

RONALD GATES)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
TODD PACIFIC SHIPYARDS)	DATE ISSUED: 09/28/2010
)	
and)	
)	
LIBERTY NORTHWEST INSURANCE)	
CORPORATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order on Attorney Fees and the Order on Motion for Reconsideration of Order on Attorney's Fees of Karen Staats, District Director, United States Department of Labor.

Matthew S. Sweeting, Tacoma, Washington, for claimant.

Russell A. Metz (Metz & Associates P.S.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order on Attorney Fees and the Order on Motion for Reconsideration of Order on Attorney's Fees (Case No. 14-144477) of District Director Karen Staats 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The following facts and procedural history are gleaned from the pleadings and attachments filed with the district director and the Board by claimant's and employer's attorneys. Claimant sought compensation for injuries sustained as the result of a work-related accident which occurred on August 5, 2005. The parties reached a settlement which was approved by Administrative Law Judge William Dorsey pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), on February 26, 2008. This settlement, which resolved all issues except for claimant's entitlement to future medical benefits, provided that a separate Section 8(i) settlement application would be submitted for approval after the Center for Medicare and Medicaid Services (CMS) determined the amount to be paid by employer into a Workers' Compensation Medicare Set-Aside Arrangement.¹ Subsequent to approval of a Medicare Set-Aside amount by CMS, the parties presented for approval a second Section 8(i) settlement agreement addressing employer's liability for future medical benefits. This agreement, which was approved by the district director on February 23, 2009, specifically provided for the payment of attorney's fees and costs to claimant's counsel for his work related to the settlement of the claim for future medical benefits.² Claimant's attorney then filed a fee petition for work performed before the district director related to the settlement of future medical benefits in which he requested a fee of \$4,101.25, representing 9.65 hours of attorney services at an hourly rate of \$425. Employer responded to the fee request, challenging both the number of hours and the hourly rate sought by claimant's counsel.

¹ Under the terms of the first settlement agreement, employer paid claimant \$100,000 to resolve all liability for claimant's disability compensation. Following approval of this settlement, claimant's counsel was awarded \$20,000 in attorney's fees.

² The second settlement agreement provided for attorney's fees as follows:

- h. ATTORNEYS' FEES In pursuit of this claim for benefits, Claimant engaged the services of Matthew Sweeting. Mr. Sweeting was awarded \$20,000.00 following the previously approved Section 8(i) settlement. If Mr. Sweeting has additional fees and costs subsequent to the previously approved Section 8(i) settlement and payment, he will advise Employer's counsel of the amount, and the parties will attempt to negotiate a stipulated fee. If the parties cannot reach an agreement, Mr. Sweeting will submit his fee petition under separate cover. Mr. Sweeting is entitled to reasonable attorneys' fees and costs related to the resolution of future medical benefits in this case. However, Employer reserves the right to submit its objections to the hourly rates and/or specific items referenced in the fee petition, consistent with the provisions of Section 28 of the Act and the relevant case law.

In her Order on Attorney Fees, the district director rejected the evidence offered in support of counsel's requested hourly rate and reduced the hourly rate to \$235. After considering employer's objections to claimant's counsel's individual time entries, the district director disallowed a total of 3.35 hours. Thus, the district director awarded claimant's counsel a fee in the amount of \$1,480.50, representing 6.3 hours of attorney services performed at an hourly rate of \$235. The district director denied claimant's motion for reconsideration, affirming both her hourly rate determination and the disallowance of various itemized entries.³

On appeal, claimant challenges the district director's reduction of the requested hourly rate and the disallowance of various itemized entries. Employer responds, urging affirmance.

Claimant's counsel submitted evidence to the district director in support of his requested hourly rate, pursuant to the decisions of the United States Court of Appeals for the Ninth Circuit in *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).⁴ In both her Order on Attorney Fees and her Order on Motion for Reconsideration of Order on Attorney's Fees, the district director acknowledged the documentation offered to support counsel's hourly rate request but she rejected that evidence and summarily determined that \$235 is an appropriate rate for claimant's counsel's services in this case. See Order on Attorney Fees at 3; Order on Reconsideration at 1. The district director did not specifically address the Ninth Circuit's decisions in *Christensen* and *Van Skike* in determining the hourly rate to be awarded to claimant's counsel. See Order on Attorney Fees at 2. For the reasons stated in *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT), and *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT), we vacate the hourly rate determination of the district director, and we remand the case for the district director to determine a reasonable hourly rate in the "relevant

³ In his motion for reconsideration, claimant requested that an hourly rate of \$350 be approved, and submitted additional evidence in support of that rate.

⁴ In support of his original fee petition, claimant's counsel submitted his own declaration, a United States District Court (W.D. Washington) attorney's fee award to another attorney in an employment discrimination case; two stipulated attorney's fee awards to Attorney Terry Barnett in Washington state workers' compensation cases; the *Laffey Matrix* with adjustments from the federal Locality-Based Comparability Payments and Pay Increases in 2009 for General Schedule Employees; and a synopsis of a National Law Journal annual survey of billing rates for the nation's largest law firms. In support of his request for reconsideration, counsel submitted the deposition testimony of Attorney Nate Manakee regarding the fair market value of claimant's attorney's legal services.

community” consistent with those decisions, taking into account the evidence and arguments offered by the parties.⁵ See *Christensen v. Stevedoring Services of America, Inc.*, 43 BRBS 145 (2009), *modified in part on recon.* 44 BRBS 39 (2010), *recon. denied*, ___ BRBS ___, BRB No. 03-0302 (Sept. 23, 2010); *H.S. [Sherman] v. Dept. of Army/NAF*, 43 BRBS 41 (2009). On remand, the district director may again decline to rely on the evidence submitted by claimant’s counsel in support of his requested hourly rate, but if she does so, she must provide a reasoned explanation of her rejection of such evidence. See *Christensen*, 557 F.3d 1055, 43 BRBS 9(CRT).

Claimant further contends that the district director erroneously disallowed 1.5 hours itemized for work which the district director found was not reasonably necessary to protect claimant’s interests.⁶ See Order on Attorney Fees at 1-2. An attorney is entitled to a reasonable fee for work in pursuit of an attorney’s fee. See generally *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009). Here, the district director summarily disallowed work performed during the course of settlement negotiations that related to the inclusion of language in the settlement agreement establishing employer’s liability for claimant’s attorney’s fee on the basis that this work did not benefit claimant. As work performed to establish employer’s liability for an attorney’s fee is compensable, *see id.*, we vacate the district director’s disallowance of this work; on remand, the district director must award a reasonable fee for services necessary to claimant’s counsel’s successful pursuit of an employer-paid fee.

Claimant additionally assigns error to the district director’s disallowance of four-tenths of an hour of attorney time itemized on January 5, 2009 and February 2, 2009 on the basis that the documented activities were clerical in nature. While time spent by attorneys on traditionally clerical duties is not compensable, *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986); *Staffile v. Int’l Terminal Operating Co., Inc.*, 12

⁵ In *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT), the Ninth Circuit held that a “reasonable fee” should be calculated according to the “prevailing market rates in the relevant community;” such rates cannot be limited to those awarded in longshore cases in a geographic region, although such rates may provide guidance when the fee applicant fails to produce relevant market evidence. *Id.*, 557 F.3d. at 1055, 43 BRBS at 9(CRT). Additionally, in *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT), the court held that the hourly rate cannot be reduced due to the case’s lack of complexity. In this case, the district director cited to the “uncomplicated nature of this claim” in awarding counsel an hourly rate of \$235. This finding is contrary to the dictate of *Van Skike*.

⁶ The entries disallowed by the district director were dated August 13, 19 and 26, 2008, October 6, 2008, November 21, 2008, and December 17 and 27, 2008.

BRBS 895 (1980), we agree with claimant that the attorney services itemized in those entries were not clerical in nature. As the case before the district director involved settlement negotiations between the parties, it was necessary for claimant's counsel to communicate with his client and with opposing counsel. These two activities, although correspondence-related, are not clerical tasks involving routine cover letters or scheduling appointments. Rather, these activities required independent legal judgment as they involved the signing and filing of the proposed settlement agreement. *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *see Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994). Consequently, we modify the district director's fee award to reflect that counsel is entitled to a fee for the four-tenths of an hour disallowed by the district director for services performed on January 5, 2009 and February 2, 2009.

Accordingly, the district director's fee award is vacated in part and modified in part, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge