

BRB No. 03-0621 BLA

CHARLES EDWARD COOPER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	DATE ISSUED: 03/31/2004
)	
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 Awarding Attorney's Fees of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Mary Zanolli Natkin (Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Mary Rich Maloy, Dorothea J. Clark (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

SMITH, Administrative Appeals Judge:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (99-BLA-1032) of Administrative Law Judge Richard E. Huddleston on an attorney fee petition 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).¹ The administrative law

¹ 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

judge awarded claimant's counsel a fee in the amount of \$14,216.32, representing 58.50 hours of legal services rendered at \$200.00 per hour totaling \$11,700 and \$2,516.32 for expenses.

In challenging this award, employer contends that the administrative law judge erroneously found that \$200.00 was a reasonable hourly fee for legal services and impermissibly augmented the fee on the basis of risk of loss. Claimant's counsel (counsel)² responds to this appeal, urging affirmance of the administrative law judge's award of attorney's fees and she attached unpublished supplemental authority to the brief. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating that he will not participate in this appeal. Employer filed a reply brief responding to counsel's arguments and reiterating its challenge to the administrative law judge's award of a \$200.00 hourly rate.

The award of attorney's fees pursuant to Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a), is discretionary and will be sustained on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. The statute provides for reasonable attorney's fees and such fees are determined by the reasonable number of hours multiplied by a reasonable hourly rate. A determination of whether the hours claimed are reasonable depends upon the issues presented and the state of the law on the subject. *Broyles v. Director, OWCP*, 974 F.2d 508, 510, 17 BLR 2-1, 2-5 (4th Cir. 1992); see *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Hensley et. al. v. Eckerhart et. al.*, 461 U.S. 424 (1983).

On appeal, employer argues that the administrative law judge's prominent consideration of "the very high risk of loss in black lung claims," Employer's Brief at 3, in awarding an hourly rate of \$200.00 was inappropriate and contrary to law. Employer contends that both the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, have held that enhancement of a reasonable fee to compensate for counsel's assuming the risk of loss in taking Black Lung cases is impermissible. Employer contends, therefore, that the attorney fee awarded by the administrative law judge must be vacated, and the case remanded for the administrative law judge to reconsider counsel's hourly rate absent any consideration of "the very high risk of loss in black lung claims." Employer's Brief at 4.

We agree. The law is clear that an attorney fee award in Black Lung cases cannot be enhanced on account of contingency. See *Dague*, 505 U.S. at 565; *Broyles*, 974 F.2d at 509,

² Counsel is Mary Zanolli Natkin, who represented Charles Edward Cooper, the miner, in pursuit of benefits on his claim. Ms. Natkin is the Director of the Legal Practice Clinic at Washington and Lee University School of Law.

17 BLR at 2-4. In *Broyles*, the Fourth Circuit declared that the Supreme Court had resolved the issue in *Dague* and the court explained that application of this principle to Black Lung cases is reasonable and fair: “[w]hile some...claims are unsuccessful, the claimants win a sufficient number to encourage lawyers to handle this type of litigation through the administrative proceedings and into federal court.” *Broyles*, 974 F.2d at 510, 17 BLR at 2-4. Because the administrative law judge indicated that risk of loss was a major factor in his determination to approve the requested hourly rate of \$200.00, it is impossible to discern the extent to which it has tainted his judgment. Hence, we must vacate the administrative law judge’s award of attorney’s fees and remand the case for reconsideration of the hourly rate. In determining an appropriate hourly rate, the administrative law judge should also consider whether the number of hours requested for legal services was reasonable in light of *Broyles*, 974 F.2d at 510, 17 BLR at 2-3.

Accordingly, the Supplemental Decision and Order Awarding Attorney’s Fees of the administrative law judge is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I agree with my colleagues that the administrative law judge’s Decision and Order Awarding Attorney’s Fees must be vacated and the case remanded for further consideration. The administrative law judge erred in considering risk of loss in determining a reasonable hourly rate. Citing *City of Burlington v. Dague*, 505 U.S. 557 (1992), counsel mistakenly argues that risk of loss is a permissible consideration in establishing the lodestar. She misreads *Dague*. The High Court declared in *Dague* that “no contingency enhancement whatever is compatible with the fee shifting statutes at issue.” *Dague*, 505 U.S. at 565. The Court could not have spoken more plainly: “we hold that enhancement for contingency is not permitted under the fee-shifting statutes....” *Id.* at 567. The language from *Dague* which counsel cites states that risk of loss is subsumed in the lodestar calculation to the extent that one of the elements of contingency risk, *i.e.*, difficulty in achieving success, is reflected in

either a higher number of hours spent to achieve success or a higher hourly rate for the attorney with the requisite expertise to achieve success. In other words, the lodestar calculation provides compensation for one of the elements determining the risk of loss. The Court stated, however, that the lodestar calculation does not provide compensation for the other element determining risk of loss, *i.e.*, the relative merits of the claim. That is because enhancement for contingency risk would “indiscriminately encourag[e] nonmeritorious claims....” *Id.* at 563. Thus, risk of loss, as such, has no place in the calculation of a reasonable attorney fee in a Black Lung claim. *Broyles*, 974 F.2d at 509, 17 BLR at 2-3.

Counsel’s suggestion that *Dague* authorizes consideration of contingency risk in determining an attorney’s hourly rate is absurd. The Court stated that a higher hourly rate would reflect the attorney’s skill and experience; risk of loss is relevant to neither. *Dague* at 563. In view of counsel’s erroneous view that risk of loss is a permissible consideration in the calculation of her attorney fee, on remand, she should state to what extent, if any, it entered into the determination of her hourly rate and she should revise her fee petition accordingly.

On remand, the administrative law judge must also reconsider whether the number of hours requested for legal services was reasonable even though employer did not specifically object to those hours until the case was on appeal. *Broyles*, 974 F.2d at 510, 17 BLR at 2-3. (In *Broyles*, the Fourth Circuit stated it was compelled to consider the reasonableness of the hours claimed even though the Director had never objected to them). *Broyles*, 974 F.2d at 510, 17 BLR at 2-3. Furthermore, the court made clear that the question of a reasonable hourly rate is interrelated with the question of a reasonable number of hours expended:

An attorney, who claims considerable experience in the field of black lung law and charges an hourly fee commensurate with his experience, should be able to research and write a brief in his field of expertise without the expenditure of excess time.

Broyles, 974 F.2d at 510, 17 BLR at 2-5. Hence, on remand the administrative law judge must reconsider the attorney fee award in light of the Fourth Circuit’s teaching in *Broyles*.

REGINA C. McGRANERY
Administrative Appeals Judge