BRB No. 99-0562 BLA

HUGH CRUMLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREAT WESTERN COAL, INC.	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen, Chartered), Washington, D.C., for employer.

Rita Roppolo (Henry L. Solano, 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: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees on Remand (88-BLA-1377) of Administrative Law Judge Thomas M. Burke 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). This is the third time that the issue in this case of liability for claimant's attorney's fees is before the Board.[1] In his most recent ruling on the issue, the administrative law

[1]Claimant filed his application for benefits on January 9, 1979. Director's Exhibit 1. On March 2, 1984, the district director denied benefits and, at the same time notified Coal Resources Corporation (Coal Resources) of its potential liability in this case. Director's Exhibit 22. Coal Resources took no action with regard to that notification. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 25. Eventually, the claim was remanded back to the district director for development of further evidence. Director's Exhibit 31. By letter dated February 19, 1987, Great Western Coal, Incorporated (employer) admitted that it was the successor to Coal Resources. Director's Exhibit 47. On October 2, 1987, benefits were again denied by the district director. Director's Exhibit 35. The Office of Workers' Compensation Programs, also on October 2, 1987, informed employer of its potential liability in this case, and, on October 30, 1987, employer contested liability. Director's Exhibit 38. On November 9, 1989, Administrative Law Judge John Forbes issued a Decision and Order awarding benefits. On January 15, 1993, the Board by Decision and Order affirmed the award of benefits. *Crumley v. Coal Resources Corp.*, BRB No. 89-5006 BLA (Jan. 15, 1993)(unpub.). On August 5, 1993, the district director issued an Attorney Fee Reconsideration Decision and Order awarding claimant's counsel a fee of $1,920.00 for services performed before the district director. Subsequent to an appeal by employer, the Board vacated this award. *Crumley v. Coal Resources Corp.*, BRB No. 93-2380 BLA (Sept. 28, 1994)(unpub.). On November 22, 1994, the district director issued an Amended Supplemental Award of Fee Legal Services. The district director determined that employer was liable for claimant's attorney fees for services from October 30, 1987, the date it filed its controversion to benefits. Subsequently, on January 31, 1997, the administrative law judge issued a Supplemental Decision and Order Awarding Representative's Fees. Employer was ordered to pay claimant's pre-controversion attorney fees for services from August 27, 1984 until March 12, 1987, while the case was pending before the Office of Administrative Law Judges. On March 25, 1997, the administrative law judge issued a Supplemental Decision and Order Denying Representative's Fees on Reconsideration, in which the administrative law judge determined that employer was not liable for attorney fees until the time that it filed the controversion and that claimant was liable for any fee during the prior period. Pursuant to a request for reconsideration by claimant's counsel, the administrative law judge, on May 9, 1997, issued a Supplemental Decision and Order Granting Reconsideration in which the administrative law judge denied counsel any fee for his pre-controversion services. Claimant appealed and the Board, on July 20, 1998, held employer liable for the attorney fee and remanded the case for

judge determined that employer was liable for an attorney fee of $1,575.00 for 10.5 hours of services at $150.00 per hour which were performed on claimant's behalf before the Office of Administrative Law Judges between August 18, 1984 and March 27, 1987. *See* Supplemental Decision and Order Awarding Attorney's Fees on Remand at 3.

On appeal, employer contends that the administrative law judge erred in holding it liable for attorney fees prior to its October 30, 1987 controversion of the claim. Claimant responds asserting that he neither accepts nor rejects employer's position in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that substantial evidence supports the administrative law judge's award of attorney fees in this case.[2]

An award of attorney's fees 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. *Abbott v. Director, OWCP,* 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP,* 2 BLR 1-894 (1980).

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the administrative law judge to determine the amount of liability. *Crumley v. Coal Resources Corp.*, BRB No. 97-1255 BLA (July 20, 1998)(unpub.).

[2]The administrative law judge's determination that the amount of the attorney fee is $1,575.00 for 10.5 hours at an hourly rate of $150.00 is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-616 (1983).

Citing the Board's holding in *O'Quinn v. The Pittston Co.*, 4 BLR 1-25 (1982), employer argues that it cannot be liable for any attorney fee prior to proper notice from the Department of Labor and an opportunity to controvert. Employer's Brief at 3-8. We disagree with employer's assertion in the instant case. Recently, the Board addressed the issue of whether an employer may be held liable for attorney fees for services performed by counsel prior to employer's controversion of liability 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 implemented by 20 C.F.R. §725.367.[3] *Jackson v. Jewell Ridge Coal Corp.,* 21 BLR 1-27 (1997)(*en banc*)(Smith and Dolder, JJ., dissenting). The majority held that under Section 28(a), an employer is liable for a reasonable fee for all services rendered in the successful prosecution of the claim, not only for services rendered after the date of notice and the declination to pay. *See Jackson, supra*. The court deferred, to the Director's position that pre-controversion attorney's fees should be awarded only in cases in which the district director has made an initial determination that the claimant is ineligible for benefits.[4] *Id.*

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[3]33 U.S.C. §928(a) provides that:

> 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).

[4]The court noted that in January 1997, the Secretary of Labor proposed a change in the regulation governing attorney's fees that would require an employer to pay post-controversion fees only. *Harris v. Clinchfield Coal Co.,* 149 F.3d 307, 21 BLR 2-479 (4th Cir. 1998); 62 Fed. Reg. 3337-3435 (Jan. 22, 1997). The court further noted that it was awkward that the Director, Office of Workers' Compensation Programs (the Director), opposed the employer's argument that it should pay post-controversion fees only in that case while simultaneously proposing a regulation that was in accord with the employer's position. *See Harris, supra.* The court, however, chose to give substantial deference to the Director's interpretation in that case,

The court stated:

> In these 'initial-denial' cases, the Director believes that an attorney's pre-controversion work deserves compensation because an adversarial relationship arises between the employer and the claimant at the moment the OWCP determines that the claimant is ineligible for benefits. By contrast, when the OWCP initially decides to award benefits to a claimant, the Director believes that 'there is no reason for the claimant to seek professional assistance until the employer registers its disagreement.' *Id.* It appears reasonable to expect that a claimant who has 'won' in the OWCP determination will not require the assistance of counsel unless his employer chooses to controvert the OWCP's award. In the Director's parlance, no adversarial relationship exists between the claimant and the employer in 'initial-award' cases until the employer decides that it will controvert the benefits award.

See Harris, 149 F.3d at 310, 21 BLR at 2-486-487.

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noting that it was not unreasonable nor inconsistent with 20 C.F.R. §725.367 in its present form. On October 8, 1999, the Secretary of Labor amended her proposed changes to 20 C.F.R §725.367 to allow for successful attorneys to collect reasonable fees for all of the necessary work they perform including that performed prior to the creation of the adversarial relationship. See 64 Fed. Reg. 195, p.55035 (October 8, 1999).

In the present case, the district director initially denied benefits on March 2, 1984, and claimant, thereafter, with the use of legal representation, continued to seek entitlement. Director's Exhibits 22, 25. In light of the court's decision in *Harris,*[5] we hold that employer is liable for the entire $1,575.00 fee award, for the 10.5 hours of services provided by claimant's counsel between August 18, 1984 and March 27, 1987, since claimant was initially found ineligible for benefits on March 2, 1984.[6] *See Harris, supra.* In adopting the reasoning of the Fourth Circuit in this case, which arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, we note that the facts in the instant case are similar to those in *Harris* where the court concluded that employer should pay the pre-controversion attorney fees once the district director determined that claimant is ineligible for benefits. In the instant case, while claimant utilized the services of an attorney prior to employer's actual notice of the claim and prior to employer's declination to pay, claimant was awarded benefits only after pursuing a hearing before an administrative law judge. Thus, the facts clearly indicate that an adversarial relationship arose between claimant and employer as of the initial denial of benefits.[7] We therefore affirm the administrative law judge's decision to award claimant's counsel attorney fees for legal services performed prior to October 30, 1987, the date of employer's actual controversion to the claim.

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[5]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the State of Kentucky. *See* Director's Exhibit 3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[6]Employer also relies on *Director, OWCP v. Bivens*, 757 F.2d 781, 7 BLR 2-166 (6th Cir. 1985) to escape attorney fee liability in this case. Employer's Brief at 4-6. The holding in *Bivens* is not contrary to our decision herein. The court determined that the mere filing of a claim was not sufficient to trigger attorney fee liability as the parties were never put in an adversarial position since there was no initial denial of benefits. *Bivens* at 786-87. In the instant claim, claimant was found not entitled to benefits on March 2, 1984 and that is when claimant was placed in an adversarial position. Thus, when employer filed its controversion on October 30, 1987, it ratified the Department of Labor's initial denial and attorney fee liability attached at that time for all fees necessary for the successful prosecution of the claim. *See Bivens, supra*; *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991).

[7]Contrary to employer's contentions, neither the Board nor the Director are bound by the position taken by the district director in this case. *See Limbach v. Hooven and Allison Co.*, 466 U.S. 353 (1984); *Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985).

Accordingly, the Supplemental Decision and Order Awarding Attorney's Fees on Remand of the administrative law judge awarding attorney fees payable by employer is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge