



**RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 260  
February 2014**

*Stephen L. Purcell*  
Chief Judge

*Paul C. Johnson, Jr.*  
Associate Chief Judge for Longshore

*Yelena Zaslavskaya*  
Senior Attorney

*William S. Colwell*  
Associate Chief Judge for Black Lung

*Seena Foster*  
Senior Attorney

**I. Longshore and related Acts**

**A. U.S. Circuit Courts of Appeals<sup>1</sup>**

***Carter v. Caleb Brett LLC*, \_\_\_ F.3d \_\_\_, 2014 WL 905767, amending \_\_\_F.3d \_\_\_, 2014 WL 350087 (9<sup>th</sup> Cir. 2014).**

The Ninth Circuit concluded that that the district court erred as a matter of law by reducing claimant's attorney's fee award under the Longshore Act by 37 percent (from \$22,585 to \$14,268.50) without sufficiently explaining its rationale for the reduction.<sup>2</sup>

The Ninth Circuit described the applicable analytical framework as follows. While the district court has discretion in determining the amount of a fee award, it needs to provide a concise but clear explanation for the fee award. When determining a reasonable fee award under a federal fee-shifting statute, a district court must first calculate the lodestar by multiplying the number of hours reasonably expended by the reasonable hourly rate. The Ninth Circuit requires that courts reach attorneys' fee decisions by considering some or all of the twelve criteria set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975). The *Kerr* factors are (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service

---

<sup>1</sup> Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at \*\_\_\_) pertain to the cases being summarized and refer to the Westlaw identifier.

<sup>2</sup> This case involved an award of attorney's fees by a district court stemming from a petition for entry of judgment on a default order issued by the District Director.

properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. A mere statement that a court has considered the *Kerr* guidelines is not sufficient. Rather, the court must articulate with sufficient clarity the manner in which it makes its determination. While detailed calculations are not mandated, where the reduction is significant, a more specific explanation is expected. An explanation must be sufficiently specific to permit an appellate court to determine whether the district court abused its discretion.

Here, the district court's selection of a blended hourly rate of \$400 (calculated by averaging the senior counsel rate of \$500 and the associate rate of \$300), combined with its reduction in the number of compensable hours by almost half (from 60.9 to 35 hours), resulted in claimant receiving a 37 percent reduction in fees (from \$22,585 to \$14,268.50). Given this significant fee reduction, the court was required to provide “relatively specific reasons” for its determination. *Id.* at \*3. The district court’s use of a blended hourly rate is difficult to understand given that the associate billed nearly three times as many hours as the two more senior counsel. Further, the court may not have considered the paralegal rate of \$150 when calculating its blended rate, even though the two paralegals expended 6.9 hours on the matter. Additionally, the court did not sufficiently explain the reduction of compensable hours. While the court identified the twelve *Kerr* factors and mentioned two that it considered most relevant (the disparity between the fees incurred and the amount at stake and CB's primary responsibility for the protracted litigation), it did not explain how they affected the ultimate fee award. Accordingly, the fee award was vacated and the matter remanded to the district court with instruction to articulate the basis for its fee determination with greater specificity.

## **[Topic 28 ATTORNEY’S FEES – Hourly Rate]**

### **B. Benefits Review Board**

#### ***Smith v. Mt. Mitchell, LLC*, \_\_ BRBS \_\_ (2014).**

The Board affirmed the ALJ’s denial of death benefits to claimant under Sections 9(b) and 9(d) of the LHWCA. Claimant’s father died as a result of lung disease allegedly caused by his employment with multiple named employers. At the time of the decedent’s death, claimant was over the age of eighteen, and was receiving \$1,357.80 in monthly Social Security benefits

(before deductions), as well as the decedent's support of approximately \$325 per month.

The Board initially affirmed the ALJ's finding that claimant did not qualify as a "child" under Section 2(14), and therefore was not entitled to death benefits under Section 9(b) of the Act. Section 2(14) of the Act provides, in pertinent part, that:

"'Child'. . .include[s] only a person who is under eighteen years of age, or who, though eighteen years of age or over, is (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student. . . ."

Here, the ALJ's finding that claimant was not "wholly dependent" upon the decedent at the time of the decedent's death was supported by substantial evidence, as the ALJ found that claimant received monthly Social Security disability benefits at least three times greater than the monthly sums he received from the decedent. Claimant's contention that public benefits should be excluded in making this determination was unsupported by citation to any authority and contrary to Board decisions applying § 9(b).

The Board also affirmed the ALJ's finding that claimant did not qualify as decedent's "dependent" for purposes of recovering benefits under Section 9(d) because the decedent did not provide claimant with over one-half of his support at the time of his death. Section 9(d) of the Act provides, in pertinent part, that if there is no surviving spouse or child, death benefits may be granted to an "other person" who was "dependent" on the decedent, as that term is defined by Section 152 of the Internal Revenue Code. The ALJ found that because claimant was a "surviving child," albeit one who is not entitled to compensation under § 9(b), Section 9(d) could not apply to this case. The Board stated that, pertinent to this case, subsection (c)(1)(D) of the IRS Code (which defines "qualifying child") requires that a putative dependent must not have provided over one-half of his own support. Here, the ALJ properly found that claimant did not establish his dependency. The Board stated that this finding is supported by the IRS's Publication 501, which states in pertinent part that "[i]f a child receives social security benefits and uses them toward his or her own support, the benefits are considered as provided by the child." Further, in light of claimant's conflicting statements regarding his expenses and income, the ALJ rationally declined to credit claimant's testimony that he did not pay rent to his parents while residing in decedent's home. Finally, while claimant argued

that IRS Code requires an analysis of claimant's self-support, any error by the ALJ in discussing decedent's support of claimant was harmless, as the ALJ addressed the relevant evidence of record.

**[Topic 2.14 DEFINITIONS – 2(14) CHILD; Topic 9.34  
COMPENSATION FOR DEATH - Section 9(b); Topic 9.36  
COMPENSATION FOR DEATH – 9(d) Payments to Other Dependents]**

## II. Black Lung Benefits Act

### A. Circuit Courts of Appeals

In *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, \_\_\_ F.3d \_\_\_, 2014 WL 804008 (10<sup>th</sup> Cir. Mar. 3, 2014), the miner testified “about his working conditions at surface coal mines in the various positions he held, which included warehouse worker for four to five years, equipment operator for 11-12 years, and equipment oiler in the mine pit for nine years.” In concluding that the miner’s working conditions at the surface mine were “substantially similar” to those of an underground miner, the court stated:

[S]urface miners do not need to provide evidence of underground mining conditions to compare with their own working conditions. (citations omitted). These decisions validate the Department’s longstanding position that consistently dusty working conditions are sufficiently similar to underground mining conditions. (citations omitted). The revised regulation (at 20 C.F.R. § 718.305(b)(2)) codifies that interpretation by making regular exposure to coal mine dust the standard to determine substantial similarity of surface working conditions to those in underground mines.

The court cited to the miner’s testimony in support of finding his surface employment conditions were “substantially similar” to that of underground mining conditions:

As an equipment operator, he drove a truck with an attached shovel, drove a water truck, and operated a machine called a scraper. Although he was located in the cabs of the vehicles, and some trucks had air filtration, ‘there was no way [to keep the dust out], even when you closed the doors, it was just like a cloud of dust inside the cabs.’ (citation omitted). He also described that the truck was ‘always kicking up a puff of dust,’ and the dust would just hang in the air. (citation omitted). When the wind blew, it was ‘like a sand blaster sometimes.’ (citation omitted). His duties frequently required him to get in and out of the equipment and work outside for a period of time. (citation omitted). Mr. Goodin next worked as an equipment oiler for nine years. During this time, he serviced the equipment exclusively in the mine pit while the other equipment was running, ‘so it would get pretty dusty out there . . . .’

The court noted that the Administrative Law Judge found the miner was credible, and the Administrative Law Judge wrote, “Based on my experience

with the testimony of underground miners, I find [Mr. Goodin's] description of the conditions in the strip mines where he worked to be substantially similar." While the court held it was error for the Administrative Law Judge to base his opinion on his "personal experience with the testimony of underground miners," the error was harmless because "the evidence the ALJ properly accepted was sufficient to meet the 'regular exposure' standards under the revised regulation.

With regard to rebuttal of the 15-year presumption, the court noted that Section 921(c)(4) of the Black Lung Benefits Act provides:

. . . the Secretary may rebut the 15-year presumption only two ways: by proving (1) the claimant does not have pneumoconiosis (legal and clinical), or (2) the claimant's impairment 'did not arise out of, or in connection with, employment in a coal mine.' 30 U.S.C. § 921(c)(4). The Department has applied this limitation to both the Secretary and mine operators like Antelope, and it has enacted regulations reflecting this interpretation. See 20 C.F.R. § 718.305(d)(1).

Employer challenged limitation of its rebuttal to the foregoing two methods, stating that this limitation applied only to the Secretary. The court concluded that "Antelope failed to rebut Mr. Goodin's claim even without the rebuttal limitations and therefore any error in applying the rebuttal limitations was harmless."

Specifically, the Administrative Law Judge found the x-ray evidence was in equipoise such that it did not support rebuttal of the presence of clinical pneumoconiosis. And, although CT-scan evidence did not yield findings "typical of pneumoconiosis," the court held Employer "failed to show why this lung disease was not pneumoconiosis because Antelope's experts were not persuasive."

With regard to legal pneumoconiosis, the court observed that Dr. Repsher and Dr. Farney opined that smoking is a statistically significant factor in the development of obstructive lung disease, and they attributed the miner's disabling lung disease to his 40-pack-year smoking history and/or asthma, but not coal mine dust. The court affirmed the Administrative Law Judge's decision to accord less weight to the opinions of these physicians:

The ALJ found the Antelope's experts' reliance on statistical probabilities undermined their ultimate conclusion that Mr. Goodin did not have pneumoconiosis because they did not show why Mr. Goodin is not among the cohort of those who suffer COPD from surface coal mining. (citation omitted). Antelope did

not show that Mr. Goodin did not have legal pneumoconiosis. It therefore did not rebut the presumption.

As a result, the court held the Administrative Law Judge properly concluded the existence of legal pneumoconiosis was not rebutted. And, although the Administrative Law Judge did not conduct a separate disability causation analysis, the court concluded “the reasoning and evidentiary analysis throughout the ALJ’s opinion supports the ALJ’s holding that the presumption was not rebutted.”

Finally, the court addressed Employer’s argument that it should not be limited to two methods of rebuttal (*i.e.* rebuttal of clinical and legal pneumoconiosis, or rebuttal of disability causation) to defeat a claim for benefits. Here, the court noted that, even absent application of the limitations, the 15-year presumption was not rebutted. The court stated:

First, as to Mr. Goodin suffering from pneumoconiosis, we have already upheld the ALJ’s finding that Antelope did not rebut this element.

Second, as to Mr. Goodin’s pneumoconiosis arising out of coal mine employment, the ALJ noted that legal pneumoconiosis by statutory definition arises from coal mining. (citations omitted). Because Antelope failed to rebut the first element—the presence of legal pneumoconiosis—Antelope also failed to rebut the presumption that the pneumoconiosis arose out of Mr. Goodin’s coal mine employment. (citation omitted).

Third, as to Mr. Goodin being totally disabled, Drs. Bodoni, Rose, and Farney all agreed Mr. Goodin was totally disabled. (citation omitted). The ALJ discounted Dr. Repsher’s opinion to the contrary because Dr. Repsher appeared to misunderstand Mr. Goodin’s job duties and because he did not consider Mr. Goodin’s more recent test results.

Fourth, as to pneumoconiosis having caused Mr. Goodin’s total disability, Antelope needed to show that coal mining was not a ‘substantially contributing cause’ to rebut this fourth element. It did not do so.

With regard to the fourth element, the court noted the “rule-out standard does not factor into this analysis because it is tied to the rebuttal limitations.” Said differently, if the rebuttal limitations at 20 C.F.R. § 718.305 apply to an employer, then the rule-out standard is applied to rebut disability causation. On the other hand, if the rebuttal limitations do not apply, then the employer may rebut the disability causation element by

presenting evidence sufficient to demonstrate that pneumoconiosis was not a “substantially contributing cause” of the miner’s totally disabling respiratory impairment as defined at 20 C.F.R. § 718.204(c)(1). In this case, the court did not rule on applicability of the rebuttal limitations to Employer; rather, the court held that Employer failed to present evidence sufficient to rebut the 15-year presumption even without limiting its methods of rebuttal.

**[ invocation and rebuttal of 15-year presumption; burden for demonstrating that surface mining is “substantially similar” to underground mining ]**