



BRB No. 17-0435 BLA
Case No. 2013-BLA-05755

STEVE B. CONLEY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
NATIONAL MINES CORPORATION)	DATE ISSUED: 01/07/2019
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	ORDER on
)	RECONSIDERATION and
Party-in-Interest)	AWARD of FEES

As no member of the panel has affirmatively voted to vacate or modify the decision herein, the motion for reconsideration filed by employer is DENIED.¹ 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(b); 802.407(a); 802.409.

¹ Employer argues for the first time on reconsideration that the manner in which Department of Labor administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer’s Motion for Reconsideration at 2-6. Because employer first raised the Appointments Clause issue only after the Board issued

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed before the Board pursuant to 20 C.F.R. §802.203. Counsel requests a fee of \$1,562.50 for 1.50 hours of legal services at an hourly rate of \$350.00 (Joseph E. Wolfe), 3.75 hours of legal services at an hourly rate of \$200.00 (Brad A. Austin), 0.25 of an hour of legal services at an hourly rate of \$150.00 (Rachel Wolfe), and 2.5 hours for work performed by a legal assistant at an hourly rate of \$100.00. Employer objects that the hourly rates are not market based, and requests that the fees be reduced.

In support of his fee petition, counsel has provided a list of seventy black lung cases in which the district director, the Office of Administrative Law Judges, the Board, and the United States Court of Appeals for the Fourth Circuit awarded attorney fees to his firm.²

Fifty-four of the cases include fees awarded for Mr. Wolfe's work. The list includes one case from August 2008 in which the Board affirmed an award from the Office of Administrative Law Judges where Mr. Wolfe received an hourly rate of \$400.00. In six cases, an administrative law judge awarded counsel an hourly rate of \$425.00, but noted that no objections were filed.³ In two other cases, Mr. Wolfe was awarded an hourly rate

its decision on the merits, employer forfeited the issue. *See Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (requiring “a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party’s] case”); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256-57 (6th Cir. 2018) (holding that the employer forfeited its Appointments Clause challenge by failing to raise it in its opening brief); *Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

² Counsel further argues that his requested rates are reasonable in light of the experience and qualifications of the representatives, their passion for their work, and the lack of attorneys taking similar cases.

³ In a Supplemental Order Awarding Fees in *Hall v. Cody Mining Co.*, 2013-BLA-05449 (Jan. 26, 2016) (Order), the administrative law judge questioned Mr. Wolfe's requested hourly rate, and stated that he would carefully consider any objections to the hourly rate in any future fee petition from his firm. In the Orders Awarding Fees in *Young v. James River Coal Co.*, 2014-BLA-05168 (July 25, 2015) (Order), *Wright v. Shipyard River Coal Terminal Co.*, 2016-BLA-05166 (Nov. 7, 2016) (Order), *Muncy v. Dir., OWCP*, 2013-BLA-06086 (Jan. 17, 2017) (Order), *Lee v. Cody Mining Co., Inc.*, 2012-BLA-05365

of \$425.00 by the United States Court of Appeals for the Fourth Circuit. *Donaldson Mining Co. v. Hinzman*, No. 16-1185 (4th Cir. Apr. 13, 2016) (Order);⁴ *S. Ohio Coal Co. v. Weaver*, No. 16-1580 (4th Cir. July 11, 2016) (Order). Of the remaining cases submitted, Mr. Wolfe has been awarded an hourly rate of \$350.00 on twenty occasions, \$325.00 on three occasions, and \$300.00 on twenty-two occasions.

Evidence of fees received in the past provides some guidance as to what the market rate is, and is appropriately included within the range of sources from which to ascertain a reasonable rate.⁵ See *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664 (6th Cir. 2008); see also *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010). Based on the documentation submitted in this case, counsel has demonstrated that he has been awarded the hourly rate of \$350.00 by the Office of Administrative Law Judges in twenty cases between August 2016 and March 2017. The Board notes that these fee awards are more recent than those in which counsel was awarded a lower rate, and are therefore more representative of the hourly rate that counsel is entitled to for the work performed during the time that this case was before the Board. The Board therefore finds the requested hourly rate of \$350.00 to be reasonable in light of the quality of representation, the complexity of the issues involved, and the area where the services were rendered.

