



BRB No. 15-0071

RANDOLPH BESSARD)	
)	
Claimant-Respondent)	
)	
TONY B. JOBE)	
(Former attorney for claimant))	
)	
Petitioner)	
)	
v.)	
)	
C & D PRODUCTION SPECIALIST)	DATE ISSUED: <u>Dec. 15, 2015</u>
COMPANY, INCORPORATED)	
)	
and)	
)	
LOUISIANA WORKERS')	
COMPENSATION CORPORATION)	
)	
Employer/Carrier)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	ORDER on MOTION
)	for RECONSIDERATION
Respondent)	EN BANC

Claimant’s former counsel, Tony B. Jobe, has filed a timely motion for en banc reconsideration in the captioned case, *Bessard v. C & D Production Specialist Co., Inc.*, BRB No. 15-0071 (Aug. 25, 2015). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(b). No response briefs have been filed. We grant counsel’s motion for reconsideration en banc, but deny the relief requested.¹

¹The Board’s substantive consideration of counsel’s motion for reconsideration renders moot counsel’s challenge to the Board’s acceptance of the response brief of the Director, Office of Workers’ Compensation Programs.

Counsel contends the Board erred in affirming the district director's finding that he lacks the authority to award counsel a fee for work performed before the Office of Administrative Law Judges (OALJ) in this case. The regulation at 20 C.F.R. §702.132(a) provides,

Any person seeking a fee for services performed on behalf of a claimant with respect to claims filed under the Act shall make application therefor to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed

20 C.F.R. §702.132(a); *see also* 33 U.S.C. §928(a) (a reasonable attorney's fee may be awarded against the employer or carrier "by the deputy commissioner, Board, or court, as the case may be"); 33 U.S.C. §928(c) (where "any proceedings are had before the Board or any court of review . . . the Board or court may approve an attorney's fee for the work done before it by the attorney for the claimant").² It is, therefore, well-settled that each adjudicatory level must approve an attorney's fee for services performed before it, unless the parties agree otherwise.³ *See Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 5 BRBS 317 (5th Cir. 1977);⁴ *see also Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001)

²Counsel's interpretation of the third sentence of Section 28(c) as empowering the district director to resolve the OALJ attorney's fee issue in this case is incorrect. The third sentence, stating that "the [district director], Board, or court shall fix in the award approving the fee, such lien and manner of payment," must be read in conjunction with the second sentence which has been routinely interpreted as requiring that each adjudicatory level must set the appropriate award of an attorney's fee for services performed before it. To do as counsel suggests would render the second sentence meaningless.

³The parties can agree to have one adjudicator approve an attorney's fee for the entirety of the work performed by claimant's counsel on claimant's claim. *See generally Losacano v. Electric Boat Corp.*, 48 BRBS 49 (2014); 20 C.F.R. §702.132(c). However, no such agreement regarding attorney's fees was reached in this case.

⁴In *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 5 BRBS 317 (5th Cir. 1977), the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, stated that it does not have "the authority nor the competence" to ascertain what fees should be awarded at the administrative law judge level. Specifically, the court stated:

The statute, in our view, intends each body - the hearing examiner, the Board, and the reviewing court - separately to assess the worth of the claimant's representation before it. Hence, we will only award fees for the work of counsel which was directly related to our review.

(en banc); *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996); *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). Accordingly, we reject counsel's contention that the Board erred in affirming the district director's "refusal to address counsel's fee petition for services rendered while the case was before the OALJ." *Bessard*, slip op. at 4.

We also reject counsel's contention that the Board's decision deprives him of the right to seek an additional fee for work before the OALJ. Counsel's contention ignores the Board's holding. The settlement agreement did not resolve the issue of counsel's entitlement to additional attorney's fees,⁵ but instead explicitly recognized that claimant "was previously represented" by counsel who "indicated that he will file a Fee Petition with the Department of Labor pursuant to 33 U.S.C. §928(b) and (c)." The "final" nature of the settlement simply has no effect on counsel's ability to seek an attorney's fee before the administrative law judge on the facts of this case, as the agreement did not address counsel's entitlement to an additional fee. Rather, as the Board stated in its decision, "[i]f the employer cannot be held liable for an attorney's fee under Section 28(a) or (b), the claimant may be held liable under Section 28(c) for any necessary work performed on his behalf, as a lien on his compensation. 33 U.S.C. §928(c); 20 C.F.R. §702.132(a)." *Bessard*, slip op. at 4-5. Thus, counsel may file an itemized petition with the administrative law judge for consideration of an award of attorney's fees as a lien against claimant's compensation pursuant to Section 28(c).

Bryant, 544 F.2d at 814, 5 BRBS at 319. In this regard, we reject counsel's reliance on *Hensley v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1054, 15 BRBS 43(CRT) (D.C. Cir. 1982). In *Hensley*, the United States Court of Appeals for the D.C. Circuit awarded an attorney's fee for work performed before the Supreme Court *only* because the authority to do so was explicitly delegated to it by the Supreme Court. *Id.*, 690 F.2d at 1057, 15 BRBS at 45-46(CRT).

⁵Claimant and employer, however, did agree that employer "is not responsible for the attorney fees" of claimant's former counsel.

Accordingly, counsel's motion for reconsideration en banc is granted, but the relief requested is denied. The Board's decision is affirmed. 20 C.F.R. §§801.301(c); 802.409.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge