

BRB No. 99-0434 BLA consolidated
with BRB No. 04-0398 BLA

WILLIAM E. HAWKER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ZEIGLER COAL COMPANY)	DATE ISSUED: 06/14/2005
)	
Employer-Petitioner)	
)	
INSURANCE COMPANY OF NORTH AMERICA)	
)	
Intervener)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Interest on Attorney Fees of
Rudolf L. Jansen, Administrative Law Judge, United States Department of
Labor.

Paul (Rick) Rauch (Harrison & Moberly, LLP), Indianapolis, Indiana, for
claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for
employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire,
Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor;
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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (1995-BLA-0834) of Administrative Law Judge Rudolf L. Jansen awarding interest on attorney fees which had previously been approved in a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case has a lengthy procedural history. Following the Board's affirmance of the administrative law judge's award of benefits and attorney fees, and the Board's approval of attorney fees for work performed before the Board, the United States Court of Appeals for the Seventh Circuit entered a judgment on April 18, 2003, which enforced the Board's orders.¹ On June 26, 2003, the Seventh Circuit issued an Order denying employer's petition for rehearing. Claimant subsequently filed a motion for contempt with the Seventh Circuit based on employer's failure to pay the attorney fees approved by the administrative law judge and the Board with interest pursuant to the provisions at 20 C.F.R. §725.608(c).² On August 29, 2003, the Seventh Circuit denied claimant's motion in light of employer's representation that it had paid the fees awarded. However, upon claimant's motion for clarification and filing of supplemental authority, *i.e.*, a copy of the Board's decision in *Frisco v. Consolidation Coal Co.*, 22 BLR 1-321 (2003)(Dolder, J., concurring and dissenting), the Seventh Circuit granted claimant's motion on November 14, 2003, to the extent that claimant "may seek the award of interest on the fees awarded by the lower tribunals in those tribunals." Claimant then filed applications with the administrative law judge and the Board for interest on the attorney fees previously awarded. On January 21, 2004, the administrative law judge granted claimant's application and ordered employer to pay counsel interest on his approved attorney fees.

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit as the miner was last employed in the coal mine industry in the State of Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 4, 5.

² The administrative law judge awarded claimant's counsel a fee of \$26,850.70 on June 28, 1999, representing \$17,865.75 in fees for legal services plus \$8,984.95 in expenses. The Board awarded counsel a fee of \$9,349.20 on July 2, 2001, representing \$9,181.25 in fees for legal services plus \$167.95 in expenses; a fee of \$3,055.65 on September 28, 2001, representing \$3,030.00 in fees for legal services plus \$25.65 in expenses; and a fee of \$1,804.13 on May 30, 2003, representing \$1,766.00 in fees for legal services plus \$38.13 in expenses.

Employer appealed, contending that the administrative law judge erred in awarding interest on attorney fees, and was assigned Case Number BRB No. 04-0398 BLA. Claimant and the Director, Officer of Workers' Compensation Programs (the Director), responded, urging affirmance of the administrative law judge's award of interest. Employer also filed an objection to counsel's application for interest on attorney fees approved by the Board in Case Number BRB No. 99-0434 BLA, to which claimant responded in support of his position. Upon claimant's motion, the Board issued an Order on April 19, 2004, consolidating claimant's request for interest on attorney fees approved by the Board in BRB No. 99-0434 BLA with employer's appeal in BRB No. 04-0398 BLA. Employer subsequently filed a combined reply in support of its position, and claimant filed a surreply.³

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that application of Section 725.608(c) to award interest on attorney fees is inappropriate, as the Longshore and Harbor Workers' Compensation Act (LHWCA) and the Black Lung Benefits Act (BLBA) do not provide for such interest, Congress did not authorize such interest, and the Department of Labor (DOL) lacks the authority to increase an award of attorney fees by assessing interest through a regulation. Employer notes that the underlying claim in this case was filed prior to January 19, 2001, the effective date of Section 725.608, and that the previous regulations did not provide for mandatory interest payable from the date of the award of attorney fees. As no Seventh

³ By letter dated November 22, 2004, counsel for employer withdrew its representation of employer in this case, and informed the Board that Horizon Natural Resources, Inc., the parent company of employer, had been liquidated in bankruptcy. On February 11, 2005, the Director identified the Insurance Company of North America (INA) as the company which issued the surety bond covering this claim, and on February 25, 2005, INA filed a petition to intervene. In response to various motions filed by the parties, the Board issued an Order on April 28, 2005, granting the Director's motion to retain employer as a party to this claim; granting INA's petition to intervene; and allowing INA 30 days from receipt of the Order to file any pleadings relevant to the appeal, with an additional 20 days allowed from receipt of such pleadings for the parties to file reply briefs. As no further pleadings were received within the time allowed, the Board will address the issues raised in the original briefs filed by the parties in this appeal.

Circuit case has held that interest on attorney fees could be awarded under the BLBA, employer maintains that even if the regulation were valid, retroactive application of Section 725.608 is impermissible in the present case because its provisions changed the law in the Seventh Circuit. Employer's arguments are without merit.

The award of fees is governed by Section 28 of the Longshore and Harbor Workers' Compensation Act, which authorizes the payment of a "reasonable" attorney's fee by an employer if the claimant obtains an award of benefits after the employer controverts the claimant's entitlement. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a). While no fee is payable until the award is final, the United States Supreme Court has held that "[a]n adjustment for delay in payment is . . . an appropriate factor in the determination of what constitutes a reasonable attorney's fee" under a fee-shifting statute. *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989). The Board subsequently held that the factfinder may adjust the fee by employing any reasonable means to compensate counsel for delay. *Nelson v. Stevedoring Services of America*, 29 BRBS 90, 97 (1995).

A rule is impermissibly retroactive if its application would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244, 280 (1994). In the present case, 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. As the Board noted in *Frisco*, the regulation at Section 725.608 simply provides the mechanism by which claimants' attorneys receive this enhancement in the form of interest in cases involving responsible operators. *Frisco*, 22 BLR at 1-326. Further, although no Seventh Circuit authority is directly on point, the Court has recognized that enhancement in the form of interest for delay in payment of attorney fees is appropriate. *Cf. Fleming v. County of Kane*, 898 F.2d 553 (7th Cir. 1990); *Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663 (7th Cir. 1982). More importantly, as the administrative law judge acknowledged, the Seventh Circuit expressly authorized counsel to seek interest in this case. Decision and Order at 3. The administrative law judge permissibly rejected employer's arguments and applied the provisions at Section 725.608.⁴ Decision and Order at 2-3. Consequently, we affirm the administrative law judge's finding that counsel is entitled to interest on his award of attorney fees as enhancement for the delay in employer's payment of the fees. We also

⁴ We also reject, as unsupported by the record, employer's assertions that counsel's hourly rates already reflected a premium and that an award of interest would provide counsel with a windfall.

hold that, pursuant to Section 725.608(c), counsel is entitled to interest on the attorney fees previously approved by the Board. We, therefore, remand this case to the district director to calculate the amount of interest payable by employer.

Claimant is entitled to simple annual interest, computed from the dates on which the attorney fees were awarded through the date on which employer paid the attorney fees, in accordance with 20 C.F.R. §725.608(c), (d)(3). To the extent, if any, that the administrative law judge's award of interest based on counsel's calculations is inconsistent with the provisions at Section 725.608(c), (d)(3), we modify the award of interest and otherwise affirm the administrative law judge's Decision and Order.

Accordingly, claimant's application for interest on attorney fees previously approved by the Board is granted. The administrative law judge's Decision and Order – Awarding Interest on Attorney Fees is affirmed in part and modified in part, and this case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge