# Determining the Reasonable Hourly Rate: An Update on Recent Decisions and Evolving Issues

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In *Hensley v. Eckerhart*, the Supreme Court declared a "request for attorney's fees should not result in a second major litigation."[1] The Supreme Court also stated that in attorney's fee litigation, trial courts should not become "green-eyeshade accountants."[2] The goal in shifting fees "is to do rough justice, not achieve auditing perfection."[3] In fact, appellate courts should give substantial deference to the trial courts' determination due to their "superior understanding of the litigation."[4]

Despite this guidance, attorney fee litigation and awards under the Longshore and Harbor Workers' Compensation Act often becomes complex, protracted, and heavily scrutinized by appellate courts. This article discusses some of the new and evolving issues in attorney's fee litigation under the Longshore Act; focusing specifically on reasonable hourly rates.

## 1. Governing Law:

Under Section 28 of the Longshore and Harbor Workers' Compensation Act a prevailing claimant's attorney is entitled to a "reasonable attorney's fee" upon successful prosecution of a claim.[5] An attorney's fee award should "reasonably commensurate with" the necessary work completed in the matter and consider the quality of the representation, the complexity of the legal issues, and the amount of

[1] 461 U.S. 424, 437 (1983).
[2] *Fox v. Vice*, 663 U.S. 826, 838 (2011).
[3] *Id.*
[4] *Id.*
[5] 33 U.S.C.S § 928(a). *See also* 20 C.F.R. §§ 702.132, 802.203. Successful prosecution occurs when the claimant establishes entitlement to some sort of relief. Relief or "compensation" under Section 28 is a generic term which encompasses all forms of potential relief available to the claimant including disability, medical benefits, and death benefits. *Timmons Jacksonville Shipyards, Inc.*, 2 BRBS 125 (1975).

benefits awarded.[6] Case law addressing reasonable fees under other federal fee-shifting statutes is also applicable to fee determinations under the Longshore Act.[7]

**2. The "Lodestar" Method:**

Under the Longshore Act, attorney's fees are calculated using the lodestar method.[8] The lodestar "is the product of reasonable hours times a reasonable rate."[9] This formula yields a fee that is presumptively "reasonable" under federal fee-shifting statutes.[10] The purpose of the lodestar method is to produce an objective award that "roughly approximates" the fee the prevailing attorney would have received if he or she had represented a paying client.[11]

In *Kenny A.*, the Supreme Court explained the "lodestar method is not perfect, but it has several important virtues."[12] First, the lodestar method considers the prevailing market rates in the relevant market.[13] Therefore, it produces an award which "*roughly* approximates" the fee the attorney would have received had they represented a paying client instead.[14] Second, the lodestar method "is readily administrable."[15] It is an objective approach which narrows the trial judge's discretion, permits meaningful judicial review, and produces reasonably predictable results.[16]

The Supreme Court also enumerated several policy considerations that support the lodestar method.[17] For one, the "reasonable" fee calculated using the lodestar method encourages capable attorneys to represent non-paying clients with the promise of fair compensation upon successful prosecution.[18] Second, the lodestar method considers several relevant factors that contribute to a "reasonable" attorney's fee award.[19] For instance, the lodestar assumes the number of billed hours

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[6] 20 C.F.R. § 702.132.
[7] *See City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 110 n.3 (2010).
[8] *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). *See e.g.*, *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 227 (4th Cir. 2009); *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1053 (9th Cir. 2009).
[9] *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564 (1986).
[10] *Purdue v. Kenny A.*, 559 U.S. 542, 553-54 (2010).
[11] *Kenny A.*, 559 U.S. at 551; *Hensley*, 461 U.S. at 433.
[12] *Kenny A.*, 559 U.S. at 551.
[13] *Id.* (citing *Blum v. Stenson*, 465 U.S. 886, 895 (1984).
[14] *Id.* (emphasis in original).
[15] *Id.* at 552 (citing *Hensley*, 461 U.S. at 433).
[16] *Id.*
[17] *Id.*
[18] *See id.*
[19] *Id.* at 553.

reflects the "novelty," "complexity," and "attorney's performance generally" in a case.[20]

These factors also support the rationale for applying the lodestar method in cases arising under the Longshore Act. For instance, the Act forbids attorneys from charging fees to their clients under threat of fine and/or imprisonment.[21] Thus, the lodestar method ensures that capable attorneys take on Longshore clients with the promise that they will receive a reasonable fee in exchange for successful prosecution.[22]

### 3. Determining the Relevant Community:

The lodestar method requires a determination of the "prevailing market rate" in the "*relevant community*."[23] If an improper market is used, there is a risk counsel is either over- or undercompensated.[24] Administrative Law Judges ("ALJs"), the Benefits Review Board ("BRB" or "Board"), and District Directors ("DDs") have discretion to determine the "relevant community," so long as they provide adequate justification for their decision.[25]

The traditional approach to the "relevant community" analysis is the "forum rule," which dictates the relevant community is the location in which the forum court sits.[26] This rule is simple and presumably effective.[27] The D.C. Circuit Court noted "[u]sually no problem arises in choosing the relevant community because the lawyers work in the community in which the suit was brought. The difficulty arises when lawyers come from out of town to litigate the suit."[28]

In Longshore cases it is quite common for attorneys to live in different cities from their clients and the ALJ's office. In other words, it is common the forum, claimant, counsel, and subject matter of the litigation are not in the same geographic location. This issue is starker in Defense Base Act cases in which claimants are oftentimes foreign nationals injured overseas. Furthermore, due to the COVID-19 pandemic and the expanding use of videoconferencing technology, many ALJs

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[20] *Id.* at 552 (citing *Del. Valley Citizens' Council for Clean Air*, 478 U.S. at 566).
[21] 33 U.S.C.S. § 928(e); 20 C.F.R. § 702.132(a).
[22] *See Christensen*, 557 F.3d at 1053-54.
[23] *Kenny A.*, 559 U.S. at 551 (emphasis added).
[24] *See id.* at 552 (cautioning that attorneys fee awards should not produce windfalls or improve the financial lot of attorneys).
[25] *Shirrod v. Dir., OWCP*, 809 F.3d 1082, 1086 (9th Cir. 2015) (citing *Christensen*, 557 F.3d at 1055).
[26] *Polk v. N.Y. State Dep't of Corr. Servs.*, 722 F.2d 23, 25 (2d Cir. 1983); *Christensen*, 557 F.3d at 1053; *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997); *ACLU v. Barnes*, 168 F.3d 423, 437 (11th Cir. 1999); *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 140 (8th Cir. 1982); *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 317 (4th Cir. 1988); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 726 F.3d 403, 412 (3d Cir. 2013); *Davis Cnty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. United States EPA*, 169 F.3d 755, 758 (D.C. Cir. 1999).
[27] *Hanson*, 859 F.2d at 317; *Donnell v. United States*, 682 F.2d 240, 251 (D.C. Cir. 1982).
[28] *Donnell*, 682 F.2d at 251.

conduct entirely remote hearings in which attorneys can represent clients from virtually anywhere.

These factors challenge the applicability of the forum rule because the location in which the forum court sits often has little to no connection to the claimant, counsel, or subject matter of the litigation. The Circuits differ on their reliance on the forum rule and the circumstances that permit exceptions to the rule.

The Second Circuit generally applies the traditional forum rule, which states the relevant community is the location in which the forum court sits.[29] In applying Second Circuit law to Longshore cases, the BRB has found the location where the forum/court sits is the location of the presiding ALJ's office.[30] For example, in *Mbule*, the BRB held because the ALJ's office was "in Newport News, Virginia, the administrative law judge did not err in concluding that the relevant community for determining the prevailing market rate for counsel's services is Newport News.[31] The BRB rejected Employer's assertion that it "was not logical to use a prevailing market rate in Newport News" even though there was no hearing held in the case and claimant's counsel worked and resided in Michigan.[32] Specifically, the BRB noted, "[t]his is not a case in which the 'out-of-town' counsel seeks a higher rate than that in the prevailing forum."[33]

However, Second Circuit also recognizes the presumption in favor of the forum rate can be rebutted in the circumstance that a party obtains out-of-district counsel from a district with a higher rate than the forum.[34] This exception to the forum rule applies in cases which require the expertise of non-local attorneys or where a reasonable client would have selected an out-of-district counsel because doing so would likely produce a substantially better result.[35] This exception permits a claimant who hires a longshore attorney who lives and works in a more expensive market than that of forum market, to recover their home rates as opposed to the lower forum rate. For instance, in *O'Kelley*, the Board awarded a fee based on the hourly rate in Atlanta where counsel's offices were located, even though the hearing

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[29] *Serv. Emps. Int'l, Inc. v. Dir. OWCP*, 595 F.3d 447, 454 (2d Cir. 2010); *Polk*, 722 F.2d at 25. *See also Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany*, 522 F.3d 182, 190-91 (2d Cir. 2007), *abrogated on other grounds by*, *Simmons v. N.Y. City Transit Auth.*, 575 F.3d 170, 174 (2d Cir. 2009).

[30] *See Mbule v. EOD Tech., Inc.*, No. 11-0733, slip op. at 3 (BRB July 24, 2012) (unpub.) (affirming the ALJ's finding that Newport News, Virginia is the relevant market). *See also Wakami v. SOC-SMG, Inc.*, 2018-LDA-00671, at 4 (ALJ Mar. 19, 2021).

[31] *Mbule* at 3. (citing *Arbor Hill*, 422 F.3d 182; *McDonald* 45 BRBS 45).

[32] *Id.* at 2-3.

[33] *Id.* at 3 (citing *Arbor Hill* 522 F.3d 182).

[34] *Simmons*, 575 F.3d at 174 (explaining a presumptively reasonable fee boils down to what the minimum a reasonable paying client would pay to litigate the case effectively).

[35] *Id.* at 175 (noting district courts may deviate from the forum rule where litigants show "the case required special expertise beyond the competence of [forum district] law firms") (internal citations omitted).

was held in Savannah, Georgia.[36] But the fee applicant might have to show there were no local attorneys the claimant reasonably could have hired.

However, the Second Circuit has refused to directly address the opposite situation in which the forum rate (for example, New York City) is higher than counsel's home rate (say, Covington, Louisiana).[37] The Board has also yet to address this issue under Second Circuit law and the Longshore Act.

The Ninth Circuit also recognizes that in civil litigation the "relevant community" is the forum in which the district court sits.[38] But since cases under the Longshore Act do not involve the district courts, the Ninth Circuit clarified that other indicia must be used to determine the "relevant community."[39] Accordingly, the "relevant community" determination should focus on the location in which the litigation "took place".[40] Indicia might include the location of counsel, the location of the client, and the location of the ALJ.[41]

For example, in a case arising in the Ninth Circuit, the Board held the proper market rate was Washington D.C. because counsel's office was in D.C.[42] Thus, counsel's overhead costs were based on the market conditions of D.C. and not the forum where the ALJ sat.[43] Additionally, counsel only participated in the case at the appellate level before the BRB in D.C. and had no contacts with the local area where the claimant resided.[44] On the other hand, in *Orpilla*, the BRB affirmed Hawaii was the relevant community even though claimant's counsel worked out of San Francisco, because the claimant lived in Hawaii, the injury occurred in Hawaii, the employer operated out of Hawaii, and counsel inserted himself into the Hawaii legal market by actively soliciting clients there.[45]

In applying this approach to Defense Base Act cases, the Board upheld a decision in which the ALJ determined the relevant community was San Francisco even

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[36] *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). *See also Stanhope*, 44 BRBS at 109 (discussing that Hartford, Connecticut where counsel lived and worked is the relevant community in case litigated before the BRB in Washington D.C.).

[37] *See K.L. v. Warwick Valley Cent. Sch. Dist.*, 584 F. App. 17, 19 n.3 (2d Cir. 2015) (refusing to address other circumstances in which the district court may downwardly deviate from the forum rate presumption) (differentiating from *Davis Cnty. Solid Waste Mgmt.*, 169 F.3d at 758, which held that downward deviation from the forum rate was permissible when "the bulk of the work is done outside the jurisdiction of the court and where there is a very significant difference in compensation favoring [the forum district].").

[38] *Christensen*, 557 F.3d at 1053; *Barjon*, 132 F.3d at 500.

[39] *Shirrod*, 809 F.3d at 1087.

[40] *Id.*

[41] *See id.* (discussing Portland, Oregon was the relevant community because both employer and claimant's counsel maintain their offices there and that is where the hearing took place).

[42] *Beckwith v. Horizon Lines Inc.*, 43 BRBS 156, 158 (2009).

[43] *Id.*

[44] *Id.*

[45] *Orpilla v. Haw. Stevedores, Inc.*, BRB No. 18-0079, slip op. at 7-8 (BRB July 24, 2018) (unpub.)

though the hearing was held before an ALJ in Louisiana and the claimant lived in Oklahoma.[46] The BRB reasoned that because claimant's counsel was from San Francisco and the claim "may have required expertise not available in Oklahoma" a San Francisco rate was proper.[47] The BRB expressly rejected employer's argument the relevant community should be Oklahoma simply because claimant's injury became manifest in Oklahoma after he returned home from Afghanistan.[48] On the other hand, in *Blaine v. Dyncorp Int'l,* the ALJ found the relevant community was Missoula, Montana, even though counsel's office was in Houston, Texas, because claimant lived in Missoula at the time of hearing, which was also in Missoula.[49]

The opposite situation, in which claimant hires an attorney from a less expensive area of the country compared to the location of the ALJ, is unusual for traditional Longshore cases.[50] In fact, in many Longshore cases, claimants hire more experienced and well-regarded Longshore attorneys residing in expensive cities in California and Florida.

However, with foreign LDA cases as well as the changing nature of legal practice in general, the inverse is becoming more common. The remote nature of work post-COVID-19 and technology permitting remote hearings allows Longshore practitioners to practice from anywhere in the country. Accordingly, it is common for attorneys to live and practice in much cheaper cities than San Francisco, Washington, D.C., or Boston – but still appear remotely before ALJs in those cities.

On several occasions in non-Longshore cases the Ninth Circuit has refused to depart from the forum rule in cases where counsel practices in far less expensive legal markets than the forum and performs the bulk of his or her work in the less expensive market.[51] In fact, the Ninth Circuit recognized the forum rule is not perfect because it will at times under- or overcompensate certain attorneys.[52] The Ninth Circuit stated it favors the forum rule because of its objectivity and efficiency in producing uniform rates.[53] "Given the objectivity and efficiency concerns that motivated the forum rule, exceptions to it should not be adopted lightly."[54]

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[46] *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45, 45, 51 (2011).
[47] *Id.*
[48] *Id.* at 51 n.7 (explaining the injury occurred in Afghanistan not Oklahoma). *See also Dizaye v. L3 Communication-Titan Corp.*, 2007 LDA 00215, No. 02-146648, at 8 (ALJ June 27, 2023) (discussing that a claimant does not need to prove there was not a competent, local attorney he could hire in order to award his counsel their home rates. Under the DBA, retaining a distant specialist is reasonable.).
[49] 2014-LDA-00409, at 5-6 (ALJ Jan. 19, 2017).
[50] *See Sierra Club v. U.S. Env't Prot. Agency*, 339 F. App. 678, 679 (9th Cir. 2009).
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id. See also Bell v. SSA*, BRB No. 13-0055, slip op. at 5 (BRB Nov. 26, 2013) (unpub.) (awarding attorney's fee based on San Francisco rates although attorney's office was in San Diego); *Oddo v. Navy Exchange*, 2017-LHC-01255, at 4 (ALJ Aug. 31, 2018) (awarding fees based on Los Angeles rates even though attorney's office was in Jacksonville, Florida).

At the same time, under *Shirrod*, the Ninth Circuit continues to utilize the "indicia" approach for Longshore cases even though the Ninth Circuit has not expressly adopted the forum rule exception.[55] The indicia approach leaves open the possibility of awarding an attorney his or her lower home rate as opposed to the higher forum rate. For example, *Hudson v. L-3 Communications-MPRI*, the ALJ held Denver was the relevant community because all petitioner's work was done in Colorado, injuries occurred abroad, and no hearing was held; accordingly, none of the relevant factors pointed to San Francisco, the forum location, as the relevant community.[56]

The Eleventh Circuit's general rule is the "relevant market" is the "place where the case is filed."[57] If a fee applicant wants to recover a non-local rate because counsel is not from the location in which the case is filed, the fee applicant "must show a lack of attorneys practicing in that place who are willing and able to handle his claim."[58] Therefore, in *Coffey*, an Eleventh Circuit DBA case in which claimant's counsel operated out of South Florida but the hearing was held in Atlanta, the Board held the relevant community may be South Florida, but only if the fee applicant shows there were no available and competent counsel in Atlanta to represent claimant.[59]

The Fourth Circuit's approach is very similar to the Eleventh Circuit's approach.[60] The analysis starts with the community in which the court sits.[61] An out-of-district attorney's home rate may be used when "the complexity and specialized nature of a case may mean that no attorney, with the required skills, is locally available and the party choosing the attorney from elsewhere acted reasonably in making the choice."[62] However, the choice is unreasonable when a claimant hires an unnecessarily expensive attorney.[63]

The Seventh Circuit has considered an entirely different approach to the forum rule in Longshore cases. In *Jeffboat*, the Seventh Circuit stated that for specialized areas of law such as Longshore practice, the relevant community may be that

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[55] *See e.g.*, *Abed v. Mission Essential Personnel, Inc.*, 2014-LDA-00471, at 4-5 (ALJ Feb. 26, 2019); *Brimm v. Valley Power Sys.*, 2014-LHC-01582, at 25 (ALJ Feb. 7, 2019); *Anderson v. Haw. Stevedores, Inc.*, 2011-LHC-01015, at 3 (ALJ Dec. 29, 2016), *aff'd*, BRB No. 17-0281 (BRB Oct. 31, 2017).
[56] 2017-LDA-00065, at 5 (ALJ Jan. 3, 2018).
[57] *Barnes*, 168 F.3d at 437 (quoting *Cullens v. Georgia Dep't. of Transp.*, 29 F.3d 1489, 1494 (11th Cir. 1994)).
[58] *Id. See also Vital Pharm., Inc. v. Pepsico, Inc.*, 2022 U.S. App. LEXIS 15740, at 18 (11th Cir. 2022).
[59] *Coffey v. Serv. Emps. Int'l, Inc.*, BRB No. 17-0483 at 5 (BRB Feb. 19, 2019) (unpub.).
[60] *See Holiday v. Newport News Shipping & Dry Dock Co.*, 44 BRB 67, 68 (2010). *See also Hanson*, 859 F.2d at 317 (community in which the court sits is the appropriate starting point for selecting the proper rate).
[61] *Rum Creek Coal Sales v. Caperton*, 31 F.3d 169, 179 (4th Cir. 1994) (citing *Hanson*, 859 F.2d at 317).
[62] *Id.* (internal citations omitted).
[63] *Holiday,* 44 BRBS at 67.

of practitioners nationwide, as opposed to a particular geographic location.[64] The Seventh Circuit noted the word "community" as used in case law is not limited to simply the "local market area" where counsel works.[65] The court articulated the word "community" could just as well include a "community of practitioners."[66] Accordingly, Longshore practice could be considered a "national market."[67] The court also held there is no requirement that a claimant must first attempt to find local counsel before hiring an out-of-area attorney.[68]

Despite *Jeffboat's* declaration that the Longshore legal service market may be national in scope, the court still recognized that geographic submarkets have a large impact on supply and demand factors that affect rates.[69] In fact, in *Jeffboat* the Seventh Circuit affirmed counsel's Connecticut-based market rate evidence, based on where counsel practiced, as opposed to the Indiana-based evidence that employer relied on because the case was litigated in Indiana.[70]

Due to the national and international scope of DBA claims, several ALJs have embraced *Jeffboat's* suggestion that the relevant community should be the community of practitioners who litigate Defense Base Act claims throughout the country.[71] In following *Jeffboat*, however, a determination that there is a nationwide community of Longshore or Defense Base Act practitioners does not necessarily mean that all practitioners are afforded the same rate regardless of where they live and work.

For example, in *Taremwa*, a case governed by the law of the Second Circuit, the ALJ determined her own location in San Francisco had very little to do with the representation by claimant's counsel.[72] All filings were electronic, and any appearances were via videoconference.[73] Accordingly, the claimant was not limited in his choice of attorneys by their proximity to San Francisco.[74] Rather, claimant's counsel was able to complete all her work from her offices in Michigan.[75] The ALJ concluded these factors were sufficient to overcome the Second Circuit's presumption favoring the forum rule.[76] The ALJ also considered that "practice under the Defense Base Act is highly specialized work performed by attorneys in a national market."[77]

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[64] *Jeffboat LLC v. Dir., OWCP*, 553 F.3d 487, 490-91 (7th Cir. 2009).
[65] *Id.* at 490.
[66] *Id.* at 491.
[67] *See id.*
[68] *Id.*
[69] *See id.*
[70] *Id.*
[71] *See, e.g.*, *Taremwa v. Allied World Nat'l Assurance Co.*, 2020-LDA-00248, at 4 (ALJ Dec. 7, 2021); *Deacon v. Marine Builders*, 2018-LHC-00229, at 4 (ALJ Oct. 17, 2018).
[72] *Taremwa*, 2020-LDA-00248, at 4.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*

Thus, the ALJ found the relevant community to be "the community of practitioners who litigate Defense Base Act cases or perform similar services to such litigation.[78] Ultimately, the ALJ found claimant's counsel failed to meet her burden of establishing the requested rates.[79] Accordingly, the ALJ based the awarded rate on previous fee awards awarded to counsel in various geographic markets as well as the fees awarded in cases which also determined the relevant community was all Longshore and Defense Base Act practitioners.[80]

**4. Evidence Used in Determining a Reasonable Rate:**

Claimant's counsel carries the burden of establishing the reasonable rate. "[T]he burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."[81] Claimant's counsel must file an application for attorney's fees which states the "normal billing rate" for each person who worked on the matter.[82] A judge should not allow his or her subjective opinion of the attorneys or the case influence the fee award.[83]

But, because the Act forbids attorneys from charging fees to their clients, there is no "private market" for attorney's fees in Longshore cases.[84] This makes it challenging to determine the "prevailing market rate" because attorneys cannot simply point to the amounts being charged by other Longshore claimants' attorneys.[85] The circuit courts agree that regardless of the type of evidence the factfinder bases the hourly rate on, the factfinder cannot base his or her determination on a summary statement that the rate is warranted.[86] Rather, there must be sufficient explanation for the factfinder's determination to permit appellate review.[87] However, the circuits disagree on the best evidence to establish the reasonable rate.

Traditionally, evidence of reasonable rates included past Longshore fee awards by ALJs and the BRB, fee survey data, and affidavits from other practitioners. The Board and ALJs often heavily relied on past fee awards in similar

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[78] *Id.*
[79] *Id.* at 7-8.
[80] *Id.* (referencing fee awards in *Miakhel v. Worldwide Resources*, 2019-LDA-01089 (ALJ Apr. 30, 2020), *Deacon*, 2018-LHC-00229, and *Bary v. Global American Terminals, LLC*, 2012-LHC-02015 (ALJ Feb. 15, 2018).
[81] *Blum*, 465 U.S. at 896 n.11.
[82] 20 C.F.R. § 702.132(a).
[83] *See Kenny A.*, 559 U.S. at 558.
[84] *Christensen*, 557 F.3d at 1053.
[85] *See id. See also E. Assoc. Coal Corp. v. Dir., OWCP*, 724 F.3d 561, 571-72 (4th Cir. 2013).
[86] *See Kenny A.*, 559 U.S. at 558.
[87] *See id.*

Longshore cases within the same geographical area. However, in 2009, the Ninth Circuit began to depart from this traditional approach.[88]

The Ninth Circuit emphasizes that a reasonable rate should be based on rates charged to clients of private law firms for "similar" work, not necessarily the "same" work (*i.e.*, litigation under the Longshore Act).[89] The Ninth Circuit rejects exclusive consideration of past fee awards.[90] In *Christensen*, the Ninth Circuit reasoned that since there is no private market for attorney's fees, counsel should receive fees "commensurate with those which they could obtain by taking *other types* of cases."[91] Specifically, the Ninth Circuit identified that the Fourth Circuit's approach of relying exclusively on past ALJ or BRB awards was "problematic."[92]

In the Ninth Circuit's view, the flaw in limiting the determination of a market rate to previous fee awards is that this approach does not consider the "independently operating market governed by supply and demand."[93] In other words, relying only on past "court-established" rates ignores the current conditions of the marketplace and might potentially fail to provide rates that attract competent counsel.[94] *Christensen* asserts that courts who only consider past awards "engage in tautological, self-referential enterprise" and "perpetuate a court-established rate as a 'market' when that rate in fact bears no necessary relationship to the underling purpose of relying on the marketplace: to calculate a reasonable fee sufficient to attract competent counsel."[95] However, *Christensen* expressly permits consideration of past awards when the claimant fails to otherwise establish a reasonable rate.[96] In such a case, the factfinder must still enumerate why the fee applicant did not carry its burden with other evidence.[97]

The *Van Skike* decision in 2009 expanded upon the *Christensen* reasoning. The Ninth Circuit reiterated, "the relevant community must necessarily be defined *more broadly* than the LHWCA bar."[98] The court stressed that exclusive reliance on contemporaneous Longshore awards is contrary to the policy rationale behind fee-shifting statutes.[99] To encourage qualified attorneys to take cases from non-paying clients it is necessary to award counsel fees "commensurate with those they could

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[88] *See Christensen*, 557 F.3d 1049; *Van Skike v. Dir., OWCP*, 557 F.3d 1042 (9th Cir. 2009).
[89] *Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066, 1076 (9th Cir. 2021).
[90] *Christensen*, 557 F.3d at 1055.
[91] *Id.* at 1053-54 (emphasis added).
[92] *Id.* at 1053 (referencing *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245 (4th Cir. 2004)).
[93] *Id.* at 1054 (quoting *Student Pub. Interest Research Grp. of N.J. v. AT&T Bell Labs.*, 842 F.2d 1436, 1446 (3d Cir. 1988)).
[94] *See id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Van Skike*, 557 F.3d at 1047 (emphasis added).
[99] *Id.*

obtain by taking *other types of cases*."[100] Accordingly, the Ninth Circuit determined the ALJ's finding that the only appropriate "proxy market rate" was prior LHWCA fee awards was in error.[101] Since the prevailing market rate should be based on what the attorney could have earned if they had taken another, non-Longshore case, the ALJ should consider counsel's evidence including fees charged by commercial litigators in Portland, Oregon.[102]

To accommodate the *Christensen* and *Van Skike* holdings, factfinders rely on "proxy market rates" derived from the fees charged by attorneys practicing in different areas of law that utilize similar skills required in Longshore practice.[103] For example, in *Shirrod*, the Ninth Circuit held the average of rates from plaintiff personal injury civil litigation cases and plaintiff general civil litigation cases are appropriate proxy markets.[104] However, the court also held the BRB erred in relying on rates for state workers' compensation rates because state statute capped those fees, making them artificially low.[105] The court recognized that the "skills involved in resolving state workers'-compensation claims are similar to those involved in litigating in Longshore Act cases."[106] Nevertheless, the court explained that capped state workers' compensation fees do not reflect market conditions under which Longshore practitioners work because of their artificial cap.[107]

In the *Seachris* decision, the Ninth Circuit expanded even further on its principle that hourly rates under the Longshore Act must be based on the rates charged to clients of private law firms for "similar" work. In *Seachris*, the Ninth Circuit made five distinct holdings relevant to the hourly rate analysis: 1) the attorney satisfied the initial burden of producing satisfactory evidence establishing reasonableness of the requested fee; 2) the ALJ's rejection of petitioner's evidence as outdated was not supported by substantial evidence; 3) the ALJ's rejection of evidence of commercial litigation rates was plain error; 4) substantial evidence did not support the ALJ's rejection of the state bar survey data based on years of experience; and 5) substantial evidence did not support the ALJ's decision to include "general" practice area in the hourly rate analysis.[108]

First, *Seachris* held the ALJ erred in determining the fee applicant did not meet his initial burden.[109] In fact, the court held the fee applicant's evidence was

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[100] *Id.* (quoting *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir. 2008)) (emphasis added).
[101] *Id.* at 1044, 1047.
[102] *See id.*
[103] *See Shirrod*, 908 F.3d at 1090.
[104] *Id.*
[105] *See id.*
[106] *Id.*
[107] *See id.* at 1091.
[108] *See generally Seachris*, 994 F.3d 1066.
[109] *Id.* at 1077.

"more than sufficient to carry [his] initial burden of production."[110] Specifically, the fee applicant submissions included two affidavits from experienced practitioners, the 2012 OSB Survey, a 2014 Ninth Circuit Appellate Commissioner order, and a 2014 BRB decision and order.[111] The Ninth Circuit found the ALJs decision dismissing this evidence for being "too old to be useful" was not supported by substantial evidence.[112] The Court noted that while fee awards must be based on current and not merely historical market conditions, evidence of historical market conditions may nevertheless be appropriate "when it is the most current information available."[113]

*Seachris* also held the ALJ erred in dismissing evidence of rates in commercial litigation simply because "it is not the market that Petitioner operates in."[114] The Ninth Circuit agreed with the ALJ that there are differences between Longshore litigation and commercial litigation.[115] However, the proxy market approach necessarily requires the ALJ to rely on different types of law.[116] Accordingly, it was not proper for the ALJ to reject the commercial litigation fees, and yet rely on plaintiff civil litigation fees.[117] "Plainly, an ALJ may not reject commercial litigation as a comparator, arbitrarily, simply because commercial litigation attorneys may charge more than other attorneys."[118] "An adjudicator's function 'is not to hold the line' at a particular rate."[119]

Finally, the Ninth Circuit held that the ALJ erred by placing the fee applicant in the 75th percentile of attorneys instead of the 95th percentile.[120] "This was a judgment call that the ALJ could have reasonably resolved either way. We nonetheless vacate the ALJ's decision . . . because that decision appears to have been

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[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at 1077-78.
[114] *Id.* at 1078.
[115] *Id.* at 1079. "The ALJ's analysis is valid up to a point. There *are* differences between commercial litigation and LHWCA work. And it *is* reasonable, in identifying appropriate comparators, to distinguish between complex and non-complex litigation . . . Ultimately, however, the ALJ's reasoning fails for two distinct reasons. First, the ALJ appears to have conflated commercial litigation and complex litigation. Those two concepts are not equivalent. Although some commercial litigation qualifies as complex litigation, other commercial litigation does not, *e.g.*, a straightforward commercial debt collection case . . . Second, the ALJ's analysis proves too much. If commercial litigation differs from "straightforward" and "informal" LHWCA work, then so too do plaintiff civil litigation and litigation handled by general practitioners. Yet the ALJ relied on the market rates paid in these practice areas to establish [Counsel's] hourly rate. We can discern no rational basis for the ALJ's selective concerns about the differences between formal and informal litigation." *Id.* at 1079.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* (quoting *Moreno v. City of Sacramento*, 534 F.3d 1106, 1115 (9th Cir. 2008)).
[120] *Id.* at 1080.

influenced by an improper factor, namely, the ALJ's unwarranted irritation with a brief."[121]

*Seachris* focused heavily on the need to rely on fees charged by attorneys in "similar" fields of law. But *Seachris* also suggests that the ALJ may not reject the fee applicant's evidence without sufficient justification. Earlier in 2020 before the *Seachris* decision was issued, the Ninth Circuit denied review of a BRB decision which upheld the ALJ's decision rejecting the evidence proffered by claimant to establish the rate and instead relying on prior OALJ awards as well as 40 district court awards to obtain a sense of the market.[122] Based on the ALJ's massive survey of previous decisions, the ALJ determined the requested rates were not in the appropriate range.[123] The Board found this analysis sufficient on the grounds that it was fully explained.[124] Specifically, the BRB distinguished the holding from prior cases in which it was in error to rely on district court decisions because the ALJs did not adequately explain why they relied on district court decisions.[125] However, this decision was issued before the Ninth Circuit issued *Seachris.* Post-*Seachris*, the Ninth Circuit might be more wary of rejecting claimant's submitted fee decisions for not demonstrating "suitably similar work in a recent enough period to properly represent current market conditions."[126]

In sum, the Ninth Circuit's case law on this issue makes clear that the prevailing rate is ideally based on the fee the Longshore practitioner could have charged if he or she was not practicing under the Longshore Act, but instead engaged in a type of law that utilizes similar skills. While the fee applicant has the burden to establish the reasonable rate, the Ninth Circuit's approach puts more pressure on the opposing party to present evidence that similarly skilled attorneys are not making as much as the fee applicant's requested rate. The Ninth Circuit's approach to fee awards under the Longshore Act is peculiar, especially considering the Supreme Court's guidance that trial court judges should not become "green-eyeshade accountants," and work to "do rough justice, not achieve auditing perfection.[127]

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[121] *Id. Compare, with Iuvale v. Coastal Marine Servs.*, 2021 U.S. App. LEXIS 32978, at *4 (9th Cir. 2021) (finding the ALJ's explanations were "cogent and internally consistent, and we see no indication of 'improper purpose of holding down [applicant's] hourly rate.'").
[122] *Kupke v. Dir., OWCP*, 802 Fed. App. 290, 291 (9th Cir. Apr. 21, 2020); *Kupke v. Serve. Employees Int'l*, Inc., BRB No. 17-0359 slip op., ALJ Nos. 2014-LDA-00153/549/814, 2016-LDA-00368 (BRB Apr. 5, 2018) (unpub.).
[123] *Kupke*, BRB No. 17-0359, at 8.
[124] *Id.*
[125] *Id.*
[126] *Id.* at 3.
[127] *Fox*, 663 U.S. at 838. Under other statutes that permit attorney's fee awards, such as the Americans with Disabilities Act ("ADA"), the Ninth Circuit maintains that the trial court may "take into account their overall sense of a suit and may use estimates." *Ghadiri v. Carpet & Linoleum City*, 833 Fed. App. 106, 108 (Nov. 3, 2020) (citing *Fox*, 563 U.S. at 838). Under the ADA, the Ninth Circuit has upheld a fee decision where "the District Court did not use explicit mathematical calculations to

In contrast, the Fourth Circuit continues to indicate that evidence of prior Longshore fee awards alone is sufficient to establish the prevailing rate.[128] Compared to the Ninth Circuit, the Fourth Circuit does not prefer reliance on a proxy market based on fees charged in non-longshore cases. In *Newport News Shipbuilding & Dry Dock Co. v. Brown*, the Fourth Circuit held that evidence of fee awards in comparable cases is "generally sufficient to establish the 'prevailing market rates' in the 'relevant community.'"[129] Accordingly, where the Employer submits no counter evidence to show the hourly rate was unreasonable, evidence from past fee awards is sufficient.[130]

In *Holiday*, the Fourth Circuit reiterated its approach, stating "the BRB has the power to set awards with reference to its past determinations."[131] However, the Court ultimately held the BRB abused its discretion in basing the reasonable rate on a rate awarded ten years before.[132] "The BRB generally can look to previous awards in the relevant marketplace as a barometer for how much to award counsel . . . But, an hourly rate appropriate ten years ago, arbitrarily adjusted with no regard to the facts of the case or the lodestar factors, is not necessarily appropriate today."[133]

In *Eastern Associated Coal Corp.*, the respondent challenged the ALJs reliance on prior fee awards as evidence of the prevailing rate.[134] Respondent argued that prior fee awards can only serve as evidence of a market rate when the awards themselves were based on a market analysis.[135] The Fourth Circuit disagreed, reiterating that precedent permits the use of prior fee awards as evidence of the prevailing market rate.[136] In fact, the court expressly asserted the practice was not a violation of the APA, stating "[i]t is commonplace for courts in various fee-shifting contexts to take judicial notice of prior judgments and use them as prima facie evidence of the facts stated in them."[137] While prior fee awards do not actually set the

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determine the fee award" and rather "reduced the amount of fees requested to reflect a more reasonable rate." *Id.* (also endorsing the trial judge's reliance on past maximum fee rate awards). In other words, the Ninth Circuit upheld the trial judge's decision reduce the overall fee award to reflect what the trial judge believed was a more reasonable rate. *See id.*

[128] *E. Assoc. Coal Corp.*, 724 F.3d at 573.

[129] 376 F.3d at 251 (citations omitted).

[130] *Id.*

[131] *Holiday*, 591 F.3d at 227.

[132] *Id.* at 228.

[133] *Id.* (internal citations omitted).

[134] *E. Assoc. Coal Corp.*, 724 F.3d at 571. Note that Section 28 of the Longshore Act was incorporated into the Black Lung Benefits Act. 30 U.S.C.A. § 932(a).

[135] *E. Assoc. Coal Corp.*, 724 F.3d at 571.

[136] *Id.* at 572. *See also Bowman Coal Co. v. Dir., OWCP*, 539 F. App. 252, 252-53 (4th Cir. 2013).

[137] *E. Assoc. Coal Corp.*, 724 F.3d at 578 n.13.

market rate, they are "inferential evidence of the prevailing market rate."[138] Accordingly, prior fee awards are one of several barometers a court can rely on to determine the prevailing rate.[139]

In direct opposition to the Ninth Circuit's approach, the court concluded it was proper to rely on previous black lung fee awards because "the most reliable indicator of prevailing market rates in a black lung case will be evidence of rates allowed in other black lung cases, rather than rates in general civil litigation."[140] However, the Fourth Circuit also cautioned that prior fee awards are not the "controlling authority" when it comes to establishing the prevailing rate for later cases because rates must be able to change with market conditions.[141]

Likewise, the Sixth Circuit has held that while rates awarded in prior cases "do not set the prevailing market rate" because only the market can do that, rates from previous cases can provide inferential evidence of what the market rate is, just like state-bar-surveys.[142] However, the Sixth Circuit also noted reliance on earlier fee awards is not warranted in all instances, for example, where there is a relatively large number of similarly experienced attorneys in the same geographic location and practice area.[143] In such cases, there is likely "robust market rate" from which to compare the requested rate. *Id.* Prior awards are more helpful when there are only a small number of comparable attorneys in the community.[144]

The Seventh Circuit has also held "a previous attorneys' fee award is useful for establishing a reasonable market rate for similar work."[145] However, a fee applicant is not required to show his or her requested hourly rate has previously been upheld in another case.[146]

In the wake of *Seachris*, the BRB clarified that an ALJ still has the discretion to afford different weight to different pieces of evidence.[147] Specifically, it is within the ALJ's discretion to determine the appropriate percentile of attorneys that counsel falls under, so long as the ALJ "fully considers all relevant evidence, provides specific explanations for his findings, and does not rely on improper factors."[148]

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[138] *Id.*
[139] *Id.*
[140] *Id.* at 573.
[141] *Id.*
[142] *B&G Mining, Inc. v. Dir., OWCP*, 522 F.3d 657, 664 (6th Cir. 2008).
[143] *Id.*
[144] *Id. See also Maddox v. Lodestar Energy, Inc.*, 762 Fed. App.. 269, 272 (6th Cir. 2019).
[145] *Jeffboat*, 553 F.3d at 491.
[146] *Id. See also Nichols v. Ill. DOT*, 4 F.4th 437, 442 (7th Cir. 2021).
[147] *Miller v. Lynden Inc.*, BRB No. 22-0126, slip op. at 4 (BRB Mar. 22, 2023) (citing *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011)).
[148] *Id.* at 4-5 (citing *Seachris*, 994 F.3d at 1080).

The BRB has also held ALJs are not required to indiscriminately "accept the rates claimed by claimants' counsel, but, in the view of the 'inherently difficult' nature of establishing a market rate in a market in which there are no paying clients, 'the rates charged in private representations may afford relevant comparisons.'"[149] "The point of the market rate inquiry is to determine what counsel could earn for similar work, not, 'the same work.'"[150] Accordingly, in *Hernandez*, the BRB held the ALJ erred in rejecting a declaration from an attorney which addressed rates charged by private attorneys in the relevant community.[151] Again, if the ALJ rejects the fee applicant's evidence he or she must provide a specific and adequate explanation for why such evidence is insufficient.[152] Under *Christensen*, the ALJ may only rely on prior fee awards if the claimant fails to meet his or her burden of establishing the market rate.[153]

Furthermore, the BRB has clarified that the fee applicant must provide information regarding an attorney's skill, reputation, and experience to justify the requested rate.[154] Thus, the ALJ was proper in rejecting a fee applicant's evidence when she devoted "only one paragraph to extoll [her] credentials which included only two sentences about her background and no reference to her experience with the Act."[155]

The BRB has also noted neither *Seachris* nor *Shirrod* mandate that an ALJ consider rates awarded at the appellate level.[156] Rather, *Seachris* indicates appellate level awards "may be treated as persuasive authority."[157] The Board recognized that appellate work is significantly different from trial work and may justify a higher rate.[158] The Board reiterated that it is within the ALJ's discretion to find ALJ-awarded hourly rates are more "probative and comparable to the trial or hearing level work performed before her than past awards for appellate-level work."[159] In other words, if the ALJ gives a valid reason for rejecting appellate-level fee awards as evidence of the market rate, the Board will not disturb this finding.[160]

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[149] *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 54 BRBS 13, 14 (2020) (quoting *Blum*, 465 U.S. at 896 n.11).
[150] *Id.* at 15.
[151] *Id.*
[152] *See id.*
[153] *Id.*
[154] *Harper v. Temco, LLC*, BRB No. 22-0180, slip op. at 9 (BRB Dec. 14, 2023) (pub.).
[155] *Id.*
[156] *Bajric v. Fluor Conops. LTD.*, BRB No. 22-0364, slip op. at 7 n.9 (BRB Oct. 23, 2023) (unpub.).
[157] *Id.* at 8 (quoting *Seachris*, 994 F.3d at 1085 n.3).
[158] *Id.* at 7.
[159] *Id.* at 8.
[160] *Id. Bajric* also upheld the ALJ's reliance on prior ALJ feeawards because no more direct evidence of the market rate was available. *Bajric*, BRB No. 22-0364, at 7-8. Notably, both parties submitted evidence of prior ALJ fee awards, as well as the *2018 Real Rate Report* which provided evidence of a range of hourly rates based on geographic location, practice area, and years of experience. *Id.* at 8. The Board upheld the ALJ's hourly rate determination because she relied on all the relevant rate

However, in *Harper v. Temco, LLC*, the Board held the ALJ erred in rejecting counsel's evidence of market rates awarded at the appellate level because the ALJ failed "to provide a meaningful explanation justifying his differentiation between trial and appellate work."[161] The Board noted that a different billing standard need not be applied to trial and appellate work.[162] Accordingly, a mere statement that there are "differences between appellate and trial work" is not sufficient to justify rejecting the fee applicant's evidence of rates awarded at the appellate level.[163]

### 5. Other Factors Influencing the Rate:

Factors such as counsel's years of experience and demonstrated skill and expertise level are also considerations for the lodestar hourly rate.[164] The Board explained that years since admission to the bar, does not control the hourly rate determination, but higher rates are typically warranted to more experienced and skilled attorneys.[165] Reliance on fee survey data and prior fee awards (to the extent permitted), can confirm the requested rate with attorneys in the same geographic location with the same level of experience.[166] The determination of counsel's level of expertise is a judgment call by the factfinder, but it cannot be influenced by an improper factor such as irritation with a brief counsel filed on remand.[167]

Delay enhancement is permitted when there is a lapse in time between when the legal services occur and when the fee is awarded.[168] But such enhancement is only permitted when the delay in payment is so extreme or unexpected as to "render an otherwise reasonable fee unreasonable."[169] Accordingly, it may be appropriate to adjust the fee to reflect its present value when doing so would reasonably compensate counsel.[170] However, "delay enhancements" cannot just be an arbitrary

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evidence before her and "adequately explained her rationale for assessing the fee." *Id.* For another recent decision Board decisions see *Outlaw v. Huntington Ingalls Indus. Inc.*, BRB No. 19-0560, slip op. at 3 (BRB Mar. 3, 2020) (unpub.).

[161] *Harper*, BRB No. 22-0180, at 8.

[162] *Id.* at 8-9.

[163] *See id.* at 8.

[164] *See* 20 C.F.R. § 702.132(a); *Holiday*, 591 F.3d at 228; *Christensen*, 557 F.3d at 1053; *Christensen v. Stevedoring Services of Am.*, 43 BRBS 145 (2009), *modified in part on recon.,* 44 BRBS 39, *recon. denied,* 44 BRBS 75 (2010), *aff'd sub nom. Stevedoring Services of Am., Inc. v. Director, OWCP*, 445 F. App. 912 (9th Cir. 2011).

[165] *Christensen*, 44 BRBS 75, *denying recon. in* 44 BRBS 39 (2010), *modifying in part* 43 BRBS 145 (2009), *aff'd sub nom. Stevedoring Services of Am., Inc. v. Director, OWCP*, 445 F. App. 912 (9th Cir. 2011).

[166] *E. Assoc. Coal Corp.*, 724 F.3d at 575.

[167] *Seachris*, 994 F.3d at 1080. *See also Carter v. Caleb Brett LLC*, 757 F.3d 866, 869 (9th Cir. 2014) (discussing the appropriateness of different rates for attorneys with different levels of experience).

[168] *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989).

[169] *Hobbs v. Dir., OWCP*, 820 F.2d 1528, 1530 (9th Cir. 1987).

[170] *Nelson v. Stevedoring Services of Am.*, 29 BRBS 90 (1995) (holding that enhancement was warranted due to 11-year lapse in time between when the services were performed and the payment).

increase.[171] Delay enhancement should be based on either current rates or the present value of historical rates to fully compensate for all the work done during the litigation.[172]

Another factor of consideration is "contingency" or "risk of loss." In other words, the fact that claimant's counsel gambled with his or her services, knowing he or she would not get paid unless claimant prevailed. However, this factor is generally considered a part of the lodestar and is not an independent basis for enhancing the fee.[173] Contingency enhancements under fee-shifting statutes "would in effect pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail."[174] In Longshore cases, factors such as the risk of loss are incorporated into the normal hourly rate charged by counsel.[175] This is especially true considering Longshore claimants' attorneys can never charge their clients fees. Claimant's attorneys take a risk of loss on every single Longshore case they accept.

The courts are split on whether defense counsel's billing records are relevant for determining the prevailing plaintiff's entitlement to attorney's fees.[176] However, courts have generally rejected attempts to use defense counsel's billing rates as evidenced of the prevailing market rate.[177]

Finally, enhancement for "complexity" or "novelty" of a legal matter is a consideration when determining the reasonable number of hours and should not be a consideration when determining the reasonable rate.[178]

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*But see Anderson v. Dir., OWCP*, 91 F.3d 1322, 1325 n.3 (9th Cir. 1996) (noting counsel cannot recover for delays due to appeals of the fee award, as that would amount to an award of unauthorized interest).

[171] *See Nelson*, 28 BRBS 90.

[172] *Modar v. Mar. Services Corp.,* 632 F. App. 909, 910 (9th Cir. 2015) (quoting *In re Wash. Pub. Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994)).

[173] *See Dague*, 505 U.S. at 564 (explaining an attorney operating on a contingency fee basis "pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not"). *See also Hobbs*, 820 F.2d at 1529.

[174] *Dague*, 505 U.S. at 564 (emphasis in original).

[175] *Hobbs*, 820 F.2d at 1529-30.

[176] *Bajric*, BRB No. 22-0364, at 8-9.

[177] *B&G Mining, Inc.*, 522 F.3d 666 (explaining there was no error in ignoring evidence of rates paid to defense attorneys as they are more likely than claimants' attorneys to have a higher volume of work and to be paid promptly); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 665 n.18 (7th Cir. 1985).

[178] *Van Skike,* 557 F.3d at 1048. *See also H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41, 44 (2009); *Mitchell v. Clark Md. Terminals*, 1998 US. App. LEXIS 161310, at *4 (4th Cir. 1998) (noting that generally, the court must accept an attorney's normal billing rate unless the rate is "not reasonable or customary for an attorney of that professional status in the area where services were rendered." The nature and complexity of a case is reflected in the number of hours or overall fee awarded).

Ultimately, the landscape of laws and policies guiding Longshore fee litigation is ever-changing. While the Ninth Circuit has shifted its approach in determining the prevailing rate significantly over the past ten years, not all the circuits have done the same. Likewise, the circuit courts have yet to apply a number of evolving legal principles, such as the exceptions to the forum rule, to Longshore cases. Only time will tell how the circuits will resolve some of these evolving issues, but it is clear Longshore fee litigation remains a contentious and critical issue for Longshore practitioners, adjudicators, and parties.