BRB No. 01-0585 BLA

RITA M. CHILDERS (o/b/o and Widow of JAMES R. CHILDERS) Claimant-Petitioner v. DRUMMOND COMPANY, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER *EN BANC*

Appeal of the Proposed Order Supplemental Award Fee for Legal Services of Harry Skidmore, District Director, United States Department of Labor.

Michael E. Bevers (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Laura A. Woodruff (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Rita Roppolo (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Proposed Order Supplemental Award Fee for Legal Services of District Director Harry Skidmore awarding attorney fees on a miner's claim and a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1]

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Claimant's counsel filed a fee petition following the successful prosecution of the miner's claim and the survivor's claim for benefits under the Act.[2] In his most recent,

[2] Claimant is the surviving widow of the miner, James R. Childers. The miner originally filed a living miner's claim on May 13, 1998, Director's Exhibit 1. A Notice of Claim, notifying employer of its potential liability, was sent to employer on May 28, 1998, Director's Exhibit 20, to which employer responded by filing an Operator's Response on June 22, 1998, controverting its potential liability in the miner's claim, Director's Exhibit 21.

The district director denied benefits in the miner's claim on August 21, 1998, Director's Exhibit 18. On September 28, 1998, claimant's and the miner's counsel forwarded a form CM-1078, notifying the district director of the appointment of claimant's and the miner's counsel in the miner's claim as of September 23, 1998, Director's Exhibit 19. An Operator Notification, notifying employer of the initial denial of the miner's claim, was sent to employer on October 6, 1998, Director's Exhibit 22, to which employer responded by filing an Operator's Controversion on October 13, 1998, controverting the miner's claim, Director's Exhibit 24.

The miner died on October 5, 1998, Director's Exhibit 27, and by letter dated October 8, 1998, claimant's and the miner's attorney informed the district director of the miner's death, requested that he be listed as the claimant's/widow's representative and noted that the miner's widow intended to pursue the miner's claim, as well as file a survivor's claim, Director's Exhibit 23. Subsequently, claimant filed a survivor's claim on October 21, 1998, Director's Exhibit 26. On October 27, 1998, claimant's counsel forwarded a form CM-1078, notifying the district director of the appointment of claimant's counsel in the survivor's claim as of October 21, 1998, Director's Exhibit 35. A Notice of Claim, notifying employer of its potential liability in the survivor's claim, was sent to employer on December 21, 1998, Director's Exhibit 36, to which employer responded by filing an Operator's Response on January 4, 1999, controverting its potential liability in the survivor's claim, Director's Exhibit 37.

A Notice of Initial Finding, finding claimant entitled to benefits in the survivor's claim, was issued by the district director on April 16, 1999, Director's Exhibit 34, to which employer responded by filing an Operator's Controversion on April 28, 1999, which was received by the district director on April 30, 1999, controverting the survivor's claim, Director's Exhibit 38.

Ultimately, both claims were referred to the Office of Administrative Law Judges and in a Decision and Order issued on September 5, 2000, Administrative Law Judge Mollie W. Neal awarded benefits in both claims. No further appeal was taken by the parties.

relevant fee petition, at issue herein, claimant's counsel requested $2,052.35 for services performed before the district director in the miner's claim, plus expenses, and $880 for services performed before the district director in the survivor's claim. The district director found that services performed by claimant's counsel on certain dates were of equal importance to the development of evidence in the miner's and the survivor's claims and, therefore, divided the time spent on those dates, with half being considered services performed in the miner's claim and half being considered services performed in the survivor's claim.

In regard to the miner's claim, the district director found claimant's counsel entitled to a fee of $539.85 for services performed exclusively in the miner's claim, based on 3.25 hours of legal services at a reasonable hourly rate of $160.00, .25 hours of services performed by a legal assistant at a reasonable hourly rate of $65.00, plus $3.60 in expenses. The district director found claimant's counsel entitled to an additional fee of $756.25 for services performed in the miner's claim, based on the half of the services which the district director determined should be considered as services performed in the miner's claim, based on 4.625 hours of legal services at a reasonable hourly rate of $160.00 and .25 hours of services performed by a legal assistant at a reasonable hourly rate of $65.00. Thus, the district director found claimant's counsel entitled to a total fee of $1296.10 for services performed in the miner's claim. Because all of the services performed in the miner's claim were rendered after the miner's claim was initially denied on August 21, 1998, *see* Director's Exhibit 18, the district director found that employer was liable for all of the services performed in the miner's claim.

Regarding services performed in the survivor's claim, the district director determined that as claimant was initially awarded benefits in the survivor's claim, *see* Director's Exhibit 34, employer was liable only for services performed in the survivor's claim following employer's subsequent controversion of the award of benefits on April 30, 1999, *see* Director's Exhibit 38. Thus, the district director found claimant's counsel entitled to a fee of $400 for services performed exclusively in the survivor's claim subsequent to employer's controversion of the award of benefits on April 30, 1999, based on 2.50 hours of legal services at a reasonable hourly rate of $160.00, for which employer was liable. The district director found claimant's counsel entitled to a fee of $480 for services performed exclusively in the survivor's claim prior to employer's controversion of the award of benefits on April 30, 1999, based on 3 hours of legal services at a reasonable hourly rate of $160.00, for which claimant was liable. Moreover, the district director found claimant's counsel entitled to an additional fee of $756.25 for services performed in the survivor's claim, based on the half of the services which the district director determined should be

considered as services performed in the survivor's claim, which were also performed prior to employer's controversion of the award of benefits on April 30, 1999, based on 4.625 hours of legal services at a reasonable hourly rate of $160.00 and .25 hours of services performed by a legal assistant at a reasonable hourly rate of $65.00. Consequently, the district director found employer liable for a total of $400 of claimant's counsel fee for services performed exclusively in the survivor's claim subsequent to employer's controversion of the award of benefits on April 30, 1999, and found claimant liable for the remaining $1236.25 of claimant's counsel fee for services performed in the survivor's claim prior to employer's controversion.