In the thirty-seven listed cases in which Mr. Austin was awarded a fee, he was awarded an hourly rate of \$200.00. The Board finds that the hourly rate of \$200.00 for Mr. Austin is reasonable, based on the evidence submitted and the prevailing market rate in the area. In the nine listed cases in which Ms. Wolfe was awarded a fee, she was awarded an

(Jan. 20, 2017) (Order), and *Fortney v. Dir., OWCP*, 2014-BLA-00014 (Jan. 24, 2017) (Order), the administrative law judge noted that no objection was filed.

⁴ Counsel inaccurately identifies the 2016 circuit court order as having been issued by the United States Court of Appeals for the Sixth Circuit. In fact, the United States Court of Appeals for the Fourth Circuit issued this Order. In that case, the Fourth Circuit noted that counsel's motion for attorney's fees was unopposed. *Donaldson Mine Co. v. Hinzman*, No. 16-1185 (4th Cir. Apr. 13, 2016) (Order).

⁵ Counsel also submitted a one-page extract from The National Law Journal's 2014 Survey of Law Firm Economics, which purportedly shows that the average hourly billing rate for an attorney with thirty-one or more years of experience in the South-Atlantic Region is \$426.00. However, the extract does not indicate the distribution of participating law firms, and the Board is not persuaded that this chart sufficiently establishes the market rate for Mr. Wolfe.

hourly rate of \$150.00. The Board finds that the hourly rate of \$150.00 for Ms. Wolfe is reasonable, based on the evidence submitted and the prevailing market rate in the area. In the fifty listed cases in which a legal assistant was awarded a fee, the legal assistant was awarded an hourly rate of \$100.00. The Board finds that the hourly rate of \$100.00 for the services of a legal assistant is reasonable, based on the evidence submitted and the prevailing market rate in the area.

Employer also contends that the Board should disallow 1.25 hours billed by Mr. Wolfe for reviewing routine documents and 0.25 of an hour billed by Mr. Austin for reviewing the Petition for Review. Opposition to Fee Petition at 8-10. We decline to do so. Claimant's counsel reasonably billed 0.25 of an hour for each entry reviewing pleadings, as a quarter-hour increment is the minimum billing increment set forth in the applicable regulation. 20 C.F.R. §802.203(d)(3); *see Bentley*, 522 F.3d at 666; *Gosnell*, 724 F.3d at 576; *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984).

Employer challenges several time entries by Mr. Wolfe and Mr. Austin. Opposition to Fee Petition at 8-10. A November 6, 2017 entry reflects that Mr. Wolfe reviewed and submitted to the Board the response brief drafted by the legal assistant and by Mr. Austin. *Id.* at 8-9. We reject employer's argument that this task was clerical in nature, and therefore allow the 0.25 of an hour requested for these services. *See Bentley*, 522 F.3d at 666; *Gosnell*, 724 F.3d at 576; *Lanning*, 7 BLR at 1-316-17. We also reject employer's argument that the 0.25 of an hour billed by Mr. Austin on October 31, 2017 for submitting to the Board an unopposed motion to file a response brief out of time was clerical in nature, and therefore also allow the 0.25 of an hour requested for these services. *Id.* We agree with employer, however, that the services rendered by Mr. Austin on October 31, 2017 relating to conducting a conflicts check should be disallowed, as this service is considered overhead and thus must be subsumed as part of the attorney's fee. Opposition to Fee Petition at 10. We therefore disallow the 0.25 of an hour requested for these services. *See Whitaker*, 9 BLR at 1-218; *McKee v. Director, OWCP*, 6 BLR 1-233 (1983).

We reject employer's contention that the 0.25 of an hour requested for legal services by Ms. Wolfe for communicating with the claimant and providing a status update on May 1, 2018 was unnecessary and excessive. Employer's Brief at 10. Communications between counsel and her client are a reasonable and necessary service. *Lanning*, 7 BLR at 1-316-17. Because employer has not shown that these charges were unnecessary, we find the disputed charges neither excessive nor unreasonable. *Id.*

In all other respects, the Board finds the fees requested to be reasonable and commensurate with the necessary services performed in defending claimant's award of benefits. Therefore, we award claimant's counsel a total fee of \$1,512.50, representing 1.50 hours of legal services at an hourly rate of \$350.00 (Joseph E. Wolfe), 3.50 hours of

legal services at an hourly rate of \$200.00 (Brad A. Austin), 0.25 of an hour of legal services at an hourly rate of \$150.00 (Rachel Wolfe), and 2.5 hours for work performed by a legal assistant at an hourly rate of \$100.00, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge