

BRB No. 08-0379 BLA

V.B.C.)
)
 Claimant-Respondent)
)
 v.)
)
 HARMAN MINING CORPORATION)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 01/23/2009
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Attorney Fee Order and the Order Denying Employer's Motion for Reconsideration of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Attorney Fee Order and Order Denying Employer's Motion for Reconsideration (05-BLA-5166) of Administrative Law Judge

Larry S. Merck rendered on a 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 issued on June 5, 2007, the administrative law judge awarded benefits to claimant. Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case to the administrative law judge for further consideration. *V.C. v. Harman Mining Corp.*, BRB No. 07-0824 BLA (July 14, 2008)(unpub.).

Following the administrative law judge's 2007 decision, claimant's counsel submitted a fee petition with the administrative law judge requesting a fee of \$7,850.00, representing sixteen hours of legal services by Mr. Wolfe at an hourly rate of \$400.00; one-quarter hour of legal services by Mr. Delph at an hourly rate of \$200.00; and fourteen hours of services by a legal assistant at an hourly rate of \$100.00. Employer objected to the hourly rate and the number of hours. The administrative law judge considered employer's objections, and determined that an hourly rate of \$300.00 for Mr. Wolfe was appropriate, and that the requested hourly rates of \$200.00 for Mr. Delph and \$100.00 for the legal assistant were appropriate. The administrative law judge also rejected employer's objection to the number of hours claimed, and he allowed the number of hours requested. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$6,250.00 for legal services performed while the case was before the Office of Administrative Law Judges. Upon employer's Motion for Reconsideration, the administrative law judge found no basis to alter his award of attorney's fees.

On appeal, employer contends that the administrative law judge erred in determining that \$300.00 was a reasonable hourly rate for work performed by Mr. Wolfe, and that the administrative law judge erred by rejecting its objection to the number of hours claimed by counsel. Claimant responds, urging affirmance of the administrative law judge's fee award. Employer filed a reply brief restating its position. The Director, Office of Workers' Compensation Programs, has not filed a brief in 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. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*). Since we have vacated the award of benefits in this case, we note that no fee award is enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *See* 20 C.F.R. §725.367(a); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).

Employer first argues that the administrative law judge erred in awarding an hourly rate of \$300.00. In awarding claimant's counsel an hourly rate of \$300.00, 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 U.S. 557, 567 (1992); *see also Broyles v. Director, OWCP*, 974 F.2d 508, 510, 17 BLR

2-1, 2-3 (4th Cir. 1992); Attorney Fee Order at 2. However, in awarding the hourly rate of \$300.00, the administrative law judge also applied the regulatory criteria appropriately, and took into account the complexity of the legal issues involved, as well as claimant's counsel's qualifications, experience, level of expertise, quality of representation, and the fact that he had previously been awarded an hourly rate of \$300.00, to find that his requested hourly rate was reasonable.¹ See 20 C.F.R. §725.366(b); *B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664, 24 BLR 2-106, 2-122 (6th Cir. 2008); *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 895, 22 BLR 2-514, 2-535 (7th Cir. 2002); Attorney Fee Order at 4-5. Based on the administrative law judge's proper analysis of the regulatory criteria, we affirm his finding that an hourly rate of \$300.00 was reasonable.

Employer next argues that the administrative law judge erred by compensating claimant's counsel for an unreasonable number of hours for legal services. Specifically, employer contends that the number of hours claimed in this case is excessive based on counsel's use of the quarter-hour billing method. Employer's Brief at 10-12. Contrary to employer's contention, the administrative law judge did not err in finding that counsel's practice of billing in quarter-hour increments was reasonable. See *Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993); 20 C.F.R. §802.203(d)(3).

Employer raises no further challenges to the fee award. Detecting no abuse of discretion by the administrative law judge, we affirm the administrative law judge's award of attorney fees in the amount of \$6,250.00. *Jones*, 21 BLR at 1-108. The fee award is not enforceable until there has been a successful prosecution of claimant's case. *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993).

¹ The administrative law judge did not abuse his discretion in finding that the declaration of Ms. Christine M. Terrill, submitted by employer, stating that Old Republic Insurance Company pays attorneys in southwestern Virginia between \$125.00 and \$150.00 per hour to defend black lung claims, was not convincing evidence of claimant's counsel's market rate, in light of the factors listed at 20 C.F.R. §725.366(b). Attorney Fee Order at 5.

Accordingly, the administrative law judge's Attorney Fee Order and Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge