

BRB No. 00-0281
and 00-0281A

JEFFREY ROCK	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
HALTER MARINE INCORPORATED	)	DATE ISSUED: <u>Nov. 14, 2000</u>
	)	
and	)	
	)	
RELIANCE INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Compensation Orders Awards of Attorney's Fee of Chris John Gleasman, District Director, United States Department of Labor.

Richard M. Millet (Millet Law Office), LaPlace, Louisiana, for claimant.

Peter L. Hilbert, Darnell Bludworth and Michael A. France (Sher Garner Cahill Richter Klein McAlister & Hilbert, L.L.C.), New Orleans, Louisiana, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Compensation Orders Awards of Attorney's Fee (7-123271) of District Director Chris John Gleasman rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim under the Act for a work-related injury he suffered to his left knee on June 24, 1991. In a Decision and Order issued on October 13, 1994, Administrative Law Judge Lee J. Romero awarded claimant temporary partial disability compensation and temporary total disability compensation for various periods from June 24, 1991 through August 31, 1993, *see* 33 U.S.C. §908(b), (e), temporary partial disability compensation commencing on September 1, 1993, and continuing, and medical benefits under Section 7 of the Act, 33 U.S.C. §907. Subsequently, Dr. Morris determined that claimant reached maximum medical improvement on February 9, 1995, and assigned claimant a 20 percent impairment rating to his left lower extremity. Thereafter, in September 1995, claimant and employer entered into a settlement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), wherein the parties agreed that claimant was entitled to a lump sum payment of \$17,500 to compensate claimant for his permanent partial disability and medical expenses.

On November 9, 1994, claimant's counsel submitted a fee petition for work performed before the district director from June 8, 1992, through December 16, 1992, in connection with claimant's claim for temporary disability benefits, seeking a total fee of \$5,317.50, representing 35.45 hours at an hourly rate \$150. In addition, claimant's counsel, on August 31, 1995, submitted a second fee petition for services performed before the district director from November 8, 1994, through August 28, 1995, in connection with counsel's efforts in obtaining additional benefits pursuant to the Section 8(i) settlement, seeking a total fee of \$3,780, representing 25.2 hours at an hourly rate of \$150. Employer filed objections to both fee petitions. As no order had been issued concerning the requests for an attorney's fee, on October 1, 1999, claimant's counsel requested that the district director increase his hourly rate to \$250 due to the delay in payment of the fee, and that four additional hours be added to each fee petition for work concerning the requested augmentation of the attorney's fee.

In his Compensation Order Award of Attorney's Fee of November 2, 1999, the district director reduced the number of hours sought by counsel to 26.275 on the first fee petition, initially reduced the hourly rate sought by counsel to \$125 to reflect the prevailing rate in the geographic area at the time the work was performed, but thereafter increased the hourly rate to \$150 due to the delay in payment of an attorney's fee, and awarded claimant's counsel an attorney's fee of \$3,941.25. In his Compensation Order Award of Attorney's Fee of November 3, 1999, the district director reduced the number of hours sought by counsel to 23.675 on the second fee petition, again reduced the hourly sought by counsel to \$125 to reflect the prevailing rate, but thereafter increased the hourly rate to \$150 due to the delay in payment of an attorney's fee, and awarded claimant's counsel an attorney's fee of \$3,551.25.

On appeal, employer contends that the district director erred in increasing the hourly rate awarded to claimant's counsel due to the delay in payment of an attorney's fee. Specifically, employer argues that the district director's augmentation of claimant's counsel's hourly rate is tantamount to an award of interest on counsel's fee, which contravenes the holding of the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, in *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th

Cir. 1995). Claimant responds, arguing that an augmented hourly rate due to the delay in payment of an attorney's fee is in accordance with law. In his cross-appeal, claimant challenges the attorney's fee awards of the district director, contending that the district director erred by not augmenting the awarded hourly rate to \$250, and by failing to consider counsel's request for an additional four hours in each fee petition with respect to counsel's request for augmentation. Employer responds, urging the Board to reject claimant's arguments.

The Board has held that in light of the United States Supreme Court's decisions in *Missouri v. Jenkins*, 491 U.S. 274 (1989), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), it is clear that consideration of enhancement for delay is appropriate for fees awarded under Section 28 of the Act, 33 U.S.C. §928. See *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995);¹ see also *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991). In *Jenkins*, the Supreme Court, in considering a fee award made under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, held that "enhancement for delay in payment is, where appropriate, part of a 'reasonable attorney's fee.'" *Jenkins*, 491 U.S. at 282. The Court reasoned that fees are to be based on market rates for services rendered, and compensation received by counsel several years after services are rendered is not equal to the same dollar amount received for services promptly paid when performed. Thus, there must be an "appropriate adjustment for delay in payment – whether by application of current rather than historic hourly rates, or otherwise . . ." *Id.*, 491 U.S. at 284. In *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 13 BLR 2-364 (1990), the Court upheld the constitutionality of the attorney's fee provisions of the Black Lung Benefits Act, indicating that 33 U.S.C. §928 requires that the fees awarded be reasonable, and that the agency has included a requirement that fees compensate for delay. See also *Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982)(regulation at 20 C.F.R. §702.132 is sufficiently broad to include increased fee due to delay in appropriate cases). In *Dague*, the Court held that contingency fee enhancement is improper under federal fee-shifting statutes. Significantly, the Court specifically stated that its case law construing what is a "reasonable fee" under the various federal fee-shifting statutes applies uniformly to all of them. *Dague*, 505 U.S. at 562.

¹In *Nelson*, the Board specifically overruled previous Board decisions in *Fisher v. Todd Shipyards Corp.*, 21 BRBS 323 (1988), and *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988), which held that awards of increased hourly rates due to delay are an abuse of discretion. See *Nelson*, 29 BRBS at 97.

Contrary to employer's contention, the instant case is not controlled by *Boland*. In *Boland*, the Fifth Circuit declined the claimant's request of an award of interest on his counsel's fee, holding that there is no indication in the statute or the case law that interest is available on attorneys' fees granted under Section 28 of the Act. *Boland*, 41 F.3d at 1007, 29 BRBS at 51 (CRT). Unlike the instant case, however, the court in *Boland* was not presented with a situation where counsel requested an enhanced hourly rate due to delay in payment. Where such a situation exists, the courts and the Board, in accordance with *Jenkins*, have held that augmentation of an attorney's hourly rate may be appropriate where there has been a delay in payment of counsel's fee in order to fairly compensate counsel for services rendered. See *Johnson v. Director, OWCP*, 183 F.3d 112, 33 BRBS 55 (CRT)(9th Cir. 1999); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67 (CRT)(9th Cir. 1996); *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993); *Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987); *Bellmer*, 32 BRBS at 246; *Nelson*, 29 BRBS at 97. On appeal, employer requests that the Board overrule its previous holding in *Nelson*. We decline to do so, and hold that the district director did not abuse his discretion in awarding claimant's counsel an hourly rate greater than that which prevailed at the time his services were rendered due to the four year delay in payment of counsel's fee.

On cross-appeal, claimant asserts that the district director erred by not awarding counsel an augmented hourly rate of \$250 on each fee petition. Where a party requests an increase in counsel's hourly rate due to delay, the fact finder may adjust the fee based on historical rates to reflect its present value, apply current rates, or employ any other reasonable means to compensate counsel for delay. See *Jenkins*, 491 U.S. at 282, 284; *Nelson*, 29 BRBS at 97. In the instant case, the district director, in each of his awards of an attorney's fee, recognized that there had been a delay in the payment of counsel's fee, but determined that the delay was not extreme. Thus, the district director increased counsel's hourly rate to \$150 in each fee petition based on the current prevailing rate in the geographic area. With regard to the Compensation Order of November 3, 1999, which concerned work performed before the district director from November 1994 to December 1995, we hold that the district director applied a reasonable method of compensating counsel for the delay in payment by applying the prevailing hourly rate in the geographic area, and affirm his award of an augmented hourly rate of \$150. However, we hold that the augmented hourly rate contained in the district director's Compensation Order of November 2, 1999, cannot be affirmed. Counsel's fee petition in this regard concerned work performed before the district director in 1992, and thus seven years has elapsed between the time services were rendered and the time the fee was awarded. We hold that the delay in payment of counsel's fee in this regard was extreme, and note that claimant's counsel bears no blame for the delay, as he filed his fee application in 1994 for the work performed in 1992. See, e.g., *Anderson*, 91 F.3d at 1325, 30 BRBS at 69 (CRT); *Nelson*, 29 BRBS at 97-98. Accordingly, we remand the case to the district director to apply a reasonable means to compensate counsel for delay in payment of counsel's fee for work performed before the district director in 1992.

Lastly, claimant contends that the district director erred in not addressing counsel's

request for an additional four hours concerning each of the fee petitions based on time counsel spent in pursuit of the augmentation of the fee awards. In this regard, the Board has held that requests for fee enhancements are to be treated as supplemental fee petitions. See *Bellmer*, 32 BRBS at 246. Moreover, attorneys are entitled to a reasonable fee for time spent preparing fee applications under the Act. See *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd*, 195 F.3d 790, 33 BRBS 184 (CRT)(5th Cir. 1999), *cert. denied*, 120 U.S. 2215 (2000); *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996). In the instant case, counsel, on October 1, 1999, specifically requested that the district director add four hours of work to each fee petition based on work performed in pursuit of augmentation of his attorney's fee. As the district director did not consider this request in his fee awards, we remand the case to the district director to consider counsel's request.

Accordingly, the case is remanded to the district director for reconsideration consistent with this opinion. In all other respects, the Compensation Orders Awards of Attorney's Fee of the district director are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge