Chapter 27
Representative's Fees and Representation Issues

I. Entitlement to fees

Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, as incorporated into the Black Lung Benefits Act at 30 U.S.C. § 932, provides for the award of a fee to claimant's counsel or lay representative upon successful prosecution of a claim. The statutory fee provisions are constitutional, and do not deprive the employer of due process of law. *United States Department of Labor v. Triplett*, 110 S. Ct. 1428 (1990).

Regulations governing the award of fees in black lung cases are found at 20 C.F.R. §§ 725.362-725.367, and the disposition of a fee petition may be styled as a "*Supplemental Decision and Order Awarding Representative's Fees*." The award of representative's fees is discretionary, and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 B.L.R. 1-15 (1989).

A. Notice of appearance

A claimant may appear *pro se,* or may be represented. 20 C.F.R. § 725.363. Any representative, whether an attorney or lay person, must file a notice of appearance, or otherwise be authorized to appear before the Department of Labor on behalf of a particular claimant. 20 C.F.R. § 725.362.

Under the amended regulations, a representative may file a declaration that s/he is authorized to represent a party. Twenty C.F.R. 725.362(a) provides, in part, as follows:

> An attorney qualified in accordance with § 725.363(a) shall file a written declaration that he or she is authorized to represent a party, or declare his or her representation on the record at a formal hearing. Any other person (see § 725.363(b)) shall file a written declaration that he or she is authorized to represent a

> party, or declare his or her representation on the record at a formal hearing.

20 C.F.R. § 725.362(a).

B. Privacy Act

In *Doe v. Chao*, 435 F.3d 492 (4th Cir. 2006), *aff'g. in part, vac'g. in part*, 2006 WL 2038442 (W.D. Va. July 19, 2006), a case stemming from a federal black lung claimant's pursuit of damages under the Privacy Act for the "wrongful disclosure of his Social Security number" by the Administrative Law Judge on a multi-captioned notice of hearing, the court affirmed the district judge's finding that "Doe is entitled to costs and reasonable attorney fees even though he suffered no actual damages." However, the court remanded the case for recalculation of attorney fees. With regard to this issue, the court rejected the government's argument that "because Doe sought money damages from the United States, and was awarded none, the only reasonable attorney fee is no fee at all."

Citing to *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983), the court held, in determining the reasonableness of a fee, the "most critical factor" is the "degree of success obtained." The court reasoned:

> Doe failed to recover any monetary award, despite the fact that damages were the primary goal of his suit. Because his underlying litigation was largely unsuccessful, it is unlikely that Doe may recover significant attorney fees.

As a result, the district court would need to revisit its award of $15,000.00 in attorney's fee to Buck Doe. On the other hand, the court concluded it would not "disturb the district court's calculation of Buck Doe's litigation costs" as 5 U.S.C. § 552a(g)(4)(B) permits an award of "the actual costs of his action unrestrained by any reasonableness inquiry."

C. Successful prosecution of the claim

1. Generally

If a claimant is successful in prosecuting a claim, the party opposing entitlement is liable for attorney's fees associated with the litigation. As will be discussed later in this chapter, a claimant is liable for the payment of any fees to a lay representative.

Fees are awarded only if the claimant is finally awarded benefits, or if the amount of overpayment is reduced or waived. *Bryant v. Lambert Coal Co.*, 9 B.L.R. 1-166 (1986) (benefits awarded); *Sosbee v. Director, OWCP*, 17 B.L.R. 1-136 (1993)(*en banc*) (amount of recovery of overpayment reduced); *Reynolds v. Director, OWCP*, 6 B.L.R. 1-914 (1984) (fees awarded where overpayment waived).

2. Representation at any time relevant

Fees are awarded to a representative in the successful prosecution of a claim, even if s/he did not represent the claimant at the time benefits were awarded. In *Murphy v. Director, OWCP*, 21 B.L.R. 1-116 (1999), the Administrative Law Judge erred in failing to award a fee to an attorney who originally represented Claimant, but who did not represent him at the time he prevailed. The Board reiterated a representative is entitled to fees, even if he was unsuccessful at a particular level of adjudication, so long as Claimant ultimately prevails. Thus, while the miner's original claim was denied by the Administrative Law Judge when counsel represented him, counsel's work during that time period was necessary and relevant to Claimant's ultimate award of benefits on modification. Finally, the Board reiterated, "[A]ny award of attorney fees does not become enforceable and payable until such time as an award of benefits becomes final and reflects successful prosecution of the claim."

Similarly, "counsel is entitled to fees for all services rendered to claimant at each level of the adjudication process, even if unsuccessful at a particular level, so long as counsel is ultimately successful in prosecuting a claim." *Clark v. Director, OWCP*, 9 B.L.R. 1-211 (1986). *See also Brodhead v. Director, OWCP*, 17 B.L.R. 1-138 (1993) (fees awarded for entitlement to benefits on modification).[1]

[1] *Compare George Hyman Construction Co v. Brooks*, 963 F.2d 1532 (D.C. Cir. 1992), the court adopted the United States Supreme Court's ruling in *Hensley v. Eckerhart*, 461 U.S. 424 (1981), to hold that the fact-finder must determine whether the successful and unsuccessful claims are related and, if not, then the award of attorney's fees must be confined to the successful claims. Underlying this conclusion is the rationale that the party opposing entitlement should not be liable for time spent on groundless claims merely because they were included in a suit involving successful claims. Finally, the percentage of time spent by counsel on the successful claims must be ascertained to determine the amount of the fee award. This concept has not been applied in federal black lung litigation.

D. Claimant's interest; adversarial proceeding

The following principles relate to a claimant's interest in the issues of the claim, and whether the proceeding for which fees are awarded was *adversarial* in nature.

1. For claims filed on or before January 19, 2001, pre-controversion fees not awarded

The "successful prosecution" of a claim necessarily requires that the posture of the parties be adversarial. The regulation at 20 C.F.R. § 725.367 states, in relevant part:

> If an operator declines to pay any benefits on or before the 30th day after receiving written notice of its liability for a claim on the ground that there is no liability for benefits within the provisions of the Act, and the person seeking benefits shall thereafter have utilized the services of an attorney in the successful prosecution of the claim, there shall be awarded, in addition to an award of benefits, in an order, a reasonable attorney's fee against the operator or carrier in an amount approved by the [district director], administrative law judge, Board, or court as the case may be, which shall be paid promptly and directly by the operator or carrier to the claimant's attorney in a lump sum after the order becomes final.

20 C.F.R. § 725.367.

a. Benefits Review Board

In *Jackson v. Jewell Ridge Coal Corp.*, 21 B.L.R. 1-27 (1997)(en banc), Employer, as opposed to Claimant, was liable 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." On the other hand, the Board stated, "The imposition of liability for attorney fees (upon claimants) 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." *See also Carter v. Peabody Coal Co.*, BRB Nos. 93-0651 BLA and 93-0651 BLA-S (July 19, 1994) (unpub.) (Employer's agreement with the District Director's finding of non-entitlement resulted in *adversarial* proceeding).

Similarly, Employer was liable for fees when it controverted the claim, and then withdrew the controversion to accept liability. *Markovich v. Bethlehem Mines Corp.*, 11 B.L.R. 1-105 (1988). *See also Davis v. Ingalls Shipbuilding, Inc.*, BRB Nos. 90-072 and 90-672A (Jan. 27, 1992)(unpub.) (Employer's acceptance of liability after the case was referred to the Administrative Law Judge is a "successful prosecution" of a claim). *But see Lucas v. Director, OWCP*, BRB No. 92-1618 BLA (May 26, 1994)(unpub.) (award of fees to be paid by Claimant, not the Trust Fund, where the Director did not object to the repayment schedule negotiated by Claimant's counsel and, therefore, the proceeding was non-adversarial in nature).

Finally, in *Childers v. Drummond Co.*, 22 B.L.R. 1-146 (2002)(en banc) (Judges McGranery and Hall, dissenting), the miner's and survivor's claims were filed prior to January 19, 2001 and, as a result, the amended provisions at 20 C.F.R. § 725.367(a) were inapplicable. Consequently, an award of pre-controversion attorney's fees was denied. In so holding, the Board concluded "imposition of pre-controversion attorney fees on employers may be made only where the district director has initially denied benefits, as an adversarial relationship arises at that point . . .." The Board further stated, in a case where the District Director initially awards benefits, a claimant cannot receive pre-controversion attorney's fees. The Board reasoned, "[N]o adversarial relationship arises unless and until employer controverts the award and, therefore, claimant has no reason to seek professional assistance in pursuing the claim." Moreover, the Board determined Employer's controversion of the miner's claim was "separate and distinct" from its controversion in the survivor's claim, and the controversions "do not merge." Claimant is liable for fees incurred prior to Employer's "receipt of the formal notice of claim, notice of its potential liability, and subsequent refusal to pay compensation . . .."

b. Third Circuit

Bethenergy Mines, Inc. v. Director, OWCP [Markovich], 854 F.2d 632 (3rd Cir. 1988).

c. Sixth Circuit

In *Director, OWCP v. Bivens*, 757 F.2d 781 (6th Cir. 1985), the court barred recovery of attorney's fees where the District Director awarded fees, and this finding was not contested by the Director who proceeded to pay benefits. Rather, Claimant was liable for such fees under these non-adversarial circumstances. The rationale underlying this interpretation of 20 C.F.R. § 725.367(a) is notice of *actua*l liability, not merely potential

liability, must be provided to the Director or Employer, "who is then placed in an adversarial position *vis-a-vis* claimant." *Id.* at 787. *See also Director, OWCP v. Poyner*, 810 F.2d 99 (6th Cir. 1987).

