BRB No. 98-0928 BLA

FRANKLIN ENDICOTT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARGIE McCOY MAYNARD	)	
d.b.a. M & M TRUCKING COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 9/3/99
	)	
Party-in-Interest	)	DECISION and ORDER

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

Leonard Stayton, Inez, Kentucky, for claimant.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

BROWN, Administrative Appeals Judge:

Claimant appeals the Supplemental Award Fee for Legal Services of District Director Harry Skidmore 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 filed for benefits on October 10, 1992. The district director initially denied benefits on March 28, 1994. Director's Exhibit 18. At that time, employer was also notified of its potential liability and was required to respond within thirty days. Director's Exhibit 27. Claimant sought legal representation on April 1, 1994. Director's Exhibit 22. The district director again denied benefits on January 3, 1995 and claimant requested a hearing before an administrative law judge. Administrative Law Judge Daniel J. Roketenetz found claimant entitled to benefits in a Decision and Order issued on March 24, 1997. This finding was not appealed by employer, and claimant's counsel filed a fee petition in the amount of $1,050.00,[1] with the district director's office. The district director awarded a fee of $900.00 for services performed before the district director. Employer was ordered to pay $337.50 of the total fee amount, while claimant was directed to pay the balance of $562.50 for services rendered prior to, and up to thirty days after, March 28, 1994, the date of the notice of initial finding. By letter dated February 12, 1998, claimant's counsel requested that the district director reconsider that portion of the fee for which claimant was held responsible, contending that employer should be held liable for the entire fee due to claimant's counsel. The district director denied this request on March 26, 1998, noting that pursuant to the law of the United States Court of Appeals for the Sixth Circuit, an employer is not required to pay pre-controversion attorney fees. In the instant appeal, claimant challenges the district director's finding that claimant is responsible for pre-controversion attorney fees. Neither employer nor the Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has participated in this appeal.

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

[1]One hour of this fee request, at the rate of $150.00 per hour, was disallowed by the district director as excessive in light of the work performed. This finding is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

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

Citing the Board's recent holding in *Jackson v. Jewell Ridge Coal Corp.,* 21 BLR 1-27 (1997)(*en banc*)(Smith and Dolder, JJ., dissenting), claimant argues that employer is liable for his attorney fees incurred prior to thirty days beyond the notice of initial finding. In *Jackson,* 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.[2] 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 majority relied, in part, upon the United States Supreme Court's decisions in *City of Burlington v. Dague,* 505 U.S. 557 (1992) and *Hensley v. Eckerhart,* 461 U.S. 424 (1983).[3] On appeal, the United States Court of Appeals for the Fourth Circuit held

---

[2]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).

[3]Judges Smith and Dolder dissented on the ground that, following the plain language of Section 28(a) of the Longshore Act, an employer must receive formal notice of the claim from the district director as provided by Section 19(b) of the Longshore Act, 33 U.S.C. §919(b), and actually or constructively decline to pay before the employer's fee liability commences. *Jackson v. Jewell Ridge Coal Corp.,* 21 BLR 1-27 (1997)(*en banc*)(Smith and Dolder, JJ., dissenting). The dissenting opinion noted that the Board has uniformly held that an employer is only liable for

that the Board's reliance on *Hensley* and *Dague* was misplaced. *Harris v. Clinchfield Coal Co.,* 149 F.3d 307, 21 BLR 2-479 (4th Cir. 1998). The court deferred, however, to the Director's position that pre-controversion attorney's fees should only be awarded in cases in which the district director has made an initial determination that the claimant is ineligible for benefits.[4] *Id.*

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

---

fees incurred by a claimant after it receives notice of the claim. *Id.*

[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 Harr, supra.* The court, however, chose to gave substantial deference to the Director's interpretation in that case, noting that it was not unreasonable nor inconsistent with 20 C.F.R. §725.367 in its present form.

> 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.

In the present case, the district director initially denied benefits on March 28, 1994, Director's Exhibit 18, and claimant, thereafter, sought legal representation on April 1, 1994.[5] Director's Exhibit 22. In light of the Director's position, which was accepted by the court in *Harris,*[6] we hold that employer is liable for the entire $900.00 fee award, including the 3.75 hours of services provided by claimant's counsel between April 1, 1994 to April 25, 1994, since claimant was initially found ineligible for benefits on March 22, 1994. *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 claimant should not have to pay the pre-controversion attorney fees. In the instant case, while claimant utilized the services of an attorney within thirty days of employer's 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 reverse the district

[5]There is no indication that employer ever filed a controversion in the instant case.

[6]The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit inasmuch as claimant's coal mine employment occurred in Kentucky. Director's Exhibit 2; *see Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*).

[7]Claimant counsel's requested fees for 1.25 hours spent on April 1, 1994

director's decision to exclude 3.75 hours of legal services performed prior to thirty days after March 28, 1994, the date of the initial denial of benefits.

Accordingly, we affirm in part and reverse in part the Supplemental Award Fee for Legal Services of the district director, and order employer to pay counsel for claimant $900.00 representing six hours of legal services at $150.00 per hour.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

I concur:

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

Judge SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's opinion. As noted in my dissent in *Jackson v. Jewell Ridge Coal Corp.,* 21 BLR 1-27 (1997) (*en banc*) (Smith and Dolder, JJ., dissenting), it is well established that the interpretation of a statute

---

discussing with claimant the applicable law, the feasibility of pursuing the claim, and the steps that would be taken in pursuing the claim. Also for April 1, 1994, counsel requested fees for .75 hours spent reviewing various documents and forms and .25 hours drafting a letter to the Department of Labor (DOL). For April 22, 1994, counsel requested fees for a total of 2 hours for the receipt and review of correspondence and copies of documents from DOL.

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). Prior to *Jackson*, the Board had consistently held that the interpretation of Section 28(a) required 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...." 33 U.S.C. §928(a) [emphasis added]; *see Jones v. The Chesapeake & Potomac Telephone Co.,* 11 BRBS 7 (1979). Giving effect to the word "thereafter," the Board had thus uniformly held in cases arising under Section 28(a) that employers were only liable for fees incurred by claimants after they received notice of the claims. *See Capelli v. Bethlehem Mines Corp.,* 11 BLR 1-129 (1982); *Couch v. The Pittston Co.,* 4 BLR 1-651 (1982) (Miller, J., concurring in part and dissenting in part); *Christensen v. U.S. Steel Corp.,* 3 BLR 1-817 (1981) (Miller, J., concurring).

The adoption of my colleagues' 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 of the claim. In fact, an employer may be notified that it may be a putative responsible operator but, if the notice does not contain findings regarding the claimant's eligibility for benefits, the notice may not constitute a notice of liability. *See Bethenergy Mines v. Director* [*Markovich*], 854 F.2d 632 (3d Cir. 1986). Additionally, under the regulations, an employer may not be notified at all until long after a final determination of the claimant's eligibility has been issued. 20 C.F.R. §725.412(c). Holding an 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).

Moreover, in *Director, OWCP v. Bivens,* 757 F.2d 781, 7 BLR 2-166 (6th Cir. 1985), the United States Court of Appeals for the Sixth Circuit, under whose jurisdiction the instant case arises, held that the initial denial of the claim triggered the running of the thirty days set out in Section 28(a), after which the Black Lung Disability Trust Fund (Trust Fund) could be liable for the claimant's attorney fees. The *Bivens* court held that the Trust Fund could not be held liable for the claimant's attorney's fees prior to the issuance of the order denying benefits because it was that order which created an adversarial proceeding. *See Bivens, supra.* The court further stated that a prerequisite to attorney fee liability pursuant to Section 28(a) is that the employer or the Director must have declined to pay the claimant benefits, *i.e.*, taken some affirmative action which would put them in an adversarial position against the claimant. *Id.; see Allen v. Director, OWCP,* 9 BLR 1-38 (1986)(*en banc*).

Consequently, based on the Board's case law prior to *Jackson* and the Sixth Circuit's *Bivens* decision, I would affirm the district director's decision to exclude the 3.75 hours of represented legal services performed prior to employer's notice and declination to pay claimant benefits.

ROY P. SMITH
Administrative Appeals Judge