

BRB Nos. 02-0766 BLA
and 02-0766 BLA-A

JOHN R. FRISCO (DECEASED))		
)		
Claimant-Respondent)		
Cross-Petitioner)		
)		
v.)	DATE	ISSUED:
09/08/2003)		
)		
CONSOLIDATION COAL COMPANY)		
)		
Employer-Petitioner)		
Cross-Respondent)		
)		
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

Appeals of the Decision and Order on Remand Awarding Attorney Fees of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Morgantown, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals, and claimant cross-appeals, the Decision and Order on Remand Awarding Attorney Fees (80-BLA-9829) of Administrative Law Judge Thomas M. Burke issued 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 relevant procedural history of this case is as follows: On September 15, 1982, Administrative Law Judge Arthur C. White issued a Decision and Order awarding benefits and granting claimant's counsel attorney's fees in the amount of \$3,318.15 for thirty hours of legal services billed at \$100.00 per hour, paralegal services, and miscellaneous expenses.² Subsequently, employer appealed the award of benefits and claimant cross-appealed, challenging Judge White's findings regarding the date from which benefits commence and the award of attorney's fees. The Board vacated Judge White's award of benefits and findings with regard to counsel for claimant's attorney's fee petition, instructing Judge White to set forth his rationale for his disallowance of eighteen and one-half hours of legal services. *Frisco v. Consolidation Coal Co.*, BRB Nos. 82-1820 BLA and 82-1820 BLA-A (May 20, 1985)(unpublished).

In a Decision and Order dated August 27, 1985, Judge White awarded benefits, and again issued an order requiring employer to remit \$3,318.15 to claimant's counsel in payment of attorney's fees. Employer appealed the award of benefits, and claimant filed a cross-appeal which did not pertain to the attorney's fee issue.³ The Board vacated Judge White's award of benefits, and remanded the

¹The 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.

²Claimant's counsel requested a fee in the amount of \$5,168.15. This amount represented forty-eight and one-half hours of legal services billed at \$100.00 per hour, one hour of paralegal work billed at \$20.00 per hour, and \$298.15 in expenses. Administrative Law Judge Arthur C. White reduced the number of compensable hours of legal services to thirty, and approved the paralegal time and the expenses.

case for further consideration on the merits of the claim. *Frisco v. Consolidation Coal Co.*, BRB Nos. 85-2197 BLA and 85-2197 BLA-A (July 27, 1988)(unpublished). In a Second Supplemental Decision and Order on Remand dated November 9, 1988, Judge White awarded benefits, and again ordered employer to remit \$3,318.15 to claimant's counsel in payment of attorney's fees. Employer appealed the award of benefits, and claimant filed a cross-appeal which did not pertain to the attorney's fee issue.⁴ The Board affirmed Judge White's finding of entitlement on April 28, 1993, and no further appeal was taken with regard to the award of benefits. *Frisco v. Consolidation Co.*, BRB Nos. 88-4027 BLA and 88-4027 BLA-A (April 28, 1993)(unpublished).

In a letter to the Office of Administrative Law Judges, dated May 7, 1993, claimant's counsel requested reconsideration of his attorney's fee award of August 27, 1985. In a Supplemental Decision and Order on Reconsideration, dated October 25, 1995, Administrative Law Judge James Guill⁵ determined that inasmuch as claimant's counsel did not request reconsideration of the fee award within thirty days of Judge White's August 27, 1985 Decision and Order, counsel waived his right to contest the fee award. Judge Guill also found that Judge White's determination with respect to the attorney's fee petition did not contain any errors. Claimant's counsel filed an appeal with the Board. The Board vacated Judge Guill's findings and remanded the case for consideration of whether counsel was entitled to an enhancement of the fees due to the delay between the date of the initial attorney's fee petition and the date on which employer actually paid the fee. *Frisco v. Consolidation Coal Co.*, BRB No. 96-0379 BLA (Oct. 29, 1999)(unpublished). In deciding the case, the Board relied upon the holding of the United States Court of Appeals for the Fourth Circuit in *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 21 BLR 2-631 (4th Cir. 1999), that an administrative law

³In his cross-appeal, claimant challenged Administrative Law Judge Arthur C. White's finding with regard to the date of onset of total disability due to pneumoconiosis.

⁴In this cross-appeal, claimant challenged Administrative Law Judge Arthur C. White's finding that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3).

⁵The case was assigned to Administrative Law Judge James Guill after claimant's counsel requested reconsideration of the attorney's fee award, as Administrative Law Judge Arthur C. White was no longer available to render a decision.

judge must consider an attorney's petition for enhancement of a fee award for delay.⁶ *Id.*

In a Decision and Order on Remand Awarding Attorney Fees dated September 26, 2000, Administrative Law Judge Thomas M. Burke (the administrative law judge)⁷ determined, based upon data reported in the 1993 edition of *The Survey of Law Firm Economics* identifying the average hourly rate charged by attorneys in the northeast region of the country with sixteen to twenty years of experience, that counsel for claimant's hourly rate should be adjusted upward from \$100.00 to \$181.00. The administrative law judge thus found that employer owed claimant's counsel an additional \$2,430.00. Employer appealed. The Board agreed with employer's argument that the administrative law judge erred in relying upon the 1993 edition of *The Survey of Law Firm Economics* to determine the method and amount by which counsel's fee would be enhanced, as the administrative law judge did not notify the parties that he would base his findings upon this source. *Frisco v. Consolidation Coal Co.*, BRB No. 01-0209 BLA (Nov. 1, 2001)(unpublished). The Board thus vacated the administrative law judge's decision to raise counsel's hourly rate to \$181.00 in order to enhance counsel's fee award and remanded the case for further consideration. *Id.* The Board instructed the administrative law judge to notify the parties if he intended to refer to a source outside the record to determine the method and amount of enhancement, and to give the parties the opportunity to respond. *Id.*

In his Decision and Order on Remand Awarding Attorney Fees, dated July 8, 2002, the administrative law judge held that the newly promulgated regulations at 20 C.F.R. §725.608(c) and (d), which became effective January 19, 2001, required the application of simple interest to the \$3,318.15 fees granted by Judge White in his November 9, 1988 Decision and Order awarding benefits. The administrative law judge determined that the interest be calculated from November 9, 1988, the date of Judge White's most recent decision awarding benefits and granting attorney's fees, to December 20, 1993, the date employer paid the attorney's fee.

⁶This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in West Virginia. See *Shupe v. Director*, OWCP, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

⁷The case was reassigned to Administrative Law Judge Thomas M. Burke, without objection from the parties, as Administrative Law Judge James Guill was unavailable to render a decision.

On appeal, employer contends the administrative law judge erred by applying the amended regulations retroactively to enhance the attorney's fee. Employer further contends, in the alternative, that the period of time for which interest may be applied to enhance the attorney's fee does not begin until the time for appeal has expired on a final decision. Employer asserts that, in this case, therefore, the administrative law judge should have found that the time period during which counsel for claimant is entitled to interest began sixty days from the issuance of the Board's April 28, 1993 Decision and Order affirming Judge White's determination that claimant was entitled to benefits. *See Frisco v. Consolidation Co.*, BRB Nos. 88-4027 BLA and 88-4027 BLA-A (April 28, 1993)(unpublished). In his cross-appeal, counsel for claimant argues that the payment of interest pursuant to the new regulations should be calculated from the date of the original award of the attorney's fee, *i.e.*, September 15, 1982. Counsel asserts that he is thus entitled to an award of interest in the amount of \$3,887.53. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief urging the Board to reject employer's contentions on appeal, and to reverse, consistent with the contention of counsel for claimant, the administrative law judge's Decision and Order to reflect that interest is payable on the award of attorney's fees from September 15, 1982, the date of the original award of attorney's fees, until December 20, 1993, the date employer paid the fee.

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, an abuse of discretion or not in accordance with law. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *see Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 (1995).

Employer contends that the administrative law judge erred in applying the revised regulation at 20 C.F.R. §725.608 to determine that claimant's counsel is entitled to interest for delay in payment of the fee. Employer argues that Section 725.608 is impermissibly retroactive. A rule is retroactive if it would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244, 280 (1994).

Employer contends that application of the new regulation at Section 725.608 is impermissibly retroactive because it imposes a new burden on employer. Employer argues that Section 725.608 is inconsistent with the Fourth Circuit's decision in *Kerns*, which was issued prior to the promulgation of the new regulations, because Section 725.608 mandates that interest be paid, while the court in *Kerns* merely provides for discretionary enhancement of attorney's fee awards. We reject employer's contention. Attorney's fees paid by responsible operators were subject to enhancement before January 19, 2001, the effective date of the new regulation at Section 725.608. The United States Supreme Court has

held that enhancement for a delay in payment of an attorney's fee is an "appropriate factor in what constitutes a reasonable attorney's fee" under a fee shifting statute. *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989). In *Kerns*, the Fourth Circuit explicitly authorized enhancement for delays in payment of attorney's fees. *Kerns*, 176 F.3d at 803, 21 BLR at 2-638. The Board has held that the factfinder may adjust the fee by employing any reasonable means to compensate counsel for delay. *Nelson v. Stevedoring Services of America*, 29 BRBS 90, 97 (1995), *citing Jenkins*, 491 U.S. at 282, 284. The regulation at Section 725.608 simply provides the mechanism by which claimants' attorneys receive this enhancement in the form of interest in cases involving responsible operators. 65 Fed. Reg. 80020 (2000). As such, Section 725.608 is a procedural rule and is, therefore, entitled to retroactive effect. *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974); *Abbot v. Louisiana Ins. Guaranty Ass'n.*, 27 BRBS 192, 197-198 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). Because no new burden was imposed upon employer by application of the new regulation at Section 725.608,⁸ we reject employer's argument that application of the regulation at Section 725.608 was impermissibly retroactive. Accordingly, we affirm the administrative law judge's finding that claimant's counsel is entitled to interest on his award of attorney's fees as enhancement for the delay in employer's payment of the fees pursuant to Section 725.608(c) and (d). 20 C.F.R. §725.608; *see Kerns*, 176 F.3d at 803, 21 BLR at 2-638.

Employer also argues, in the alternative, that if interest on the award of attorney's fees is payable, it should not begin to accrue until the date on which the period for appeal has run on a final decision; *i.e.*, in this case, sixty days after the Board's April 27, 1993 Decision and Order affirming Judge White's November 9, 1988 decision awarding benefits. In his cross-appeal, claimant's counsel contends that, to the contrary, the date from which interest should accrue is September 15,

⁸We thus reject employer's contention that the new regulation at 20 C.F.R. §725.608 is impermissibly retroactive pursuant to the decision of the United States Court of Appeals for the D.C. Circuit in *National Mining Association v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002), where the court held that impermissible retroactive application of regulations occurs where the revised regulations introduce a new concept into the jurisprudence. Because the Fourth Circuit held in *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 21 BLR 2-631 (4th Cir. 1999), that attorney's fees may be enhanced for delay in payment, the revised regulation at Section 725.608 does not introduce, as employer suggests, an entirely new concept into the jurisprudence so as to render its application impermissibly retroactive.

1982, the date of the original attorney's fee award. The Director agrees with claimant's contention.

The administrative law judge determined that the date from which interest on the attorney's fee award accrued was November 9, 1988, the date of the most recent administrative law judge Decision and Order finding claimant entitled to benefits. Section 725.608 specifically provides, however, that interest on an attorney's fee is due from the date the fee is awarded.⁹ 20 C.F.R. §725.608(c). In the instant case, counsel's fee was awarded on September 15, 1982, after claimant was initially found entitled to benefits. We vacate, therefore, the administrative law judge's finding that interest on the attorney's fee award is due from the date of the last administrative law judge decision awarding benefits, and remand the case for the administrative law judge to calculate the appropriate interest amount due claimant's counsel pursuant to Section 725.608(d), accruing from September 15, 1982 until December 20, 1993, when employer paid counsel his attorney's fee. 20 C.F.R. §725.608(d).

⁹The regulation at 20 C.F.R. §725.608(c) provides:

In any case in which an operator is liable for the payment of an attorney's fee pursuant to §725.367, and the attorney's fee is payable because the award of benefits has become final, the attorney shall also be entitled to simple annual interest, computed from the date on which the attorney's fee was awarded. The interest shall be computed through the date on which the operator paid the attorney's fee.

20 C.F.R. §725.608(c). The regulation at 20 C.F.R. §725.608(d) prescribes how the rates of interest shall be computed. 20 C.F.R. §725.608(d)(1)-(3).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Attorney Fees is affirmed in part, and vacated in part, 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

DOLDER, Chief Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's decision to vacate the administrative law judge's finding that interest on the attorney's fee award paid to claimant's counsel is due from November 9, 1988, the date of Judge White's most recent Decision and Order awarding benefits and granting attorney's fees. However, I disagree with the majority's decision that the interest amount due claimant's counsel begins accruing on September 15, 1982. Although an attorney's fee was awarded to claimant's counsel on that date, claimant appealed the attorney's fee award, and the Board vacated the fee award in its Decision and Order dated May 20, 1985. Not until Judge White issued his Decision and Order on Remand on August 27, 1985, was claimant's counsel awarded an attorney's fee he did not appeal. Thus, while I agree with the majority's decision in all other respects, I believe that an appropriate interest amount due claimant's counsel in this case pursuant to 20 C.F.R. §725.608 should be calculated beginning on August 27, 1985, not September 15, 1982.

NANCY S. DOLDER, Chief
Administrative Appeals Judge