

BRB No. 10-0308

ESTATE OF ROBERTA A. STRAMIELLO)
(Widow of ANTHONY STRAMIELLO, Jr.))
)
 Claimant-Petitioner)
)
 v.)
)
 SERVICE EMPLOYEES) DATE ISSUED: 09/29/2010
 INTERNATIONAL, INCORPORATED)
)
 and)
)
 INSURANCE COMPANY OF THE STATE)
 OF PENNSYLVANIA)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Order Awarding Fees of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

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

PER CURIAM:

Claimant appeals the Order Awarding Fees (2007-LDA-0355) of Administrative Law Judge Jennifer Gee 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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). This is the second time that this case is before the Board.

Claimant¹ represents the estate of the now-deceased widow of the employee who was killed while in the course of his employment with employer in Iraq. Following the administrative law judge's approval of the parties' stipulations regarding claimant's entitlement to benefits under the Act, claimant's attorney filed a fee petition with the administrative law judge requesting a fee of \$5,342.53, representing 13.75 hours of attorney services at \$375 per hour, 1.5 hours of legal assistant services at \$120 per hour, and costs of \$6.28.

In her initial Order on Attorney Fees, the administrative law judge reduced the hourly rates sought by claimant's counsel and legal assistant to \$275 and \$110 respectively, approved the number of hours and the amount of costs sought by counsel, and consequently awarded a fee of \$3,952.53

On appeal, the Board vacated the administrative law judge's hourly rate determination for attorney and legal assistant services and remanded the case for the administrative law judge to determine reasonable hourly rates consistent with the decisions of the United States Court of Appeals for the Ninth Circuit in *Christensen v. Stevedoring Services of America*, 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). *Estate of R.S. [Stramiello] v. Service Employees International, Inc.*, BRB Nos. 08-0696, 08-0776 (Apr. 29, 2009)(unpubl.).²

On remand, the administrative law judge addressed the Ninth Circuit's holdings in *Christensen* and *Van Skike* and determined that, since counsel's services were rendered during the same time periods which were addressed by the Board in its decision following the Ninth Circuit's remand in *Christensen*, see *Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), on remand from 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), she need not make a new finding as to the relevant community and prevailing market rate. Consequently, utilizing the hourly rates awarded to claimant's counsel by the Board in *Christensen*, 43 BRBS 145, the administrative law judge awarded an attorney's fee of \$5,198.52, representing 13.75 hours of attorney services performed in 2008 at an hourly rate of \$325.50, 1.5 hours of attorney services

¹ The estate of the employee's widow is being represented by Merritt Yoelin.

² The Board's decision in this case, BRB No. 08-0696, was consolidated with an appeal of the fee award entered by the district director. BRB No. 08-0776. The district director's fee award was also vacated and the case remanded for further proceedings.

performed in 2009 at an hourly rate of \$338, 1.5 hours of legal assistant services performed in 2007 at an hourly rate of \$139.74, and \$6.28 in costs.³

On appeal, claimant challenges the hourly rates awarded by the administrative law judge for attorney services. Employer has not responded to this appeal.

Claimant contends that the rates for workers' compensation attorneys reflected in the 2007 Oregon Bar Survey are not "market" rates, and that consequently the administrative law judge erred in adopting the hourly rates inclusive of such figures as calculated by the Board in *Christensen*, 43 BRBS 145. The Board addressed this contention in claimant's motion for reconsideration of the decision in *Christensen*, 43 BRBS 145. The Board agreed with claimant that the rates for workers' compensation attorneys reflected in the Oregon Bar Survey should not be included in an hourly rate calculation. Accordingly, as the administrative law judge has adopted the Board's decision on this issue and for the reasons stated in *Christensen v. Stevedoring Services of America*, 44 BRBS 39 (2010), *modifying on recon.* 43 BRBS 145 (2009), *recon. denied*, ___ BRBS ___, BRB No. 03-0302 (Sept. 23, 2010), we modify the fee award of the administrative law judge to award claimant's counsel a fee at the hourly rates of \$370 for legal services rendered in 2008 and \$384 for legal services rendered in 2009.

Claimant further contends that the administrative law judge erred in not compensating counsel for delay in the payment of his requested fee. We reject this contention. The administrative law judge's initial fee award was entered in June 2008 for services rendered in 2007 and 2008. This delay in payment is not so egregious or extraordinary as to require a delay enhancement. *See Christensen*, 557 F.3d at 1056, 43 BRBS at 10(CRT). Moreover, as any further delay in payment was due to the appeals of the fee award, no enhancement for the delay in payment is appropriate. *See Anderson v. Director, OWCP*, 91 F.3d 1322, 1325 n.3, 30 BRBS 67, 69 n.3(CRT) (9th Cir. 1996).

³ After noting that the Board, in *Christensen*, 43 BRBS 145, had awarded claimant's legal assistant an hourly rate of \$150 for services performed in 2009, the administrative law judge adjusted this rate for 2007 by using the federal locality pay increases between 2007 and 2009.

Accordingly, the administrative law judge's fee award is modified to award claimant's counsel an attorney's fee in the amount of \$5,879.39, representing 13.75 hours of attorney services at \$370 per hour, 1.5 hours of attorney services at \$384 per hour, 1.5 hours of paralegal services at \$139.74 per hour, and \$6.28 in costs.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge