

PART XI
ATTORNEY FEES

B. ATTORNEY FEES FOR SERVICES PERFORMED BEFORE THE BOARD

DIGESTS

The Sixth Circuit held that the “lodestar method” of calculating fees, *i.e.* where the fee amount equals the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate, is the appropriate starting point for calculating fee awards in black lung benefits cases. In so holding, the court noted that there was no binding precedent on this issue in the 6th Circuit, but that this approach was consistent with the fee-shifting provision of the Longshore Act, and with other federal fee-shifting statutes, as well as with the Secretary of Labor’s position in *Nat’l Mining Ass’n v. Department of Labor*, 292 F.3d 849, 23 BLR 2-124 (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), that the factors identified at Section 725.366(b) do not supplant or enhance the lodestar method but, rather, are already reflected in the lodestar method. ***B&G Mining, Inc. v. Director, OWCP [Bentley]***, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

The Sixth Circuit held that the Board acted within its discretion in striking hours for duplicative work and for work unrelated to the appeal before the Board. ***B&G Mining, Inc. v. Director, OWCP [Bentley]***, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

The Sixth Circuit held that the Board acted within its discretion in approving billing in quarter-hour increments. ***B&G Mining, Inc. v. Director, OWCP [Bentley]***, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

1. HOURLY RATE

The Board held that \$100 per hour was not an excessive fee request for services regarding an appeal before the Board, since claimant's counsel was highly experienced in litigating black lung claims, inasmuch as counsel's expertise reduced the number of hours that needed to be claimed for compensation. Moreover, the employer raised a complex constitutional issue on appeal to which the attorney responded. 20 C.F.R. §802.203(d). The Board held that the \$100 hourly rate requested before the Board need not be the same as the billing rate for work performed before the administrative law judge (\$75.00) where the issue before the Board was more complex. ***Leonard v.***

Republic Steel Corp., 2 BLR 1-571 (1979); see also Desk Book Part XI.A.7.b.(1) for more information on hourly rate.

CASE LISTINGS

[lower rate may be awarded to lay representative than permissible for attorney]
Scicchitano v. Director, OWCP, 6 BLR 1-1279 (1984).

DIGESTS

The Board reduced the requested hourly rate from \$150.00 to \$125.00. **Picinich v. Lockheed Shipbuilding**, 23 BRBS 128 (1989).

The Board has approved hourly rates of \$150.00. See generally **Goodloe v. Peabody Coal Co.**, 19 BLR 1-91 (1995).

The Sixth Circuit held that where an attorney was awarded an hourly rate of \$200 for work before the district director, and was awarded an hourly rate of \$250 for work before the ALJ, it was reasonable for the Board to award an hourly rate of \$225, for work before the Board. The differing rates did not indicate an abuse of discretion, as the Board was reviewing the awards of both the district director and the ALJ for an abuse of discretion, as well as making its own award *de novo*. Where different adjudicators are awarding the fees for work before them, reasonable differences in opinion about what constitutes the appropriate rate can be expected. **B&G Mining, Inc. v. Director, OWCP [Bentley]**, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

The Sixth Circuit, in affirming the Board's award of attorney's fees for work before the Board, held that while the Board did not state that the rate it awarded (\$225/hour) was based on a market rate for comparable attorneys doing similar work, it did select a rate at the median between the other two rates approved by the district director (\$200) and the ALJ (\$250), which were based on the market rates. The court stated that if both \$200 and \$250 represent reasonable approximations of the going rate for like work and like experience, it is hard to fathom how \$225 does not as well. **B&G Mining, Inc. v. Director, OWCP [Bentley]**, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

The Sixth Circuit held that in determining an appropriate hourly rate, 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. Thus, the Court held that while reliance on awards in earlier cases might not be warranted in all cases, in some

circumstances, such as where there is no clear market rate against which to compare the attorney's requested rate, it is appropriate to look to prior awards for guidance in determining a prevailing market rate. **B&G Mining, Inc. v. Director, OWCP [Bentley]**, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

The Sixth Circuit held that in determining the appropriate hourly rate, it is reasonable for the Board to consider factors such as an attorney's professionalism, experience, and the complexity of the case to determine the appropriate lodestar rate. Mere reference to these factors is not necessarily "double counting" factors already taken into account by the lodestar rate. **B&G Mining, Inc. v. Director, OWCP [Bentley]**, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

The Sixth Circuit held that in determining the appropriate hourly rate, the Board did not abuse its discretion by failing to comment upon employer's evidence that attorneys performing legal work for insurance companies typically earn \$125. The court noted that insurance-defense cases are not necessarily comparable to black lung cases, where there can be a significant delay in getting paid that can justify a higher hourly rate. **B&G Mining, Inc. v. Director, OWCP [Bentley]**, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

The Sixth Circuit held that it is error for an adjudicator to consider risk of loss in determining a reasonable hourly rate. Compensation for the risk of loss is already factored into any reasonable hourly rate. **B&G Mining, Inc. v. Director, OWCP [Bentley]**, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

The United States Court of Appeals for the Fourth Circuit held that the Board abused its discretion in awarding claimant's counsel an hourly rate of \$250 under Section 28 of the Longshore and Harbor Workers' Compensation Act, which is incorporated into the Black Lung Benefits Act, given that the Board relied upon a ten-year old hourly rate of \$200, assumed it was a reasonable basis for an hourly rate today, and adjusted it upwards by the arbitrary amount of \$50. The court stated that the Board can generally look to previous awards in the relevant marketplace as a barometer for how much to award counsel in the immediate area. Nevertheless, the court reasoned that an hourly rate that was set approximately ten years ago, and that was arbitrarily adjusted with no regard to the facts of the case or the lodestar factors, was not necessarily appropriate today. Consequently, the court remanded the case to the Board for a determination and explanation of the appropriate hourly rate. **Newport News Shipbuilding and Dry Dock Co. v. Holiday**, 591 F.3d 219, 24 BLR 2-293 (4th Cir. 2009).

In two companion cases, the Board recognized that a market rate is established with evidence of earnings that attorneys have received from paying clients for similar services in similar circumstances. The fee applicant bears the burden of producing specific evidence of prevailing market rates. **Bowman v. Bowman Coal Co.**, BLR (Apr. 15, 2010) (Order); **Maggard v. International Coal Group**, BLR (Apr. 15,

2010) (Order).

A fee petition is incomplete on its face if it does not contain “the normal billing rate for each person who performed services on behalf of the claimant.” 20 C.F.R. §802.203(d)(4); ***Bowman v. Bowman Coal Co.***, BLR (Apr. 15, 2010) (Order); ***Maggard v. International Coal Group***, BLR (Apr. 15, 2010) (Order).

The following factors may be considered by the Board in determining a reasonable hourly rate: (1) the difficulty of black lung litigation; (2) the skill required to represent miners properly; and (3) the experience, reputation, and ability of the attorneys providing representation. ***Bowman v. Bowman Coal Co.***, BLR (Apr. 15, 2010) (Order); ***Maggard v. International Coal Group***, BLR (Apr. 15, 2010) (Order).

Although the Board may consider fee schedules in determining a proper hourly rate, it is not bound by them. ***Bowman v. Bowman Coal Co.***, BLR (Apr. 15, 2010) (Order); ***Maggard v. International Coal Group***, BLR (Apr. 15, 2010) (Order).

Hourly rates charged by similarly situated attorneys in nearby states may assist in establishing a market rate. However, this is not the only evidence relevant to establishing a market rate, as the goal is to establish a market rate paid by paying clients in the requesting attorneys’ geographic area. ***Bowman v. Bowman Coal Co.***, BLR (Apr. 15, 2010) (Order); ***Maggard v. International Coal Group***, BLR (Apr. 15, 2010) (Order).

In order to be entitled to a requested hourly rate, it is claimant’s counsel’s burden to produce satisfactory evidence that the requested rate is in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation. ***Bowman v. Bowman Coal Co.***, BLR (Apr. 15, 2010) (Order); ***Maggard v. International Coal Group***, BLR (Apr. 15, 2010) (Order).

In companion cases where counsel did not provide a complete fee application, the Board elected to grant counsel an additional period of time in which to submit an amended fee petition. ***Bowman v. Bowman Coal Co.***, BLR (Apr. 15, 2010) (Order); ***Maggard v. International Coal Group***, BLR (Apr. 15, 2010) (Order).

In support of a market rate, counsel may submit evidence of the fees that he has received in the past, or affidavits of other lawyers who might not practice federal black lung law, but who are familiar both with the skills of the fee applicants and more generally with the type of work in the relevant community. Evidence regarding the fees that counsel has received for work involving cases of similar complexity may also be useful in establishing a reasonable prevailing market rate. ***Bowman v. Bowman Coal Co.***, BLR (Apr. 15, 2010) (Order); ***Maggard v. International Coal Group***, BLR (Apr. 15, 2010) (Order).

Where claimant's counsel provided an extensive list of black lung cases from 2006 to 2008, in which he was awarded an hourly rate of \$300.00, and provided evidence of his expertise and experience in the field of black lung litigation, the Board found that claimant's counsel provided sufficient evidence of a market rate in his geographic area for an attorney of his expertise and experience, for appellate work before the Board. ***Maggard v. Int'l Coal Group***, BLR , BRB No. 09-0271 BLA (Nov. 8, 2010) (Order).

Because claimant's counsel failed to identify the training, education, and experience of his legal assistants, as required by 20 C.F.R. §802.203(d)(2), the Board disallowed the requested fee for the 1.25 hours of legal services performed by the legal assistants. ***Maggard v. Int'l Coal Group***, BLR , BRB No. 09-0271 BLA (Nov. 8, 2010) (Order).

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