On appeal, claimant contends that the district director erred in holding that employer was not liable for attorney fees charged for services performed before the district director in the survivor's claim, that were incurred prior to employer's controversion of claimant's entitlement to benefits in the survivor's claim. Employer and the Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, respond, urging that the district director's Proposed Order Supplemental Award Fee for Legal Services be affirmed.

The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law, *see Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).[3]

[3] Because the miner's most recent coal mine employment was performed in Alabama, *see* Director's Exhibit 21, the instant case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, *see Shupe v. Director, OWCP,* 12 BLR 1-200 (1989).

Claimant contends that the district director erred in finding claimant liable for $1236.25 of claimant's counsel fee for the services performed by claimant's counsel in the survivor's claim prior to employer's controversion in the survivor's claim.[4] Specifically, claimant contends that because the Board has held that an employer is liable for attorney fees incurred prior to controversion of liability, *see Jackson v. Jewell Ridge Coal Corp.*, 21 BLR 1-28 (1997)(*en banc*)(Smith and Dolder, JJ., dissenting); *see also Liggett v. Crescent City Marine Ways & Drydock, Inc.*, 31 BRBS 135 (1997)(*en banc)*(Smith & Dolder, JJ., dissenting)(holding that the rationale in *Jackson* is equally applicable to cases arising under the Longshore and Harbor Workers' Compensation Act [LHWCA]), the district director erred in finding claimant liable for the services performed by claimant's counsel in the survivor's claim prior to employer's controversion in the survivor's claim.

Under the "American Rule," a court generally will not award attorney fees absent "explicit statutory authority," *see Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 262 (1975); *see also Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services*, 532 U.S. 598, 602, 608 (2001); *Key Tronic Corp. v. United States*, 511 U.S. 809, 814, 819 (1994). Moreover, Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted," *see Alyeska*, 421 U.S. at 260; *see also Buckhannon*, 532 U.S. at 610.

[4] We affirm as unchallenged on appeal the district director's findings regarding the number of hours and hourly rates of compensation, the award of expenses and his determination that half of 9.25 hours of legal services and .50 hours of services performed by a legal assistant as having been performed in the miner's claim and half as having been performed in the survivor's claim, as unchallenged by any party on appeal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Attorney fees are awardable under the Act based on the language of Section 28(a) of the LHWCA, 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a).[5] In the

[5] Section 28(a) of the LHWCA provides:

> (a) Attorney's fee; successful prosecution of claim
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> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

instant miner's and survivor's claims filed prior to January 19, 2001, Section 28(a) is implemented by 20 C.F.R. §725.367 (2000), *see* 20 C.F.R. §725.2(c); Director's Exhibits 1, 26.[6] In *Jackson, supra*, the majority of the Board at that time, sitting *en banc*, held that Section 28(a) requires employer, once properly identified as the responsible operator, "thereafter" to be responsible for all "reasonable fee(s)" incurred by claimant throughout the litigation of the claim, relying on the holdings in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *City of Burlington v. Dague*, 505 U.S. 557(1992), which the majority held were applicable to the interpretation of Section 28(a), as the Act is a federal fee-shifting statute.

However, the Board's decision in *Jackson* was appealed to the United States Court of Appeals for the Fourth Circuit, where the case arose. *See 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). In *Harris*, the Fourth Circuit rejected as misplaced the Board's rationale, relying on the holdings in *Hensley* and *Dague* interpreting what was a "reasonable" fee in federal fee-shifting statutes, as it was inapposite to the interpretation of the word "thereafter" in Section 28(a), but nevertheless affirmed the result of the Board's decision awarding pre-controversion attorney fees in that case based on an alternative interpretation of Section 725.367(a) (2000) offered by the Director in that case, *id*. The Fourth Circuit deferred to the Director's interpretation of Section 725.367 (2000), as reasonable, that the imposition of pre-controversion attorney fees on employers may be made only where the district director has initially denied benefits, as an adversarial relationship arises at that point and employer's subsequent controversion "merely ratifies" the agency action, *see Harris*, 149 F.3d at 310, 21 BLR at 2-486-487. On the other hand, in cases where the district director has initially awarded benefits, "the claimant may not receive pre-controversion attorney fees," as no adversarial relationship arises unless and until employer controverts the award and, therefore, claimant has no reason to seek professional assistance in pursuing the claim, *id*.

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33 U.S.C. §928(a).

[6] Although the Department of Labor has amended the regulation implementing Section 28(a) of the LHWCA, 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a), *see* 20 C.F.R. §725.367, the revised Section 725.367 is only applicable to claims filed after January, 19, 2001, *see* 20 C.F.R. §725.2(c); *see also* 65 Fed. Reg. 79979-79980 (2000).

The Director, as well as employer, urge the Board to affirm the district director's holding in this case, as they contend that it is consistent with the Director's interpretation of Section 725.367(a) (2000) that was adopted by the Fourth Circuit in *Harris, supra*; *i.e.*, because claimant was initially awarded benefits in the survivor's claim, Director's Exhibit 34, employer is only liable for attorney fees rendered in the survivor's claim that were incurred after employer's controversion of liability in the survivor's claim on April 30, 1999, Director's Exhibit 38. We note, however, that while the Director had initially proposed changes to the black lung regulations at the time of the issuance of the Board's decision in *Jackson, supra*, that would similarly have held that employer is only liable for fees incurred after its controversion of liability, *see* 62 Fed. Reg. 3337-3435 (1997), the revised 20 C.F.R. §725.367 ultimately promulgated by the Director holds that an employer is liable for attorney fees incurred prior to its controversion of liability. *See* 20 C.F.R. §725.367(a); 65 Fed. Reg. 79979-79980 (2000).[7] In the comments provided with the revised regulation, the Director indicated that the revision was intended to "encourage attorneys to represent claimants as early as possible" "in the adjudicatory process" because of the "new evidentiary restrictions imposed by" the revised black lung regulations, which "will require claimants to make critical decisions at the earliest stage of adjudication," *see* 65 Fed. Reg. 79979-79980 (2000). Because the "new evidentiary restrictions" are only applicable to claims filed after January, 19, 2001, the Director agreed that the revised Section 725.367 "should not be applied retroactively," but is only applicable to claims filed after January, 19, 2001, *see* 20 C.F.R. §725.2(c); 65 Fed. Reg. 79980 (2000).[8]

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[7] The revised Section 725.367(a) states, in relevant part :

> "Generally, the operator or fund liable for the payment of benefits shall be liable for the payment of the claimant's attorney's fees where the operator or fund, as appropriate, took action, or acquiesced in action, that created an adversarial relationship between it self and the claimant" and the "fees payable under this section shall include reasonable fees for necessary services performed prior to the creation of the adversarial relationship."

Such circumstances include:

> "The responsible operator ... fails to accept claimant's entitlement to benefits within the 30-day period provided by §725.412(b) and is ultimately determined to be liable for benefits. The operator shall be liable for an attorney's fee with respect to all necessary services performed by the claimant's attorney."

20 C.F.R. §725.367(a)(1).

[8] While the revised Section 725.367 is, on its face, apparently consistent with the

Moreover, we note that while the Director asserts that his interpretation of Section 28(a) and its implementing regulation at Section 725.367 (2000), as adopted by the Fourth Circuit in *Harris*, "remains the Director's position" "[a]t least with regard to claims filed prior to January 19, 2001," the Director's interpretation of Section 28(a) and its implementing regulation at Section 725.367 (2000), as adopted by the Fourth Circuit in *Harris*, is inconsistent with the Director's interpretation of Section 28(a) in claims filed prior to January 19, 2001, arising under the LHWCA, *see Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12 (CRT)(5th Cir. 2002), *aff'g in pertinent part, Weaver v. Ingalls Shipbuilding, Inc.*, BRB No. 99-921 (June 1, 2000)(*en banc*)(unpub.)(Hall and Smith, JJ., concurring; Brown and McGranery, JJ., dissenting). In *Weaver, supra*, the Director urged the United States Court of Appeals for the Fifth Circuit to interpret the word "thereafter" in Section 28(a) to allow an attorney to recover fees from the employer regardless of when the

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Board's holding in *Jackson, supra*, the basis for the revised Section 725.367 provided by the Director in the accompanying comments is not relevant to Section 725.367 (2000), applicable to claims filed prior to January 19, 2001, such as in the instant claim, which are not regulated by evidentiary restrictions requiring claimants to make "critical decisions at the earliest stage of adjudication," *see* 20 C.F.R. §725.2(c); 65 Fed. Reg. 79979-79980 (2000). Similarly, although Section 725.367 implements Section 28(a) in regard to black lung claims, the basis of the Director's revised Section 725.367 and the Director's interpretation of Section 725.367(a) (2000) that was adopted by the Fourth Circuit in *Harris, supra*, are seemingly not applicable in cases arising under the LHWCA, which are not regulated by evidentiary restrictions requiring claimants to make "critical decisions at the earliest stage of adjudication" and as the district director in a Longshore case does not make an initial finding regarding eligibility for benefits requiring action by the employer that would create an adversarial relationship.

attorney incurred the fees. Consequently, while the Director is free to change his position or offer inconsistent positions regarding his interpretation of a statute, deference is not due his position in such circumstances, *see Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476, 26 BRBS 49, 52 (CRT)(1992).

It is well established that the interpretation of a statute begins with the plain meaning of the wording contained therein, giving effect, if possible, to every word of the statute. *Cowart, supra*; *Mallard v. U.S. Dist. Ct. For the Southern Dist. Of Iowa*, 490 U.S. 296 (1989); *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 530 n. 15 (1985). Interpretation of Section 28(a) requires strict adherence to the wording of the statute, emphasizing that when "...the employer or carrier *declines to pay* any compensation on or before the thirtieth day *after receiving written notice* of a claim...*and* the person seeking benefits *shall thereafter have utilized the services of an attorney* at law in the successful prosecution of his claim, there shall be awarded...a reasonable attorney's fee against the employer or carrier...." [emphasis added]. Giving effect to the word "thereafter" in Section 28(a), employer is only liable for fees incurred by claimant after it receives notice of its potential liability in a claim, *see Weaver, supra; see also Watkins v. Ingalls Shipbuilding, Inc.*, 12 F.3d 209, No. 93-04367 (5th Cir., Dec. 9, 1993) (table)(unpub.), *aff'g*, 26 BRBS 179 (1993). Following the plain language of Section 28(a), the Board has further held that employer must receive formal notice from the district director as provided by Section 19(b) of the LHWCA, 33 U.S.C. §919(b),[9] as incorporated into the Act by 30 U.S.C. §932(a), before employer's fee liability commences, even where the formal written notice was received from the district director almost eight months after the claim was filed and employer received notice from claimant. *Watkins*, 26 BRBS at 84-185, *aff'd mem.*, 12 F.3d 209, No. 93-04367 (5th Cir., Dec. 9, 1993) (table)(unpub.). The strict interpretation adopted in *Watkins* resulted in claimant's liability for fees incurred in the months prior to formal notice, with liability shifting "thereafter" to employer.[10]

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[9] Section 19(b) of the LHWCA requires that the district director notify employer within ten (10) days of the filing of a claim, serving employer personally or by registered mail. 33 U.S.C. §919(b), as incorporated into the Act by 30 U.S.C. §932(a); *see also* 20 C.F.R. §702.224.

[10] We note that in affirming the Board's decision in *Watkins*, the Fifth Circuit carefully reviewed claimant's argument that application of a strict interpretation of Section 28(a) to his case where, through no fault of his own, the district director delayed sending notice of his claim to the employer for eight months, was unfair. The court stated that "...claimant's position has no legal foundation, even though it raises an issue with possible equitable appeal." The court went on to hold that the Board "...properly applied the law as it is written in denying compensation for attorneys' fees that were incurred before the formal notice of claim was filed upon the employer by the district director. Like the BRB, this court

Procedures under the Act provide for investigation by the district director before employer is formally notified of its potential liability for benefits and attorney fees. During the informal time period after claimant files a claim, the district director may gather medical and employment information to provide claimant with an initial finding of eligibility for benefits, identifying a potentially responsible operator "...as soon after the filing of the claim as the evidence obtained permits." 20 C.F.R. §725.412(a) (2000); *see also* 20 C.F.R. §§725.2(c), 725.303, 725.308, 725.351(a) (2000), 725.410 (2000), 725.412(b-d) (2000), 725.413. Moreover, employer may not receive notification of its liability until well after a final adjudication of claimant's entitlement; Section 725.412(c) (2000) provides that the district director may, within one year after the final adjudication of a claim, identify and notify a responsible operator of potential liability, providing a response time and further adjudication if the employer contests liability of claimant's entitlement, *see* 20 C.F.R. §725.412(c); *see also* 20 C.F.R. §725.2(c). Thus, pursuant to the plain language of Section 28(a), employer is liable for fees incurred only after it has notice and the opportunity to resolve or controvert the claim, *see Weaver, supra; see also Watkins, supra*.

Claimant contends that because employer had already controverted liability in the miner's claim before the survivor's claim was filed, an adversarial relationship arose between claimant and employer at that time and, therefore, the inevitable and only reasonable conclusion is that employer would also controvert liability in the subsequent survivor's claim. Thus, from a practical standpoint, claimant contends that the miner's claim and the survivor's claim should be deemed to have merged for the purposes of holding employer liable for all of the services performed by claimant's counsel in the survivor's claim as well, which were rendered after the adversarial relationship between claimant and employer had been established when employer had controverted liability in the miner's claim. Claimant further contends that the fact that the miner's claim and the survivor's claim merged from a practical standpoint is evidenced by the fact that the district director found that certain services performed by claimant's counsel were considered to have been necessary for both the miner's claim and the survivor's claim.

We reject claimant's contention. Contrary to claimant's contention, employer's controversion of the miner's claim is separate and distinct from employer's controversion of the survivor's claim because a survivor's claim and a miner's claim are separate and distinct claims and do not merge, *see* 20 C.F.R. §725.309(c) (2000); *see also* 20 C.F.R. §725.2(c); *The Earl Patton Coal Co. v. Patton*, 848 F.2d 668, 11 BLR 2-97 (6th Cir. 1988); *see also*

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has no power to rewrite the statute." *Watkins, mem. op*. at 2.

Johnson v. Eastern Associated Coal Corp., 8 BLR 1-248 (1985); *but see Kubachka v. Windsor Power House Coal Co.*, 11 BLR 1-171, 1-173 n.1 (1988).

Consequently, the district director's finding that employer is only liable for attorney fees rendered in the survivor's claim that were incurred after employer's controversion of liability in the survivor's claim is affirmed, *see Weaver, supra; see also Watkins, supra*. In addition, because claimants are responsible for fees incurred prior to the employer's receipt of the formal notice of the claim and its potential liability and subsequent refusal to pay compensation, *see Weaver, supra; Couch v. The Pittston Co.*, 7 BLR 1-514 (1984); *cf. Harris, supra*, we affirm the district director's holding that claimant is liable for the pre-controversion attorney fees in the survivor's claim.[11]

[11] Our dissenting colleague is in error in asserting that our decision violates Section 28(d) of the Act. This section provides, "The amounts awarded *against an employer or carrier* as attorney's fees, costs, fees and mileage for witnesses shall not in any respect affect or diminish the compensation payable under this Act." 33 U.S.C. §928(d)(emphasis added). By its plain language, therefore, Section 28(d) applies where employer is liable for the payment of the attorney's fee. Employer is only liable for fees under Section 28 where the specific requirements of Section 28(a) or (b) are met. *See, e.g.*, *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981). In this case, we have held that employer

Finally, while the district director considered the date of employer's controversion after the initial award in the survivor's claim, *i.e.*, April 30, 1999, Director's Exhibit 34, to be the operative date of controversion for the purposes of imposing liability for attorney fees pursuant to Section 725.367(a) (2000), consistent with the Fourth Circuit's holding in *Harris, supra*, and the United States Court of Appeals for the Sixth Circuit in *Director, OWCP v. Bivens*, 757 F.2d 781, 788, 7 BLR 2-166, 2-175 (6th Cir. 1985)*; see also Allen v. Director, OWCP*, 9 BLR 1-38 (1986), the Board has interpreted the Act and Section 725.367 (2000) as imposing liability for attorney fees on employer after the date it receives actual or constructive notice of its potential liability for black lung benefits and, as in this case, declines to pay or fails to respond within thirty days, whichever occurs first, *see Bethenergy Mines Inc. v. Director, OWCP* [*Markovich*], 854 F.2d 632 (3d Cir. 1988), *aff'g sub nom. Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987); *Capelli v. Bethlehem Mines*

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cannot be liable under Section 28(a) for pre-controversion fees, and there is no argument for liability under Section 28(b). Accordingly, employer is not liable for the fees at issue here. Where employer is not liable, the applicable provision is Section 28(c), which provides, "An approved attorney's fee, in cases in which the obligation to pay the fee lies upon the claimant, may be made a lien upon the compensation due under an award;..." 33 U.S.C. §928(c). As the statute explicitly states that a fee may be assessed against claimant as a lien upon his compensation, where claimant is liable for the fee the amount of the fee will necessarily reduce the amount of the compensation. *Id*. This provision does not conflict with Section 28(d), as that section only applies where employer is liable for the fee. In such cases, the amount of employer's fee liability may not reduce the compensation awarded. *See generally Carswell v. Wills Trucking*, 13 BRBS 340 (1981)(discussing settlement agreements encompassing both the attorney's fee and compensation). As claimant is liable for the portion of the fee at issue here, Section 28(d) is inapposite to this case.

Corp., 11 BLR 1-129 (1988). Thus, the actual date of controversion for the purposes of imposing liability for attorney fees pursuant to Section 725.367(a) (2000), was, as claimant contends, the date of the filing of the Operator's Response on January 4,1999, controverting its potential liability in the survivor's claim, Director's Exhibit 37, after receiving the Notice of Claim, notifying employer of its potential liability in the survivor's claim, which was sent to employer on December 21, 1998, Director's Exhibit 36.

Consequently, we vacate the district director's finding that the operative date of controversion for the purposes of imposing liability for attorney fees pursuant to Section 725.367(a) (2000) was the date of employer's controversion after the initial award in the survivor's claim, *i.e.*, April 30, 1999, Director's Exhibit 34, and amend the district director's award of attorney fees to reflect the actual date of controversion, *i.e.*, the date of the filing of the Operator's Response on January 4, 1999, controverting its potential liability in the survivor's claim, Director's Exhibit 37. Based on claimant's counsel's most recent, relevant fee petition of record, employer is liable for additional attorney fees for 1.75 hours of legal services at an hourly rate of $160.00 performed exclusively in the survivor's claim between January 4, 1999, and April 30, 1999, plus 1.25 hours of legal services at an hourly rate of $160.00 and .25 hours of services performed by a legal assistant at an hourly rate of $65.00 based on the half of the services which the district director determined should be considered as services performed in the survivor's claim between January 4, 1999, and April 30, 1999, which amounts to an additional $496.25 in attorney fees. Thus, the district director's finding that employer is liable for a total fee of $1,696.10 for services performed in both the miner's and survivor's claims is amended to reflect that employer is liable for a total fee of $2,192.35 for services performed in both the miner's and survivor's claims.

Accordingly, the district director's Proposed Order Supplemental Award Fee for Legal Services is of District Director Harry Skidmore awarding attorney fees is amended in part and affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

We concur:

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I dissent from the majority's determination that 33 U.S.C. §928(a) authorizes the district director to hold claimant liable for a reasonable attorney's fee for work performed in the successful prosecution of her claim prior to employer's controversion.

The fee-shifting attorney fee provision of the Longshore and Harbor Workers' Compensation Act, incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), provides a claimant who is successful in the prosecution of his or her claim with a reasonable attorney's fee. Specifically, the Act states in pertinent part:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner...and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board or court....

33 U.S.C. §928(a). According to the terms of the statute, an employer which declines to pay compensation or which fails to act within thirty days becomes liable for a successful claimant's reasonable attorney's fee. The issue presented in the case at bar is the extent of employer's liability for an attorney's fee which has been triggered by employer's declination

to pay within a thirty-day period: does its liability for a reasonable attorney's fee include liability for all reasonable work performed in prosecution of the claim or does it exclude liability for reasonable work performed prior to employer's declination to pay?

As to whether employer is liable for a successful claimant's reasonable attorney's fee incurred for work performed prior to employer's controversion, three views are presented in this case: the majority says "no," consistent with the Board's holding in *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209, No. 93-04367 (5th Cir., Dec. 9, 1993)(table)(unpub.); the Director says "maybe," consistent with the court's decision in *Clinchfield Coal Co. v. Harris*, 149 F.3d 307, 21 BLR 2-479 (4th Cir. 1998)(Murnaghan, J., concurring); and I, together with Judge Hall and claimant, say "yes," consistent with the Board's decision in *Jackson v. Jewell Ridge Coal Corp.*, 21 BLR 1-28 (1997)(*en banc*)(Smith and Dolder, JJ., dissenting), *aff'd on other grd's, Clinchfield Coal Co. v. Harris*, 149 F.3d 307, 21 BLR 2-479 (4th Cir. 1998)(Murnaghan, J., concurring), and *Liggett v. Crescent City Marine Ways & Drydock, Inc.*, 31 BRBS 135 (1997)(*en banc*)(Smith and Dolder, JJ., dissenting). As I shall demonstrate, imposing upon a successful claimant liability for a reasonable attorney's fee incurred in prosecution of the claim contravenes the Act.

Careful consideration of the statute makes clear the error of the majority and the Director in bifurcating attorney fee liability between employer and claimant under Section 28(a). The United States Court of Appeals for the Fifth Circuit has analyzed Section 28 of the Longshore Act and concluded:

> From this comprehensive scheme regulating attorney's fees we discern a Congressional intent that when an employer contests its liability for compensation in whole or in part and the claimant is ultimately successful, the employer and not the claimant must pay the claimant's attorney's fees for services necessary to that success...[citations omitted].

Hole v. Miami Shipyards Corporation, 640 F.2d 769, 774 (5th Cir. 1981). This analysis accords with the Third Circuit's perception of Section 28(a) as a "rather straight-forward fee-shifting device [ ], designed to ensure that a claimant's disability benefits [are not] eroded by legal fees." *Bethenergy Mines Inc. v. Director, OWCP [Markovich]*, 854 F.2d 632, 637 (3d Cir. 1988). Similarly, the Fourth Circuit has recognized that Congress's "overriding purpose" in enacting the fee shifting provisions was to preserve claimant's compensation in full. *Director, OWCP v. Simmons*, 706 F.2d 481, 485 (4th Cir. 1983). Reference to the legislative history of Section 28(a) reflects Congressional intent to impose upon employer all liability for a reasonable attorney's fee incurred in the successful prosecution of a claim, against an employer which declined to pay compensation:

> A new provision is added directing an award of a reasonable attorney's fee

> against an employer or carrier to be paid directly to the attorney in a lump sum, where such employer or carrier has declined to pay compensation within 30 days after notice that a claim has been filed on the ground of nonliability, and such claim is successful.

H. R. Rep. No. 92-1441, reprinted at 3 U.S. Cong. and Adm. News pp. 4698, 4717 (1972). Not surprisingly, the statutory interpretation which imposes upon employer liability for all reasonable attorney's fees incurred in connection with the successful prosecution of the claim was previously the interpretation adopted by the district directors. *See, e.g., Couch v. The Pittston Co.*, 4 BLR 1-651 (1982), *rev'd on other grounds*, 7 BLR 1-514 (1984); *O'Quinn v. The Pittston Co.*, 4 BLR 1-25 (1981); *McReynolds v. The Pittston Co.*, 3 BLR 1-827 (1981); *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980); *Jones v. The Chesapeake & Potomac Telephone Co.*, 11 BRBS 7 (1979), *aff'd mem.*, No. 79-1458 (D.C. Cir. Feb. 26, 1980), *amended*, (D.C. Cir. Mar. 31, 1980).

The case at bar reveals the arbitrariness of the statutory interpretations of both the majority and the Director. The majority believes that the word "thereafter" in 33 U.S.C. §928(a) precludes imposing upon employer liability for an attorney's fee for work performed prior to employer's declination to pay benefits or the passage of thirty days after employer's receipt of actual or constructive notice of its potential liability for Black Lung benefits, whichever date occurs first. In the instant case, the majority holds that employer is not liable for the work performed between the filing date of the claim on October 8, 1998, and the filing date of the Operator's Response on January 4, 1999. Thus, the majority holds that, while employer is liable for a total fee of $2,192.35, claimant is liable for a fee of $740.00, despite the necessity of the work performed. To read the terms, "shall thereafter have utilized the services of an attorney," to relieve employer of liability for fees reasonably incurred prior to controversion conflicts with the clear import of the provision. Given the intent of the statute, to relieve claimants of liability for reasonable attorney's fees for the successful prosecution of their claims, so that their full amount of compensation is protected, "thereafter" should be read to establish a necessary timing sequence of events to lead to an assessment of an attorney's fee: employer is liable only after it has controverted, or the thirty day period has run, and thereafter claimant used an attorney's services to successfully prosecute the claim. "[T]hereafter" refers to part of the sequence of events necessary to establish employer's liability for an attorney's fee. The extent of liability is set forth in the latter portion of Section 28(a): a successful claimant is entitled to recover a "reasonable attorney's fee" against the liable employer in an approved amount.

The majority is so intent on giving meaning to the word "thereafter" in Section 28(a), that it has lost sight altogether that that section guarantees the award of a "reasonable attorney's fee" and that Section 28(d), 33 U.S.C. §928(d), directs: "The amounts awarded against an employer or carrier as attorney's fees, costs, fees and mileage for witnesses shall

not in any respect affect or diminish the compensation payable under this chapter." Assuredly, a fee cannot be deemed reasonable which does not compensate for the performance of necessary work. The necessity of the work, which is the basis for a reasonable fee, is a proper subject for the administrative law judge's or district director's determination in each case. If the administrative law judge or district director determines that necessary legal work was performed pre-controversion, compensation for that work should be incorporated into the award of a reasonable attorney's fee for which employer is held liable. If there is any doubt about the proper construction of Section 28(a), reference to Section 28(d) should eliminate it. To preclude from employer's liability for an attorney's fee, all reasonable work performed pre-controversion, necessarily diminishes claimant's compensation in contravention of the statute.

The majority seeks to evade the force of this argument by asserting that its decision does not violate Section 28(d) because that provision prohibits reduction of claimant's compensation by an attorney's fee award only when employer is liable for the attorney's fee.[12] The majority contends that because its decision diminishes claimant's compensation by imposing the attorney's fee liability directly on claimant, it does not conflict with Section 28(d)'s directive: "The amounts awarded against an employer or carrier as attorney's fees...shall not in any respect affect or diminish the compensation payable...." 33 U.S.C. §928(a). The majority's defense is specious, implicitly denying the reality of its decision: because it excluded the pre-controversion attorney's fee from employer's liability, it imposed

[12] The Longshore Act limits employer's liability for attorney's fees to claims involving the existence or extent of liability, which are resisted by employer and subsequently successfully prosecuted by claimant's attorney, as set forth in Section 28(a) and (b). The cost of other litigation is borne by claimant. *See* Section 28(c), *E.g.*, attorney fee to obtain commutation order is the responsibility of claimant. *Portland Stevedoring Company v. Director, OWCP*, 552 F.2d 293 (9th Cir. 1977).

that liability on claimant. The majority's decision reduces claimant's compensation to the extent it reduces employer's liability under Section 28(a) for a reasonable attorney's fee, for that reason the majority's decision violates Section 28(d).[13]

Because both the majority's and the Director's interpretations of Section 28(a) would reduce claimant's compensation by imposing upon claimant liability for part of the attorney's fee for work necessary to prosecution of the case, they clearly contravene Section 28(d). Furthermore, the majority and the Director cannot argue that their interpretations vindicate Congressional intent when there is no logical justification for denying recovery of a portion of a successful claimant's attorney's fee for legal services which are reasonable and necessary to obtain payment of compensation, based solely upon a fluke of timing in rendering these services.

The Director's construction of Section 28(a), as adopted by the Fourth Circuit in *Harris*, is susceptible to the same criticism as the majority's because it precludes imposition upon employer of liability for an attorney's fee for work performed prior to the creation of an adversarial relationship between claimant and employer. Thus, the district director held claimant liable for an attorney's fee of $1,236.25 for work related to the survivor's claim, which was performed prior to employer's declination to pay on April 30, 1999. The district director held employer liable for a fee of $1,696.10. Contrary to the direction of the statute, the district director's order reduces claimant's compensation by $1,236.25. Similarly, the majority's amendment of the district director's finding, to reflect that employer is liable for a total fee of $2,192.35 for services performed in both the miner's and survivor's claims, effectively holds claimant liable for an attorney's fee of $740.00 for work related to the survivor's claim performed prior to the date of the filing of the Operator's Response on January 4,1999, controverting its potential liability in the survivor's claim, Director's Exhibit 37. The majority would thereby reduce claimant's compensation by $740.00.

The first mistake in the Director's statutory analysis was to ignore the plain words of the statute and to substitute for them his understanding of statutory intent. Although the

[13] The majority's argument, that its decision does not violate Section 28(d) because its decision reduces claimant's compensation by imposing attorney's fee liability directly on claimant, has a brazen quality reminiscent of the plea by the defendant who was convicted of murdering his parents and then threw himself on the mercy of the court because he was an orphan.

statute provides: "If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed with the deputy commissioner...," the Director would substitute for those words, "If an adversarial relationship is created between employer and claimant...." Claimant in the instant case demonstrates the inadequacy of this substitution by arguing that she and employer achieved adversarial status when she filed her survivor's claim, because employer had previously controverted her husband's claim. The Director concedes the appeal of this argument, which is manifestly reasonable, but the Director asserts that under this rationale employer could be held liable for an attorney's fee even if it never specifically "declined to pay benefits." And so the Director acknowledges that its concept of an adversarial relationship requires refinement: if the district director denies benefits, employer is deemed to reject the claim on the date the denial is issued; if, however, as in the instant case, the district director awards benefits, employer does not establish an adversarial relationship until it controverts the claim, following the district director's order of an award. The Director's contrived gloss on the statute reflects his effort to determine the point in time when it was reasonable for claimant to engage the services of an attorney. Applying his rules to the case at bar, he settles upon the date on which employer contravened liability following the district director's award, even though it is obvious to all, including the Director, that employer was determined to contest the claim from the date of filing.

Although the Fourth Circuit stated in *Harris* that the Director's interpretation was reasonable, in the three claims before the court in *Harris* the district director had denied benefits, and claimants thereafter obtained the services of attorneys. The net effect of the court's decision, adopting the Director's interpretation, was the same as that of the Board in *Jackson*: to hold employer liable for all pre-controversion attorney's fees. The instant case reveals that the Director's interpretation is not reasonable because the Director determined that an adversarial relationship was not established between employer and claimant until April 30, 1999, the date of employer's controversion after the initial award in the survivor's claim, Director's Exhibit 34, when realistically, the filing of the survivor's claim in October, 1998, was sufficient to create an adversarial relationship between employer and claimant, as claimant rightly contends. Furthermore, the Director's interpretation must be rejected because it is irreconcilable with the statute, by imposing upon claimant liability for a reasonable attorney's fee in the amount of $1,236.25, thereby diminishing claimant's compensation in contravention of Section 28(d).

Although the Director urges the Board to follow the example of the Fourth Circuit in *Harris*, holding that the Director's position was entitled to deference as a reasonable interpretation of an "ambiguous fee-shifting scheme," *Harris*, 149 F.3d at 310, 21 BLR at 2-487, the Director had declared when that case was before the Board, "calculation of an attorney fee to be paid to claimant's counsel... does not implicate the Director's responsibility for proper administration of the Act." *Jackson*, 21 BLR at 1-29 (quoting the Director's letter

filed with the Board). Apparently the Director recognizes that his interpretation of Section 28 is not owed deference. This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, which has previously advised the Director when rejecting his view, "If the Secretary has a position he wishes to express, he can do it through the proper forum, *i.e.*, the implementation of new, clarifying regulations." *Williams Brothers, Inc. v. Pate,* 833 F.2d 261, 265, 10 BLR 2-333, 2-337 (11th Cir. 1987). Needless to say, the Department never promulgated a regulation setting forth the position advanced herein. When the Department amended the regulations in 2000, the position set forth was that advanced by the Board in *Harris* and *Liggett*, not that currently advanced by the Director, *see* 20 C.F.R. §725.367(a); the revised regulation, however, is applicable only to claims filed after January 19, 2001, *see* 20 C.F.R. §725.2(c); *see also* 65 Fed. Reg. 79979-79980 (2000).

