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Information On Attorney Fees
Paid For State Black Lung
Workmen's Compensation Claims
In Kentucky B-164031(4)

Social Security Administration
Department of Health, Education,
and Welfare

**BY THE COMPTROLLER GENERAL
OF THE UNITED STATES**

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JAN. 8, 1974



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-164031(4)

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The Honorable John N. Erlenborn
House of Representatives

Dear Mr. Erlenborn:

As you requested on July 10, 1973, we inquired into (1) the nature and extent of the black lung benefits under the workmen's compensation programs in Kentucky, Pennsylvania, Virginia, and West Virginia before the enactment of the Federal black lung benefits program on December 30, 1969, (2) the savings to all States, as estimated by the Social Security Administration (SSA), as a result of the Black Lung Benefits Act of 1972 which extended Federal responsibility for black lung claims by 18 months, (3) the amounts and legislative bases for fees authorized by the four States to attorneys handling black lung workmen's compensation claims, and (4) the reasonableness of fees Kentucky authorized to attorneys handling State black lung workmen's compensation claims. 26

On October 5, 1973, we reported informally to you on those matters. We are now reporting on the reasonableness of attorney fees for State black lung workmen's compensation claims in Kentucky as well as the amounts and legislative bases for similar fees in the three other States.

We reviewed the applicable Kentucky statutes and compiled information on the number and amounts of attorney fees the Kentucky Workmen's Compensation Board authorized for black lung claims during fiscal year 1973. We compiled information also on fees earned by four attorneys in Kentucky for fiscal years 1971 through 1973. We randomly selected 34 cases handled by these four attorneys during fiscal year 1973 and met with three of the attorneys in an attempt to determine what they had to do to earn their fees. We met also with the Kentucky Workmen's Compensation Board to determine the criteria used by the board in authorizing attorney fees and discussed attorney fees with officials of the Kentucky Department of Labor, SSA, the Department of Labor, and the United Mine Workers (UMW).

The Kentucky Workmen's Compensation Board and the four attorneys were given an opportunity to comment on this report. The board has declined to comment, and we did not receive any comments from the attorneys within the specified 2-week period.

We also reviewed the applicable statutes in Pennsylvania, Virginia, and West Virginia and obtained information from State officials on the attorney fees paid in State black lung workmen's compensation claims.

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BACKGROUND

The Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 801), enacted on December 30, 1969, was amended by the Black Lung Benefits Act of 1972 (30 U.S.C. 901), approved on May 19, 1972. The stated purpose of the 1969 act was to protect the health and safety of the Nation's coal miners. The law, as amended, provided for the payment of monthly cash benefits from general tax funds to

- coal miners who are totally disabled due to black lung resulting from employment in coal mines and
- survivors of deceased coal miners who are entitled to such benefits.

The law, as amended, placed the responsibility for administering title IV, part B, of the act with the Secretary of Health, Education, and Welfare who delegated administrative responsibility to SSA. SSA is responsible for (1) miners' claims filed before July 1973, (2) widows' claims filed before 1974, and (3) widows' claims filed after 1973 if the deceased miners either died due to black lung before January 1974 or were entitled to part B benefits at the time of their deaths and if the widows filed within 6 months after the miners' death. SSA is responsible also for the following claims if deceased miners either died due to black lung before January 1974 or were entitled to part B benefits at the time of their deaths.

- Claims of orphans of miners which are filed within 6 months after the deaths of the miners or their widows or by December 31, 1973, whichever is later.
- Claims of totally dependent surviving parents, brothers, and sisters of miners which are filed within 6 months after the deaths of the miners or by December 31, 1973, whichever is later.

Under part C of title IV, the Department of Labor is responsible for all other claims. Beginning in 1974, these claims will be processed through workmen's compensation agencies in States which have enacted appropriate legislation providing comparable benefits. If the applicable State law fails to meet the standards set by the Secretary of Labor, the operator of the coal mine must pay benefits to those miners it employed. When the liability of a coal mine operator cannot be established or the operator fails to pay the benefits, the Secretary of Labor will pay them and the operator, if any, will be liable to the United States in a civil suit for an equal amount.

The Department of Labor and the mine operators will not be required to pay benefits after December 30, 1981. However, State workmen's compensation benefits may continue to be paid to the beneficiaries who are entitled to them under the State program.

The law, as amended, provides that Federal black lung benefits paid to a miner be reduced by any payment he received under State workmen's compensation, if the latter was based on his disability. Because SSA has decided not to count as workmen's compensation the amounts authorized as attorney fees taken out of the beneficiaries' State workmen's compensation benefits, the Federal Government may, in effect, subsidize fees in the future through increased Federal benefits equal to the amount of the fees.

As a hypothetical example, a miner receives an award in Kentucky valued at \$25,500 (425 weeks at \$60 a week) and his attorney's fee is \$5,100 (85 weeks at \$60 a week). The State pays the attorney's fee in a lump sum, which reduces the miner's benefits from 425 weeks to 340 weeks, or by 85 weeks. Assuming that the miner also applies for Federal black lung benefits and receives an award, the Federal payment would start after 340 weeks instead of 425 weeks. Assuming further that he lives that long or has eligible dependents, there is a potential future Federal subsidy for the amount of the authorized fee.

REASONABLENESS OF ATTORNEY FEES IN KENTUCKY

The four attorneys were either unwilling or unable to tell us the amount of work involved in representing the claimants and we could not determine the criteria the board used in authorizing the fees. Therefore, although we were unable to obtain all the information we desired, the information which we were able to document presented a prima facie case, in our opinion, that the fees authorized by the board in most cases we reviewed were excessive.

This information revealed that

- the board authorized the maximum fee of 20 percent of the awards in about 90 percent of the cases, regardless of the services provided by the attorneys;
- the average fee in fiscal year 1973 was \$4,277 for each award, compared to the average attorney's fee of \$419 SSA authorized for Federal black lung cases;
- the computed average billing rate for the four attorneys during fiscal year 1973 was \$215 an hour;
- maximum fees were authorized in a number of cases that we believe were relatively easy to adjudicate;
- a private study for the Kentucky Commissioner of Labor concluded that the fees were excessive; and
- a black lung task force formed by Kentucky recommended reducing the fees.

Regulation of attorney fees in Kentucky

Kentucky workmen's compensation claims are adjudicated under an adversary system which requires that the claimant prove his eligibility for benefits in a quasi-judicial procedure. Such a system, in effect, requires the claimant to retain the services of an attorney.

Kentucky's regulation of attorney fees in State black lung workmen's compensation cases is governed by section 342.320 of the Kentucky Revised Statutes. All attorney fees paid under the workmen's compensation laws must be approved by the Workmen's Compensation Board. The board consists of five members appointed by the Governor each for a term of 4 years. The members of the board must have the qualifications of a circuit court judge.

The maximum allowable attorney fee in Kentucky is 20 percent of the value of the award under the State's Workmen's Compensation Act. The board has the authority to allow less than the maximum permissible attorney fee even though the attorney and the claimant have agreed to the maximum amount. In each case the board is required to examine the record to ascertain the extent of services rendered and to fix a reasonable fee for such services. According to Kentucky statutes, the board, in determining the reasonableness of attorney fees, should consider the time and effort required to present and prosecute the claim and the results achieved.

Records of the Kentucky Department of Labor showed that the board authorized attorney fees totaling \$5,277,792 during fiscal year 1973 for 1,234 cases, or an average fee of \$4,277. The board authorized the maximum attorney fees in 1,118, or 91 percent of the cases. In 1973 the board dismissed 184 cases, for which the attorneys received no fees. Thus, of the 1,418 cases considered by the board, 1,234, or 87 percent, resulted in awards for which fees were authorized.

The board seems to have been more conservative in authorizing maximum fees in fiscal year 1974. In July and August 1973, the board authorized the maximum fee in 127, or 72 percent of 177 cases. The average authorized fee during these 2 months was \$4,020.

Analysis of fees paid to four attorneys

The four attorneys received \$2,317,450, or 44 percent of the \$5,277,792 in fees authorized, in fiscal year 1973.

These four attorneys were authorized fees totaling \$5,088,090 for 1,225 cases in fiscal years 1971-73. The board authorized the maximum attorney fee in 93 percent of the cases.

<u>Attorney</u>	<u>Fiscal year</u>	<u>Total fees</u>	<u>Number of awards</u>	<u>Awards when maximum fee was authorized</u>	<u>Percent of awards when maximum fee was authorized</u>	<u>Average fee</u>
A	1973	\$1,142,718	259	247	95.4	\$4,412
	1972	886,714	214	208	97.2	4,144
	1971	<u>111,928</u>	<u>28</u>	<u>27</u>	96.4	3,997
		<u>2,141,360</u>	<u>501</u>	<u>482</u>	96.2	4,274
B	1973	454,528	101	95	94.1	4,500
	1972	487,996	119	108	90.8	4,101
	1971	<u>328,759</u>	<u>88</u>	<u>78</u>	88.6	3,736
		<u>1,271,283</u>	<u>308</u>	<u>281</u>	91.2	4,128
C	1973	186,315	44	42	95.5	4,234
	1972	104,477	26	24	92.3	4,018
	1971	<u>16,093</u>	<u>4</u>	<u>4</u>	100.0	4,023
		<u>306,885</u>	<u>74</u>	<u>70</u>	94.6	4,147
D	1973	533,889	135	116	85.9	3,955
	1972	600,028	144	133	92.4	4,167
	1971	<u>234,645</u>	<u>63</u>	<u>61</u>	96.8	3,725
		<u>1,368,562</u>	<u>342</u>	<u>310</u>	90.6	4,002
Total		<u>\$5,088,090</u>	<u>1,225</u>	<u>1,143</u>	93.3	4,154

Estimated hourly billing rate

We met with the Kentucky Workmen's Compensation Board to ascertain the criterion used for authorizing attorney fees in the State black lung workmen's compensation cases. Board officials said that they had no written criteria to follow in setting attorney fees and that the only criterion they used was their judgment as lawyers. Further, as indicated on page 7, our discussions with these attorneys gave us little insight as to the amount of time and expenses involved in presenting State black lung claims. We computed an estimated hourly billing rate on the basis of the fiscal year 1973 payments to the four attorneys and the annual billable hours shown in the May 1971 Fee Manual of the Kentucky State Bar Association. This manual states:

"Every attorney, regardless of his competence and station, operates under an inescapable restriction--the matter of available time.

Billable time is invariably still less. Assuming, perhaps rather generously, 1200 billable hours in a year (i.e., 5 billable hours, every day, 240 office days per year), and assuming that each of the 1200 hours is fully billable at \$25.00 annual billings will be \$30,000.00."

Using this method, we estimated that the hourly rate for these attorneys ranged from \$155 to \$238.

<u>Attorney</u>	<u>Number of attorneys on staff</u>	<u>Annual billable hours per Kentucky fee manual</u>	<u>Total billable hours</u>	<u>Total black lung fees 1973</u>	<u>Estimated hourly billing rate</u>
				(thousands)	
A	4	1,200	4,800	\$1,142.7	\$238
B	2	1,200	2,400	454.5	189
C	1	1,200	1,200	186.3	155
D	<u>2</u>	1,200	<u>2,400</u>	<u>533.9</u>	222
Total	<u>9</u>		<u>10,800</u>	<u>\$2,317.4</u>	215

Although these computations produce an average hourly billing rate of \$215, we noted that the Kentucky Bar Association Fee Manual recommends a contingent fee of 33-1/3 percent of the amount recovered as compared with the maximum fee of 20 percent in the statutes for workmen's compensation claims. Even though fees paid on workmen's compensation claims (at a maximum 20 percent) are contingent on the outcome of the case, the award rate on black lung claims in Kentucky during fiscal year 1973 was 87 percent, as discussed on page 4, which indicates a rather low risk during that year.

Analysis of sample cases

In our sample of 34 cases, the maximum fee was awarded in 29 cases. The Kentucky Department of Labor file showed that 24 cases--including 20 cases for which the maximum fees were authorized--were relatively easy to adjudicate. We classified as easy to adjudicate all cases in which the State did not contest the claim (2 cases), withdrew its resistance (11 cases), or introduced no evidence to support that the claimants were not eligible for benefits (11 cases). All other cases were classified as complex even though we could not determine the services rendered by the attorneys.

Attorney	Cases reviewed	Maximum awards	GAO analysis	
			Simple	Complex
A	10	9	9	1
B	7	6	5	2
C	7	7	5	2
D	<u>10</u>	<u>7</u>	<u>5</u>	<u>5</u>
Total	<u>34</u>	<u>29</u>	<u>24</u>	<u>10</u>

Based on our discussions with Kentucky officials, it appears that the practice of the board was generally to award the maximum 20-percent fee in workmen's compensation cases, including black lung cases, when the State contested the claim and a 10-percent fee when the case was uncontested. Kentucky officials also advised us that it had been a practice to award the maximum attorney fee in contested workmen's compensation cases prior to enactment of the Federal Coal Mine Health and Safety Act of 1969.

We discussed with three of the four attorneys the amount of work involved in representing State black lung claims. These three attorneys were either unable or unwilling to tell us the amount of time and expenses involved in representing these claimants. The fourth attorney would not meet with us, but he was present when we discussed attorney fees with the board.

On October 1, 1973, another attorney who handles black lung cases in Kentucky testified before the Subcommittee on Representation of Citizens' Interests, Senate Committee on the Judiciary, on what he did to earn his fees. He said that a typical State black lung case involved preparing the claimant's application, including a complete work history; arranging for at least two medical examinations; attending the local hearing; obtaining sufficient depositions to prove the claimant was disabled from black lung; cross-examining the defendants' witnesses; submitting a brief on the case to the board; and consulting with the claimant.

Other studies of Kentucky attorney fees

At the request of the Commissioner of the Kentucky Department of Labor, Public Systems, Inc., Government Management Consultants, made a study of the State workmen's compensation program. On April 16, 1973, the consultant reported that:

"Kentucky attorney fees, for what has become an assembly line legal service in many cases, are clearly excessive. * * * It seems clear that this abuse has been justified solely because of the availability of the federal settlement as 'subsidy' of the fees. In practice, very few attorney fees are granted by the Workmen's Compensation Board for less than the 20% 'maximum.'"

Kentucky Governor Wendell H. Ford formed a 14-member black lung task force to analyze, among other things, the attorney fee situation and to recommend improvements. The 14-member force included attorneys and representatives from the UMW, coal operators, Kentucky General Assembly, Workmen's Compensation Board, and the Kentucky Department of Labor. On July 5, 1973, the Black Lung Task Force recommended in its report that Kentucky

- revise its legislation to provide a maximum attorney fee of \$750 in a noncontested claim;
- establish a maximum fee of \$4,212, unless the attorney can justify a higher fee; and
- require any attorney representing a claimant for black lung benefits to support a claim for a fee by a detailed affidavit including a statement of the number of hours he spent in prosecution of the claim.

As a result of this report, the Workmen's Compensation Board revised its regulations, effective July 14, 1973, to require a detailed statement in affidavit form of the amount of work done, time spent, complexity of issues involved, and any related materials the attorney used in making the request. Although, as noted on page 4, we compiled data on fees authorized by the board during July and August 1973, none of these fees were applicable to cases filed under the July 14, 1973, regulations. The board is not expected to act on the first two recommendations until the Kentucky General Assembly convenes in January 1974, because State officials feel that implementing the first two recommendations will require amendments to Kentucky statutes.

Attorney fees authorized in black lung cases
by the Social Security Administration

SSA officials told us that the attorney fee in a Federal claim is authorized on the basis of the value of his services to the claimant and on an amount that will reasonably compensate the attorney. Neither a fee agreement nor an hourly rate is included in the criterion used in determining a reasonable fee. The maximum attorney fee in a Federal claim is 25 percent of the claimant's past-due benefits rather than the value of the total award. According to SSA, attorneys were authorized a total of \$854,000 for 2,036 cases by SSA's Bureau of Disability Insurance from November 1972 through May 1973 and by SSA's Bureau of Hearings and Appeals from September 1972 through May 1973. The average attorney fee for these cases was approximately \$419. According to Kentucky officials and certain attorneys we interviewed, a Kentucky black lung workmen's compensation claim generally requires more effort by an attorney than does a Federal black lung claim.

ATTORNEY FEES FOR BLACK LUNG
WORKMEN'S COMPENSATION CLAIMS IN OTHER STATES

As in Kentucky, the regulation of attorney fees in State black lung workmen's compensation claims in Pennsylvania, Virginia, and West Virginia is governed by the statutes. The attorney fees authorized in State black lung workmen's compensation cases are insignificant compared with the fees paid attorneys in Kentucky because (1) UMW attorneys represent a large number of claimants in these States but less than 1 percent of the claimants in Kentucky and (2) claimants do not always have to retain attorneys to obtain benefits.

Pennsylvania

As of July 1, 1973, employees and their dependents can apply for lifetime benefits for occupational diseases, such as black lung, under either the Occupational Disease Act or the Workmen's Compensation Act. Each act has different provisions governing the payment of attorney fees. The Occupational Disease Act requires that attorney fees be approved by the Workmen's Compensation Board but sets no statutory limit on them. The Workmen's Compensation Act, effective July 1, 1973, does not authorize the Department of Industry and Labor or the Workmen's Compensation Appeal Board to reduce agreed-upon attorney fees which are 20 percent or less of the amount awarded. These State authorities' allowing attorney fees in excess of 20 percent is discretionary.

According to a Pennsylvania official, attorneys of claimants under the Occupational Disease Act generally charge about \$300 for their services. This official said that a large percentage of claimants in Pennsylvania are represented by UMW attorneys at no cost to the claimants. A Pennsylvania official told us that about 90 percent of the miners in Pennsylvania were UMW members and were therefore eligible for the free services of UMW attorneys.

At the time our fieldwork was completed in Pennsylvania, no fee had been approved under the Workmen's Compensation Act, as amended July 1, 1973.

Virginia

The Industrial Commission approves and awards attorney fees; no maximum fee is set out in the statutes. The matter is left to the discretion of the Industrial Commission. A State official said that 97 percent of all applicants for State black lung benefits in Virginia were represented by UMW attorneys at no cost to the claimants. A State official told us that, in those few cases where private attorneys are retained, the fees are generally 15 percent of the claimants' awards. During calendar year 1972, Virginia made 237 awards totaling \$720,840 to claimants for State black lung benefits. On the basis of information furnished to us by a State official, it appears that private attorneys were involved in only seven cases in calendar year 1972. The fees for these cases may have totaled about \$3,200.

West Virginia

Attorney fees in West Virginia State black lung claims cannot exceed 25 percent of the benefits to be paid during 208 weeks. The West Virginia Workmen's Compensation Board is given no power to allow or approve attorney fees or to enforce the fee limitation.

State officials said that applicants for State black lung workmen's compensation were not required to retain attorneys to obtain benefits. State and UMW officials also said that many claimants were represented by UMW attorneys. On the basis of our discussions with West Virginia and UMW officials, we estimate that private attorneys represented claimants on about 10 percent of the awards during fiscal year 1972. The fees in these cases may have totaled about \$300,000.

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As agreed with your office we are sending copies of this report to ^{Col 3} Senator Robert J. Dole and to the Chairman, Subcommittee on Labor, Senate Committee on Labor and Public Welfare. We do not plan to distribute this report further unless you agree or publicly announce its contents. 5.01108

Sincerely yours,



Comptroller General
of the United States