

No. 08-970

In The
Supreme Court of the United States

SONNY PERDUE, in his official capacity
as Governor of the State of Georgia, *et al.*,

Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

**BRIEF AMICI CURIAE ON BEHALF OF THE
OLD REPUBLIC INSURANCE COMPANY AND
NATIONAL ASSOCIATION OF WATERFRONT
EMPLOYERS IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI¹

Section 28(a) of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901-952 (“Longshore Act”), 33 U.S.C. § 928(a), provides that claimants for workers compensation benefits under the Longshore Act who

have utilized the services of an attorney at law in the successful prosecution of his claim, . . . shall be awarded, in addition to the award of compensation, . . . a reasonable attorney’s fee against the employer or carrier in an amount approved by the [adjudicator], . . . which shall be paid directly by the employer or carrier, to the attorney for the claimant in a lump sum after the compensation order becomes final.

This fee-shifting provision applies in claims awarded under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (“BLBA”). 30 U.S.C. § 932(a), *incorporating by reference* 33 U.S.C. § 928.² *United States Dep’t of Labor v. Triplett*, 494 U.S. 715, 718 (1990).

¹ Counsel for amici are the sole authors of this brief. Amici are the sole contributors to the cost of this brief. The parties’ written consents to file this brief have been submitted to the Court.

² The same fee-shifting provision applies to claims awarded under the Defense Base Act, 42 U.S.C. §§ 1651-1654, the War Hazards Compensation Act, 42 U.S.C. §§ 1701-1706, 1711-1717, and the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356a.

The Old Republic Insurance Company (“Old Republic”), a subsidiary of the Old Republic International Corporation, is a commercial insurance carrier licensed in most coal mining states to insure the workers compensation liability of mine operators under the BLBA. For many years, Old Republic was the principal servicing carrier for the National Workers Compensation Reinsurance Pool and various states’ residual market pools in coal mining states allowing private workers compensation insurance. Old Republic has received over 35,000 federal black lung claims since 1974, as a direct insurer, residual market (pool) servicing carrier and third party administrator. Thousands of previously filed claims remain active and thousands more are anticipated in coming years. In cases insured or administered by Old Republic, when attorney’s fees are claimed under the BLBA, Old Republic defends attorney’s fee applications and pays attorney’s fees awarded. Old Republic’s counsel respond to hundreds of fee-shifting applications each year.

The National Association of Waterfront Employers (“NAWE”) is a not-for-profit trade association incorporated under the laws of the District of Columbia that represents United States private sector stevedoring companies and marine terminal operators. NAWE members load and unload vessels at the vast majority of the general marine cargo and container terminals along the Great Lakes, East Coast, Gulf Coast, West Coast, Alaska, Hawaii, territories and commonwealths of the United States.

NAWE members are “employers” as that term is defined in the Long Shore Act: “The term ‘employer’ means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).” 33 U.S.C. § 902(4). Some NAWE members are “carriers” as that term is defined in the Long Shore Act: “The term ‘carrier’ means any person or fund authorized under section 32 of this title to insure under this chapter and includes self-insurers.” 33 U.S.C. § 902(5).

In these capacities, NAWE’s members defend attorney’s fee applications and pay attorney’s fee awards to successful claimants under the Long Shore Act. NAWE’s members respond to thousands of attorney’s fee applications annually.



INTRODUCTION AND SUMMARY OF ARGUMENT

For over thirty years, this Court has endeavored to articulate an objective and easily applied standard for determining a “reasonable” attorney’s fee to be applied in federal attorney’s fee-shifting statutes. This has not been an easy job and it has met with persistent opposition from lawyers who want more money, judges who believe that the contingent character of a

fee-shifting recovery merits some kind of consideration, and academics who believe that certain kinds of public interest lawsuits that could be filed should be filed and that enhanced shifted fees are a reasonable price to pay to advance that objective. Amici urge this Court to stay the course with an objective standard.

Since the mid-1970's, this Court has favored the "lodestar model" as an objective way to determine "a reasonable attorney's fee" in federal fee-shifting statutes. See *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002). This Court has turned away most demands for a formula that considers more subjective factors like risk of loss or contingency, complexity of the litigation and other less easily defined considerations. *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). This formula has been fairly easily applied by most courts, provides fair market-based compensation to attorneys, discourages insubstantial lawsuits under fee-shifting statutes, and reduces the likelihood of collateral litigation over fee awards. It does not need to be fixed.

This case asks the Court to decide whether enhancements for quality work or exceptional results ought to be available at the discretion of the courts in cases like this one that are claimed to be special. Amici believe that a departure from the basic formula to incorporate these enhancement methodologies abandons the marketplace principles reflected in this Court's prior jurisprudence in favor of an unpredictable and unfair regime that will cause perverse

consequences in many different ways. For insured programs like the black lung and longshore benefits programs, incorporation of these enhancement possibilities is likely to disrupt insuring mechanisms, cause much more fee litigation, affect settlements in Longshore claims,³ and produce consistently unfair results that will look suspiciously like contingent fee enhancements. Over time, the “rare” exception will certainly swallow the rule.

The impact of a new fee-shifting formula permitting the consideration of inherently subjective and almost unreviewable factors such as quality and outcome would be sure to cause chaos in the black lung and longshore programs.



ARGUMENT

1. The BLBA is a federal workers compensation law that provides employer-funded benefits to coal miners and their families on account of total disability or death due to black lung disease. 30 U.S.C. § 901(a); *Mullins Coal Co. of Va. v. Director, Office of Workers' Compensation Programs*, 484 U.S.

³ Although not expressly prohibited by Congress, the Department of Labor takes the position that black lung claims cannot be settled and should not be settled because of a risk that employers will outsmart claimants. The courts have deferred to the Department's interpretation of the relevant provisions. *Ramey v. Director, Office of Workers' Compensation Programs*, 326 F.3d 474 (4th Cir. 2003).

135, 141-42 (1987). The Longshore Act provides employer-funded workers compensation benefits to longshore and harbor workers, and certain other persons engaged in maritime employment who suffer injury or death as a result of their employment. In 1972, Congress added a standard fee-shifting provision to the Longshore Act that also is applicable to black lung claims. 33 U.S.C. § 928, *incorporated by reference into* 30 U.S.C. § 932(a).

Black lung and longshore claims rarely present issues of great public significance and when contested, they typically involve a routine battle of the experts. There are, however, a lot of cases. In fiscal year 2005, the most recent year for which data are available, 24,980 lost time injuries were reported under the Longshore Act. Over the same time, 4,567 new claims were filed under the BLBA.⁴ Since 1974, 645,385 black lung claims have been filed.⁵

If an award is warranted in a black lung or longshore case, an attorney's fee award is also available for work performed at each stage of the proceedings, which includes administrative processing, a hearing before an administrative law judge, an internal appeal to the Benefits Review Board, and an appeal as

⁴ United States Dep't of Labor, Office of Workers' Compensation Programs, ANNUAL REPORT TO THE CONGRESS FY 2005 at 31, 61 (2008).

⁵ United States Dep't of Labor, Employment Standards Administration Distribution of Black Lung Claims by State, <www.dol.gov/esa/owcp/dcmwc/statistics> (last viewed June 24, 2009).

of right to a United States Court of Appeals. 33 U.S.C. §§ 919-21. Remands are frequent and it is not unusual for each claim to produce from three to five fee applications or more.

In black lung cases, there has been considerable litigation over fee enhancement for contingency or risk of losing, or quality notwithstanding this Court's holding in *Dague* as administrative law judges, and, in some instances, the courts of appeals, have sought to inject inappropriate factors to justify fee awards in excess of what the standard lodestar method would permit.⁶ For example, recently, the Sixth Circuit,

⁶ Hundreds of cases are in litigation over these issues. *E.g.*, *Bolling v. Indian Mt. Coal Co.*, Case No. 2005-BLA-0537 at 3 (ALJ June 15, 2009) (stating: "Employer is correct that risk of loss may not be considered. . . . This is not to say however that an attorney may not adopt a billing rate that is sufficient to allow him to stay in business" and "The fees charged in black lung cases are what is relevant here . . . [T]here is no requirement that any rate approved fall within the range obtained by the general legal community."); *Williamson v. Robert Coal Co.*, 2005-BLA-06056, 2006-BLA-05944 at 3 (ALJ May 13, 2009) (awarding a rate that is more than the local rate because the "difficulty in prevailing in such an atmosphere is quite high."); *Parks v. Eastern Associated Coal Co.*, Case No. 2007-BLA-05276 at 3 (ALJ May 11, 2009) (awarding a fee far exceeding local rates); *Pauley v. Manning Coal*, Case No. 2003-BLA-05600 at 2 (ALJ May 8, 2009) (stating: "Employer's insistence that [counsel] establish a 'market rate' for his work in the case imposes too heavy a burden"); *Bentley v. Kentucky Elkhorn Coal Co.*, Case Nos. 2006-BLA-05737 and 2007-BLA-05333 at 2 (ALJ Nov. 5, 2008) (stating: "Additional factors that may be considered are risk of loss. . . ."); *Dye v. Farwest Coal Co.*, Case No. 2005-BLA-06152 at 4 (ALJ Jan. 29, 2009) (citing quality work and zealous

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while paying lip service to the lodestar, sanctioned the application of a special market rate for fee-shifted work in black lung claims. *B&G Mining Co. v. Director, Office of Workers' Compensation Programs*, 522 F.3d 657, 666 (6th Cir. 2008) (affirming awards of fees based upon an administrative law judge's past awards to other lawyers from other places in other cases that also were not supported by market evidence).

The problems confronted by employers under Section 28(a) of the Longshore Act because administrative law judges and courts decline to enforce the lodestar is rapidly becoming one of the most active litigation drivers in the black lung and longshore programs. *See, e.g., B&G Mining Co.*, 522 F.3d 657; *Christensen v. Stevedoring Services of Am.*, 527 F.3d 1049 (9th Cir. 2009); *Skike v. Director, Office of Workers' Compensation Programs*, 557 F.3d 1041 (9th Cir. 2009).

2. The addition of a quality or outcome enhancement to lodestar principles would have a chaotic effect on fee shifting in both the longshore and black lung programs. Both measures of attorney worth suggested by the decision below cannot rationally be administered by courts or agencies and both would lead to an exponential growth in the amount of fees awarded. A quality enhancement is not definable.

representation to award a rate far in excess of a community standard).

This Court had held that a lawyer's quality is reflected in the rate that fee-paying clients are willing to pay for the lawyer's services. Beyond that proposition, any further consideration of quality of work is double-counting, not a reflection of the private market. See *Dague*, 505 U.S. at 563 citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 726-27 (1987). No paying client would engage a lawyer whose reputation for quality was below par with a promise of a higher rate if the lawyer's work improved during the litigation of the particular matter. No marketplace for legal services works this way. Hourly rates are not enhanced by fee-paying clients because a lawyer wrote a great brief or delivered a stirring closing argument. It also is hard to imagine what standards or criteria a court could properly apply for determining a level of quality that justifies an enhancement. Such a proposition that lends itself to arbitrary or biased judgment raises Due Process concerns.

An enhancement for exceptional results is similarly flawed. There are no most valuable player or Academy Awards for lawyers for good reason. The best outcomes may, but do not necessarily, reflect hard, careful work by capable practitioners. Bad lawyers who do poor work may have great success and no worthy principle is served by enhancing their pay for the work. Similarly, great lawyers who always do a superb job lose cases. In the private market, lawyers are not paid less for an unsatisfactory outcome or paid more for doing the job correctly just as no one

knowingly hires a lawyer to do less than high quality work. These considerations are already reflected in the lodestar.

The marketplace recognizes unusual fee arrangements between a paying client and the attorney. It is not unheard of for a paying client to offer a lawyer an agreed upon bonus for a specified outcome, but that arrangement usually involves a reduced rate or fixed fee at the front end. In any case, the payer, not the court, negotiates the arrangement. Whether the lawyer accepts that arrangement is voluntary and contractual. No fee-paying client in the private market for legal services would allow a third party adjudicator unilaterally to award an enhanced fee after the fact.

Outcome enhancement criteria are no more easily discerned than are quality criteria. The only thing that is certain is that these metaphysical considerations would enable judicial capriciousness in ways that always would be unpredictable and, in many instances, unreviewable. If quality and outcome enhancements become available, no matter how they are defined, it would not be long until half or more of the fee awards in black lung and longshore cases included enhancements for exceptional quality work or exceptional results or both. This would be a convenient surrogate for an otherwise impermissible risk of loss enhancement.

3. For high volume insured benefits programs like black lung and longshore, a significant escalation

in shifted attorney's fees will have additional adverse, if not unintended consequences.

First, a key factor making workers compensation costs and benefits insurable and affordable is predictability. In black lung and longshore claims, benefits include a factor for a shifted fee. In black lung claims being litigated now, the policies were written, premiums were charged, or reserves were set aside many years ago, thus making any effect of a new fee-shifting formula retroactive and unfunded. Going forward it would impose a new cost of doing business on mining and maritime companies and their insurers that was not intended by Congress.

Second, new subjective enhancements will increase fee litigation inappropriately. A good argument can be made that no longshore or black lung case requires exceptional skill on the part of claimant's counsel and no result is so spectacular that it should warrant an enhancement. Benefits are, after all, statutory and limited. Nevertheless, history teaches that if legally permitted, enhancements for quality and outcome will be awarded with frequency and in an unpredictable way. Claimant's counsel will ask for these enhancements in every case and many judges will give them. Because the enhanced awards will seem unfair to the employer or insurer, they will be litigated and appealed. Because an unenhanced award will seem unfair to claimant's counsel, they too will be litigated and appealed. The recent efforts by black lung claimants' counsel to be compensated for the risk of losing or contingency enhancements and

the willingness of administrative law judges to award them proves the point.

Finally, while black lung claims cannot be settled, longshore claims frequently are settled. *See* 33 U.S.C. § 908. Settlements may include an attorney's fee. The prospect of a much larger fee award may encourage counsel to litigate a close case instead of settling.

The enhancement rules being considered by this Court, if adopted, would apply unpredictably. Amici believe that a pronouncement by this Court allowing enhancements for quality and outcome, however finely tuned a rule might be, will become the rule in most, if not every case in the black lung and longshore benefits programs, and it will not be applied following a thoughtful evaluation of rational standards.

The lodestar rule uncluttered by enhancements for any subjective, unknowable, or personal sentiments is the most fair, predictable and just rule for fee shifting and Amici respectfully ask the Court to preserve this good rule.



CONCLUSION

The decision of the Eleventh Circuit approving quality and outcome enhancements should be reversed.

Respectfully submitted,

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