Of overriding significance is the fact that application of the Secretary's interpretation would reduce claimant's compensation in violation of Section 28(d). The statement of the Eleventh Circuit in *Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 245, 10 BLR 2-322, 2-327 (11th Cir. 1987), rejecting the Director's interpretation of a Black Lung regulation, applies with equal force to the case at bar:

> Ordinarily, the Department's construction of the statute involved must be given deference, *see Chevron U.S.A. v. NRDC*, 467 U.S. 837, 843-44 & n.11, 104 S.Ct. 2778, 2781-82 & n.11, 81 L.Ed.2d 694 (1984); *accord Young v. Community Nutrition Institute*, 476 U.S. 974, 106 S.Ct. 2360, 2364, 90 L.Ed.2d 959 (1986). However, the implication the Director seeks to draw from the regulation cannot be given effect where, as here, it directly contravenes the express statutory language. As always, the courts must give effect to the unambiguously expressed intent of the legislative branch as that intent is reflected in the clear language of the statute. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781-82; *see also American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982)(the "starting point must be the language employed by Congress"); *Birmingham Trust National Bank v. Case*, 755 F.2d 1474, 1477 (11th Cir. 1985)(same). Absent a clear legislative intent to the contrary, express statutory language is conclusive. *Case*, 755 F.2d at 1477.

In sum, the Director's position is entitled to no deference because it does not implicate his responsibility as Administrator of the Act. Even if he were arguing in defense of his role as Administrator, the position would not be entitled to deference because it is unreasonable and, above all, because it contravenes the Act. *Chevron, supra*; *Cornelius, supra*.

In contrast to the statutory interpretation of the majority, which would result in

imposing upon the successful claimant liability for a reasonable attorney's fee in the amount of $740.00, and in contrast to the statutory interpretation of the Director, which would impose upon the successful claimant liability for a reasonable attorney's fee in the amount of $1,236.25, the statutory interpretation herein advanced would vindicate Congressional intent by imposing upon employer, alone, liability for a reasonable attorney's fee incurred in the successful prosecution of the survivor's claim, pursuant to Section 28(a). This interpretation is not only consistent with the Director's prior interpretation in both black lung and longshore cases, *see Couch*, *supra*; *McReynolds*, *supra*; *O'Quinn*, *supra*; *Baker*, *supra*; *Jones*, *supra*, but it essentially accords with that currently advanced by the Director in longshore cases. *See Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12 (CRT)(5th Cir. 2002), *aff'g in pertinent part, Weaver v. Ingalls Shipbuilding, Inc.*, BRB No. 99-921 (June 1, 2000)(*en banc*)(unpub.)(Hall and Smith, JJ., concurring; Brown and McGranery, JJ., dissenting). The Director concluded his brief to the United States Court of Appeals for the Fifth Circuit in *Weaver* with the statement:

> [I]f an attorney provides "reasonable" services that ultimately aid in the successful prosecution of the claim after the employer declines to pay compensation, the employer must pay for the entirety of that work....[I]t is fundamentally fair and logical to require an employer to pay for legal services provided a successful claimant during a period prior to the employer's refusal to pay compensation.

Brief for Director at 35.

The Director explained to the Fifth Circuit that he interprets Section 28 differently when administering the Longshore Program than when administering the Black Lung Program because their procedures are different and as a result, longshore claimants, unlike black lung claimants may have need for legal assistance from the initial filing of the claim. Brief for Director in *Weaver* at 26 note 13. The Director thereby attempts to justify the artificial commencement dates for employer's liability for attorney's fees which he has laid down in the Black Lung Program. The Director's suggestion, that it is appropriate to discourage Black Lung claimants from promptly obtaining legal representation after filing their claims because legal assistance may not be necessary, overlooks the factual context in which the issue is presented, *i.e.*, the issue of an attorney's fee award arises only after claimant has obtained legal representation necessary to the successful prosecution of the claim. The Director also overlooks the reality of litigation, *i.e.*, the earlier one obtains legal services, the better one can avoid the loss of evidence, obtain necessary evidence and develop appropriate evidence.

In its amended regulation, 20 C.F.R. §725.367(a), applicable to claims filed after January 19, 2001, *see* 20 C.F.R. §725.2(c), the Department states that the attorney's fee

payable by a responsible operator or the fund for the successful prosecution of a Black Lung claim "shall include reasonable fees for necessary services performed prior to the creation of the adversarial relationship." The Department has thereby aligned its interpretation of Section 28 in new Black Lung cases with the Director's interpretation of Section 28 in Longshore cases. According to the Department, it changed its position for new black lung claims "[b]ecause the evidentiary limitations proposed by the Department [in the amended regulations] make legal representation for claimants advisable at the earliest possible stage of claims adjudication." 65 Fed. Reg. at 79979 (2000). The Department's explanation betrays a surprising ignorance of a fundamental principle of litigation: legal representation is *always* "advisable at the earliest possible stage." This rule is known by every experienced litigator, as discussed *supra*. Undoubtedly, this rule has also been learned by some black lung claimants.

Although the revised regulation does not apply to the survivor's claim before us, it shows that the statutory interpretation advanced herein is considered reasonable by the Department. Because both the statutory interpretation advanced by the Director and that advanced by the majority would impose upon claimant liability for a reasonable attorney's fee for services performed in the successful prosecution of her claim, thereby reducing her compensation in plain violation of Section 28(d), they must be rejected. *Cornelius, supra*. Accordingly, the district director's attorney's fee award should be reversed insofar as it imposed liability upon claimant for a reasonable attorney's fee in the amount of $1,236.25, and the district director's order awarding attorney's fees should be modified to hold employer liable for an additional $1,236.25.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL,
Administrative Appeals Judge