

BRB No. 11-0338

BRUCE CHRISTENSEN )  
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 Claimant-Petitioner )  
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 v. )  
 )  
 STEVEDORING SERVICES OF AMERICA ) DATE ISSUED: 12/15/2011  
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 and )  
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 HOMEPORT INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Supplemental Order on Second Remand Awarding Attorney's Fee of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Frederickson, LLC), Portland, Oregon, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Order on Second Remand Awarding Attorney's Fee of Administrative Law Judge Jeffrey Tureck (2000-LHC-2200, 2201) 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 will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

We need not recount the full procedural history of this case as it is fully summarized in the Board's prior published decision. *B.C. [Christensen] v. Stevedoring*

*Services of America*, 41 BRBS 107 (2007), *recon granted*, BRB No. 07-0162 (May 28, 2008) (unpub.). In that appeal, the Board, *inter alia*, affirmed the administrative law judge's award to claimant's counsel of a fee for 12.5 hours of attorney services provided in 2006 based on an hourly rate of \$250. *Christensen*, 41 BRBS at 112-113. The Board modified the administrative law judge's prior fee awards to reflect an enhanced 2006 hourly rate of \$250 for all previously approved attorney services,<sup>1</sup> and the Board ordered an enhanced fee of \$1,750 for the 7 hours of services itemized in a 2004 fee petition and a fee of \$500 for 2 hours expended on claimant's reply to employer's objections to the 2006 fee petition. *Id.* at 115. Claimant filed a motion for reconsideration. In support of his motion, claimant submitted the affidavit of Attorney William B. Crow, a Portland, Oregon, attorney with expertise on the issue of attorney fees as additional documentation that claimant's counsel's requested hourly rate of \$350 for work performed in 2006 is in line with prevailing market rates for comparable Portland area attorneys performing comparable work. The Board granted claimant's motion and remanded for the administrative law judge to determine whether this affidavit warranted further consideration of an appropriate 2006 hourly rate. Order on Motion for Reconsideration at 2.

In his order on second remand, the administrative law judge adopted the hourly rates awarded by the Board to claimant's counsel for his services rendered on appeal in this case, which were: 2006 - \$350; 2007 - \$357.50; 2008 - \$370; 2009 - \$384; and, 2010 - \$392. Order at 2; *see Christensen v. Stevedoring Services of America*, 44 BRBS 39, 40 (2010), *modifying in part on recon.* 43 BRBS 145 (2009), *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, No. 10-73574, 2011 WL 3267679 (9<sup>th</sup> Cir. Aug. 1, 2011). The administrative law judge, therefore, awarded claimant's counsel an additional \$1,250 for 12.5 hours of services rendered in 2006 based on an hourly rate of \$350. The administrative law judge further awarded counsel \$1,050 for three hours expended in December 2006 to reply to employer's objections to his October 2006 fee petition.<sup>2</sup> Finally, the administrative law judge awarded claimant's counsel a fee of \$3,539.91 for nine hours of attorney services at

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<sup>1</sup>Specifically, 63 hours of attorney services in the January 31, 2003 fee petition and 8.75 hours of attorney services in the March 17, May 12, June 5, and July 8, 2003 fee petitions. *See Christensen*, 41 BRBS at 110 n.7.

<sup>2</sup>The administrative law judge had previously denied a fee for claimant's counsel's reply brief since he had adopted employer's objections to the requested hourly rate. Subsequently, however, the United States Court of Appeals for the Ninth Circuit and the Board agreed with the hourly rate arguments advanced in counsel's reply brief. *See Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9<sup>th</sup> Cir. 2009); *Christensen*, 44 BRBS at 40.

a rate of \$384.99, and one hour of legal assistant services at \$150, that were rendered in 2009 after the administrative law judge reopened the record for the parties to submit additional evidence and argument in light of the Board's remand order and the decision of the United States Court of Appeals in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9<sup>th</sup> Cir. 2009), which addressed, *inter alia*, claimant's counsel's appeal of the Board's fee award for time expended on claimant's initial appeal of this case.<sup>3</sup> See *Christensen v. Stevedoring Services of America*, BRB Nos. 03-0302, 03-0761 (Jan. 12, 2004) (unpub.).

On appeal, claimant alleges error in the administrative law judge's failure to award a fee that takes into account the delay in payment of a fee based on a market rate. Employer responds, urging affirmance. Claimant filed a reply brief.

Claimant contends that the administrative law judge erred by awarding a fee based on the market rates for 2006 and 2009, rather than an enhanced fee to compensate claimant's counsel for the delay in receiving a fee for time expended in 2006 and 2009. Claimant also contends that his counsel is entitled to an enhanced fee for 63 hours of attorney services enumerated in counsel's January 31, 2003 fee petition, 8.75 hours of attorney services in the March 17, May 12, June 5, and July 8, 2003 fee petitions, and 7 hours of attorney services itemized in the August 11, 2004 fee petition. In his reply brief, claimant submits that he should be awarded a fee for all attorney time expended on this case based on a 2011 market rate of \$400 per hour or more.

Where counsel timely raises the issue of the delay between the performance of counsel's services and the payment of his fee, this factor must be considered by the body awarding the fee in determining a reasonable attorney's fee. See *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9<sup>th</sup> Cir. 1996); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95, 96 (1997); *Nelson v. Stevedoring Services of America*, 29 BRBS 90, 96-98 (1995). In its 2007 decision, the Board modified the fee award to augment the fee for services itemized in counsel's 2003 and 2004 fee petitions to reflect the then-applicable 2006 rate of \$250. Moreover, four years elapsed between the time the services enumerated in the 2006 fee petition were provided and the administrative law judge issued his order on second remand on December 17, 2010. Thus, on the facts of this case, we agree with claimant that counsel is entitled to an augmentation of the hourly rate to account for delay in receiving payment

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<sup>3</sup>The administrative law judge also awarded claimant's counsel \$96.25 for one quarter-hour expended to draft a letter on August 20, 2009.

for these services, as well as for the 2003 and 2004 services.<sup>4</sup> *See Anderson*, 91 F.3d at 1323, 30 BRBS at 68-69(CRT); *Nelson*, 29 BRBS at 97-98.

The award of an attorney's fee at a current hourly rate is one method that may be utilized to compensate for delay. *See Allen*, 31 BRBS at 96. The administrative law judge, in rendering his fee award, implicitly determined that \$392 was a reasonable rate at the time his fee award was issued in December 2010 by adopting, *in toto*, the hourly rates the Board stated were applicable for claimant's counsel's services that were rendered from 2006 to 2010. Order at 2. Accordingly, we agree with claimant that the administrative law judge's fee award may be modified. We, therefore, modify the administrative law judge's order to reflect a fee award based on an hourly rate of \$392 for the 94.5 hours of attorney services rendered before the administrative law judge through December 2006.<sup>5</sup> We reject claimant's contention that counsel is entitled to an enhanced fee for services rendered from June to August 2009. The less than two-year delay from the time these services were performed to the issuance of the administrative law judge's fee order in December 2010 is not sufficient to warrant a fee enhancement.<sup>6</sup> *See Christensen*, 557 F.3d at 1056, 43 BRBS at 10(CRT).

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<sup>4</sup>The services in the 2003, 2004 and 2006 itemized in the 2006 fee petitions concerned the merits of claimant's entitlement to benefits. *See Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9<sup>th</sup> Cir. 1996).

<sup>5</sup>Employer agrees that remand is unnecessary since the administrative law judge used the market rates stated by the Board in *Christensen v. Stevedoring Services of America*, 44 BRBS 39 (2010). Employer's Response Brief at 3.

<sup>6</sup>Moreover, we reject claimant's contention that the fee enhancement should be based on the market rate for 2011, which is after the administrative law judge issued his decision.

Accordingly, the administrative law judge's Supplemental Order on Second Remand Awarding Attorney's Fee is modified to award claimant's counsel an attorney fee for the 94.5 hours of services rendered through December 2006 based on an hourly rate of \$392. Employer is entitled to a credit for all attorney's fees already paid. In all other respects, the administrative law judge's Order on Second Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge