



**In the Matter of:**

**THOMAS E. CLEMMONS,**

**ARB CASE NO. 08-067**

**COMPLAINANT,**

**ALJ CASE NO. 2004-AIR-011**

**v.**

**DATE: June 7, 2011**

**AMERISTAR AIRWAYS, INC.,**

**and**

**AMERISTAR JET CHARTER, INC.,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Steven K. Hoffman, Esq., *James & Hoffman, P.C.*, Washington, District of Columbia**

*For the Respondent:*

**Chris E. Howe, Esq., *Kelly, Hart & Hallman, LLP*, Fort Worth, Texas**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Luis A. Corchado, *Administrative Appeals Judge***

**ORDER DENYING RECONSIDERATION OF ATTORNEY'S FEE AWARD**

In a January 14, 2005 decision and order,<sup>1</sup> an Administrative Law Judge (ALJ) concluded that Ameristar Airways, Inc. and Ameristar Jet Charter, Inc. violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act)<sup>2</sup> when Ameristar fired Thomas E. Clemmons after he complained about air safety issues. Ameristar appealed to the Administrative Review Board (ARB), which vacated the ALJ's recommended decision and remanded the case for further consideration.<sup>3</sup> On remand, the ALJ again concluded in a February 20, 2008 decision and order that Ameristar had violated AIR 21.<sup>4</sup> Ameristar appealed, and the ARB affirmed the ALJ's decision.<sup>5</sup> On January 5, 2011, the ARB awarded Clemmons's attorney fees of \$55,328.00 and costs of \$1,252.04 for a total of \$56,580.04.<sup>6</sup> He now seeks reconsideration.

### DISCUSSION

Under AIR 21, the Secretary of Labor shall, at the complainant's request, assess against a person who violated the employee protection provision the costs of bringing the case, including attorney's fees the complainant reasonably incurred.<sup>7</sup> The regulations governing AIR 21 provide for an award of attorney's fees incurred by a complainant who prevails before the ALJ and before the ARB.<sup>8</sup>

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<sup>1</sup> *Clemmons v. Ameristar Airways, Inc.*, ALJ No. 2004-AIR-011 (ALJ Jan. 14, 2005).

<sup>2</sup> 49 U.S.C.A. § 42121 (Thomson/West 2011). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2010).

<sup>3</sup> *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, -096; ALJ No. 2004-AIR-011 (ARB June 29, 2007).

<sup>4</sup> *Clemmons v. Ameristar Airways, Inc.*, ALJ No. 2004-AIR-011 (ALJ Feb. 20, 2008).

<sup>5</sup> *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB May 26, 2010).

<sup>6</sup> *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB Jan. 5, 2011).

<sup>7</sup> 49 U.S.C.A. § 42121(b)(3)(B)(iii).

<sup>8</sup> 29 C.F.R. § 1979.109(b) ("At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred); 29 C.F.R. § 1979.110(d) ("If the Board concludes that the party charged has violated the law, . . . the Board shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred."). See generally *Jackson v. Butler & Co.*, ARB Nos. 03-116, -144; ALJ No. 2003-STA-026 (ARB Aug. 31, 2004).

In its initial remand of this case, the ARB vacated the ALJ's supplemental order awarding \$225,293.19 in attorney's fees and costs for legal services before him. We noted that Ameristar had appealed this award, ARB No. 05-096, but, given our disposition on the merits, we necessarily vacated and remanded the award decision, with leave to the ALJ to reinstate or modify his order as appropriate.<sup>9</sup>

In ruling in Clemmons's favor on remand, the ALJ re-affirmed "his previous order, as it appears at page 74 of [the] original Decision and Order which issued on January 14, 2005."<sup>10</sup> That January 14, 2005 decision ordered Ameristar to pay Clemmons "all costs and expenses, including attorney fees, reasonably incurred . . . in connection with this proceeding" and further permitted Clemmons's attorney "thirty days to file a fully supported fee application" with the ALJ.<sup>11</sup>

As noted, Ameristar appealed the ALJ's decision on remand. The ARB affirmed the ALJ's decision, with certain modifications to the back pay award, and permitted Clemmons's attorney 30 days to submit a petition for fees and costs for legal services before the ARB.<sup>12</sup> At the time, Clemmons's attorney requested that we remand this case to the ALJ for consideration of fees and expenses before the ALJ. We declined this request, noting that Clemmons's attorney must file a petition for such fees and expenses with the ALJ.

Notwithstanding what we believe were clear instructions, Clemmons's attorney subsequently requested in his petition to the ARB for attorney's fees, an award of fees for 13 hours of work before the ALJ on remand from July 2, 2007, through February 22, 2008.<sup>13</sup> Subsequently, in our award of attorney's fees before the ARB, we again instructed Clemmons's attorney to apply to the ALJ for any legal fees to which he was entitled for services performed before the ALJ. We noted that the ALJ's initial award of attorney's fees had been returned to him for possible reinstatement or modification.<sup>14</sup>

On January 13, 2011, Clemmons's attorney filed a motion to reconsider that portion of our January 5, 2011 decision pertaining to awarding attorney's fees for services before the ALJ. Attorney Hoffman asks the ARB to "deem" the ALJ's 2005 decision awarding Clemmons \$225,293.19 in fees and costs "reinstated" by the ALJ's

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<sup>9</sup> *Clemmons*, ARB Nos. 05-048, -096; slip op. at 11, n.27.

<sup>10</sup> *Clemmons*, ALJ No. 2004-AIR-011, slip op. at 9 (ALJ Feb. 20, 2008).

<sup>11</sup> *Clemmons*, ALJ No. 2004-AIR-011, slip op. at 74 (ALJ Jan. 14, 2005).

<sup>12</sup> *Clemmons*, ARB No. 08-067, slip op. at 15 n.73 (ARB May 26, 2010).

<sup>13</sup> Complainant's Fee Petition, Attachment 2 at 3.

<sup>14</sup> *Clemmons*, ARB No. 08-067, slip op. at 4, n.13 (ARB Jan. 5, 2011).

February 20, 2008 decision on remand and decide the merits of that fee award, based on the briefs of the parties that were filed in the 2005 appeal. Attorney Hoffman argues that the ALJ's decision on remand effectively reinstated his supplemental award of fees and that the ARB should take jurisdiction in the interests of justice and to conserve the parties' resources.<sup>15</sup>

By regulation, the ARB has power to award attorney's fees and costs for services performed before the Board; it also has power to review an ALJ's recommended award of fees upon appeal. There is no statutory authority for the ARB to review an ALJ's award of attorney's fees unless the ALJ's recommended award is appealed.

Here, the ALJ's 2005 fee award was appealed, but the ARB vacated that award when it vacated and remanded the merits decision to the ALJ for further consideration. The ALJ's 2008 decision on remand re-affirmed his 2005 decision ordering Ameristar to pay fees and costs to Clemmons's attorney. This reaffirmation, coupled with the ARB's instruction to the ALJ to reinstate or modify his 2005 attorney's fee award on remand if appropriate, could be construed as reinstatement of the initial fee award, without requiring Clemmons's attorney to resubmit his initial petition to the ALJ.

Given such an ambiguity, the ARB in both its 2010 decision on the merits and its 2011 decision awarding attorney's fees sought to clarify the fee situation for Clemmons and Ameristar. When the Board previously considered Clemmons's request for additional legal fees for services before the ALJ on remand, we referred to his original fee petition and our limited ability to review fee awards for services before the ALJ. We had intended, in so doing, to make it clear that the ARB does not wish to consider bifurcated appeals of an ALJ's fee awards, and that the proper course for Clemmons's attorney is to wrap his request for 13 hours of legal fees on remand into his original request, thereby affording Ameristar the opportunity to challenge the entire amount of the fee request before the ALJ at one time and, depending on the results of the ALJ's consideration of the entirety of the award, affording both parties the opportunity to challenge that decision on appeal to the ARB.

Thus, Attorney Hoffman's reliance on two ARB cases that purportedly show that the ARB has in the past decided appeals of fee awards without requiring ALJ reinstatement is misplaced. In *Jackson v. Butler & Co.*, the ARB considered appeals of both the merits decision and the fee award; no remand was involved.<sup>16</sup> In *McQuade v. U.S. Dep't of Energy*, the case settled and no attorney's fee was involved.<sup>17</sup>

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<sup>15</sup> Complainant's Motion at 3-4.

<sup>16</sup> ARB Nos. 03-116, -144; ALJ No. 2003-STA-026, slip op. at 9 (ARB Aug. 31, 2004).

<sup>17</sup> ARB Nos. 01-093, -094; ALJ Nos. 1997-CAA-007-010 (ARB Nov. 28, 2001).

Accordingly, because the ALJ's order to pay attorney's fees has been reinstated, we deny Attorney Hoffman's request for reconsideration of our January 5, 2011 fee award as unnecessary. Again we note that only upon the ALJ's consideration of the attorney's request for fees and costs pertinent to his services performed before the ALJ initially and on remand, and a final decision by the ALJ on the entire amount of a fee award, will the ARB entertain review of that award on appeal. As we have repeatedly indicated, awarding an attorney fees for services before the ALJ is only within the purview of the ALJ. The ARB has jurisdiction only over a timely appeal of the ALJ's decision.

**SO ORDERED.**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**