

**PART XI**  
**ATTORNEY FEES**

**A. BOARD REVIEW OF ATTORNEY FEE AWARDS MADE BELOW**

**7. ISSUES ON APPEAL OF ATTORNEY FEE AWARDS**

**c. Enhancement of Fees**

The United States Supreme Court has held in *City of Burlington v. Dague*, 112 S.Ct 2638 (1992), that enhancement of an award of attorney fees on the basis of contingency is not permitted under various fee-shifting statutes. See *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995).

Counsel must raise the enhancement for delay factor at the time the fee petition is filed since counsel is precluded from raising the issue for the first time on appeal. *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995); see *Bennett v. Director, OWCP*, 17 BLR 1-72, 1-73-4 (1992); *Mitchell v. United States Steel Corp.*, 7 BLR 1-68, 1-70 (1984); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982); *Taylor v. 3D Coal Corp.*, 3 BLR 1-350, 1-355 (1981).

**CASE LISTINGS**

**DIGESTS**

Since claimant's counsel failed to raise the enhancement for delay factor at the time the fee petition was filed and waited until claimant's counsel filed his Response with the Board to employer's Petition for Review, claimant's counsel is precluded from now raising the enhancement for delay issue on appeal. *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995); see *Bennett v. Director, OWCP*, 17 BLR 1-72, 1-73-4 (1992).

In *Missouri v. Jenkins*, 109 S.Ct 2463 (1989), the United States Supreme Court held that an adjustment for delay in payment is an appropriate factor in determining what constitutes a reasonable attorney fee, see 20 C.F.R. §725.366(b); Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928; see also *Hobbs v. Stan Flowers Co.*, 18 BRBS 65 (1986), *aff'd*, 820 F.2d 1528, 1530 (9th Cir. 1987); *U.S. Department of Labor v. Triplett*, 110 S.Ct 1428, 13 BLR 2-364 (1990); *Goodloe*

**v. Peabody Coal Co.**, 19 BLR 1-91 (1995); **Cox v. Brady-Hamilton Stevedore Co.**, 25 BRBS 203, 208-9 (1991); **Bennett**, *supra*.

The Board, citing **Jenkins**, held that to the extent that **Fisher v. Todd Shipyards Corp.**, 21 BRBS 323, 327-8 (1988) and **Blake v. Bethlehem Steel Corp.**, 21 BRBS 49, 55 (1988), Longshore cases in which the Board stated that "[a]ugmentation of the hourly rate to reflect delay in payment constitutes an abuse of discretion under the Act because factors such as risk of loss and delay of payment occur generally in Longshore cases and are considered to be incorporated into the normal hourly rate charged by counsel," **Blake**, 21 BRBS at 55; **Fisher**, 21 BRBS at 328, are inconsistent with **Jenkins**, those decisions are overruled. **Goodloe v. Peabody Coal Co.**, 19 BLR 1-91 (1995).

Enhancement of an attorney's fee because of delay in processing the case is not appropriate where the Trust Fund is liable for the fee because the Act does not waive the government's sovereign immunity from an award of interest. **Shaffer v. Director, OWCP**, 21 BLR 1-97 (1998)(en banc recon.).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.366(b), pertaining to attorney's fees, is consistent with the holding of the United States Supreme Court in **Burlington v. Dague**, 505 U.S. 557, 562 (1992) and does not supplant the lodestar method of calculating reasonable fees or enhance the lodestar fee once it is calculated. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 874-875, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

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