APPEALS BOARD
UTAH LABOR COMMISSION

JAMES L. COATS, **Petitioner,** **vs.** **EMERY MINING and EMPLOYERS' REINSURANCE FUND,** **Respondents.**	**ORDER SETTING ASIDE ALJ'S DECISION** **ORDER OF REMAND** **Case No. 99-0016**

James L. Coats and the Employers' Reinsurance Fund both ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge George's award of an attorney's fee to Mr. Coats' attorney in this proceeding under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63-46b-12 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

In previous proceedings before the Commission, Mr. Coats was awarded permanent total disability compensation for injuries he suffered from a work accident at Emery Mining Corporation on July 23, 1982. Pursuant to the law in effect at the time of Mr. Coats' accident, the Employers' Reinsurance Fund ("ERF") is now liable to pay Mr. Coats' disability compensation.

On March 17, 1999, ERF requested permission to terminate payment of Mr. Coats' disability compensation. ERF's petition was denied by Judge George. The Labor Commission subsequently affirmed Judge George's decision, but remanded the case back to Judge George to determine a reasonable fee to be awarded to Mr. Coats' attorney.

ERF filed a petition for appellate review of the Commission's decision. The Court of Appeals dismissed ERF's petition on the grounds that, because the Commission had not yet adjudicated the attorney's fee issue, the Commission's order was not final for purposes of appellate judicial review. The case was returned to the Commission and Judge George proceeded to adjudicate the attorney's fee issue.

Judge George issued his decision on August 2, 2005. In summary, Judge George concluded that ERF was liable pursuant to § 34A-2-413(11)(g) of the Utah Workers' Compensation Act to pay a reasonable fee to Mr. Coats' attorney. However, rather than making a determination of what was "reasonable" under the circumstances of this case, Judge George computed the fee according to the

formula contained in Labor Commission Rule 602-2-4. On that basis, Judge George found ERF liable for an attorney's fee of $15,850.

Mr. Coats and ERF are both dissatisfied with Judge George's decision. Both argue that, while Rule 602-2-4 governs attorneys' fees when injured workers claim disability compensation, the rule does not apply when an employer or insurance carrier seeks to terminate an existing right to compensation. Mr. Coats also argues that additional evidentiary proceedings are necessary to determine a reasonable attorney's fee under the specific facts of this case. ERF makes a similar argument, but also reiterates its contention—previously rejected by the Commission—that Mr. Coats' right to continuing disability compensation should be terminated.

DISCUSSION AND CONCLUSIONS OF LAW

Although ERF renews its argument that Mr. Coats should be denied continuing permanent total disability compensation, the Labor Commissioner has already considered and rejected that argument. The Labor Commissioner's determination that Mr. Coats is entitled to continuing compensation is the law of the case and binding on the Appeals Board. Consequently, in this decision the Appeals Board considers only the issue of attorney's fees.

Section 34A-1-309(1) of the Utah Labor Commission Act provides that "[i]n all cases coming before the commission in which attorneys have been employed, the commission is vested with full power to regulate and fix the fees of the attorneys." This broad authority to fix attorney's fees is specifically referenced in §34A-2-413(11)(g) of the Utah Workers' Compensation Act, as follows:

> In accordance with Section 34A-1-309, the administrative law judge may award reasonable attorneys fees to an attorney retained by an employee to represent the employee's interests with respect to reexamination of the permanent total disability finding, except if the employee does not prevail, the attorney s fees shall be set at $1,000. The attorneys fees shall be paid by the employer or its insurance carrier in addition to the permanent total disability compensation benefits due.

As previously noted, Judge George computed Mr. Coats' attorney's fee by applying the formula found in the Commission's Rule 602-2-4. However, by its own terms, that formula regulates attorney's fees of "applicants" and is based on "benefits generated." In such cases, the fees are paid by the injured worker out of his or her disability compensation, and Rule 602-2-4's formula serves to preserve that compensation for the injured worker's use.

Mr. Coats' case presents a much different situation. Mr. Coats was not an "applicant" attempting to qualify for compensation. Instead, ERF was attempting to terminate Mr. Coats' entitlement to future compensation he was otherwise entitled to receive. In such cases, § 34A-2-

413(11)(g) specifically provides that the employer, rather than the injured worker, is liable for the injured worker's attorney's fee. Thus, in this context Rule 602-2-4's purpose of preserving compensation for the benefit of the injured worker does not apply. Likewise, the rule's reference to compensation "generated" is inapplicable, since no additional disability compensation is generated in this type of proceeding. For these reasons, the Appeals Board concludes that Judge George erred in using Rule 602-2-4 to compute Mr. Coats' attorney's fee.

Nevertheless, Mr. Coats' is entitled to an award of "reasonable attorneys fees" in this matter. The amount of the fee must be determined by consideration of all relevant factors, including but not limited to the legal work actually performed, the amount of time reasonably spent to accomplish that work, and fees customarily charged for similar legal services. Because Judge George applied Rule 602-2-4 rather than making the individualized determination discussed above, the existing record does not allow the Appeals Board to determine an appropriate attorney's fee. The Appeals Board therefore remands this matter to the Adjudication Division. On remand, the Adjudication Division will designate an ALJ[1] to conduct such additional proceedings as are necessary to establish a reasonable attorney's fee for Mr. Coats' attorney, and to then order ERF to pay such attorney's fees to Mr. Coats' attorney.

ORDER

The Appeals Board sets aside Judge George's decision regarding Mr. Coats' attorney's fees. The Appeals Board remands this matter to the Adjudication Division for further proceedings consistent with this decision. It is so ordered.

Dated this 3rd day of December, 2007.

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Colleen S. Colton, Chair

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Patricia S. Drawe

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Joseph E. Hatch

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[1] Judge George has retired from the Commission. It is therefore necessary that another ALJ be designated to preside over this matter