PART XI

ATTORNEY FEES

A. BOARD REVIEW OF ATTORNEY FEE AWARDS MADE BELOW

9. LIABILITY FOR ATTORNEY FEES

Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.367(a), authorizes a separate award of attorney fees in black lung cases payable by the employer. ***Markovich v. Bethlehem Mines Corp.***, 11 BLR 1-105 (1987); ***Capelli v. Bethlehem Mines Corp.***, 11 BLR 1-129 (1988). The Board has consistently interpreted the Act and the implementing regulation as imposing liability for attorney fees on employer after it receives actual or constructive notice of its potential liability for black lung benefits and declines to pay or fails to respond within thirty days, whichever occurs first. *Id*; *Cf*. ***Director, OWCP v. Blevins***, 757 F.2d 718 (6th Cir. 1985). Claimants, in such cases, are responsible for fees incurred prior to the notice of employer's potential liability and refusal to pay compensation. ***Couch v. The Pittston Co.***, 7 BLR 1-514 (1984); ***O'Quinn v. The Pittston Co.***, 4 BLR 1-25 (1981).

With the 1977 Reform and Revenue Acts, Congress released employers from liability for Part C claims for benefits where the miner had performed no coal mine employment after 1969, and created the Black Lung Disability Trust Fund which assumed liability for those claims. ***Matulevich v. Director, OWCP***, 9 BLR 1-152 (1986). At that point, the Trust Fund also became responsible for claimant's attorney fees. 30 U.S.C. §932(c); ***Solarczyk v. Rochester & Pittsburgh Coal Co.***, 1 BLR 1-738 (1978); *aff'd mem. sub nom*. ***Director, OWCP v. Rochester & Pittsburgh Coal Co.***, 594 F.2d 854 (3d Cir. 1979); ***Director, OWCP v. South East Coal Co. (Spicer)***, 598 F.2d 1046 (6th Cir. 1979); ***Director, OWCP v. Black Diamond Coal Mining Co. (Frederick)***, 598 F.2d 945 (5th Cir. 1979); ***Director, OWCP v. Leckie Smokeless Coal Co. (Bennett)***, 598 F.2d 881 (4th Cir. 1979); ***Republic Steel Corp. v. Director, OWCP (Hromyak)***, 590 F.2d 77 (3d Cir. 1978).

Employer's liability for attorney fees was further reduced by the 1981 Amendments that provided for the transfer of liability in those cases where the claim was finally denied prior to March 1, 1978 and benefits were awarded on review pursuant to Section 435 of the Reform Act. 30 U.S.C. §932(c); 20 C.F.R. §725.496; ***Lawley v. U.S. Steel Corp.***, 11 BLR 1-14 (1985); ***Chadwick v. Island Creek Coal Co.***, 7 BLR 1-883 (1985), *aff'd*, 8 BLR 1-447 (1986)(en banc); *see also* Part III.C.2. of the Desk Book, Payment of Benefits under the 1981 Amendments to the Act, *supra*.

In those cases where claimant elects DOL review and benefits are awarded, the Trust Fund assumes liability for those attorney fees and costs for which employer would have been liable but for the 1981 Amendments and that employer has not already paid pursuant to a final order. 20 C.F.R. §725.367(b); ***Marple v. Jones & Laughlin Steel Corp.***, 7 BLR 1-580 (1984); ***Burress v. Windsor Power House Coal Co.***, 7 BLR 1-517 (1984); ***Couch v. The Pittson Co.***, 7 BLR 1-514 (1984); ***Yokley v. Director, OWCP***, 3 BLR 1-230 (1981); *Cf*. ***Graham v. Director, OWCP***, 10 BLR 1-30 (1987). Where claimant has already paid the attorney fee, the Trust Fund must reimburse him for the portion for which the Trust Fund is liable. ***Cox v. Director, OWCP***, 7 BLR 1-810 (1985).

In those cases where claimant has elected review by the Social Security Administration, benefits are awarded, and the case is certified to the Department of Labor for payment, the Trust Fund is liable for payment of the attorney fee. ***Parker v. Director, OWCP***, 12 BLR 1-98 (1987); ***Cecil v. Director, OWCP***, 3 BLR 1-257 (1981).

Finally, in those cases where claimant elects SSA review, his claim is denied, and his claim is approved by subsequent DOL review, the Trust Fund is liable only for those attorney fees incurred after the Director receives notice of the Trust Fund's liability except where counsel can demonstrate that certain services before SSA were reasonably necessary to establish entitlement before the DOL. ***Yokley***, *supra*; ***Parker***, *supra*.

CASE LISTINGS

[Sixth Circuit refused to hold Trust Fund liable for attorney fees when initial and only finding was entitlement, and Director was never in adversarial position with claimant] ***Director, OWCP v. Bivens***, 757 F.2d 781 (6th Cir. 1985).

DIGESTS

Counsel's request for enhancement due to delay is, in essence, a request for interest to be paid by the Black Lung Disability Trust Fund. The Act and its implementing regulations, *see* 20 C.F.R. §725.608(d), do not authorize an award of interest against the Trust Fund. ***Bennett v. Director, OWCP***, 17 BLR 1-72 (1992).

Employer is liable for attorney fees incurred prior to controversion of liability. The majority of the Board, sitting en banc, held that Section 28(a) requires employer, once properly identified as the responsible operator, “thereafter” to be responsible for all “reasonable fee(s)” incurred by claimant throughout the litigation of the claim. Noting that the Act is a federal fee-shifting statute, the majority held that the holdings in ***Hensley v. Eckerhart***, 461 U.S. 424 (1983) and ***City of Burlington v. Dague***, 505 U.S. 557(1992) were applicable to the interpretation of Section 28(a) under the Longshore Act. ***See also George Hyman Construction Co. v. Brooks***, 963 F.2d 1532, 25 BRBS

161 (CRT)(D.C. Cir. 1992); ***Anderson v. Director, OWCP***, 91 F.3d 1922, 30 BRBS 67 (CRT)(9th Cir. 1996). Finding that the $400 of pre-controversion fees were reasonable as awarded by the district director and not objected to by employer, the majority affirmed the district director's award of the full fee, including pre-controversion fees, to claimant's counsel. The dissenting two members noted that the Board's eighteen-year strict interpretation of Section 28(a) had been affirmed by the United States Court of Appeals for the Fourth Circuit, wherein this case arose, and had been adopted by the Director in their pending proposed changes to the Black Lung regulations. The dissent would continue to hold that employer is only liable for fees incurred "thereafter" its controversion and notice of a potential claim for benefits. ***Jackson v. Jewell Ridge Coal Corp.***, 21 BLR 1-28 (1997)(en banc)(Smith and Dolder, JJ., dissenting).

The majority of the Board, sitting *en banc*, held that pursuant to the plain language of Section 28(a) (as implemented in this case involving claims filed prior to January 19, 2001, by 20 C.F.R. §725.367 (2000), ***see*** 20 C.F.R. §725.2(c)), employer is only liable for fees incurred by claimant after it receives notice of its potential liability in a claim and has the opportunity to resolve or controvert the claim, giving effect to the word "thereafter" in Section 28(a), and that claimants are responsible for pre-controversion attorney fees incurred prior to the employer's receipt of the formal notice of the claim and its potential liability and subsequent refusal to pay compensation. Thus, the Board overturned its prior decision in ***Jackson v. Jewell Ridge Coal Corp.***, 21 BLR 1-28 (1997)(*en banc*)(Smith and Dolder, JJ., dissenting). The dissenting two members would continue to hold, consistent with the Board's holding in *Jackson*, that employer is liable for attorney fees incurred prior to employer's controversion of liability, and contend that the majority's interpretation of Section 28(a) violates Section 28(d), as it reduces claimant's compensation to the extent that it reduces employer's liability under Section 28(a) for a reasonable attorney's fee by imposing upon claimant liability for part of the attorney's fee for work necessary to the prosecution of the case. In response, the majority noted that as claimant is responsible for the portion of the attorney fee at issue in this case and as Section 28(d) only applies where employer is liable for the fee at issue, Section 28(d) is inapposite to this case. ***Childers v. Drummond Co., Inc.***, 22 BLR 1-146 (2002)(*en banc*)(McGranery and Hall, JJ., dissenting).

In those cases where there has been an adjudicative proceeding because "someone" contested liability, the party ultimately held responsible for the payment of benefits is also responsible for the payment of an attorney's fee, regardless of which party created the adversarial relationship. ***Duncan v. Director, OWCP***, BLR (2010).

9. LIABILITY FOR ATTORNEY FEES

(a) Notice of Liability

The Board has long held that employer receives notice of its potential liability pursuant to Section 725.367(a) when it receives notice of claimant's application for

benefits. *See e.g.* ***Capelli v. Bethlehem Mines Corp.***, 11 BLR 1-129 (1988). Similarly, in cases involving Trust Fund liability, the Board has held that the 30-day period described in Section 725.367 begins to run after the Director receives notice of the Trust Fund's potential liability: either on receipt of the claim where no putative responsible operator is identified, on referral of the claim from the SSA after the miner's election of DOL review, or on receipt of notification of employer's release from liability. ***Parker v. Director, OWCP***, 12 BLR 1-98 (1987); ***Wade v. Director, OWCP***, 7 BLR 1-334 (1984); ***Yokley v. Director, OWCP***, 3 BLR 1-230 (1981); ***Director, OWCP v. Simmons***, 706 F.2d 481 (4th Cir. 1983).

In cases arising within the appellate jurisdiction of the Sixth Circuit, however, the Board must apply the Court's stricter interpretation of "notice of liability" pursuant to Section 725.367. The Court has held that "for both the Trust Fund and for a coal mine operator the mere filing of a claim by a miner without any initial finding or pulmonary determination of disability does not constitute a 'notice of its liability,'" and would require either opposing party to take some affirmative action to place itself in an adversarial posture with claimant before liability for attorney fees is incurred. 20 C.F.R. §725.367; ***Director, OWCP v. Bivens***, 757 F.2d 781, 788, 7 BLR 2-166, 2-175 (6th Cir. 1985). Instead, where claimant's entitlement to benefits is never opposed by employer or the Director, claimant is liable for any attorney fees incurred during the pursuit of his claim. ***Ackison v. Director, OWCP***, 8 BLR 1-353 (1985); ***Bivens***, *supra*. The Court further held in ***Poyner v. Director, OWCP***, 810 F.2d 99, 9 BLR 2-201 (6th Cir. 1987), that the notice of transfer from the SSA to the DOL without approval also does not constitute notice of liability as required by Section 725.367. *See also* ***Graham v. Director, OWCP***, 10 BLR 1-30 (1987); ***Allen v. Director, OWCP***, 9 BLR 1-38 (1986).

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Pursuant to ***Bivens***, DOL Form Cm-1088 does not constitute a denial and did not place the Director in an adversarial position for purposes of transferring attorney fee liability to the Trust Fund. ***Allen v. Director, OWCP***, 9 BLR 1-38 (1986).

The majority of the Board, sitting *en banc*, interpreted the Act and Section 725.367(a) (2000), applicable in this case involving claims filed prior to January 19, 2001, *see* 20 C.F.R. §725.2(c), as imposing liability for attorney fees on employer after the date it receives actual or constructive notice of its potential liability for black lung benefits and, as in this case, declines to pay or fails to respond within thirty days, whichever occurs first. ***Childers v. Drummond Co., Inc.***, 22 BLR 1-171 (2002)(*en banc*)(McGranery and Hall, JJ., dissenting).

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