



BRB No. 17-0409

RAYMOND LEFFARD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EAGLE MARINE SERVICES)	
)	
Self-Insured)	
Employer-Respondent)	
)	
LOUIS DREYFUS CORPORATION)	DATE ISSUED: <u>Feb. 20, 2018</u>
)	
and)	
)	
ZURICH AMERICAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Approving Attorney’s Fees of R. Todd Bruininks, District Director, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Daniel P. Thompson (Thompson & Delay), Seattle, Washington, for claimant.

Raymond H. Warns, Jr. (Holmes, Weddle & Barcott), Seattle, Washington, for Eagle Marine Services.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Approving Attorney’s Fees of District Director R. Todd Bruininks (OWCP Nos. 14-143398, 14-146617, 14-152124) 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 it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant filed claims against two employers, Eagle Marine Services (EMS) and Louis Dreyfus Corporation (LDC), for injuries to his left bicep, left hand, and right shoulder. The parties reached a settlement regarding these claims, which Administrative Law Judge Pulver approved in November 2011. On December 6, 2011, claimant’s counsel filed a fee petition with the district director for work performed before the Office of Workers’ Compensation Programs (OWCP), seeking an attorney’s fee totaling \$9,540, representing 31.8 hours at an hourly rate of \$300.¹ EMS and LDC, in separate briefs, filed objections to the fee petition and counsel filed a reply brief, which included a request for an additional fee of \$3,000 in attorney’s fees (10 hours of attorney work at an hourly rate of \$300) for preparing the reply.

On February 8, 2016, counsel filed with the district director an updated declaration in support of his 2011 fee petition.² At this time, counsel requested that his 2011 fee petition be amended to reflect an hourly rate of \$350 for all services performed before OWCP in this case. EMS again filed objections, including to the requested hourly rate. EMS maintained that counsel’s hourly rate should be limited to the \$250 hourly rate awarded by Judge Pulver in this case.³ Counsel filed a reply, which included a request for an additional \$1,863 in attorney fees (5.4 hours of attorney work at an hourly rate of \$325 and 1.2 hours of paralegal work at an hourly rate of \$90), and EMS filed a sur-reply.

¹The services in the fee petition were performed between December 2008 and September 2009.

²The district director stated that the delay was the result of the parties “attempting to resolve the fee issue informally,” with counsel continuing “to agree to extensions for employer/carrier to file additional objections” to his fee petition. Order at 6.

³In his Order dated October 24, 2012, Judge Pulver awarded counsel a fee of \$39,325, representing 157.3 hours of attorney services at an hourly rate of \$250, and \$3,886.36 in costs. Judge Pulver apportioned the fee between the two employers: 75 percent to be paid by EMS and 25 percent to be paid by LDC, pursuant to the ratio of liability set forth in the settlement agreement. On appeal, the Board affirmed the \$250 hourly rate finding because it fell within the range of rates established by the evidence upon which Judge Pulver relied. *Leffard v. Eagle Marine Services*, BRB No. 13-0199 (Jan. 17, 2014) (Boggs, J., concurring and dissenting) (unpub.).

In his Order Approving Attorney's Fees dated April 7, 2017, the district director awarded counsel an attorney's fee totaling \$8,961, representing 35.7 hours of attorney work at an hourly rate of \$250 and .4 hours of paralegal work at an hourly rate of \$90. The district director specifically denied counsel's request that he receive his current market rate to account for the delay in payment of the fee. Order at 7. In accordance with the ratio of liability set forth in the settlement agreement, *see* n. 3, *supra*, the district director ordered EMS to pay \$6,720.75, and LDC to pay \$2,240.25, in attorney's fees to counsel.

On appeal, claimant's counsel challenges the hourly rate awarded for attorney work, including the district director's rejection of counsel's request for a delay enhancement.⁴ EMS responds, urging affirmance of the district director's award of an attorney's fee. LDC has not responded. Counsel has filed a reply brief.

Counsel contends the district director erroneously reused Judge Pulver's fee determination from 2012 to set the hourly rate, and improperly rejected, without explanation, counsel's documentation in support of his requested hourly rate. Counsel further contends the district director improperly failed to account for the delay in payment of the fee by not awarding counsel's current rate of \$350 for all services, which commenced in 2008. We agree that the district director's fee award cannot be affirmed.

The United States Supreme Court has held that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see also Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that a "reasonable" hourly rate must reflect the rate: (1) that prevails in the "community" (2) for "similar" services (3) by an attorney of "reasonably comparable skill, experience, and reputation." *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009). The burden is on the fee applicant to produce satisfactory evidence of his requested hourly rate. *Blum*, 465 U.S. at 896 n.11; *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010).

Claimant's counsel correctly contends that the district director's consideration of

⁴The district director's hourly rate award for paralegal work and reduction in the requested number of hours are affirmed as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2004).

the hourly rate issue is flawed. Although the district director generally outlined the documentation counsel submitted in support of his requested hourly rate, and noted that such documentation may constitute “satisfactory evidence of the prevailing market rate,” Order at 3, he did not specifically discuss counsel’s evidence or explain why he rejected counsel’s evidence and found it insufficient to meet his burden to prove he is entitled to his claimed rate. *See generally Stanhope*, 44 BRBS 107 (rates awarded in recent cases may be inferential evidence of the prevailing market rates in the relevant community, but the adjudicator also must consider the evidence submitted by the parties regarding prevailing market rates); *H.S. [Sherman] v. Dep’t of Army/NAF*, 43 BRBS 41 (2009) (there must be a sufficient explanation for the rejection of counsel’s hourly rate evidence). We also cannot discern whether the district director considered the documentation submitted by counsel with his 2016 declaration.⁵ In addition, it appears from the district director’s order that he inappropriately considered the “novelty and difficulty of the issues involved” in setting the hourly rate. Order at 3. The complexity of the issues is not a market rate factor. *See Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT); *Sherman*, 43 BRBS 41. While a new rate determination need not be made in every case, *Christensen* 557 F.3d at 1055, 43 BRBS at 9(CRT), the passage of time in this case arguably makes Judge Pulver’s 2012 rate analysis outdated. Thus, the district director erred in summarily relying on Judge Pulver’s hourly rate determination. *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT); *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT) (while the adjudicators could reject the rate evidence provided by counsel, they erred in summarily relying on prior fee awards under the Act.).

Furthermore, we cannot affirm the district director’s award of an hourly rate of \$250 for all work performed in this case. In denying counsel’s request for a delay enhancement, the district director incorrectly noted that the delay is measured between the filing of the fee petition and the entry of a fee award. Order at 7. Rather, the issue of a delay enhancement concerns the lapse in time between when the legal services were performed and the award of a fee for those services. *Missouri v. Jenkins*, 491 U.S. 274

⁵This consists of two Washington State Superior Court decisions in which counsel was awarded hourly rates of \$425 and \$431; a Board order in which counsel was, without objection, awarded an hourly rate of \$375 for work before the Board; declarations from attorneys attesting to the reasonableness of an hourly rate of \$350 or more for counsel; a compensation order from the district director awarding a less-experienced attorney an hourly rate of \$330 for work in Portland, Oregon; evidence of a 19 to 36 percent greater cost of living for the relevant Seattle, Washington, market than in Portland; and the Board’s unpublished decision in *Hardman v. Marine Terminals Corp.*, 50 BRBS 149(UBD) (Aug. 29, 2016), in which the Board vacated an hourly rate of \$389 for another attorney in Portland, Oregon, in part, because it was not based upon a current rate.

(1989). The district director also denied a delay enhancement because he found that, as late as 2016, “the parties were attempting to resolve the fee issue informally” with claimant’s counsel continuing “to agree to extensions for employer/carrier to file additional objections.” Order at 7. It appears the district director denied the delay enhancement in this case because there were not “extraordinary circumstances” that resulted in “unexpected exceptional delay” such as where the delay was “unjustifiably caused by the defense.” *Id.* (citing *Kenny A.*, 559 U.S. at 556). However, the issue in *Kenny A.* concerned an enhancement to the lodestar for exceptional performance and the Supreme Court did not limit delay enhancements to situations where the defense unjustly caused the delay.

The Ninth Circuit has held that the precepts of *Jenkins* are applicable to the Act’s fee-shifting scheme. *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). In *Modar v. Maritime Services Corp.*, 632 F. App’x 909, 49 BRBS 91(CRT) (9th Cir. 2015), *vacating* BRB No. 13-0319 (Jan. 17, 2014), the court applied *Jenkins* and *Anderson*. In *Modar*, the district director awarded a delay enhancement that, in 2012, awarded 2008 rates for services performed in 2004 and 2005, which the Board affirmed. *Modar*, 632 F. App’x at 909, 49 BRBS at 91-92(CRT). The Ninth Circuit vacated the Board’s affirmance and remanded the case, holding it was erroneous to affirm an award that reflected neither current rates nor the present value of historical rates. *Id.*

For the foregoing reasons, we vacate the district director’s hourly rate determination for attorney work and remand this case for further consideration of this issue. On remand, the district director must address whether counsel’s documentation supports his requested hourly rates. If not, the district director must provide reasons for rejecting counsel’s evidence as well as for his determination of the applicable market rate. The district director also must reconsider counsel’s entitlement to a fee that accounts for the delay in payment of his fee. *Modar*, 632 F. App’x 909, 49 BRBS 91(CRT); *see Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT) (Ninth Circuit ordered a fee enhancement as a result of a 14-year delay). In addressing this issue on remand, the district director must evaluate the facts of this case, including the amount of time spent in trying to negotiate a fee, to determine whether a fee enhancement is warranted.

Accordingly, the district director's hourly rate determination for attorney work is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the district director's Order Approving Attorney's Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge