BRB No. 93-0579 BLA

RANSOM McREYNOLDS )
)
Claimant-Respondent )
)
v. )
)
CLINCHFIELD COAL COMPANY )
) Date Issued:
Employer-Petitioner )
)
)
DIRECTOR, OFFICE OF WORKERS' )
COMPENSATION PROGRAMS, UNITED )
STATES DEPARTMENT OF LABOR )
)
Party-In-Interest ) DECISION and ORDER

Appeal of the Supplemental Award [of] Fees for Legal Services of Douglas Dettling, Acting District Director, United States Department of Labor.

Donald E. Earls, Norton, Virginia, for claimant.

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

Eileen McCarthy (Thomas S. Williamson, Jr., 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, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge and SHEA, Administrative Law Judge.*

PER CURIAM:
Employer appeals the Supplemental Award [of] Fees for Legal Services (227-

05-6865) of Acting District Director Douglas Dettling

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

In a Supplemental Award [of] Fees for Legal Services issued on October 13, 1992, the district director approved an hourly rate of $80.00 and found that employer is responsible for all time approved after May 12, 1981, the date that the claim was initially denied. The district director then determined that counsel's miscellaneous expenses are overhead and did not approve them. The district director further disallowed 38.25 hours of service performed. Accordingly, the district director found employer liable for $3,160.00 for 39.50 hours of services performed. On appeal, employer contends that the district director erred in imposing responsibility for the payment of pre-controversion attorney's fees on employer and requests that the award of attorney's fees be modified to delete 6.5 hours of legal services performed prior to the employer's controversion. Counsel responds in support of the district director's Supplemental Award.[1] The Director, Office of Workers' Compensation Programs (the Director), filed a motion requesting that this case be held in abeyance pending the Board's decision on the Director's motion for reconsideration in *Siler v. Clinchfield Coal Co.*, BRB No. 90-1894 BLA (Dec. 21, 1992)(unpub.).[2]

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, or an abuse of discretion. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

As employer contends, a responsible operator is not liable for attorney's fees based on services performed prior to the time the operator controverts liability. Employer is liable only for services performed by counsel after employer receives notice of its potential liability and declines to pay compensation or fails to respond within thirty days, whichever occurs first. *See* 20 C.F.R. §725.367(a); *Capelli v. Bethlehem Mines Corp.*, 11 BLR 1-129 (1988);
*Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987); *Couch v. The Pittson Co.*, 4 BLR 1-651 (1982), *rev'd on other ground*, 7 BLR 1-514 (1984); *O'Quinn v. The*

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[1]We affirm as unchallenged on appeal the district director's findings regarding the hourly rate of compensation, the date the claim was initially denied, responsible operator status, and noncompensatory expenses and services. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2]By order dated February 17, 1994, the Board ordered this case, which was consolidated by order of the Board dated October 22, 1993 with *Vanover v. Clinchfield Coal Co.*, BRB No. 92-2053 BLA, *Jackson v. Jewell Ridge Coal Corp.*, BRB No. 93-0927 BLA, and *Vandyke v. Jewell Ridge Mining Corp.*, BRB No. 93-1005 BLA, held in abeyance pending the outcome of the Board's decision on the Director's motion for reconsideration in *Siler*. Inasmuch as the Board issued a decision in *Siler*, *Siler v. Clinchfield Coal Co.*, BRB No. 91-1894 (Jul. 26, 1994)(unpub.), we hereby sever this case and review the merits.

*Pittson Co.*, 4 BLR 1-25 (1981); *Christensen v. United States Steel Corp.*, 3 BLR 1-817 (1981); *cf. Director, OWCP v. Bivens*, 757 F.2d 781 (6th Cir. 1985). In this case, the record indicates that notice of potential liability was issued to employer on June 29, 1981 and employer controverted liability on July 29, 1981. *See* Director's Exhibits 16, 20. The district director, however, awarded fees beginning on May 12, 1981, the date that the claim was initially denied. Thus, the district director's Supplemental Award is modified to delete $520.00, for 6.5 hours of service performed prior to the date of employer's controversion at an hourly rate of $80.00, from the $3,160.00 that employer was ordered to pay, leaving employer responsible for payment of $2,640.00. *See Capelli*, *supra*; *Markovich*, *supra*; *Couch*, *supra*; *O'Quinn*, *supra*; *Christensen*, *supra*.

Accordingly, the district director's Supplemental Award [of] Fees for Legal Services is modified consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH,
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge