U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 93-0927 BLA

CLEO JACKSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JEWELL RIDGE COAL CORPORATION	)	
	)	
Employer-Petitioner	)	
	)	DATE ISSUED: 06/30/1997
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in Interest	)	DECISION and ORDER

Appeal of the Denial of Reconsideration of Attorney Fee Award of Douglas Dettling, Acting District Director, United States Department of Labor.

Stephen E. Arey, Tazewell, Virginia, for claimant.

Michael F. Blair (Penn, Stuart, Eskridge and Jones), Abingdon, Virginia for employer.

Jill M. Otte (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associated 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

BROWN, Administrative Appeals Judge:

Employer appeals the Denial of Reconsideration of the Attorney Fee Award of Douglas Dettling, Acting District Director, awarding attorney fees on a 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).

Claimant's counsel (counsel) filed a fee petition in December 1992 following the successful prosecution of the miner's claim for benefits under the Act. Counsel requested $1,340.00, representing 16.5 hours of work from June 23, 1981 through December 1, 1992 billed at an hourly rate of $80, and for $33.80 in miscellaneous expenses. On December 29, 1992, Acting District Director Detting granted this fee request and imposed liability for the payment of the fee on employer. Employer requested reconsideration, arguing that 5.5 hours, or $440.00, of the awarded fee represented work performed prior to employer's controversion of liability in this case on February 24, 1982 and that therefore employer was not liable for the payment of this portion of the fee. The district director denied employer's reconsideration request on January 12, 1993. Employer then filed this timely appeal with the Board. *See* 20 C.F.R. §725.366(e)[authorizes an appeal to be taken directly to the Benefits Review Board from a district director's decision on attorney fee cases].

On appeal, employer argues that the district director erred in finding it liable for attorney fees charged for services performed by counsel prior to employer's controversion.[1] Counsel responds that the amount of the attorney fee awarded is not contested but that the only issue on appeal concerns liability for the payment of pre-controversion fees. Counsel states that the case law supports employer's position that it is not liable for the pre-controversion fees. The Director filed a letter with the Board on April 25, 1995 stating that he will not respond to the Petition for Review as "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." In an accompanying footnote, the Director states that the case law has held that an operator's obligation for attorney fees attaches only after controversion and that once properly identified, "the fact that the operator nevertheless is liable for benefits precludes imposing liability for the excused fees on the Trust Fund." Director's April 25, 1995 Letter, n. 1.

On July 16, 1996, the Board issued an order requesting supplemental briefing on the issue of liability for attorney fees for services performed in the period between an initial denial of benefits by the Department of Labor and the responsible operator's receipt of notice of the claim and controversion of entitlement. Employer's Supplemental Brief reiterated that under Section 28(a) of the Longshore and Harbor Workers' Compensation Act, 30 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a) and

[1] On April 26, 1993, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Consolidate this case with cases then pending at the Board presenting identical issues for disposition. This motion was granted on October 22, 1993. Furthermore, the Director's subsequent Motion to Hold in Abeyance the consolidated cases was granted on February 24, 1994. Pursuant to Motions from the Director, the abeyance was lifted, the remaining cases severed and a briefing schedule established by orders dated July 28, 1994, August 22, 1994 and March 22, 1995.

implemented by 20 C.F.R. §725.367 [Longshore Act], imposition of liability for attorney fees may only be made following notification of employer and its controversion thereafter. Claimant responded on August 21, 1996, stating that should employer not be held responsible for pre-controversion fees, that the Black Lung Disability Trust Fund should be held responsible for those fees. "No attorney's fees were incurred in this matter until after the director denied Mr. Jackson's claim for benefits. Had the director not denied Mr. Jackson's claims for benefits he would not have sought the services of an attorney." Counsel August 21, 1995 Supplemental Letter, p.1.

The Director filed a response[2] requesting that the Board hold this case in abeyance until enactment of the Secretary's proposed amendments to the Act's implementing regulations, published January 22, 1997, and that these proposed amendments at 20 C.F.R. §725.367(a) resolve the disputed issue by providing: "...that, in no event, shall the responsible operator or the Fund be held liable for the payment of attorney's fees with respect to any services performed prior to..." the date of controversion by employer. Director's Response at 3. The Director informed the Board therein that the required public comment period was then scheduled to end on March 24, 1997. We note that the comment period has been extended since the filing of the Director's Response and public hearings on the proposed black lung regulations were scheduled for June 19, 1997 in Charleston, West Virginia and a second hearing in Washington, D.C., at a date and time yet to be announced. As counsel has awaited payment for this fee request[3] since December 1992, we will not delay our decision any longer.

The amount of an attorney fee award pursuant to Section 28(a) of the Longshore Act, is discretionary and will be sustained on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law.

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[2] On August 13, 1996, the Director filed a Motion for Extension of Time until September 11, 1996 to file a supplemental brief. Although the motion was opposed by employer, the Board granted the motion on August 19, 1996. On January 23, 1997, the Board issued an Order to show cause why the Board should not proceed without the Director's supplemental brief, which was never filed. On February 3, 1997 the Board received the Director's Response to Order to Show Cause and Motion to Hold Decision in Abeyance. Therein, the Director asserted that he was unaware that a briefing deadline had been established having no record of receipt of the Board's August 19, 1996 order. We accept the Director's response to the Order to show cause and deny his request to hold this case in abeyance consistent with the holdings herein.

[3] We affirm as unchallenged on appeal the district director's findings regarding the number of hours and hourly rate of compensation, the date the claim was initially denied, the responsible operator status and the award of miscellaneous expenses. *See Coen v. Director, OWCP,* 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

Abbott v. Director, OWCP, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Attorney fees are awardable under the Act based on the language of Section 28(a) of the Longshore Act.[4] Employer contends that the Board has held that an employer in a federal black lung claim is not responsible for the payment of pre-controversion attorney fees, citing *Couch v. The Pittston Co.*, 4 BLR 1-651 (1982), *rev'd on other grds,* 7 BLR 1-514 (1984) and *O'Quinn v. The Pittston Co.*, 4 BLR 1-25 (1981). In a supplemental brief, employer cites two additional cases, *Jones v. The Chesapeake & Potomac Telephone Co.,* 11 BRBS 7 (1979)(Miller, J. and Smith, C.J., dissenting in part), *aff'd mem.*, No. 79-1458 (D.C. Cir. Feb. 26, 1980), *amended*, (D.C. Cir. March 31, 1980) and *Baker v. Todd Shipyards Corp.,* 12 BRBS 309 (1980)(Miller, J., concurring in part and dissenting in part), in which the Board held that Section 28(a) of the Longshore Act limits employer's liability for an attorney fee solely to the services performed after the time employer receives notice of its potential liability. In all of the cases cited, together with *McReynolds v. The Pittston Co.*, 3 BLR 1-827 (1981), the district directors granted fee awards to claimant's counsel for all reasonable services rendered, including pre-controversion services as well as the services rendered after employer received notice of a claim and declined to pay it on or before thirty days. Again in the instant case, the district director granted claimant's counsel a fee award of $1,373.80, covering all reasonable services rendered, both pre-controversion and post-controversion, and assessed it against employer. Supplemental Award-Fees for Legal Services, December 29, 1992.

In all of the cases cited, *Couch, O'Quinn, Jones, Baker* and *McReynolds*, the Board rejected the position of the Director, and held that Section 28(a) of the Longshore Act limited an employer's liability to those fees incurred 30 days from the date it receives

written notice of a claim or from the date it declines to pay, whichever comes first. All of

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[4] Section 28(a) of the Longshore Act 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.

33 U.S.C. §928(a).

the cited cases were split decisions with one Board member dissenting. The majority stressed the language in Section 28(a) that upon notice, if the claimant *thereafter* utilizes the services of an attorney, and is successful, a reasonable attorney fee for the claimant shall be awarded and assessed against employer. Conversely, they held that liability for fees incurred prior to notice of a claim and a declination to pay are the responsibility of the claimant. The minority Board member took the position that the provisions about notice of a claim and declination to pay, plus the utilizing *thereafter* of an attorney, plus a successful prosecution of the claim simply trigger the liability of the employer for a reasonable fee for all services rendered in the successful prosection of the claim, not only for the services rendered after the date of notice of the claim and declination to pay. This is the position we adopt in the current cases. It is the same position that has been adopted by the deputy commissioners and district directors consistently since *Jones* in 1979 and followed in *Baker, McReynolds, O'Quinn, Couch* and up to the present in the instant case.

The United States Courts of Appeals for the District of Columbia Circuit and the Ninth Circuit have applied the holdings of the United States Supreme Court in In *Dague*, the Supreme Court considered the issue of enhancement of fees in federal fee-shifting statutes as it related to case law construing what is a "reasonable" fee. The Court held that this case law "applies uniformly to all [federal fee-shifting statutes]." *Dague, supra* at 562; see also *Farrar v. Hobby*, 113 S.Ct. 566 (1992); *Missouri v. Jenkins*, 491 U.S. 274 (1989); *Riverside v. Rivera*, 477 U.S. 561 (1986). In *Hensley*, the Supreme Court outlined the two-step process for evaluation of fee requests in fee-shifting statutes, holding that once it is determined whether the lawsuit was successful, the fact-finder must consider whether the requested fee is reasonable to the success obtained. *Hensley, supra* at 436. The Ninth Circuit in *Anderson* applied the holding in *Dague* to the definition of what is a reasonable fee under the Longshore Act at Section 928(a) and the D.C. Circuit in *Brooks* held that "the [Longshore Act]'s substantive language demands application of *Hensley's* two-step inquiry." *Anderson*, 30 BRBS at 69(CRT); *Brooks*, 25 BRBS at 167(CRT).

As pointed out above, the Board issued its decisions in *Jones* in 1979, *Baker* in 1980, *McReynolds* in 1981, *O'Quinn* in 1982 and *Couch* in 1984. The majority opinions stressed the *thereafter* language of Section 28(a) and allowed a prevailing claimant a r*easonable* attorney fee only for services rendered post-controversion. Similarly, the United States Court of Appeals for the Fourth Circuit, wherein this case arises, reviewed this interpretation of Section 28(a), stating that if the "...Board's construction is 'sufficiently reasonable,' it must be accepted, even if it is not the only reasonable construction or the construction this court would have reached if originally deciding the question." *Kemp v. Newport News Shipbuilding & Dry Dock Co.*, 805 F.2d 1152, 1153, 19 BRBS 50, 53

(CRT)(4th Cir. 1986). At that time, the Board and the court did not have the benefit of the decisions of the Supreme Court and the courts of appeals that adopted the *Hensley* principle. In all of these appellate cases the courts stressed the fact that a prevailing party was entitled to a "reasonable attorney fee" with liability transferred to the employer or carrier. These cases began with *Hensley* in 1983 followed by *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT)(1st Cir. 1988). In *Dague* in 1992 the Supreme Court stated that its case law construing what is a "reasonable" fee applied to all federal fee-shifting statutes. *Dague, supra* at 562. The Court of Appeals for the District of Columbia Circuit applied the principles to Section 28(a) of the Longshore Act in *Brooks* in 1992, followed by *Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 B.2d 163, 27 BRBS 14(CRT)(5th Cir. 1993), followed by the Court of Appeals for the Ninth Circuit in *Anderson* in 1996.

Any current case, therefore, should be reviewed bearing in mind what the above cases have determined on the criteria assessing a "reasonable" fee. In *Hensley*, the Court stated that the most useful starting point is the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate. Of interest is the observation in *Jenkins* that an enhancement for delay in payment is, where appropriate, a part of a "reasonable attorney's fee." *Jenkins*, 491 U.S. at 280. The Court stated that compensation received several years after the services are rendered is not equivalent to the same dollar amount received reasonably promptly after the legal services are performed. *Jenkins,* 491 U.S. at 284. What would be a reasonable fee if paid promptly is something less than a reasonable fee after a long delay.

Of great significance are the observations of the Court of Appeals for the Third Circuit in *Bethenergy Mines v. Director, OWCP* [*Markovich*], 854 F.2d 632 (3d Cir. 1988). Although the main issue in the case did not involve pre-controversion vs. post-controversion fees, the court held that 33 U.S.C. §928(a) and 20 C.F.R. §725.367 are rather straight forward fee-shifting devices, designed *to ensure that a claimant's disability benefits are not eroded by legal fees*. *Markovich* at 637. The court went on to state:

> An operator is given 30 days to evaluate the claim and decide whether or not to pay it. If the operator chooses to contest the claim, it must pay the claimant's attorney's fees if the claimant is successful. We conclude that notification of an initial finding of non-entitlement, at least where coupled with a statement that the claimant continues to press the claim, is a sufficient notification of liability to trigger the 30 day period in which the operator must decide, at the risk of paying the claimant's attorney's fees, whether to contest the claim. *Id.*

The court in *Markovich* looked upon Section 28(a) of the Longshore Act and the pertinent regulation as fee-shifting devices, not fee-splitting provisions. It made no mention of the term "thereafter" in Section 28(a) of the Longshore Act, but held that if employer allowed the 30 day notice provisions to pass without accepting liability, employer would be liable

for all of claimant's attorney fees, not only those for services rendered after controversion.

Therefore, upon reconsideration of this issue, despite the position the Board took in the early cases and bearing in mind the principles set forth by the Supreme Court and the various courts of appeals cited herein, we affirm the determination of the district director who awarded claimant's counsel a fee of $1,340.0 for 16.75 hours of work. Employer requested reconsideration, arguing that 5.5 hours, or $440.00, of the represented services were performed prior to employer's controversion and that it should be liable for only the services performed thereafter, amounting to 11.25 hours, or $900.00. The district director denied reconsideration, stating that "...to date no policy changes have been issued." Denial of Reconsideration by letter dated January 12, 1993. None of the parties have taken issue with the amount of the fee, including the $33.80 awarded for miscellaneous expenses. Apparently, all agree that the sum awarded by the district director reflects a reasonable fee in this case. If $1,373.80 represents a reasonable fee for all of the necessary services rendered before the district director in this case, it seems obvious that to allocate $440.00 of the fee to claimant results in a fee award that is $440.00 less than a reasonable fee. We choose not to do so. We affirm the district director's entire fee of $1,373.80 to be paid in full by employer.

This approach is consistent with the legislative history of the 1972 amendments to the Longshore Act. *See* Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, S. 2318 and H.R. 12006 (1971); *Jones,* 11 BRBS at 20. Section 39(c)(1) of the Longshore Act provides for legal assistance upon request from the Secretary, revealing Congressional acknowledgment of the practical challenges posed to claimants whose education, work-related injury and possible unfamiliarity with compensation law may disadvantage them in the successful initiation and processing of a claim. The imposition of liability for attorney fees for pre-controversion representation of claimants is inconsistent with the 1972 Amendments providing clear Congressional preference that the attorney fee not diminish the recovery of a claimant.

We therefore affirm the January 12, 1993 Denial of Reconsideration of the Supplemental Award dated December 29, 1992 by the district director and order employer to pay counsel for claimant $1,340.00, representing 16.5 hours of work from June 23, 1981 through December 1, 1992 billed at an hourly rate of $80, and for $33.80 in miscellaneous expenses, including 5.5 hours, or $440.00, of the awarded fee representing work performed prior to employer's controversion of liability in this case on February 24, 1982.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

We concur:

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

SMITH and DOLDER, Administrative Appeals Judges, dissenting:

We respectfully dissent from the conclusions reached by the majority. While we agree with the majority that the Longshore Act contains a fee-shifting arrangement for the resolution of attorney fees obtained under the Act, and that thereunder, claimant's attorney is due a "reasonable fee" for services rendered in representing the successful claimant, this case revolves around the sole issue of when a properly identified responsible operator becomes liable for those attorney fees. As we believe that the Longshore Act prohibits the imposition of liability on the responsible operator until it is properly notified of potential liability in a claim, we would reverse the January 12, 1993 Denial of Reconsideration of the Supplemental Award dated December 29, 1992 by the district director and exclude the 5.5 hours, or $440.00, of the awarded fee that represented work performed prior to employer's controversion of liability in this case on February 24, 1982.

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.
Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 496, 26 BRBS 49 (CRT)(1992); *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). As noted by the majority, the Board has consistently held since 1979 that interpretation of Section 28(a) of the Longshore Act 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," the Board has thus uniformly held in cases arising under Section 28(a) of the Longshore Act that employer is only liable for fees incurred by claimant after it receives notice of the claim, *see Jones*, 11 BRBS at 7; *Baker*, 12 BRBS at 309, and has applied this rationale in Black Lung cases as well. *See O'Quinn*, 4 BLR at 1-27; *Couch,* 4 BLR at 1-652; *McReynolds*, 3 BLR at 1-828. The Board's interpretation of Section 28(a) has been affirmed by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. *Kemp v. Newport News Shipbuilding & Dry Dock Co.*, 805 F.2d 1152, 1153, 19 BRBS 50, 52 (CRT)(4th Cir. 1986). 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 Longshore Act, 33 U.S.C. §919(b)[5] 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 v. Ingalls Shipbuilding, Inc*., 26 BRBS 179, 184-185 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). 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.[6] A similar result should be reached in this case.

While there are significant differences in the procedures for processing claims under the Black Lung and Longshore Acts, both require action by a Department of Labor official before the employer is notified of its potential liability. Under the Longshore Act, formal notification is to occur within 10 days of claimant's filing of the claim. 33 U.S.C. §919(b); 20 C.F.R. §702.224. As *Watkins* demonstrates, however, formal notice can be delayed by months. The statutory scheme accommodates such delay, as it assumes a period of time when informal negotiation may resolve a claim without the need for counsel. Thus, in the Longshore Act, Congress provided claimant access to information and

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[5] Section 19(b) of the Longshore Act 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); *see also* 20 C.F.R. §702.224.

[6] We note that the court 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 has no power to rewrite the statute." *Watkins, mem. op*. at 2.

assistance throughout the informal processing of the claim. 33 U.S.C. §939(c)(1); *see Watkins,* 26 BRBS at 185, n. 5. As the majority in *Jones* recognized, the legislative history to Section 28(a) supports the view that assessment of legal fees against employers is authorized once formal proceedings have commenced and the claim is resolved through litigation; however, Congress did not intend that employer be liable for fees during a period when informal negotiations may resolve the dispute. *Jones,* 11 BRBS at 15. Thus, fee liability cannot shift to employer until two prerequisites are met: 1) employer must receive notice of a claim for benefits, and 2) it must actually or constructively decline to pay. If claimant chooses to obtain an attorney during the informal period prior to formal notice, he is liable for fees incurred during this time. *Watkins,* 26 BRBS at 185.

Consideration of Section 28(a) in the context of the Black Lung Act leads to similar results. Procedures under the Black Lung Act provide for additional 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); *see also* 20 C.F.R. §§725.303, 725.308, 725.351(a), 725.410, 725.412(b-d), 725.413. Moreover, employer may not receive notification of its liability until well after a final adjudication of claimant's entitlement; Section 725.412© 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. 20 C.F.R. §725.412(c). Thus, in a Black Lung claim, adoption of our colleague's view leads to the result that an employer may be held liable for fees incurred at a time when it has not yet received notice and thus has had no opportunity to seek an informal resolution of the claim. In fact, employer may be notified that it may be a putative responsible operator but, if the notice does not contain findings regarding claimant's eligibility for benefits, the notice may not constitute a notice of liability. See *Markovich,* 854 F.2d at 635, n.2. Additionally, under the Black Lung regulations, an employer may not be notified at all until long after a final determination of claimant's eligibility has been issued under the regulations. 20 C.F.R. §725.412(c). Holding employer liable for fees incurred before it has notice and the opportunity to resolve or controvert the claim is contrary to the plain language of Section 28(a).

The decisions in *Dague* and *Hensley* do not affect the interpretation of Section 28(a) of the Longshore Act. They do not discuss when an employer's liability commences, but establish the framework for determining the amount of a reasonable fee where liability has shifted to employer. Unlike the Longshore and Black Lung Acts, the fee shifting statutes reviewed in *Dague* and *Hensley* involve situations where the opposing parties are aware of potential liability upon the filing of the legal action. These cases simply do not provide any guidance regarding a regulatory scheme which

specifically shifts liability only after

employer receives formal written notice from a government agency. Thus, while we agree that these cases apply in determining a reasonable fee, they are wholly inapplicable to the question of fee liability presented here.

The United States Court of Appeals for the Fourth Circuit, wherein this claim arises, has affirmed the Board's strict interpretation of Section 28(a) of the Longshore Act, noting that it "...can be reconciled with the text and the legislative history. Furthermore it is consistent with the congressional intent that disputes be resolved in the first instance without the necessity of relying on assistance other than that provided by the Secretary of Labor, " citing Section 39(c)(1). *Kemp*, 19 BRBS at 53(CRT). It is noted that *Hensley* was decided in 1983, before the Fourth Circuit considered the Board's strict interpretation of Section 28(a) in *Kemp* in 1986. In addition, the Board's decision in *Watkins* was affirmed by the Fifth Circuit in 1993. *Watkins*, 12 F.3d 209 (5th Cir. 1993).

The majority's reliance on *Markovich* is also misplaced. The United States Court of Appeals for the Third Circuit considered two unrelated questions.[7] The court never considered the issue of pre-controversion fees. In fact, the employer in *Markovich* was notified by the district director within sixty days of the filing of the claim of its potential liability. Nowhere in the court's opinion is there an indication that claimant sought the services of an attorney prior to employer's timely controversion. The court notes the complex scheme created by the Black Lung Act, however, and discusses how the procedures established under the Longshore Act "...might not be appropriate for processing black lung claims...." *Markovich*, 854 F.2d at 634. "Due to the progressive nature of pneumoconiosis, a coal mine operator is less likely to know the details underlying a particular claim than an employer is in the typical case arising under the [Longshore Act. Once a notice of] potential liability [is served on employer which] includes 'a copy of the claim form and all documentary evidence pertaining to the claim obtained by the district director', 20 C.F.R. §725.412...there is scant reason to treat a coal mine operator more favorably than an employer subject to the [Longshore Act]." *Markovich*, 854 F.2d at 636, 637.

[7] The two issues addressed by the court were: 1) where an employer receives an initial determination by a district director that claimant is not eligible but that claimant disputes the denial, does a controversion of the claim constitute a declination to pay; and 2) where claimant hires an attorney following employer's controversion and employer withdraws its controversion before the hearing, has there been a successful prosecution of the claim to form the basis for an attorney fee award. *Markovich*, 854 F.2d at 633.

Finally, we note that the Director has proposed regulations that seek to formally incorporate the Board's eighteen year precedent strictly interpreting Section 28(a) of the Longshore Act into the Black Lung regulations at Section 725.367(a). Director's Response at 3. As the courts of appeal owe their deference to the interpretations of the Secretary of Labor, *c.f. Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1, 2-13 (1987), *reh'g denied*, 484 U.S. 1047 (1988), there is further basis for the Board to maintain its well established holdings.

Therefore, we would order employer to pay counsel for claimant a fee of $900.00, representing 11 hours of work from February 24, 1982 through December 1, 1992 billed at an hourly rate of $80, and $33.80 in miscellaneous expenses, excluding the 5.5 hours, or $440.00, of the awarded fee that represented work performed prior to employer's controversion of liability in this case on February 24, 1982.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge