

BRB No. 00-0681 BLA

CARL FOGARTY )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 UNITED CASTLE COAL COMPANY )  
 )  
 and )  
 )  
 OLD REPUBLIC INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioner )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest )

DATE ISSUED:

DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney Fee of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Jonathan W. Lipshie, Tab R. Turano and Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Dorothy L. Page (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, McGRANERY and McATEER, Administrative Appeals Judges.  
PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fee (89-BLA-0704) of Administrative Law Judge Clement J. Kichuk 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).<sup>1</sup> The administrative law judge found claimant's counsel entitled to a fee of \$13,275.00, based on 28.25 hours of legal services at an hourly rate of \$175.00, 47.25 hours of legal services at an hourly rate of \$150.00, 6.75 hours of legal services at an hourly rate of \$125.00, and 8 hours of services performed by a legal assistant at an a hourly rate of \$50.00.<sup>2</sup> On appeal, employer contends that

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<sup>1</sup>The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which both employer and the Director, Office of Workers' Compensation Programs, have responded, contending that the regulations at issue in the lawsuit will not affect the outcome of the case. Inasmuch as claimant has not timely submitted a brief in response to the Board's order, we construe claimant's position as being that the challenged regulations will not affect the outcome of the case.

The implementing regulations for the award of attorney fees to claimant's counsel for work performed before the Office of Administrative Law Judges are set forth at 20 C.F.R. §§725.365 through 725.367. The implementing regulation at 20 C.F.R. §725.365 was not revised. Although challenged in the lawsuit, only technical revisions were made to 20 C.F.R. §725.366. Finally, although the revised 20 C.F.R. §725.367 has been challenged in the lawsuit, it is only applicable to claims filed after January, 19, 2001, *see* 20 C.F.R. §725.2(c). Consequently, based on the timely briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the revised and/or challenged regulations.

<sup>2</sup>The Board affirmed an award of benefits in instant claim, which was filed on

claimant's counsel's fee request was unreasonable because the hourly rates requested were excessive, because 45.50 hours of the services requested by claimant's counsel were for clerical matters and because claimant's counsel billed for their services in fifteen minute increments. Claimant's counsel responds, urging that the administrative law judge's Supplemental Decision and Order Granting Attorney Fee be affirmed. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not responded to the merits of this appeal.

The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion, see *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Claimant's counsel requested a fee of \$13,575.00 for 84.25 hours of legal services and 8 hours of services by a legal assistant performed before the administrative law judge. Specifically, counsel requested fees for 28.75 hours of legal services performed by Joseph E. Wolfe, Esq., at an hourly rate of \$175.00, 49.25 hours of legal services performed by Vernon M. Williams, Esq., at an hourly rate of \$150.00, 6.75 hours of legal services performed by Bobby S. Belcher, Jr., Esq., at an hourly rate of \$125.00, and 8 hours of services performed by a legal assistant at an hourly rate of \$50.00. Employer objected, contending that claimant's counsel's fee request was unreasonable because the hourly rates requested were excessive, because 45.50 hours of the services requested by claimant's counsel were for clerical matters and because claimant's counsel billed for their services in fifteen minute increments.

The administrative law judge found that claimant's counsel's petition was in compliance with 20 C.F.R. §725.366, setting forth in detail the extent and nature of the services rendered and the professional status of the person performing the work.

The administrative law judge rejected employer's contentions and found that the services described in the petition were necessary and that the time expended and the rates requested were reasonable for the services rendered. However, the

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May 23, 1983, Director's Exhibit 2, and arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, see *Fogarty v. United Castle Coal Co.*, BRB No. 98-0756 BLA (Mar. 2, 1999)(unpub.). No further appeal was taken by the parties.

administrative law judge noted that the amount of hours of legal services listed as performed by Joseph E. Wolfe, Esq., was actually 28.25 and disallowed 2 hours of legal services performed at an hourly rate of \$150.00 because it involved work performed before the Board. Thus, the administrative law judge found claimant's counsel entitled to a fee of \$13,275.00, based on 28.25 hours of services at an hourly rate of \$175.00, for 47.25 hours of services at an hourly rate of \$150.00, 6.75 hours of services at an hourly rate of \$125.00, and 8 hours of services at an a hourly rate of \$50.00.

Employer contends that the hourly rates requested by claimant's counsel were unreasonably excessive and that claimant's counsel failed to provide evidence that the hourly rates requested were the typical "customary" rates charged to fee paying clients or which prevail in claimant's counsel's "legal community." As the administrative law judge noted, Supplemental Decision and Order at 2, the Board has approved hourly rates of \$150.00, *see Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995), and of \$200.00 as reasonable, *see Jones v. v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*). Thus, employer's contention is insufficient to meet employer's burden before the Board of proving that the rate awarded was excessive or that the administrative law judge abused his discretion in this regard, *see generally Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *see also Jones, supra*.

Employer also contends that claimant's counsel's fee request was unreasonable because at least 45.50 hours of the services requested by claimant's counsel were for clerical matters, which should more properly be considered and compensated when figuring the hourly rate. The administrative law judge found that the services for which claimant's counsel sought compensation did not include "clerical" matters that are typically disallowed, but were reasonable and necessary for an attorney, particularly in a smaller law firm, to perform. Supplemental Decision and Order at 2-3. It is within the discretion of the administrative law judge to determine whether, in any given case based on the record evidence, services requested by claimant's counsel are reasonable and necessary or merely part of ordinary office overhead and employer's contention is insufficient to meet employer's burden before the Board of proving that the administrative law judge's finding that the services for which claimant's counsel sought compensation were reasonable and necessary was arbitrary and/or capricious or that the administrative law judge abused his discretion in this regard, *see Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989).

Finally, employer contends that claimant's counsel's fee request was unreasonable because claimant's counsel billed for their services in fifteen minute increments for tasks that should have taken less than fifteen minutes to perform.

Employer contends that a more reasonable billing increment of six minutes should have been utilized by the administrative law judge, which would reduce the number of hours of services for which claimant's counsel sought compensation by sixty percent.<sup>3</sup> The administrative law judge noted that the Board has held that it is not an abuse of discretion to award attorney fees for services billed in fifteen minute increments in cases arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a), as the method is reasonable and in compliance with the applicable regulations. Supplemental Decision and Order at 3. Inasmuch as the administrative law judge considered the reasonableness of the time claimed by claimant's counsel, we reject employer's contention that the administrative law judge erred by approving claimant's counsel's request for services in increments of one-quarter of an hour for services, see *Abbott, supra*; *Marcum, supra*.

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<sup>3</sup>Although employer contends that the practice of claiming fifteen minutes for routine tasks was rejected by the United States Court of Appeals for the Fourth Circuit in *Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992), employer's contention is incorrect. Whereas the Fourth Circuit Court held that the fifteen minute rule was unreasonable based on the facts in that case, given that fifteen minutes were claimed for tasks performed in the Fourth Circuit Court's clerk's office which did not take that amount of time. There is no such consideration in this case.

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney Fee is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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J. DAVITT McATEER,  
Administrative Appeals Judge