2. For claims filed after January 19, 2001, pre-controversion fees awarded

The regulations have been amended to permit an award of pre-controversion fees to an attorney. However, these regulations are inapplicable to claims filed prior to January 19, 2001. *See Childers, supra*. Twenty C.F.R. § 725.367(a) provides, in part, the following:

> An attorney who represents a claimant in the successful prosecution of a claim for benefits may be entitled to collect a reasonable attorney's fee from the responsible operator that is ultimately found liable for the payment of benefits, or, in the case in which there is no operator who is liable for the payment of benefits, from the fund. Generally, the operator or fund liable for the payment of benefits shall be liable for the payment of the claimant's attorney's fees where the operator or fund, as appropriate, took action, or acquiesced in action, that created an adversarial relationship between itself and the claimant. The fees payable under this section shall include reasonable fees for necessary services performed prior to the creation of the adversarial relationship.

20 C.F.R. § 725.367(a).

The regulation also contains examples of cases where fees are properly awarded, including success in (1) a medical treatment dispute claim, (2) obtaining an increase in the monthly benefit payments, or (3) "resisting the request for a decrease in the amount of benefits payable." 20 C.F.R. § 725.367(a)(1) to (5).

In *Duncan v. Director, OWCP*, 24 B.L.R. 1-153 (2010), it was improper for an Administrative Law Judge to deny the fee petition of Claimant's attorney. Under the facts of the claim, the Black Lung Disability Trust Fund (Trust Fund), and not the operator designated by the District Director, was held liable for the payment of benefits by the Administrative Law Judge. As a result, the Administrative Law Judge noted the Trust Fund never challenged Claimant's entitlement to benefits, was never in an adversarial relationship with Claimant, and, as a result, the Trust Fund could not be held liable for the payment of attorney's fees.

Adopting the position of the Director on appeal, the Board concluded otherwise and stated:

> [W]hile Section 725.367 does not directly address this issue, the regulations contains no provision that would negate imposing liability on the Trust Fund for the payment of an attorney's fee, when the operator that created an adversarial relationship is later (released) by the administrative law judge.

Id. at 1-156. Consequently, the Board remanded the matter to the Administrative Law Judge for consideration of the fee petition.

E. Overpayment cases

In *Sosbee v. Director, OWCP,* 17 B.L.R. 1-136 (1993)(*en banc*), attorney's fees may be awarded where Claimant's counsel "succeeded in reducing the overpayment amount and defeating the Director's appeal before the Board. . . ." *See also Reynolds v. Director, OWCP*, 6 B.L.R. 1-914 (1984) (fees awarded where overpayment waived). *But see Lucas v. Director, OWCP*, BRB No. 92-1618 BLA (May 26, 1994)(unpub.) (award of fees to be paid by Claimant, not the Trust Fund, in a pre-amendment claim where the Director did not object to the repayment schedule negotiated by claimant's counsel and, therefore, the proceeding was non-adversarial in nature). *See* 20 C.F.R § 725.367 (applicable to claims filed after January 19, 2001).

F. Medical treatment disputes

Twenty C.F.R. § 725.367 contains examples of cases where fees are properly awarded, including success in a medical treatment dispute claim. 20 C.F.R. § 725.367(a)(1) to (5).

However, by unpublished decision in *Fuller v. South Hollow Coal Co.*, BRB No. 09-0710 BLA (July 20, 2010)(unpub.)(J. Hall, dissenting), two panel members vacated the Administrative Law Judge's award of attorney's fees and costs in a medical treatment dispute case. The Board reasoned as follows:

> This proceeding involved a request by the Director for employer to reimburse the Trust Fund for the payment of the miner's medical bills, all of which had been previously paid by the Trust Fund. Because all of the miner's bills for medical treatment were paid by the Trust Fund, they were not 'declined,' as required under Section 725.367(a)(3) in order for liability for the payment

> of attorneys' fees to attach. Furthermore, as employer has never sought recoupment of the payment of any medical bills from the miner's estate and no overpayment was ever sought by the Trust Fund against the miner's estate, no adversarial relationship between employer or the Director and claimant existed. *See* 20 C.F.R. § 725.367(a)(3). Representation by claimant's counsel, therefore was not 'necessary' to the proceeding, especially in light of the fact that recoupment would have impossible against the miner's widow. (footnote and citations omitted).

Slip op. at 4. In a dissenting opinion, Appeals Judge Hall wrote:

> I would affirm the administrative law judge's finding that an adversarial relationship existed between claimant and employer, . . . when claimant, as a named party to the proceeding, was requested by employer to sign a medical records release, and continuing when claimant was served with interrogatories from employer . . ., which necessitated the retention of counsel. *See* 20 C.F.R. § 725.367(a)(3). Furthermore, despite the administrative law judge's urging on several occasions, neither employer nor the Director would agree to voluntarily dismiss claimant from the case or stipulate that they would not seek subrogation or indemnification against claimant. Thus, the administrative law judge rationally concluded that the presence of claimant's counsel was required to ensure that claimant would not be exposed to liability.

Slip op. at 5.

G. Preparation of the fee application; litigation of the fee petition

An attorney is entitled to fees for time spent *litigating the fee award*. The Board reasoned Claimant has an interest in the fee issue, and derives a benefit from such services if found not liable for these payments. *Bardovinus v. Director, OWCP*, BRB No. 88-1445 BLA (July 30, 1991)(unpub.). *See also Kerns v. Consolidation Coal Co*., 247 F.3d 133 (4th Cir. 2001) (fees for litigating petition are properly awarded). However, 20 C.F.R. § 725.366(b) provides "[n]o fee approved shall include payment for time spent in preparation of a fee application."

H. No separation of issues

A representative may be awarded fees only where a claimant has an interest in the outcome of the litigation. The Board holds, however, it will not separate issues in which a claimant does (and does not) have an interest in the outcome in determining the total fee awarded. *Yates v. Harman Mining Co.*, 12 B.L.R. 1-175 (1989), *aff'd on recon.*, 13 B.L.R. 1-56 (1989)(*en banc*).

I. Survivor's claim awarded under PPACA's automatic entitlement provisions

In *Duke v. Cowin & Co.,* 25 B.L.R. 1-55 (2012), Employer argued Claimant's counsel was not entitled to an award of attorney's fees since Claimant was granted benefits under the automatic entitlement provisions of Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). Under the facts of the case, Employer petitioned for modification of the award of benefits in the miner's claim, and opposed automatic entitlement in the survivor's claim. Both claims were forwarded to the Administrative Law Judge for adjudication. The Administrative Law Judge determined reopening the miner's claim based on Employer's modification petition would not render justice under the Act and, as a result, Claimant was awarded survivor's benefits based on the existing award of benefits in the miner's lifetime claim. Employer asserted Claimant's award stemmed from a "fortuitous legislative event," and no fees should be payable to her counsel. The Board disagreed:

> Claimant's counsel is entitled to attorney fees payable by employer for the successful prosecution of a claim. (citations omitted). 'Successful prosecution' of a claim requires success in establishing, or preserving, claimant's entitlement to benefits. (citations omitted).
>
> . . .
>
> Contrary to employer's contention, the administrative law judge properly concluded that the work performed by claimant's counsel in defending the modification request was reasonable and necessary to uphold the award of benefits in the miner's claim, and that fact that 'a fortuitous legislative event' later changed claimant's burden of proof in the survivor's claim has no bearing on whether services were necessary at the time they were rendered.

As a result, the Board affirmed the Administrative Law Judge's award of attorney's fees and costs.

II. Fee Petitions

A. Generally

Pursuant to 20 C.F.R. § 725.366(a), to receive an award for fees, an application must be filed with the appropriate adjudicator and served on the claimant and other parties to the claim within the time limits allowed by the adjudicator.

B. Limiting time to file fee petition

The regulations do not contain time limitations for filing a fee petition. Therefore, the Administrative Law Judge has authority to limit the time for acceptance of fee petitions. However, 20 C.F.R. § 725.366(a) does not provide a penalty for failure to file a fee petition within the established time limits. *See e.g., Brock v. Pierce County* 476 U.S. 253 (1986); *Twin Pines Coal Co. v. U.S. Department of Labor*, 854 F.2d 1212 (10th Cir. 1988). In addition, the Board holds the "loss of an attorney's fee is a harsh result and should not be imposed on counsel as a penalty except in the most extreme circumstances." *Paynter v. Director, OWCP*, 9 B.L.R. 1-190, 1-191 (1986).

1. Examples of reasonableness of time limitations

a. Fifteen days reasonable

Fifteen days is "not an unreasonable" amount of time to require the submission of a fee petition. *Bradley v. Director, OWCP,* 8 B.L.R. 1-418 (1985).

b. Late petition still considered

It was an "abuse of discretion" to deny all fees because a petition was received 30 days past the time allowed for filing. The penalty was too harsh, and there was no evidence that the failure to file on time was an intentional omission. *Paynter v. Director, OWCP*, 9 B.L.R. 1-190 (1986).

Likewise, in *Mullins v. Director, OWCP*, BRB No. 92-2332 BLA (Sept. 29, 1995)(unpub.), the Administrative Law Judge's denial of a fee

petition based on untimeliness was arbitrary. Petitioner was granted extensions for the filing of his fee petition, but maintained the law firm with which he was associated failed to forward his application. The Administrative Law Judge found no basis to set aside the time limits. However, the Board noted the Director neither objected to the late filing, nor contended she suffered any prejudice thereby. The Board concluded the Administrative Law Judge's denial of the entire fee petition was arbitrary. *Slip op.* at 3. In another fee petition in the same case, the Board held the application was not untimely where Claimant's counsel was not provided proper notice by the Administrative Law Judge of the deadline for filing the fee petition. *Slip op.* at 4.

C. Fees awarded separately at each administrative level

Under 20 C.F.R. § 725.366(a), a representative seeking a fee for services performed on behalf of a claimant shall make application to the District Director, Administrative Law Judge, or appropriate appellate tribunal, as the case may be, before whom the services were performed. 20 C.F.R. § 725.366(a). Said differently, if the work was performed before the District Director, Claimant's representative must submit a fee petition to the District Director. For work performed before the Administrative Law Judge, a petition is submitted to the Administrative Law Judge. An Administrative Law Judge cannot award a fee for services rendered before the District Director, or the Benefits Review Board. *Ilkewicz v. Director, OWCP*, 4 B.L.R. 1-400 (1982) (preparing a notice of appeal to the Board was properly disallowed by the Administrative Law Judge). *See also* 20 C.F.R. § 725.367(b).

1. Determining whether services performed before the Administrative Law Judge

The Administrative Law Judge must determine whether the services performed were necessary to adjudication of the claim at this level. Certain dates help to determine whether services were performed before the Administrative Law Judge such as the date of request for a hearing, the date of referral to the Office of Administrative Law Judges by the District Director, the date on which the case was docketed in this Office, and so on.

However, the issue is not whether the work was performed on or before a certain date; rather, it is whether the work performed was relevant to proceedings before the Administrative Law Judge. *Matthews v. Director, OWCP*, 9 B.L.R. 1-184 (1986). The Board holds, where services performed prior to referral to the Administrative Law Judge were reasonably integral to

preparation for the hearing, the Administrative Law Judge may award fees for the entire period of representation. *Vigil v. Director, OWCP*, 8 B.L.R. 1-99 (1985). Thus, if this is not clear from the fee petition, an order should be issued requesting specificity as to the work performed, and its relation to the hearing process at this level.

2. Sample boilerplate

> An Administrative Law Judge is only authorized to award fees for services rendered while the case was pending before the Office of Administrative Law Judges. In *Matthews v. Director, OWCP*, 9 B.L.R. 1-184, 1-186 (1986), the Benefits Review Board held, in determining the jurisdictional cutoff date between the District Director and the Office of Administrative Law Judges, neither the date the hearing was requested nor the date the case was transferred is dispositive. Rather, the appropriate inquiry is whether the work done was "reasonably integral to preparation for the hearing." *See Vigil v. Director, OWCP*, 8 B.L.R. 1-99 (1985).

D. Contents of the fee petition

Under 20 C.F.R. § 725.366(a), the application must be supported by a complete statement of the extent and character of the necessary work done, and it shall include the professional status (attorney, paralegal, law clerk, lay representative) of the person performing the work, and the customary billing rate for each such person. The application also may include a list of reasonable unreimbursed expenses, and receipts documenting the expenses were incurred in relation to the claim at issue. Thus, if this information is not clear from the face of the fee petition, an order should be issued requesting specificity as to any vague or incomplete entry.

E. Contingency fees or other fee arrangements prohibited

Because attorney's fees are paid by the party opposing entitlement, contingency fees and other fee agreements are invalid. Under 20 C.F.R. § 725.365, no fee charged for services rendered to a claimant shall be valid unless approved under this subpart (*i.e.* by the appropriate adjudication officer). These regulatory provisions also state no contract or prior agreement for a fee shall be valid. 20 C.F.R. § 725.365; *Goodloe v. Peabody Coal Co.*, 19 B.L.R. 1-91 (1995). In this vein, the Board holds contingent and stipulated fee agreements are invalid. *Wells v. Director, OWCP*, 9 B.L.R. 1-63 (1986).

It is noteworthy, in *Eifler v. Peabody Coal Co.*, 13 F.3d 236 (7th Cir. 1993), the Seventh Circuit held any settlement of attorney's fees requires administrative or judicial approval. Moreover, even though attorney's fees may not be awarded before a final compensation award is entered, a *settlement* of attorney's fees may be approved before such a final award.

III. Amount of the fee award

A. Factors considered

1. Generally

Pursuant to 20 C.F.R. § 725.366(b), any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of the proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fees requested.

2. Administrative Law Judge's discretion

"The amount of the attorney's fees award is discretionary and will only be set aside if shown . . . to be arbitrary, capricious, an abuse of discretion or not in accordance with the law." *Marcum v. Director, OWCP*, 2 B.L.R. 1-894 (1980). The Administrative Law Judge must provide sufficient explanation for fees and costs awarded.

3. Proponent of petition carries burden of demonstrating reasonable and necessary

It is the responsibility of a representative or attorney to establish the reasonableness of a requested hourly rate based on the quality of the representation, his or her qualifications, the complexity of the legal issues involved, and the level of the proceedings. *Pritt v. Director, OWCP*, 9 B.L.R. 1-159 (1986). The Board has consistently held that $50.00 per hour is manifestly inadequate. *Gibson v. Director, OWCP*, 9 B.L.R. 1-149 (1986). However, each case must be reviewed on its own merits to determine the proper hourly rate. Some examples are as follows:

a. Benefits Review Board

In *Parks v. Eastern Associated Coal Corp.*, 24 B.L.R. 1-177 (2010), the Board remanded an attorney fee award stating Claimant's counsel failed to sustain his burden of providing "specific evidence of the prevailing market rates in the relevant community for which he seeks an award . . .." However, the Administrative Law Judge properly found that affidavits proffered by Employer regarding the prevailing market rate for Claimant's counsel "were entitled to no weight, as they either did not provide sufficient specific underlying information to make them reliable, or they failed to recognize the factors that are necessarily incorporated into a rate charged by a claimant's counsel" in black lung claims. The Board instructed, on remand:

> . . . the administrative law judge must, as a starting point to his fee analysis, require Mr. Wolfe to provide evidence of an applicable prevailing rate. (citations omitted). The administrative law judge must also reconsider counsel's fee petition in accordance with the criteria set forth at Section 725.366.

Id. at 1-181 and 1-182. The Board offered suggested sources of "evidence" for Claimant's counsel:

> Counsel may submit evidence of the fees he has received in the past as well as affidavits of other lawyers, who might not practice black lung law, but who are familiar both with the skills of the fee applicant and more generally with the type of work in the relevant community. Further, in determining a reasonable prevailing rate, the administrative law judge is not limited to consideration of fees granted in black lung cases; rather, consideration of fees granted in other administrative proceedings of similar complexity would also yield instructive information. (citations omitted).

Id. at 1-181 and 1-182, n. 5.

In *C.B. v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008) (unpub.), the Board held it is the burden of the proponent of a petition to establish the reasonableness of the fee requested in light of the factors set forth at 20 C.F.R. § 725.366(b). As a result, the Administrative Law Judge erred in assessing the number of hours awarded based on whether Employer demonstrated the services were unnecessary or duplicative. The Board

concluded, "[T]he administrative law judge (improperly) shifted the burden of proof to employer . . .." As a result, the fee award was vacated, and the Administrative Law Judge was instructed to reconsider the reasonableness of the number of hours claimed on remand.

In companion published decisions, *Bowman v. Bowman Coal Co.*, 24 B.L.R. 1-165 (2010) (governed by Fourth Circuit case law) and *Maggard v. International Coal Group, Knott County, LLC*, 24 B.L.R. 1-172 (Apr. 15, 2010) (governed by Sixth Circuit case law), the Board allowed Claimant's counsel 30 days in which to submit amended fee petitions. Notably, it concluded counsel did not present evidence sufficient to support a finding that his hourly rate was the "market rate." The Board noted:

> Although claimant's counsel identifies the hourly rates that he seeks in this case, claimant's counsel has failed to make any declaration regarding the normal hourly rates that its lawyers seek for cases similar to this one. At a minimum, this defect must be cured before the Board addresses counsel's fee petition.

Bowman, 24 B.L.R. at 1-170; *Maggard*, 24 B.L.R. at 1-174. Further, in *Maggard*, the Board held, if work is performed by a "legal assistant," then the "normal billing rate" of the legal assistant must be set forth in a declaration.

Further, the Board concluded counsel had not "provided sufficient information relevant to the market rate for services in the geographic jurisdiction of the litigation." *Bowman*, 24 B.L.R. at 1-170; *Maggard*, 24 B.L.R. at 1-174. Here, the Board found counsel relied "exclusively upon a 2006 Altman Weil 'Survey of Law Firm Economics' to justify his requested hourly rates." *Bowman*, 24 B.L.R. at 1-170; *Maggard*, 24 B.L.R. at 1-174. However, in both cases, the Board stated:

> [B]ecause the survey alone does not provide sufficient information for the Board to determine that the listed rates are for similar services as those provided by claimant's counsel's firm, it is of little assistance in determining the prevailing market rate. (citations omitted).
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> In addressing the difficulty of determining a reasonable hourly rate, claimant's counsel states that he knows of 'no other firms in Virginia and very few across the nation taking new [federal black lung] cases. (citation omitted).

Bowman, 24 B.L.R. at 1-170; *Maggard*, 24 B.L.R. at 1-174. In both cases, the Board suggested, "Hourly rates charged by similarly situated attorneys in Kentucky may assist in establishing a market rate." *Bowman*, 24 B.L.R. at 1-170; *Maggard*, 24 B.L.R. at 1-175.

The Board stated, "[T]he goal is to establish a market rate paid by paying clients in the requesting attorneys' geographic area." *Maggard*, 24 B.L.R. at 1-175. It determined:

> [I]n order to be entitled to a rate claimed, it is claimant's counsel's burden to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation. (citation omitted).

Bowman, 24 B.L.R. at 1-171; *Maggard*, 24 B.L.R. at 1-175. Claimant's counsel complied and, by decision in *Maggard v. International Coal Group, Knott County, LLC*, 24 B.L.R. 1-203 (2010), the Board awarded counsel's fees at an hourly rate of $300.00. However, no award of fees was made for time spent by the legal assistants as "claimant's counsel has not identified the training, education, and experience of his legal assistants."

In *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102 (1998) (*en banc*), the Board held it was proper for the Administrative Law Judge to award fees at counsel's "customary hourly rate of $200 for black lung cases." In so holding, the Board rejected Employer's argument that "an hourly rate of $175 would be appropriate and more consistent with the rate obtained by the general legal community in the area of law." The Board concluded, Employer's argument was deemed "insufficient to meet (its) burden of proving the rate awarded was excessive or that the administrative law judge abused his discretion in this regard."

In *J.V. v. Edd Potter Co.*, BRB No. 07-0292 BLA (Jan. 25, 2008) (unpub.), the Board upheld the Administrative Law Judge's award of $250.00 per hour for counsel's services in the successful prosecution of a claim for benefits. The Board rejected Employer's proclaimed "uncontradicted evidence" that the "market rate for black lung attorneys in the geographic region of claimant's practice areas is no more than $140.00 per hour." Rather, the Board held the "administrative law judge properly determined that Section 725.366(b) is controlling." In applying the factors set forth in the regulation, the Administrative Law Judge noted he observed Claimant's counsel's "handling of this case," and found "the quality of representation was very good." Further, the Board upheld the Administrative Law Judge's approval of 47.25 hours of legal services,

including the Administrative Law Judge's determination "that time counsel spent conferring with his client and explaining decisions issued in this case was reasonable and compensable." *See Marcum v. Director, OWCP*, 2 B.L.R. 1-894 (1980).

In *O.R.H. v. Blue Star Coal Corp.*, BRB No. 07-0124 BLA (Oct. 30, 2007) (unpub.), the Board affirmed the Administrative Law Judge's attorney fee award to Claimant's counsel at an hourly rate of $300.00. The Administrative Law Judge noted Claimant's counsel was "highly experienced" in the area of federal black lung, and his office was "one of the few in the area that accepted these types of cases." In affirming the attorney fee award, the Board cited to *Whitaker v. Director, OWCP,* 9 B.L.R. 1-216 (1986), and held fee decisions in other cases wherein the Administrative Law Judge awarded a lower hourly rate to Claimant's counsel were not binding in this case.

In *Braenovich v. Cannelton Industries, Inc.*, 22 B.L.R.1-236 (2003), the Board upheld an hourly rate of $200.00, where the Administrative Law Judge properly considered the factors at 20 C.F.R. § 725.366(b), including the "high quality" of counsel's representation, her professional credentials and experience, and the complex issues involving complicated pneumoconiosis presented in the case. In the case, Claimant was represented by the Director of the Washington and Lee University School of Law Legal Practice Clinic who, in turn, was assisted by law school students.

b. Fourth Circuit

In *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227 (4th Cir. May 11, 2004) (unpub.), the court upheld the Administrative Law Judge's award of $225.00 per hour to Claimant's counsel for successful prosecution of a black lung claim. Employer argued that counsel normally charged $175.00 for most civil litigation matters. The court concluded the Administrative Law Judge properly considered the factors set forth at 20 C.F.R. § 725.366(b) in approving a higher hourly rate.

In *Westmoreland Coal Co. v. Director, OWCP [Cox]*, 602 F.3d 276 (4th Cir. 2010), the court held there are a variety of “sources” from which to determine a prevailing hourly rate, including evidence of fees received by the attorney in the past, and affidavits of other lawyers. The court further noted fees awarded in “other administrative proceedings of similar complexity may also yield instructive information.” *See also Eastern Assoc. Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013) (evidence of a market-based rate may include prior fee awards and an excerpt from the Altman Weil *Survey of Law Firm Economics*; hourly rate for

legal assistants reduced to $50.00 due to petitioner's failure to "submit any evidence to support the prevailing market rate for the work of those assistants," whereas counsel for Employer submitted prior fee awards wherein legal assistants were awarded $50.00 per hour).

c. Sixth Circuit

In *B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657 (6th Cir. 2008), the court affirmed an awards of attorney's fees by the District Director, Administrative Law Judge, and Benefits Review Board in the amount of $16,618.75 for 69.25 hours of work. The approved hourly rates were $200.00 per hour by the District Director, $250.00 per hour by the Administrative Law Judge, and $225.00 per hour by the Benefits Review Board. In approving the awards, the court upheld the adjudicators' use of the "lodestar" method in calculating fees, *i.e.* a reasonable hourly rate times the number of hours reasonably expended in successful prosecution of the claim.

In assessing the propriety of the hourly rates requested, the Sixth Circuit noted, "[C]ourts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." The court further stated, "The appropriate rate, therefore, is not necessarily the exact value sought by a particular firm, but is rather the market rate in the venue sufficient to encourage competent representation." Finally, the court noted, "An adjustment can then be made to the lodestar rate of the attorney's efforts resulted in 'exceptional success.'" In upholding the approved hourly rates, the court reasoned fee determinations in other claims, while not binding, may provide guidance:

> As a general proposition, rates awarded in other cases do not set the prevailing market rate—only the market can do that. Rates from prior cases can, however, provide some inferential evidence of what a market rate is, just as state-bar surveys of rates provide evidence of a market rate, but themselves do not set the rate. (citations omitted).

The court stressed "'the market' for legal counsel is not a commodity market with a single price, but rather a service market with various price points based on education, experience, specialty, complexity, etc." The court declined to find the adjudicators abused their discretion in awarding different hourly rates at different levels of prosecution of the claim.

Employer submitted evidence that attorneys performing work for

insurance companies in black lung claims typically earn $125.00 per hour such that Claimant's counsel should not be entitled to a higher hourly rate. The court disagreed, and it stated:

> [T]he rates received by (insurance) attorneys are undoubtedly affected by several factors, including volume of work and prompt payment. Attorneys who represent claimants, on the other hand, likely do not benefit from the same high volume of work. Moreover, as evidenced by the briefs and letters submitted by claimant's attorney asking for expedited payment, attorneys who represent claimants often face a significant delay in getting paid. A delay in payment can justify a higher hourly rate.

Id. at 1-665.

d. Seventh Circuit

In *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002), the court approved of an attorney's fee for Claimant's counsel based on an hourly rate of $200.00. In support of its holding, the court noted counsel filed affidavits by various black lung attorneys stating $200.00 per hour was reasonable in light of counsel's expertise, a letter from the vice president of the local bar association stating that the fee was reasonable in the area, and the fact that counsel was awarded the requested hourly rate in 22 out of 27 fee applications she filed with various Administrative Law Judges and the Benefits Review Board.

But compare Peabody Coal Co. v. McCandless, 255 F.3d 465 (7th Cir. 2001). Here, the Seventh Circuit disapproved of the Administrative Law Judge's award of $200.00 per hour for attorney's fees, which would exceed what the attorney would charge his paying clients. The court noted the Administrative Law Judge did not address Employer's argument that "the rate chargeable against the mine operator must be market-based,... without a premium for the contingent nature of the compensation." Rather, the court characterized the hourly rate of $200.00 as "a number plucked from a hat."

4. *Survey of Law Firm Economics*

Some Administrative Law Judges take official notice of Altman & Weil's *Survey of Law Firm Economics*, which lists the average hourly rates for attorneys by area of practice, years of experience, and geographical location. *Schneider v. Director, OWCP*, 2 B.L.R. 1-918, 1-926 (1980). However, by unpublished decision in *Mullins v. Betty B. Coal Co.*, BRB No.

95-1149 (Mar. 14, 1996) (unpub.), the Board held, "[W]hile the Administrative Law Judge may take judicial notice of attorneys' customary hourly rates, a copy of the 1988 *Altman & Weil Survey of Law Firm Economics* is not in the record" and, therefore, on remand the Administrative Law Judge must "explain the basis for utilizing the northeast standard in setting the hourly rate for legal services rendered in Virginia."

On the other hand, it is within the Administrative Law Judge's discretion to find the survey does not provide an accurate indication of an attorney's hourly rate. In *Westmoreland Coal Co. v. Director, OWCP [Cox]*, 602 F.3d 276 (4th Cir. 2010), it was permissible for the Administrative Law Judge to find the Altman Weil Survey of Law Firm Economics (2006) was not an "accurate indicator" of counsel's prevailing hourly rate. *But compare, Eastern Assoc. Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. July 31, 2013) (holding the survey may, in the Administrative Law Judge's discretion, be considered in conjunction with other evidence). And, in *Bowman v. Bowman Coal Co.*, 24 B.L.R. 1-165 (2010) (governed by Fourth Circuit case law), and *Maggard v. International Coal Group, Knott County, LLC*, 24 B.L.R. 1-172 (Apr. 15, 2010) (governed by Sixth Circuit case law), the Board held it was error to rely exclusively on the survey to demonstrate the prevailing hourly rate.

5. Rates awarded in other litigation

In *Westmoreland Coal Co. v. Director, OWCP [Cox]*, 602 F.3d 276 (4th Cir. 2010), it was permissible for the Administrative Law Judge to find the Altman Weil Survey of Law Firm Economics (2006) was not an "accurate indicator" of counsel's prevailing hourly rate. However, the hourly rate awarded was vacated because the Administrative Law Judge took into consideration risk of loss, and the contingent nature of attorney fee awards in black lung cases. The court held such considerations are not proper. It noted there are a variety of "sources" from which to determine a prevailing hourly rate, including evidence of fees received by the attorney in the past, and affidavits of other lawyers. Moreover, the court held fees awarded in "other administrative proceedings of similar complexity may "also yield instructive information." *See also Eastern Assoc. Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013).

6. Other sources

Another source of hourly rate statistics is the local bar association for attorneys practicing black lung in a particular area. *Budinski v. Director, OWCP*, 6 B.L.R. 1-541 (1983). The Administrative Law Judge also may consider *Martindale-Hubbell* excerpts, and other types of documentation

submitted in support of a fee petition, such as affidavits from other practicing attorneys attesting to their hourly rates.

7. Amount of benefits awarded

Because the amount of benefits is set by law, "counsel bears the burden of demonstrating how the quality of representation affected the *amount* of benefits received if he or she wishes this factor to be considered." *Allen v. Director, OWCP*, 7 B.L.R. 1-330 (1984) (emphasis in original).

B. Enhancement of the fee for delay, proper for employer but not Director, OWCP

In *Shaffer v. Director, OWCP*, 21 B.L.R. 1-97 (1998) (*en banc on recon.*), the Board agreed with the Director's position that, "while an employer may be required to pay an enhanced attorney's fee due to delay, such an enhancement is not appropriate where the Trust Fund is liable for the fee because the Act does not specifically waive the government's sovereign immunity from an award of interest." The Board likened enhancement of an attorney's fee for delay to imposing interest on the Trust Fund, which is not permitted under the Act or implementing regulations.

In *Frisco v. Consolidation Coal Co.*, 22 B.L.R. 1-321 (2003), the Board upheld application of the amended regulatory provisions at 20 C.F.R. § 725.608, which allow imposition of interest on a fee award to compensate counsel for delay in payment. The Board held the regulation was valid, and could be applied to fee awards issued prior to January 19, 2001. The Board further held interest begins to accrue from the date the fee is originally awarded (even though the 1982 initial fee award was vacated in *Frisco*).

In *Jackson v. Jewell Ridge Coal Corp.*, 21 B.L.R. 1-27 (1997)(en banc), the Board held "enhancement for delay" is permissible because "[w]hat would be a reasonable fee if paid promptly is something less than a reasonable fee after a long delay."

C. "Necessary work" defined

The test of necessary work is "whether an attorney *at the time he or she performs the work in question* could reasonably regard the work as necessary to establish entitlement." *Marcum v. Director, OWCP*, 2 B.L.R. 1-894 (1980)(emphasis in original). The petitioning attorney bears the burden of establishing a particular service is necessary to establish entitlement. *Wade v. Director, OWCP*, 7 B.L.R. 1-334 (1984). The fee petition must be reasonably specific to allow such a finding. Sample

boilerplate is as follows:

> On review of Petitioner's application for a representative's fee, and after consideration of the factors set forth at 20 C.F.R. § 725.366, it is determined that services rendered by Petitioner, were [were not] necessary in the successful pursuit of benefits for Claimant.

1. Two-prong test for establishing "necessary work"

The Board, in *Lanning v. Director, OWCP*, 7 B.L.R. 1-314 (1984), set forth a two-step process for determining the necessity of services rendered:

> First, [the adjudicator] must decide whether the service is necessary to the proper conduct of the case and therefore compensable. . . . Second, once a service has been found to be compensable, the adjudicating officer must decide whether the amount of time expended by the attorney in performance of said service is excessive or unreasonable.

Id. at 1-316.

2. Examples

The following constitutes common examples of work that is, and is not, “necessary”:

a. Research time

The Board holds "an attorney must be allowed an appropriate amount of time for research." *Bradley v. Director, OWCP*, 4 B.L.R. 1-241 (1981). However, general research time must be allocated to all clients, and "should not be charged against the account of any single client." *Snyder v. Director, OWCP,* 9 B.L.R. 1-187 (1986).

b. Contacting a congressional representative

Time spent seeking or obtaining a congressperson's assistance (or intervention) in a claim "is not part of the adjudication process, nor is it necessary to establish entitlement to benefits"; therefore, it cannot be included in a fee award. *Krahenbuhl v. Director, OWCP*, 3 B.L.R. 1-673 (1981).

c. Preparing and litigating fee petition

Time spent *preparing* the fee petition is not compensable. 20 C.F.R. § 725.366(b). However, the Fourth Circuit, in *Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001), it was proper to award fees for time spent *litigating* an attorney's fee award. *See also Bardovinus v. Director, OWCP*, BRB No. 88-1445 BLA (July 30, 1991)(unpub.).

d. Advising the claimant

Time spent advising a claimant as to the status of his or her claim is compensable. *Lanning v. Director, OWCP*, 7 B.L.R. 1-314 (1984). Time spent explaining the decision to the claimant is also compensable. *Brown v. Director, OWCP*, 3 B.L.R. 1-95 (1979).

e. Clerical work

Traditional clerical duties are not properly compensable because they are deemed part of overhead in setting the hourly rate. Clerical duties include making and receiving telephone calls, photocopying, and typing. *Pritt v. Director, OWCP*, 9 B.L.R. 1-159 (1986); *Marcum v. Director, OWCP*, 2 B.L.R. 1-894 (1980).

In *B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657 (6th Cir. 2008), the court upheld the Administrative Law Judge's reduction of time spent "receiving and filing correspondence," as this constituted clerical work. Reviewing correspondence, on the other hand, "can constitute legal work," and may be billed.

Time preparing correspondence is compensable. *But see Picinich v. Lockheed Shipbuilding*, 23 B.R.B.S. 128 (1989), a case involving several parties, complex issues, and a number of appeals, wherein the Board held it is within the adjudicator's discretion to determine whether, based upon the evidence in a particular claim, photocopying costs or other miscellaneous expenses are reasonable and necessary, or are part of overhead. The Board further stated it would affirm the adjudicator's findings, unless they are demonstrated as arbitrary, capricious, or an abuse of discretion.

f. Reviewing file, traveling, organizing exhibits

In *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102 (1998) (*en banc*), it is within the Administrative Law Judge's discretion to find "that all of the hours requested by counsel for reviewing the file, traveling, organizing exhibits and preparing briefs were necessary and reasonable." *See also Bradley v. Director, OWCP*, 4 B.L.R. 1-241 (1981) (travel time is compensable, but details of trip must be provided).

g. Co-counsel

The petitioner has the burden of establishing the necessity of associating with co-counsel. *Esselstein v. Director, OWCP,* 676 F.2d 228 (6th Cir. 1982); *Coutz v. Director, OWCP* , 7 B.L.R. 1-449 (1984); *Simmons v. Director, OWCP*, 7 B.L.R. 1-175 (1984).

D. Expenses and costs

Under 20 C.F.R. § 725.366(c), reasonable and unreimbursed expenses may be awarded. Again, the fee petition must be detailed enough to demonstrate relevance and connection to the claim.

1. Clerical costs

In *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894 (7th Cir. 2003), the court upheld the Administrative Law Judge's allowance of postage and photocopying costs (as opposed to finding that the costs were part of overhead) because Claimant asserted the costs "were necessary to successfully prosecute (the) case as the physicians needed a complete copy of the record to provide a written report on Hawker's behalf." *See also Marcum v. Director, OWCP*, 2 B.L.R. 1-894 (1980) (time spent photocopying not allowed). Sample boilerplate is as follows:

> Twenty C.F.R. § 725.366(c) provides that "[i]n awarding a fee, the appropriate adjudication officer shall consider, and shall add to the fee, the amount of reasonable and unreimbursed expenses incurred in establishing the claimant's case." Petitioner seeks $_____ for expenses, which includes $_____ for postage. Traditional clerical expenses, such as local telephone calls, photocopying, and postage, should not be billed separately. These expenses are considered part of the office overhead expenses when an attorney sets the hourly rate, and

cannot be included separately in an award of a representative's fee. *See Marcum v. Director, OWCP*, 2 B.L.R. 1-894 (1980); *Pritt v. Director, OWCP*, 9 B.L.R. 1-159 (1986). Accordingly, the $_____ in costs requested for expenses related to photocopying and postage is not allowed.

2. Obtaining medical evidence

Expenses incurred in obtaining x-ray readings are compensable. However, a representative cannot be reimbursed for expenses incurred in obtaining medical or other evidence, which was previously submitted to the District Director in connection with the claim. 20 C.F.R. § 725.366(c).

3. Travel expenses

a. Travel time

Travel time is compensable, but the pertinent details of the trip must be included in the petition. *Bradley v. Director, OWCP*, 4 B.L.R. 1-241 (1981). Expenses charged must be determined in accordance with 20 C.F.R. § 725.459(a), as required by 20 C.F.R. § 725.366(c). *See also Cavote v. Director, OWCP*, 2 B.L.R. 1-1052 (1980).

b. Mileage costs

In *Branham v. Eastern Associated Coal Corp.*, 19 B.L.R. 1-1 (1994), it was proper to require Employer to reimburse Claimant's counsel a total of $48.40 in mileage costs to attend to medical depositions. In so holding, the Board reasoned such costs were "expenses necessary in establishing claimant's case."

4. Witness fees

a. Generally

The regulations at 20 C.F.R. § 725.459(a) provide, in part, a "witness testifying at a hearing before an Administrative Law Judge, or whose deposition is taken, shall receive the same fees and mileage as witnesses in the courts of the United States." The federal court provisions for witness fees and costs are found at 28 U.S.C. § 1821 (1996), which provides, in part, as follows:

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United

States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

. . .

(2)(b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

(c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d)(1) A subsistence allowance shall be paid to a witness when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

> (2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

The statute also contains provisions regarding fees and costs for incarcerated witnesses (who generally cannot receive fees or allowances), and paroled aliens (who are ineligible to receive fees and allowances).

b. Expert witness fees

In *Branham v. Eastern Associated Coal Corp.*, 19 B.L.R. 1-1 (1994), it was proper to require the Employer to reimburse Claimant a total of $400.00 for obtaining a physician's deposition. The Board reasoned "an expert need not testify at the administrative hearing in order for claimant to be reimbursed for the costs of obtaining a physician's opinion."

In *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894 (7th Cir. 2003), it was proper to require Employer to pay the fees of the successful Claimant's medical experts, regardless of whether they attended the hearing, were deposed, or merely submitted reports for consideration.

5. LEXIS research

The court, in *Corsair Asset Management Inc. v. Moskovitz*, Case No. 1:89-CV-2116-JOF, 1992 U.S. Dist. LEXIS 6679, at 12 (N.D. Ga. Mar. 17, 1992), disallowed LEXIS online research charges as being traditionally covered in office overhead expenses. The court compared incurring such expenses to using the law firm library.

IV. Augmentation or enhancement based on unique circumstances

Generally, fees are awarded based on hourly rates in effect at the time of representation. However, some cases have offered unique circumstances, which may warrant deviation from this rule.

A. Extended length of litigation

1. Benefits Review Board

a. Generally

In *Cox v. Brady Hamilton Stevedore Co.*, 25 B.R.B.S. 203 (1991), the Board permitted fees in excess of the hourly rate in effect at the time the services were rendered based upon a finding of unique circumstances, including the extended length of litigation.

In *C.B. v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008) (unpub.), the Board noted "risk of loss" is a "constant factor in black lung litigation and, therefore, is deemed incorporated into the hourly rate and is not evaluated separately." On the other hand, the Board concluded enhancement of the hourly rate to reflect "delay in payment" of the fee is an appropriate factor to consider.

b. Enhancement against Trust Fund not permitted

In *Bennett v. Director, OWCP*, 17 B.L.R. 1-72 (1992), the Board denied counsel's request for an augmented fee due to delay in a case involving the Trust Fund. Counsel's first petition for fees was awarded by the Administrative Law Judge immediately subsequent to the decision awarding benefits. The case was then appealed, and a final compensation order was not entered for several years. Counsel then filed a second fee petition seeking to enhance the initial fee award on grounds of unusual delay in the processing of the claim. The Board held because (1) counsel's petition for fees was granted and fees awarded by the Administrative Law Judge in May of 1988, at which time no request for enhancement based upon delay was made, and (2) the fee award became final within 30 days because no appeal or motion for reconsideration was filed, the adjudicator was collaterally estopped from awarding an enhancement of the fee and stated as follows:

> Claimant's counsel contends that the administrative law judge erred in failing to award a supplemental fee to compensate for counsel's delay in receiving payment.
>
> . . .
>
> The filing of a supplemental fee petition seeking an additional $500.00 to account for delay in payment is tantamount to a

> collateral attack on a final order. The administrative law judge properly denied the motion for supplemental fees.
>
> . . .
>
> Furthermore, as the Director suggests, the supplemental fee petition is, in essence, a request for interest to be paid by the Black Lung Disability Trust Fund.

Id. at 1-73. The Board held an award of interest against the Trust Fund is not permitted by the Act, or the implementing regulations. *See also Goodloe v. Peabody Coal* Co., 19 B.L.R. 1-91 (1995); *Hobbs v. Stan Flowers Co.*, 18 B.R.B.S. 65 (1986), *aff'd*, 820 F.2d 1528 (9th Cir. 1987).

2. Fourth Circuit

In *Kerns v. Consolidation Coal Co.*, 176 F.3d 802 (4th Cir. 1999), it was proper to award an enhanced fee to compensate counsel for the six-year delay between the time his fee was initially awarded, and the date on which he received payment of the fee. Specifically, the Administrative Law Judge awarded a fee to Claimant's counsel on June 20, 1984 at the hourly rate of $80. Through a myriad of appeals and remands, the award of benefits ultimately was affirmed by the court, and Employer sent counsel a check dated July 20, 1990 as payment for services rendered pursuant to the Administrative Law Judge's 1984 fee order.

The court held, contrary to Employer's assertion, it had jurisdiction to consider the fee enhancement request, which was submitted years after the 1984 fee award, as the original fee award did not become final until the compensation order became final. It noted, "Although the law at the time (counsel) filed his fee request did not require that the ALJ consider enhancement for delay, current law does." In support of this statement, the court cited the Board's holding in *Nelson v. Stevedoring Servs. of America*, 29 B.R.B.S. 90 (1995), wherein the Board held an Administrative Law Judge is permitted to award a higher hourly rate to account for the delay in receipt of payment of the fee awarded. Thus, the case was remanded for the Administrative Law Judge to consider counsel's request for enhancement of the fee award based upon delay in payment. *See also Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001) (fees for delay in payment and for litigating fee petition proper).

B. Contingent nature of black lung claims, not considered

In *Goodloe v. Peabody Coal Co.*, 19 B.L.R. 1-91 (1995), a fee cannot be enhanced to accommodate its contingent nature. However, enhancement for unusually lengthy delay may be an appropriate factor to consider in determining the hourly rate as noted in *Missouri v. Jenkins*, 109 S. Ct. 2463 (1989).

In *Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001), the Seventh Circuit disapproved of the Administrative Law Judge's award of $200.00 per hour for attorney's fees in the case (exceeding what the attorney would charge his paying clients). The court noted the Administrative Law Judge did not address Employer's argument that "the rate chargeable against the mine operator must be market-based,... without a premium for the contingent nature of the compensation." Rather, the court characterized Petitioner's hourly rate of $200.00 as "a number plucked from a hat."

In *Westmoreland Coal Co. v. Director, OWCP [Cox]*, 602 F.3d 276 (4th Cir. 2010), the hourly rate awarded was vacated because the Administrative Law Judge took into consideration risk of loss and the contingent nature of attorney fee awards in black lung cases. The court held such considerations are not proper.

C. Risk of loss

1. A background

Risk of loss and delay in payment are distinct factors. In awarding fees, risk of loss is an inappropriate factor to consider, whereas enhancement of a fee to account for the delay in payment may be properly considered.

In *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 107 S. Ct. 3078 (1987), the Supreme Court considered an award of attorney's fees for successful prosecution of a claim under the Clean Air Act. The Court noted, "[D]elay and the risk of nonpayment are often mentioned in the same breath," but "adjusting for the former is a distinct issue that is not involved in this case." The Court further stated, "We do not suggest, however, that adjustments for delay are inconsistent with the typical fee-shifting statute." Turning to an enhancement for risk of loss, the Court held such an enhancement under fee-shifting statutes should be utilized only under exceptional circumstances. It reasoned as follows:

> [P]ayment for the time and effort involved--the lodestar--is presumed to be the reasonable fee authorized by the statute, the enhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by the evidence in the record and specific findings by the courts.

Id. at 3088. For a discussion of fee enhancement to account for delay in payment, see the discussion in this chapter, *supra*.

2. The case law

Enhancement for risk of loss in black lung claims is inappropriate. *See Gibson v. Director, OWCP*, 9 B.L.R. 1-149 (1986); *Helton v. Director, OWCP*, 6 B.L.R. 1-176 (1983) (risk of loss is a constant factor in black lung litigation and is, therefore, deemed incorporated into the hourly rate).

In *C.B. v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008) (unpub.), the Board noted "risk of loss" is a "constant factor in black lung litigation and, therefore, is deemed incorporated into the hourly rate and is not evaluated separately." On the other hand, the Board concluded enhancement of the hourly rate to reflect "delay in payment" of the fee is an appropriate factor to consider.

Likewise, the Fourth Circuit declined the use of contingency multiplier to account for the risk of loss in black lung claims. In *Broyles v. Director, OWCP*, 974 F.2d 508 (4th Cir. 1992), the court addressed the issue of risk of loss, and held the following:

> A multiplier is not necessary to encourage attorneys to handle black lung litigation. These cases are argued before our court almost every term. While some of these claims are unsuccessful, the claimants win a sufficient number to encourage lawyers to handle this type of litigation through the administrative proceedings and into the federal court.

Id. at 510. *See also Westmoreland Coal Co. v. Director, OWCP [Cox]*, 602 F.3d 276 (4th Cir. 2010) (considering risk of loss and the contingent nature of attorney fee awards in black lung cases are inappropriate factors); *Simkins v. Director, OWCP*, 53 F.3d 329 (4th Cir. 1995)(table); *Stollings v. Director, OWCP*, 43 F.3d 1468 (4th Cir. 1994)(table).

D. Billing method

1. Generally

Disputes may arise regarding the billing method utilized by the representative—whether s/he uses the quarter-hour billing method, or some other time increment such as an eighth or tenth of an hour. The Board's regulations at 20 C.F.R. § 802.203(d)(3) provide for billing in one-quarter hour increments.

2. Use of quarter-hour billing method

a. Benefits Review Board

In *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 B.R.B.S. 883 (1982), the Board held a quarter-hour minimum billing method is reasonable.

In *C.B. v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008) (unpub.), the Board affirmed the Administrative Law Judge's approval of quarter-hour increments in billing.

b. Fourth Circuit

In *Eastern Assoc. Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013), Employer challenged use of quarter-hour billing, and argued Claimant's counsel should be required to prove "it took fifteen minutes to perform each and every task alleged." The court rejected this position stating it "would impose undue burdens not required by law." In upholding the quarter-hour billing method, the court found the Administrative Law Judge properly reviewed the fee petition to determine whether the hours requested were reasonable and necessary. Here, the court noted:

> In conducting this review, the ALJ eliminated over forty charges by Wolfe, Gilligan, and certain legal assistants that were not compensable because the tasks at issue were clerical in nature. Moreover, the ALJ disallowed a significant number of charges on the basis they were duplicative or unnecessary, including seven hours billed by Gilligan related to a deposition and a hearing when his co-counsel Wolfe also had charged for the same services.

The court determined “the ALJ’s award was manifestly the result of careful and thoughtful consideration of the fee petition and of Eastern’s ‘extensive’ objections.”

c. Fifth Circuit

In *Bullock v. Ingalls Shipbuilding, Inc.*, 29 B.R.B.S. 131 (1995) (en banc), a case arising under the jurisdiction of the Fifth Circuit and applying unpublished precedent of that court, the Board held counsel's use of "a minimum quarter hour billing method was improper." In so concluding, the Board found "the Fifth Circuit held that, generally, attorneys may not charge more than one-eighth hour for review of a one page letter and one-quarter hour for preparation of a one-page letter."

d. Sixth Circuit

In *B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657 (6th Cir. 2008), the court upheld use of the "quarter-hour" billing method, and noted the regulatory provisions at 20 C.F.R. § 802.203(d)(3) require fees be submitted in such increments. The court stated, "While attorneys who record their time in quarter-hour increments might overbill their clients, attorneys who bill in tenth-hour increments might also overbill—the risk exists under both methods." The court concluded, "As long as the total number of billable hours is reasonable in relation to the work performed, the award should be affirmed."

E. Interest on the fee awarded

1. For claims filed on or before January 19, 2001

An award requiring the payment of interest by the Trust Fund on an attorney's fee award is not authorized under the Act and, therefore, is not payable. *Griffin v. Director, OWCP*, 17 B.L.R. 1-75 (1993); *Bennett v. Director, OWCP*, 17 B.L.R. 1-72 (1992).

Note the Board applies the amended regulations at 20 C.F.R. § 725.608 to pre-amendment claims, wherein interest is assessed against an employer. See the discussion below.

2. For claims filed after January 19, 2001

In *Frisco v. Consolidation Coal Co.*, 22 B.L.R. 1-321 (2003), the Board upheld application of the amended regulatory provisions at 20 C.F.R. § 725.608, which allow imposition of interest on a fee award to compensate

counsel for delay in payment. The Board held the regulation was valid, and could be applied to fee awards issued prior to January 19, 2001. The Board further held interest began to accrue from the date the fee was originally awarded (even though the initial 1982 fee award was vacated in *Frisco*).

In *Hawker v. Zeigler Coal Co.*, BRB Nos. 99-0434 BLA and 04-0398 BLA (June 14, 2005) (unpub.), Employer challenged an award of interest on attorney's fees under 20 C.F.R. § 725.608(c), stating the Department "lacks the authority to increase an award of attorney fees by assessing interest through a regulation." Employer noted the claims at issue were filed before the effective date of the amended regulations, and "the previous regulations did not provide for mandatory interest payable from the date of the award of attorney fees. Citing to *Frisco v. Consolidation Coal Co.*, 22 B.L.R. 1-321 (2003), the Board held "no new burden was imposed upon employer by application of Section 725.608, as attorney's fees paid by responsible operators were subject to enhancement for delay before the regulation's effective date of January 19, 2001."

F. Request for reconsideration

Pursuant to 20 C.F.R. § 725.366(d), any party may request reconsideration of a fee award, and if appropriate, a modified fee award (or Supplemental Decision and Order on Reconsideration) may be issued. 20 C.F.R. § 725.366(e). Twenty C.F.R. § 725.366(e) requires that requests for reconsideration be in writing, and they must contain "supporting statements and information pertinent to any increase or decrease requested."

G. Petition for modification of fee petition, not permitted

By unpublished decision in *Crabtree v. Queen Anne Coal Co.*, BRB No. 10-0301 BLA (Jan. 31, 2011)(unpub.), the Board upheld the Administrative Law Judge's order dismissing Employer's petition for modification of an attorney fee award. On appeal, Employer maintained the Administrative Law Judge was obliged to determine whether the fee award contained a "mistake in a determination of fact" regarding Claimant's counsel's hourly rate. The Board disagreed. Citing to *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 B.R.B.S. 41 (1997), the Board stated an attorney fee award "does not concern 'compensation' or 'the terms of an award or denial of benefits' as required under Section 22 of the Longshore and Harbor Workers' Compensation Act," such that the award is not subject to modification.

V. Liability for payment

A. Attorney and lay representative

1. Generally

The party opposing entitlement is liable to for payment of fees to Claimant's counsel in a successfully prosecuted claim. The same is not true for fees owed to lay representatives.

2. Lay representatives

Because the Act only provides for the award of attorney fees, the Black Lung Disability Trust Fund and any named employer are not responsible for the payment of fees to lay representatives. *Madrak v. Director, OWCP*, 7 B.L.R. 1-559 (1984). In *Harrison v. Liberty Mutual Insurance Co.*, 3 B.L.R. 1-596, 1-597 (1981), the Board held the following with regard to fees awarded to lay representatives:

> [T]here is no authority in either the Act or the implementing regulations for [a lay representative's fee] to be assessed against an employer, the Black Lung Disability Trust Fund or as a lien against claimant's benefits. Sections 28(a) and 28(b) of the Act, which authorize the award of a fee against the employer or the Trust Fund, apply only to the award of attorney's fees. Section 28(c), which allows the fee to be made a lien on claimant's benefits, similarly applies only to attorney's fees.

In a case involving a lay representative, fees must be paid by a claimant, although, as previously noted, no lien may be placed upon a claimant's benefits no ensure such payment of fees. 20 C.F.R. § 725.365.

Similarly, in *Kuhn v. Kenley Mining Co.*, Case No. 01-2255 (4th Cir. Apr. 4, 2002) (unpub.), the Fourth Circuit cited to 33 U.S.C. § 928(a) and 20 C.F.R. § 725.367(a) to hold "the statute does not permit the fees of a lay representative to be shifted to an employer."

B. Fees in Part C claims, miner had no post-1969 coal mine employment

Employers are not responsible for attorney's fees and benefits in Part C claims, where the miner had no post-1969 coal mine employment. The Black Lung Disability Trust Fund is liable for the payment of compensation in these claims as well as for payment of attorney's fees.

In addition, the 1981 Amendments of the Black Lung Act provided for the transfer of liability in claims that were finally denied prior to March 1, 1978, but where benefits were later awarded upon review pursuant to Section 435 of the Reform Act. 30 U.S.C. § 932(c); 20 C.F.R. § 725.496. Thus, the Trust Fund is liable for all attorney's fees and costs in claims covered by the 1981 transfer Amendments, which an employer has not paid. 20 C.F.R. § 725.367(b); *Marple v. Jones & Laughlin Steel Corp.*, 7 B.L.R. 1-580 (1984).

The 1981 Amendments and 20 C.F.R. § 725.367(b) and (c) prohibit the Trust Fund from reimbursing an operator or carrier for any attorney's fees or costs that it paid in cases subject to the transfer provisions. Thus, fees paid by an operator or carrier pursuant to a final order awarding benefits prior to January 1, 1982 may not be reimbursed. *But see Burress v. Windsor Power House Coal Co.*, 7 B.L.R. 1-517 (1984).

C. Liability of a surety

In *Crowe v. Zeigler Coal Co.*, 2011 WL 3678136 (7th Cir. Aug. 23, 2011)(unpub.), the court upheld an award of attorney's fees to Claimant's counsel against the defunct coal company's surety, Travelers Companies, and noted:

> Travelers does not dispute that Crowe prevailed, that she is entitled to fees, or that the requested fee amount is reasonable. The most Travelers says to dispute a fee award against it is that we decided its intervention was improper.
>
> . . .
>
> A fee-shifting statute can authorize a fee award against an unsuccessful intervenor who causes the prevailing party to incur additional fees.

In the end, the court awarded $13,268.75 in attorney's fees to be paid by the surety, Travelers Companies.

VI. Enforcement of supplemental decision and order

An Administrative Law Judge may render a fee determination when a decision is issued to further the goal of administrative efficiency. *See Bruce v. Atlantic Marine, Inc.*, 12 B.R.B.S. 65, 68 (1980), *aff'd*, 661 F.2d 898 (5th Cir. 1981).[2] However, when a claim is still pending, the fee award is

[2] The Fifth Circuit affirmed the Board's decision, but the Board's holding that an

neither enforceable nor payable. A fee award is enforceable and payment only when a determination on the claim is final, and reflects a "successful prosecution" of the claim. 33 U.S.C. § 928; 20 C.F.R. § 725.367(a).

In *Adkins v. Kentland Elkhorn Coal Corp.*, 109 F.3d 307 (6th Cir. 1997), the court dismissed counsel's fee petition without prejudice to state "attorney fees may be recovered only if there has been a final decision awarding the claimant an economic benefit as a result of his black lung claim." The court concluded counsel's request for fees was premature as no award of benefits had become final.

On the other hand, in *Eifler v. Peabody Coal Co.*, 13 F.3d 236 (7th Cir. 1993), the Seventh Circuit held any settlement of attorney's fees requires administrative or judicial approval and, even though attorney's fees may not be awarded before a final compensation award is entered, a *settlement* of attorney's fees may be approved before such a final award.

VII. Solicitor as counsel to claimant pursuant to 20 C.F.R. § 725.422

The regulations at 20 C.F.R. § 725.422 provide the "Secretary or his or her designee may, upon request, provide a claimant with legal assistance in processing a claim under the Act." Twenty C.F.R. § 725.422 further states the following:

> Such assistance may be made available to a claimant in the discretion of the Secretary of Labor . . . at any time prior to or during the time in which the claim is being adjudicated and shall be furnished without charge to the claimant. Representation of a claimant in adjudicatory proceedings shall not be provided by the Department of Labor unless it is determined by the Solicitor of Labor that such representation is in the best interests of the black lung benefits program. In no event shall representation be provided to a claimant in a claim with respect to which the claimant's interests are adverse to those of the Secretary of Labor or the fund.

20 C.F.R. § 725.422.

By unpublished decision in *Adams v. Eastern Associated Coal Corp.*, BRB No. 93-305 BLA (Jan. 28, 1994) (unpub.), the Board held an

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attorney fee order may be issued before a final compensation order is entered was neither raised nor decided by the circuit court.

Administrative Law Judge is without authority to order the Solicitor provide legal assistance to a claimant under 20 C.F.R. § 725.422 of the regulations. Rather, the Board determined the "regulations clearly endow the Solicitor with sole discretion to determine whether to provide legal assistance to claimants." The Board further noted "the comments accompanying the publication of the most recent revision of Section 725.422 state that 'the decision to commit resources to a claimant's case was always within the discretion of the Solicitor.'" 43 Fed. Reg. 36, 796-97 (1978). The provisions at 20 C.F.R. § 725.422 remain unchanged in the amended regulations.

VIII. Right to counsel

A. The regulation

Twenty C.F.R. § 725.362(b) provides the following in regard to a claimant's right to counsel:

> Any party may waive his or her right to be represented in the adjudication of a claim. If an adjudication officer determines, after an appropriate inquiry has been made, that a claimant who has been informed of his or her right to representation does not wish to obtain the services of a representative, such adjudication officer shall proceed to consider the claim in accordance with this part, unless it is apparent that the claimant is, for any reason, unable to continue without the help of a representative. However, it shall not be necessary for an adjudication officer to inquire as to the ability of a claimant to proceed without representation in any adjudication taking place without a hearing. The failure of a claimant to obtain representation in an adjudication taking place without a hearing shall be considered a waiver of the claimant's right to representation. However, at any time during the processing or adjudication of a claim, any claimant may revoke such waiver and obtain a representative.

20 C.F.R. § 725.362(b). For further discussion of the right to representation, *see* Chapter 28.

B. Notice to claimant required

In *Shapell v. Director, OWCP*, 7 B.L.R. 1-304 (1984), the Board held "the administrative law judge has the responsibility to inform a *pro se* claimant of his right to be represented by a representative of his/her choice, at no cost to him/her, and inquire whether claimant desires to proceed without such representation." Here, the Administrative Law Judge may

conduct a full and fair hearing involving a *pro se* claimant where s/he: (1) advises the claimant of the contested issues; (2) asks the claimant whether s/he objects of the admission of the Director's exhibits; and (3) inquires "extensively" of the claimant's coal mine employment and medical problems.

By unpublished decision in *Talbert v. Meadow River Coal Co.*, BRB No. 93-1525 BLA (Dec. 29, 1994) (unpub.), the Board directed a *de novo* hearing be held on remand as, in addition to failing to advise the *pro se* Claimant of the advantages of obtaining representation, the Administrative Law Judge further failed to inform Claimant that he was entitled to representation by counsel of his choice.

C. Waiver by claimant

In *Petrosky v. Donex Mining, Inc.*, BRB No. 94-652 BLA (Dec. 22, 1994)(unpub.), Claimant properly waived his right to legal representation under the Act. Under the facts of the case, Claimant appeared *pro se* before the Administrative Law Judge, who failed to notify him the attorney could not charge him a fee. The Administrative Law Judge, however, did notify the claimant that he had a right to an attorney, offered to continue the proceeding until Claimant could obtain representation, gave Claimant the opportunity to testify fully, and allowed Claimant to object to the submission of any evidence.

D. Notice to employer not required

While a claimant must be informed of his or her right to counsel, the same is not required for an employer. In *Mitchell v. Daniels Co.*, 22 B.L.R. 1-73 (2000), the Board held there is no regulatory requirement that responsible operators be informed of the right to representation, and policy concerns underlying the requirement that *pro se* claimants receive such notification do not apply to presumably more sophisticated coal company officials.

IX. Qualifications of representative

A. Generally

Under pre-amendment regulations, any representative, attorney or otherwise, must file a notice of appearance or be otherwise authorized to appear before the Department of Labor on behalf of a particular claimant. The amended regulations, however, provide that a qualified attorney need not file a notice of appearance, but may submit a written declaration (or oral declaration at the formal hearing) that s/he is authorized to represent the

party. 20 C.F.R. § 725.362(a).

A representative must be qualified under 20 C.F.R. § 725.363. 20 C.F.R. § 725.362(a). If a representative is an attorney, then s/he must be in good standing; admitted to practice before a court of a state, territory, district, or insular possession, or before the Supreme Court of the United States or other federal court; and is not, pursuant to any provision of law, prohibited from acting as a representative. 20 C.F.R. § 725.362(a). For a representative who is not an attorney, s/he may be appointed as a representative so long as that person is not, pursuant to any provision of law, prohibited from acting as a representative. 20 C.F.R. § 725.363. To be awarded a fee, a representative must either be an attorney in good standing, or be approved by the adjudication officer.

B. Licensed to practice in one state, may represent claimant in another state

In *R.R. v. Marine Terminals Corporation East*, BRB No. 07-0920 (Sept. 17, 2007) (unpub.), a case arising under the Longshore and Harbor Workers' Compensation Act, the Administrative Law Judge properly found an attorney who is licensed to practice law in one jurisdiction (Virginia) may represent the claimant in another jurisdiction (North Carolina) pursuant to 29 C.F.R. § 18.34(g)(1).

C. Criminal conviction

In *United States v. Davis*, 490 F.3d 541 (6th Cir. 2007), the court upheld the criminal convictions of lay representatives Carolyn Sue and Otis Davis for aiding and abetting in Medicare fraud and obstructing a criminal investigation. The court noted the charges "stemmed from the Davis's orchestration of and participation in a scheme to supply oxygen to coal miners suffering from black lung disease." The court noted Ms. Davis "was instrumental in the founding of the Kentucky Black Lung Association . . ., an organization designed to help miners obtain black lung benefits, as well as other goods and services they might need in order to live with the disease."

D. Disqualification of representative; appearance of impropriety

Pursuant to 29 C.F.R. §§ 18.34(g)(3) and 18.36,[3] an Administrative Law Judge may disqualify counsel for conflicts of interest, or conduct prohibited by the applicable rules of professional conduct. *Baroumes v.*

[3] Proposed regulatory amendments at 29 C.F.R. §§ 18.21-18.23.

Eagle Marine Services, 23 B.R.B.S. 80 (1989). *See also Smiley v. Director, OWCP*, 984 F.2d 278 (9th Cir. 1993) (attorney's dual representation of Claimant and, in an unrelated matter, the carrier who would pay judgment in Claimant's favor). These regulations require that the Administrative Law Judge give the parties notice and an opportunity to be heard regarding the disqualification of a representative.

It gave an appearance of impropriety where Claimant was represented by his son, a DOL-ESA-OWCP employee. However, it was not error for the Administrative Law Judge to permit the representation where the son's supervisor approved of the representation, and directed that no fees could be awarded to him in the event that Claimant prevailed. *Hayes v. Director, OWCP*, 11 B.L.R. 1-20, 1-22 (1987).

X. Costs for pursuit of frivolous claim

In *Crum v. Wolf Creek Collieries*, 18 B.L.R. 1-81 (1994), the Board adopted the Ninth Circuit's holding in *Metropolitan Stevedoring Co. v. Brickner*, 11 F.3d 887 (9th Cir. 1993); *to wit*, under Section 926 of the Longshore and Harbor Workers' Compensation Act, as incorporated into the Black Lung Benefits Act, "only a federal court can assess a party's costs as a sanction against a claimant who institutes or continues, without reasonable ground, workers' compensation proceedings under LHWCA." Thus, the Board, the Administrative Law Judge, and the District Director are without authority to impose Section 926 costs.