

BRB No. 07-0882 BLA

H.C. by)
D.T. and R.W., Executors)
)
Claimant-Respondent)
) DATE ISSUED: 07/17/2008
v.)
)
QUEEN ANNE COAL COMPANY)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest)
) DECISION and ORDER

Appeal of the Supplemental Decision and Order – Award of Attorney’s Fees of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order – Award of Attorney’s Fees (06-BLA-5058) of Administrative Law Judge Daniel F. Solomon rendered on claims 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 an Order of Remand issued on February 16, 2006, the administrative law judge granted employer’s

motion to withdraw its controversion, and remanded the case to the district director for the payment of benefits.¹

Subsequently, Joseph E. Wolfe of Wolfe Williams & Rutherford, Norton, Virginia, (claimant's counsel), filed a fee petition with the administrative law judge requesting a fee of \$10,132.50, representing 23.05 hours of attorney services at \$400 per hour for Mr. Wolfe, 1.75 hours of attorney services at \$250 per hour for Mr. Bobby S. Belcher, Jr., his associate, and 4.75 hours of legal assistant hours at \$100 per hour. Employer objected to the requested hourly rates and to the number of hours.² After considering employer's objections, the administrative law judge reduced the hourly rate of \$400 for Mr. Wolfe to \$300 per hour, and reduced the hourly rate of \$100 for the legal assistant to \$75 per hour. Supplemental Decision and Order - Award of Attorney's Fees at 3. The administrative law judge did not reduce the requested hourly rate of \$250 for Mr. Belcher. *Id.* The administrative law judge declined to reduce the requested hours based upon employer's objection to counsel's use of a quarter-hour minimum billing rate, finding that the quarter-hour billing method was reasonable. *Id.* Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$7,689, representing 23.05 hours of attorney services at the hourly rate of \$300 for Mr. Wolfe, 1.75 hours of attorney services at the hourly rate of \$250 for Mr. Belcher, and 4.5 hours of legal assistant services at the hourly rate of \$75.³

On appeal, employer contends that the administrative law judge erred by awarding the hourly rates of \$300 and \$250 to Messrs. Wolfe and Belcher, respectively, erred by awarding time for certain services, and erred by awarding all time billed in minimum quarter-hour increments. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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. *B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 661, 24 BLR 2- (6th Cir. 2008); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*).

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the miner's coal mine employment was in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

² Employer stated that a "range of \$125.00 to \$150.00 would be a fair hourly rate for attorneys and \$60.00 to \$75.00 for legal assistants," and objected "to a minimum billing of .25," stating that billing should be "in increments of .10." Employer's Objections to Counsel's Fee Request, May 17, 2007.

³ As will be discussed, the administrative law judge miscalculated the total fee.

Employer argues that the administrative law judge erred in awarding hourly rates of \$300 and \$250 to Messrs. Wolfe and Belcher, respectively. In awarding claimant's counsel hourly rates of \$300 and \$250, 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); *Bentley*, 522 F.3d at 666, 24 BLR at 2- . However, in awarding the hourly rates of \$300 and \$250, respectively, the administrative law judge also applied appropriate regulatory criteria, taking into account that claimant's attorney has thirty years of legal experience, received his degree from the University of Virginia Law School, and is rated highly in Martindale-Hubbell. See Supplemental Decision and Order - Award of Attorney's Fees at 1; 20 C.F.R. §725.366(b). The administrative law judge specifically addressed employer's objection to the requested hourly rate of \$400 by Mr. Wolfe and reduced that amount to \$300, in keeping with the rate that the administrative law judge previously awarded Mr. Wolfe in 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 - Award of Attorney's Fees 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. The administrative law judge further determined that Mr. Belcher should receive a fee of \$250 per hour. Based on the administrative law judge's analysis of the proper regulatory criteria, including Mr. Wolfe's qualifications, the survey, and previous awards to Mr. Wolfe, and in the absence of any contrary information regarding claimant's counsel's market rate from employer, we affirm the administrative law judge's award of an hourly rate of \$300 and \$250 for Messrs. Wolfe and Belcher, respectively.⁴ See 20 C.F.R. §725.366(b); *Bentley*, 522 F.3d at 664, 24 BLR at 2- ; *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).

⁴ Employer's submission that \$123 per hour from August 2005, and \$127 per hour from August 2006 are reasonable because those are the amounts approved for counsel by Virginia's Department of Employment Dispute Resolution for wrongful discharge cases has no relevance here, because this case involves whether claimant was entitled to black lung benefits, not whether he was wrongfully discharged. See *Bentley*, 522 F.3d at 665-66, 24 BLR at 2- . Moreover, this information was not presented to the administrative law judge.

Employer also argues that the administrative law judge erred by awarding time for certain services, and erred by awarding all time billed in minimum quarter-hour increments. 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- ; *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993); 20 C.F.R. §802.203(d)(3). Moreover, we decline to address employer's challenges to the number of hours for certain legal services, as these objections were not raised before the administrative law judge. *See Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236, 1-251 (2003). In any event, employer has not shown that the administrative law judge's award of the time requested was arbitrary, capricious, or an abuse of discretion, or was unreasonable, or included non-compensable clerical services. *See Bentley*, 522 F.3d at 666, 24 BLR at 2- ; *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217-18 (1986). Consequently, we affirm the administrative law judge's award of all the requested time.

The administrative law judge did not reduce the total number of hours requested for the legal assistant, but when calculating the fee, he listed 4.5 hours of legal assistant services instead of the requested 4.75 hours. *See* Supplemental Decision and Order – Award of Attorney's Fees at 1, 3. We modify the administrative law judge's award to include a total of 4.75 hours for services of the legal assistant, to correct this clerical error. Thus, we compute the attorney's fee award by the administrative law judge to be \$7,708.75, and not \$7,689, as computed by the administrative law judge. *Id.*

Accordingly, the administrative law judge's Supplemental Decision and Order – Award of Attorney's Fees is affirmed in part and modified in part, consistent with this opinion, to reflect an award of \$7,708.75, representing 23.05 hours of legal services at an hourly rate of \$300, 1.75 hours of legal services at an hourly rate of \$250, and 4.75 hours of legal assistant services at an hourly rate of \$75, to be paid directly to claimant's counsel by employer.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge