

BRB No. 08-0160 BLA

R.B. )  
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 Claimant-Respondent )  
 )  
 v. ) DATE ISSUED: 08/27/2008  
 )  
 CONSOLIDATION COAL COMPANY )  
 )  
 Employer-Petitioner )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Supplemental Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order (06-BLA-5035) of Administrative Law Judge Daniel F. Solomon awarding an attorney's fee on a miner's 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). In a Decision and Order dated April 12, 2007, the administrative law judge awarded benefits.<sup>1</sup>

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<sup>1</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the miner's coal mine employment was in Virginia. *See*

Subsequently, claimant's counsel, Joseph E. Wolfe, filed a fee petition with the administrative law judge requesting a fee of \$37,385.00, representing 71.65 hours of attorney services at \$400 per hour for Mr. Wolfe, .25 hours of attorney services at \$300 per hour for Mr. Vernon M. Williams, 2 hours of attorney services at \$250 per hour for Mr. Bobby S. Belcher, Jr., 25.75 hours of attorney services at \$200 per hour for Mr. W. Andrew Delph, and 30 hours of services by a legal assistant at \$100 per hour. Employer objected to the requested hourly rates of \$400 for Mr. Wolfe and \$100 for the legal assistant.

After considering employer's objections, the administrative law judge reduced the hourly rate for Mr. Wolfe to \$300, and the hourly rate for the legal assistant to \$75. Supplemental Decision and Order at 3. Further, the administrative law judge disallowed 15 hours of noncompensable clerical services that were performed by the legal assistant. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$23,195.00, representing 71.65 hours of attorney services at the hourly rate of \$300 for Mr. Wolfe, .25 hours of attorney services at the hourly rate of \$300 for Mr. Williams, 2 hours of attorney services at the hourly rate of \$250 for Mr. Belcher, and 15 hours of legal assistant services at the hourly rate of \$75.

On appeal, employer contends that the administrative law judge abused his discretion by awarding the hourly rate of \$300 to Mr. Wolfe. Claimant has filed a response brief, asserting that employer has not shown that the administrative law judge abused his discretion in finding that the rate of \$300 an hour was reasonable. Employer has filed a reply brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.<sup>2</sup>

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. *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 804, 21 BLR 2-631, 2-636 (4th Cir. 1999); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*).

Employer argues that the administrative law judge abused his discretion by awarding an hourly rate of \$300 to Mr. Wolfe. In awarding Mr. Wolfe \$300 an hour, the administrative law judge inappropriately referenced the risk of loss. Risk of loss cannot be factored into the determination of the hourly rate. *City of Burlington v. Dague*, 505

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*Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); April 12, 2007 Decision and Order at 2.

<sup>2</sup> The administrative law judge did not award any fees for Mr. Delph's services. On appeal, claimant does not challenge the administrative law judge's failure to award a fee for Mr. Delph. Therefore, we do not address the issue.

U.S. 557, 567 (1992); *B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 666, 24 BLR 2-107, 2-125 (6th Cir. 2008); *Broyles v. Director, OWCP*, 974 F.2d 508, 509, 17 BLR 2-1, 2-3 (4th Cir. 1992). However, the administrative law judge also applied appropriate regulatory criteria, taking into account that Mr. Wolfe has thirty years of experience, is highly rated in Martindale-Hubbell, and had been awarded fees previously at the rate of \$300 an hour. See Supplemental Decision and Order at 2; 20 C.F.R. §725.366(b). The administrative law judge specifically addressed employer's objection to the requested hourly rate of \$400 and reduced the rate to \$300, in keeping with the rate that the administrative law judge previously awarded Mr. Wolfe in three other cases. Moreover, the administrative law judge specifically noted that, in support of Mr. Wolfe's request for an hourly rate of \$400, he attached Altman & Weil's Survey as of January 1, 2006, for the South Atlantic Region. Based on this Survey, the administrative law judge determined that Mr. Wolfe's "request of \$400 per hour is high in the range set forth by the Survey as the average for someone of like experience is \$334 per hour," noting that the "Survey provides a considerable range of fees for the South Atlantic region." Supplemental Decision and Order at 2. Taking into consideration Mr. Wolfe's previous awards in other cases, the Survey presented, and Mr. Wolfe's qualifications, the administrative law judge determined that an hourly rate of \$300 more accurately represented local practice in Black Lung cases for Mr. Wolfe. Because employer has failed to demonstrate that the administrative law judge's ruling is arbitrary, capricious, or an abuse of discretion, and since his determination to reduce Mr. Wolfe's hourly rate to \$300 appears reasonable, it is affirmed.<sup>3</sup> See 20 C.F.R. §725.366(b); *Bentley*, 522 F.3d at 664, 24 BLR at 2-126; *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 894-895, 22 BLR 2-514, 2-535 (7th Cir. 2002); *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 672, 22 BLR 2-483, 2-493 (7th Cir. 2002).

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<sup>3</sup> Although employer relies on one unpublished 1995 case and two 2006 orders from the Fourth Circuit, as well as a 2007 Decision and Order by Administrative Law Judge Daniel F. Solomon, which awarded Mr. Wolfe a lower hourly rate than that awarded in this case, those awards were based on the facts and circumstances of those particular cases, and are not binding on our decision in this case. See *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217 (1986).

Accordingly, the administrative law judge's Supplemental Decision and Order awarding an attorney's 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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BETTY JEAN HALL  
Administrative Appeals Judge