1988); *see also* ***Capelli v. Bethlehem Mines Corp.,*** 11 BLR 1-129 (1988)(construing the court's holding in ***Markovich***).

The Trust Fund is liable for the payment of attorneys' fees in the same manner as an employer. ***Director, OWCP v. Black Diamond Coal Mining Co.,*** 598 F.2d 945 (5th Cir. 1979); ***Director, OWCP v. Leckie Smokeless Coal Co.,*** 598 F.2d 881 (4th Cir. 1979); ***Director, OWCP v. South East Coal Co.,*** 598 F.2d 1046 (6th Cir. 1979); ***Republic Steel Corp. v. U.S. Department of Labor,*** 590 F.2d 77 (3d Cir. 1978). As one court stated, "the fund stands in the shoes of the employer for the purposes of the attorneys' fees provision in 33 U.S.C. §928(a)." ***Black Diamond,*** 598 F.2d at 953.

The Fourth Circuit held that under Section 28(a) of the Longshore and Harbor Workers' Compensation Act, 30 U.S.C. §928(a), as incorporated into the Federal Coal Mine Health and Safety Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.367, imposition of pre-controversion attorney fees on employers may be made where the OWCP has made an initial determination that claimant is ineligible for benefits. Noting that the Board had reversed almost 20 years of precedent in awarding pre-controversion attorney fees in ***Jackson***, the Court rejected the Board's rationale, based on a determination of what was a "reasonable" fee in reliance on ***Hensley v. Eckerhart***, 461 U.S. 424 (1983) and ***City of Burlington v. Dague***, 505 U.S. 557(1992), but affirmed the Board's award of pre-controversion attorney fees based on the alternative

rationale forwarded by the Director. As the three consolidated cases before the Court represented "initial-denial" cases, *i.e.* cases where the OWCP initially denied benefits, an adversarial relationship arose at that point and employer's subsequent controversion "merely ratifies" the agency action. In "initial-award" cases, no adversarial relationship arises unless and until employer controverts the award, thereby providing claimant a reason to seek professional assistance in pursuing the claim. The concurrence discussed concerns due to the Board's eighteen-year strict interpretation of Section 28(a) which had been affirmed by the Court and had been adopted by the Director in their pending proposed changes to the Black Lung regulations, but deferred to the Director's "reasonable and commonsense" interpretation herein. ***Clinchfield Coal Co. v. Harris***, 149 F.3d 307, 21 BLR 2-479 (4th Cir. 1998)(Murnaghan, J., concurring), *aff'g on other grd's,* ***Jackson v. Jewell Ridge Coal Corp.,*** 21 BLR 1-28 (1997)(en banc) (Smith and Dolder, JJ., dissenting).

6. MISCELLANEOUS ISSUES

An award of an attorney fee does not include interest. ***Hobbs v. Director, OWCP,*** 820 F.2d 1528, 1530-1531 (9th Cir. 1987).

Because attorney's fee may be enhanced to reflect delay in payment, ALJ must consider counsel's request for supplemental fee award to compensate him for six year delay between award of fee and payment of fee. ***Kerns v. Consolidation Coal Co.***, 176 F.3d 802, 21 BLR 2-631 (4th Cir. 1999).

B. ATTORNEY FEES FOR SERVICES PERFORMED BEFORE THE BOARD

1. HOURLY RATE

DIGESTS

While noting that the rate at which an attorney is compensated must be market-based, ***Peabody Coal Co. v. McCandless***, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001), the Seventh Circuit rejected employer's assertion that counsel's customary billing rate was less than $200 per hour, finding that employer's "pure speculation" was insufficient to challenge the Board's finding that counsel's usual billing rate was reasonable in light of the work performed. Given counsel's fee recoveries in a number of similar cases, his representation that $200 per hour was his usual fee, and the absence of any contrary information regarding the market rate from employer, the court affirmed the Board's award of fees. ***Peabody Coal Co. v. Estate of J.T. Goodloe***, 299 F.3d 666, 22 BLR 2-483 (7th Cir. 2002).

The United States Court of Appeals for the Fourth Circuit held that the Board abused its

discretion in awarding claimant's counsel an hourly rate of $250 under Section 28 of the Longshore and Harbor Workers' Compensation Act, which is incorporated into the Black Lung Benefits Act, given that the Board relied upon a ten-year old hourly rate of $200, assumed it was a reasonable basis for an hourly rate today, and adjusted it upwards by the arbitrary amount of $50. The court stated that the Board can generally look to previous awards in the relevant marketplace as a barometer for how much to award counsel in the immediate area. Nevertheless, the court reasoned that an hourly rate that was set approximately ten years ago, and that was arbitrarily adjusted with no regard to the facts of the case or the lodestar factors, was not necessarily appropriate today. Consequently, the court remanded the case to the Board for a determination and explanation of the appropriate hourly rate. ***Newport News Shipbuilding and Dry Dock Co. v. Holiday***, 591 F.3d 219, BLR 2- (4th Cir. 2009).

B. ATTORNEY FEES FOR SERVICES PERFORMED BEFORE THE BOARD

2. SUCCESSFUL PROSECUTION OF CLAIM BEFORE THE BOARD

DIGESTS

In a consolidated appeal of two cross-petitions for review challenging an attorney fee awarded by the Board for work performed before the Board, the Seventh Circuit dismissed the petitions for review as premature because the fee award was not final and appealable. The court recognized that in the underlying case, the administrative law judge had awarded benefits, and subsequently, the Board had remanded the case to the administrative law judge for further consideration on the merits. There being no final judgment entered on the merits of the case, the benefits award was not final. The Seventh Circuit thus found merit in the position of the Director, Office of Workers' Compensation Programs, that both petitions for review of the Board's fee award be dismissed for want of jurisdiction. ***Zeigler Coal Co. v. Kerr*** **[Griskell]**, 240 F.3d 572, 22 BLR 2-247 (7th Cir. 2000).

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