

BRUCE CHRISTENSEN)
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 Claimant-Petitioner)
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 v.)
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 STEVEDORING SERVICES OF AMERICA) DATE ISSUED: 09/23/2010
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 and)
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 HOMEPORT INSURANCE COMPANY)
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 Employer/Carrier-)
 Respondents) ORDER

Employer has filed a timely motion for reconsideration of the Board's May 13, 2010, Order in the captioned case, *Christensen v. Stevedoring Services of America*, 44 BRBS 39 (2010), *modifying in part* 43 BRBS 145 (2009). 20 C.F.R. §802.407(a). Claimant responds that employer's motion should be denied.

In its motion, employer contends that, in modifying counsel's hourly rate, the Board erred in excluding from the calculation the rates recorded in the 2007 Oregon Bar Survey for state workers' compensation attorneys. Employer contends the Board misunderstood the nature of attorney's fee awards under the Oregon workers' compensation statute. *See Christensen*, 44 BRBS at 40. Assuming, *arguendo*, that the Board's order reflects an incomplete assessment of the types of attorney's fee awards available under the Oregon statute, employer has not demonstrated error in the Board's exclusion of this category of work from its hourly rate calculation. Fees awarded by state administrative law judges are not necessarily based on market considerations, just as rates set by administrative law judges in longshore cases have been held to be non-market-based rates. *See Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). In addition, employer does not dispute that portion of the Board's Order stating that, to the extent the Oregon Bar Survey reflects rates payable to

defense counsel, such are not market rates.¹ *Christensen*, 44 BRBS at 40. Thus, we reject this contention of error.

Employer also contends that the recent Supreme Court decision in *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010), “calls into serious question” the assumption that claimant’s counsel’s years of experience should be compensated in every case by use of the 95th percentile rates in the Oregon Bar Survey. In this recent decision, the Supreme Court discussed many factors and “rules” relevant to determining a reasonable fee in a fee-shifting case and when a reasonable fee can be enhanced based on extraordinary results achieved. In the course of its decision, the Court stated the lodestar hourly rate should be adjusted “in accordance with specific proof linking the attorney’s ability to a prevailing market rate,” *id.* at 1674, thus suggesting to employer that a single factor such as years since admission to the bar should not be the sole basis for the lodestar hourly rate.

We do not disagree with employer that, generally, one factor, like years since admission to the bar, does not control an attorney’s hourly rate in every case in which he participates. Hourly rates for the same attorney can vary from case to case and, within one case, from level to level. *See B&G Mining, Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008). However, if an attorney is very experienced and skilled, a higher hourly rate for fewer hours is usually warranted.² In this case, claimant

¹ Moreover, claimant’s counsel avers that he has participated in only six cases under the state workers’ compensation scheme in the last three years and in only one has he been awarded a fee based on a fee petition he filed as opposed to a fee schedule. Thus, by excluding rates from state workers’ compensation cases, the Board has not excluded fees from a significant part of counsel’s actual practice.

² In *B&G Mining*, the Sixth Circuit observed the following:

It should be emphasized that “the market” for legal counsel is not a commodity market with a single price, but rather a service market with various price points based on education, experience, specialty, complexity, etc. By looking, for example, to the level of experience, an adjudicator could reasonably conclude that a more experienced attorney would command a higher market rate than a less seasoned one, *ceteris paribus*. That a less experienced attorney might command a rate of \$150/hour and a more experienced attorney might command a rate of \$300/hour would not offend the sensibilities of a reasonable client. Thus, an adjudicator might need to consider one or more of the “reflected” factors to determine where the particular attorney’s representation lies along the spectrum of the

ultimately was very successful in both the appeals on the merits and of the Board's attorney's fee award. *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Christensen v. Director, OWCP*, 171 F. App'x 162 (9th Cir. 2006). Thus, in this case, employer has not demonstrated error in the Board's selection of the 95th percentile rate from the 2007 Oregon Bar Survey, as adjusted. *Christensen*, 44 BRBS at 40. Therefore, we deny employer's motion for reconsideration.

Claimant's counsel has requested a fee for responding to employer's motion for reconsideration, seeking \$2,900 for 7.25 hours of attorney services at \$400 per hour. Employer has not responded to the fee petition. We award claimant's counsel an attorney's fee of \$2,842 for 7.25 hours at \$392 per hour. *Christensen*, 44 BRBS at 40; 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, employer's motion for reconsideration is denied. 20 C.F.R. §802.409. Claimant's counsel is awarded an attorney's fee of \$2,842, to be paid directly to counsel by employer.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

market for legal services. This and other courts have routinely referred to factors like experience and complexity in justifying a particular lodestar rate.

522 F.3d 665, 42 BRBS at 29(CRT).