BRB No. 07-0162

B. C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: 10/17/2007
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and the Supplemental Order on 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 Fredrickson, LLC), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand and the Supplemental Order on Remand Awarding Attorney's Fee (2000-LHC-2200, 2201) of Administrative Law Judge Jeffrey Tureck rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary,

capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case has previously been before the Board. To reiterate the facts and extensive procedural history relevant to the instant appeal, claimant sustained two separate back injuries in the course of his employment for employer on April 19, 1997 and on April 9, 1999. He filed claims for disability resulting from both work-related injuries. The only issues presented for resolution by the administrative law judge were claimant's average weekly wage for the 1999 injury and the application of the Section 6(b)(1) maximum compensation rate, 33 U.S.C. §906(b)(1), to the concurrent awards, as the parties agreed as to claimant's entitlement to benefits.

In his original Decision and Order issued on December 4, 2002, the administrative law judge awarded claimant permanent partial and permanent total disability and medical benefits in accordance with the agreement reached by the parties. With respect to the two contested issues, the administrative law judge first agreed with claimant that the applicable average weekly wage for his 1999 injury was $1,140.59. Next, the administrative law judge rejected claimant's contention that Section 6(b)(1), 33 U.S.C. 906(b)(1), does not limit the amount of compensation claimant may receive for concurrent awards; he therefore found that claimant's total compensation award is subject to the Section 6(b)(1) limitation of 200 percent of the applicable national average weekly wage.

Claimant's attorney subsequently submitted a fee petition to the administrative law judge requesting a fee of $15,345.00. Employer filed objections. Claimant replied to employer's objections, agreeing that a 2.5 hour reduction in attorney time for preparation of his closing argument regarding Section 6(b)(1) and a reduction in costs from $4,169.78 to $3,972.23 was proper, but otherwise urging that his fee as originally requested be approved. Claimant also requested an additional $475 fee for his reply to employer's objections.

In a Supplemental Order Awarding Attorney's Fee issued on April 17, 2003, the administrative law judge first reduced counsel's hourly rate to $200 on the basis that claimant was not fully successful in this litigation. Next, the administrative law judge deducted 2.5 hours for time spent preparing claimant's unsuccessful Section 6(b)(1) argument. The administrative law judge disagreed with employer's objection to the time itemized for preparation of the fee petition, but agreed with employer's objections to the payment of certain of the costs sought by claimant. Accordingly, the administrative law judge awarded claimant's counsel a total fee of $16,214.73, representing 60.5 hours of attorney time at $200 per hour, 4.5 hours of legal assistant time at $85 per hour, and $3,732.23 in expenses.

Claimant filed a motion for reconsideration, as well as a supplemental fee request, with the administrative law judge wherein claimant averred that the administrative law judge did not consider the additional $475 fee requested for claimant's reply to employer's objections, that the administrative law judge erred in reducing the hourly rate

for attorney services on the basis of his lack of success on a single issue where time spent on that unsuccessful issue also was deducted, and that the administrative law judge erred in deducting $240 from the $3,337.50 expense billed by claimant's vocational expert. Claimant requested an additional fee of $1,068.75, representing 4.5 hours at $237.50 per hour, for preparation of the motion for reconsideration.[1] In an Order on Reconsideration of Attorney's Fees, the administrative law judge reaffirmed his reduction of counsel's hourly rate from $237.50 to $200, on the basis that claimant was unsuccessful in the more significant of the two issues before the administrative law judge. The administrative law judge awarded claimant's attorney an additional $50 for his reply to employer's objections to his initial fee petition and an additional $150 for time spent attempting to settle the attorney's fee dispute. He further found that counsel is not entitled to a fee for the services related to the motion for reconsideration on the basis that the motion was almost completely unsuccessful.

Claimant appealed to the Board, challenging the administrative law judge's finding that the statutory maximum compensation rate set out in Section 6(b)(1) of the Act is applicable to this case, BRB No. 03-0302; claimant also appealed the administrative law judge's attorney's fee award, BRB No. 03-0761.[2] In a Decision and Order issued on January 12, 2004, the Board first affirmed the administrative law judge's

[1] Employer filed a response to claimant's motion for reconsideration and claimant replied to employer's response with both parties presenting argument on the issues of the cost of the vocational expert's bill, the reduction of counsel's hourly rate based on his lack of success on the Section 6(b)(1) issue, and counsel's request for additional fees. Claimant requested an additional fee of $356.25, representing 1.5 hours at $237.50 per hour, for his reply to employer's response to the motion for reconsideration. Thereafter, in an attempt to settle the attorney's fee dispute, the parties reached agreement only on the issue of counsel's entitlement to $200 of the $240 deducted by the administrative law judge from the vocational expert's expense. Claimant then requested an additional fee of $178.13, representing .75 hour at $237.50 per hour for time spent attempting to settle the attorney's fee dispute.

[2] While claimant's appeals were pending before the Board, he filed an action in federal district court to enforce the administrative law judge's award of attorney's fees and costs pursuant to Section 21(d), 33 U.S.C. §921(d); claimant also sought attorney's fees arising from the enforcement action itself. On October 17, 2003, employer paid the $16,614.73 in attorney's fees and costs that the administrative law judge had awarded. The federal district court dismissed claimant's enforcement action for lack of subject matter jurisdiction on the basis that claimant's compensation award was not final in light of his appeal to the Board, and this ruling was upheld by the United States Court of Appeals for the Ninth Circuit. *Christensen v. Stevedoring Services of America*, 430 F.3d 1032, 39 BRBS 79(CRT) (9th Cir. 2005).

determination that claimant's concurrent awards are subject to the Section 6(b)(1) limitation. With respect to claimant's appeal of the attorney's fee award, the Board agreed with claimant that, pursuant to the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 421 (1983), the administrative law judge committed legal error in reducing counsel's hourly rate on the basis that he did not prevail on the Section 6(b)(1) issue where the administrative law judge had also disallowed the hours spent on that issue. The Board therefore vacated the administrative law judge's reduction of counsel's hourly rate from the requested rate of $237.50 to $200, and remanded the case for a determination of an appropriate hourly rate for work performed on the issues on which claimant prevailed in accordance with *Hensley* and the applicable regulatory criteria, 20 C.F.R. §702.132.[3] *[B.C.] v. Stevedoring Services of America*, BRB Nos. 03-0302, 03-0761 (Jan. 12, 2004) (unpub.).

Claimant appealed the Board's decision on the Section 6(b)(1) issue to the United States Court of Appeals for the Ninth Circuit.[4] The Ninth Circuit reversed the Board's affirmance of the administrative law judge's determination that claimant's concurrent awards are subject to the Section 6(b)(1) maximum compensation rate, and remanded the

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[3] The Board also vacated the administrative law judge's disallowance of the time itemized for claimant's response to employer's objections to the fee request and work related to the motion for reconsideration, and directed the administrative law judge on remand to reconsider claimant's request for a fee for those services. The Board stated in this regard that the administrative law judge's disallowance of these hours was largely based on his rejection of claimant's argument that the administrative law judge committed legal error in reducing counsel's hourly billing rate on the basis of his failure to prevail on the Section 6(b)(1) issue.

[4] Following the Board's decision remanding the case to the administrative law judge for reconsideration of the attorney's fee award, claimant filed with the administrative law judge on August 11, 2004, a supplemental attorney's fee petition and a legal memorandum regarding the appropriate hourly rate for counsel's services. In his fee request and memorandum, claimant averred that he should be compensated at his current hourly rate of $250, rather than his previous hourly rate, for all of the services performed before the administrative law judge in this claim. Claimant further requested an additional fee of $1,750.00, representing 7 hours at $250 per hour for the preparation of his supplemental fee petition and legal memorandum. Employer responded, urging the administrative law judge to defer ruling on the attorney's fee until the Ninth Circuit entered a decision on claimant's appeal of the Section 6(b)(1) issue. By Order dated September 16, 2004, the administrative law judge declined to issue a decision regarding attorney's fees until the Ninth Circuit issued a decision on the Section 6(b)(1) issue. Claimant's subsequent appeal of the administrative law judge's September 16, 2004 Order was dismissed by the Board as interlocutory. *[B.C.] v. Stevedoring Services of America*, BRB No. 05-0113 (Nov. 29, 2004) (Order).

case for recalculation of claimant's compensation in accordance with the court's decision in *Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).[5] *Christensen v. Stevedoring Services of America*, 171 Fed. Appx. 162 (9th Cir. 2006). Thereafter, the Board remanded the case to the administrative law judge for further proceedings consistent with the Ninth Circuit's opinion.

In a Decision and Order on Remand, the administrative law judge amended his original Decision and Order to strike the proviso limiting claimant's combined disability awards to the Section 6(b)(1) maximum compensation rate consistent with the Ninth Circuit's opinion in this case. Next, the administrative law judge declined claimant's request to order that the award of interest on his past-due compensation be calculated on a compound, rather than simple, basis. Observing that he was required to reconsider the prior award of attorney's fees, the administrative law judge directed claimant's counsel to file a supplemental fee petition within 30 days. On October 23, 2006, claimant's attorney filed a fee petition, requesting a fee for 12.5 additional hours of attorney time at his current hourly rate of $350 and 2.5 additional hours of legal assistant time at a current hourly rate of $110 for services rendered subsequent to the previous fee petition filed on August 11, 2004. He further requested a fee for the 2.5 hours originally sought for preparation of argument regarding the Section 6(b)(1) issue, which the administrative law judge previously had denied. Lastly, claimant's counsel requested that the fee for all attorney services itemized in each of his fee petitions filed with the administrative law judge be based on his current $350 hourly rate. Employer responded, objecting that an hourly rate of $350 is excessive and that $250 is an appropriate current rate. Employer further objected to the seven hours of services itemized in the August 11, 2004, fee petition.[6] Claimant thereafter filed a reply to employer's objections, and requested an additional $1,050, representing three hours at $350 per hour, for preparation of such reply.

On February 12, 2007, the administrative law judge issued a Supplemental Order on Remand Awarding Attorney's Fee. With respect to claimant's original fee petition, the administrative law judge approved the 2.5 hours spent on the Section 6(b)(1) issue and further determined that the fee for the 63 hours of attorney time itemized in such fee petition should be awarded at an hourly rate of $237.50 rather than the $200 hourly rate that he had previously awarded. The administrative law judge also awarded a fee for the 8.75 hours itemized for claimant's reply to employer's objections to the original fee

[5] In its decision in *Price*, which was issued after the administrative law judge's and the Board's decisions in this case, the Ninth Circuit held that Section 6(b)(1) sets forth the maximum for each individual award, not for the combined awards.

[6] Employer agreed that claimant's attorney is entitled to a fee for the 2.5 hours spent on the Section 6(b)(1) issue and that $110 was an appropriate hourly rate for legal assistant services.

petition and for work related to claimant's motion for reconsideration at an hourly rate of $237.50. Next, the administrative law judge disallowed the seven hours itemized in counsel's August 11, 2004, fee petition. With respect to the October 23, 2006, fee petition, the administrative law judge approved the requested 12.5 hours of attorney time and found that $250 represented a reasonable hourly rate for those services; he additionally approved the 2.5 hours itemized for legal assistant services at the requested rate of $110 per hour. Lastly, the administrative law judge disallowed the three hours requested for claimant's reply to employer's objections to the October 23, 2006, fee petition. The administrative law judge awarded claimant's attorney a total fee of $24,755.36, subject to a credit to employer for the $16,614.73 in attorney's fees that it had previously paid October 17, 2003. *See* n.2, *supra*.[7]

On appeal, claimant challenges the administrative law judge's finding that the award of interest is to be calculated on a simple basis; employer responds, urging affirmance. Claimant also appeals the administrative law judge's attorney's fee award, and employer responds, urging that the Board affirm the fee award in part and modify the award in part.

Interest

Claimant contends that the administrative law judge's failure to require compound interest on claimant's award of past-due compensation constitutes legal error.[8] Specifically, citing the Board's holding in *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), *on reconsideration*, 17 BRBS 20 (1985), that the proper interest rate for interest on past-due compensation under the Act is the rate set forth at 28 U.S.C. §1961, claimant avers that such interest must be compounded annually consistent with Section 1961(b).[9]

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[7] This sum represents 63 hours of attorney services at $237.50 per hour, 4.5 hours of legal assistant services at $85 per hour, and $3,932.23 in costs itemized in the January 31, 2003 fee petition; 8.75 hours of attorney services at $237.50 per hour itemized in the March 17, May 12, June 5, and July 8, 2003 fee petitions; and 12.5 hours of attorney services at $250 per hour and 2.5 hours of legal assistant services at $110 per hour itemized in the October 23, 2006 fee petition.

[8] Interest is compounded when accrued interest is added to the principal and the whole is treated as new principal for the calculation of future interest. *Brown v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 160, 165 n.7 (1994), *citing* 45 Am. Jur. 2d Interest & Usury §83. *See also Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989).

[9] 28 U.S.C. §1961 (2005) provides in relevant part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court…. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-

Although there is no express provision in the Act for the payment of interest on past-due compensation, United States Courts of Appeals and the Board have uniformly approved interest awards as consistent with the Congressional purpose of ensuring that claimants receive the full amount of compensation due. *See Matulic v. Director, OWCP*, 154 F.3d 1052, 1059, 32 BRBS 148, 153(CRT) (9th Cir. 1998); *Sproull v. Director, OWCP*, 86 F.3d 895, 900-901, 30 BRBS 49, 52(CRT) (9th Cir. 1996); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 625, 25 BRBS 71, 76-77(CRT) (9th Cir. 1991), *aff'g Vanover v. Foundation Constructors, Inc.*, 22 BRBS 453 (1989); *see also Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 907-908, 31 BRBS 150, 152-53(CRT) (5th Cir. 1997); *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 910-11, 29 BRBS 1, 10(CRT) (3d Cir. 1994), *aff'g* 27 BRBS 260, 265 (1993); *Grant*, 16 BRBS at 269-70. Cases under the Act generally involve pre-judgment interest, *i.e.*, interest accrued on unpaid benefits during the period prior to issuance of the administrative law judge's Decision and Order. *See Matulic*, 154 F.3d at 1059, 32 BRBS at 153(CRT); *Jones v. U.S. Steel Corp.*, 25 BRBS 355, 359 (1992).

The Board held in *Grant*, 16 BRBS 267, that 28 U.S.C. §1961 is to be used as a guide in determining the proper interest rate applicable when awarding interest on past-due compensation under the Act. *Grant*, 16 BRBS at 270-71, *on reconsideration*, 17 BRBS at 22-23.[10] In holding that Section 1961 should serve as the guide for interest

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> year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
>
> (b) Interest shall be computed daily to the date of payment except as provided in Section 2516(b) of this title and Section 1304(b) of title 31, and shall be compounded annually.
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> *** * ***
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> (c)(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

[10] In utilizing 28 U.S.C. §1961 for guidance in determining interest rates for awards of pre-judgment interest under the Act, the Board was cognizant that Section 1961 is a post-judgment interest provision, applicable by its terms to awards of post-judgment interest on United States district court judgments. *See Grant*, 16 BRBS at 271. In its decision on reconsideration in *Grant*, the Board explained that because there is no general federal statute providing for pre-judgment interest on judgments of the United States district courts, Section 1961 represented the most appropriate guide to employ. *Grant*, 17 BRBS at 23 n.4.

awards under the Act, the Board in *Grant* specifically rejected the argument that the Board instead should apply the interest rate at 26 U.S.C. §6621, which is employed by the Internal Revenue Service (IRS) for over-and under-payments of taxes. *Id.*, 16 BRBS at 270-71. The Board has since consistently utilized Section 1961 for guidance in determining interest rates under the Act in accordance with its holding in *Grant. See Santos v. General Dynamics Corp.*, 22 BRBS 226, 228 (1989); *see also Meardry v. Int'l Paper Co.*, 30 BRBS 160, 164 n.3 (1996); *Brown v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 160, 163 (1994).

In *Santos*, 22 BRBS 226, the Board was similarly presented with the issue of whether interest on past-due compensation under the Act should be calculated on a simple or compound basis. The Board cited its holding in *Grant* that 28 U.S.C. §1961 provides guidance in determining the appropriate interest rate under the Act, explaining that Section 1961 had not actually been incorporated into the Act by virtue of the Board's decision in *Grant. Santos*, 22 BRBS at 228. The Board therefore held that the compounding provision at Section 1961(b) does not expressly authorize the compounding of interest on compensation awards under the Act.[11] *Id.* The Board acknowledged that compounding an award of pre-judgment interest may be appropriate in a particular case, but held that this result was not warranted on the facts presented in *Santos. Id.* Accordingly, the Board rejected the claimant's argument that compound interest was necessary to make him whole and to compensate him for not having the use of his money during the time when compensation was delayed. *Id.* at 227-28.

In the eighteen years since the Board's decision in *Santos* was issued, the Board consistently has held that, absent particular facts or circumstances that would warrant an award of compound interest, interest on past-due compensation should be calculated on a simple basis, *see Meardry*, 30 BRBS at 164 n.3; *Jones*, 25 BRBS at 360, and there are no United States Court of Appeals decisions in cases arising under the Act to the contrary. As the federal cases cited by claimant do not represent precedent that is directly contrary to that of the Board, we decline to overturn our longstanding precedent that, under normal circumstances, pre-judgment interest awards under the Act should be calculated on a simple basis.[12]

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[11] In this regard, the Board cited the general American rule that interest, when allowable, should be calculated on a simple, rather than compound, basis in the absence of express authorization otherwise. *Santos*, 22 BRBS at 228 (*citing Stovall v. Illinois Cent. Gulf R.R. Co.*, 722 F. 2d 190, 192 (5th Cir. 1984)).

[12] The federal decisions cited by claimant are not Longshore Act cases but, rather, involve various other federal causes of action. Specifically, claimant cites the statement by the United States Court of Appeals for the Seventh Circuit in *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-32 (7th Cir. 1992) that "compound prejudgment interest is the norm in federal litigation." The Seventh Circuit reaffirmed this statement in its subsequent opinion in *American Nat'l Fire Ins. Co. v. Yellow Freight Systems, Inc.*,

We further reject claimant's alternative argument that interest on past-due compensation should be awarded at the rate provided at 26 U.S.C. §6621, rather than at the 28 U.S.C. §1961 rate, an argument that was considered and rejected by the Board in its decision in *Grant*, 16 BRBS at 270-71. The Board's utilization of Section 1961 for guidance in determining the rate to apply to interest awards under the Act also represents longstanding Board precedent, and there are no circuit court decisions in cases arising under the Act to the contrary. There is no suggestion by claimant that the Section 6621 interest rate is widely applied to other federal causes of action in which that rate is not expressly made applicable by statute or regulation.[13] We therefore affirm the administrative law judge's award of simple interest on claimant's past-due compensation at the rate provided at 28 U.S.C. §1961.

Attorney's Fee Award

In challenging the administrative law judge's award of attorney's fees, claimant contends, first, that the administrative law judge's reduction in counsel's requested hourly rate of $350 to $250 lacks an evidentiary basis. In this regard, claimant argues that a recent Ninth Circuit decision involving an attorney's hourly rate in an ERISA case, *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942 (9th Cir. 2007), directly addresses the proper manner for arriving at a market hourly rate for an attorney's fee award and that this decision controls the issue herein. In *Welch*, the Ninth Circuit held that the plaintiff submitted evidence that met her burden of demonstrating that her attorney's requested hourly rates of $375 to $400 were consistent with the prevailing market rate.[14] *Id.*, 480

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325 F.3d 924, 937-38 (7th Cir. 2003), but specifically refused to adopt a rule that pre-judgment interest must be compounded as a matter of law. 325 F.3d at 938 n.11. *See also Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1555 (Fed. Cir. 1995) (specifically declining to rule that pre-judgment interest must be compounded as a matter of law). The circuit courts which have addressed the issue of interest have held that, as a general rule, the determination whether to award compound or simple pre-judgment interest is within the discretion of the trial court. *See, e.g., American Nat'l Fire Ins. Co.*, 325 F.3d at 937; *Hughes Aircraft Co. v. United States*, 86 F.3d 1566, 1575 (Fed. Cir. 1996); *EEOC v. Kentucky State Police Dep't*, 80 F.3d 1086, 1098 (6th Cir. 1996). *See also Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1071 (2d Cir. 1995)(determining whether to grant pre-judgment interest and the applicable rate is a matter for the district court's broad discretion).

[13] In cases arising under the Black Lung Benefits Act, simple interest on past-due benefits is paid at the 26 U.S.C. §6621 rate pursuant to a specific regulatory provision. *See* 20 C.F.R. §725.608(a), (d)(3).

[14] In *Welch*, the plaintiff supported her request for a fee based on hourly rates of $375 and $400 with two pieces of evidence: 1) declarations from four ERISA attorneys stating that they normally charge between $400 and $475 per hour, and 2) four district

F.3d at 947. The Ninth Circuit stated that the district court erred in reducing the hourly rate to $250 because, among other things, the court failed to explain how the evidence in the record supported an award based on an hourly rate of $250, which was significantly less than the hourly rates established by the evidence submitted by both parties. The Ninth Circuit concluded that the requested rates of $375 and $400 per hour were in line with the prevailing community rates based on the evidence submitted. *Id.* The Ninth Circuit remanded the case for further consideration, stating that the district court must presume the requested rates are reasonable but that it could reduce the requested rates based on a finding that the plaintiff's attorney performed below the level of expertise that would command those rates or on evidence demonstrating that the rates requested were unreasonable. *Id.,* 480 F.3d at 947-48.

In the instant case, claimant argues that the administrative law judge's reduction in the requested hourly rate is inconsistent with the Ninth Circuit's decision in *Welch.* We disagree. In *Welch,* the Ninth Circuit held that the plaintiff's evidence was sufficient to meet her burden of demonstrating that the requested rates were in line with the prevailing market rate. *Id.,* 480 F.3d at 947-947. In the present case, after fully addressing the documentation submitted by claimant's counsel in support of his assertion that $350 represents the prevailing community rate, the administrative law judge rationally concluded that such evidence was insufficient to support counsel's assertion. *See* Supp. Order on Remand at 3-5.[15] *See D.V. v. Cenex Harvest States Cooperative*, 41 BRBS 84 (2007). Moreover, contrary to claimant's contention, the administrative law judge did not err in relying on evidence submitted by employer consisting of recent longshore decisions by another administrative law judge awarding claimant's counsel fees based on an hourly

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court orders awarding fees to attorneys in plaintiff's counsel's firm based on hourly rates between $300 and $375. The defendant argued that the hourly rate request was unreasonable, but it submitted as evidence documentation of only four fee requests, all based on the hourly rate of $375. *Welch,* 480 F.3d at 945.

[15] Specifically, the administrative law judge rationally rejected claimant's evidence of higher hourly rates awarded to attorneys in longshore cases in other cities and claimant's statements that he had charged other clients $275 to $300 per hour on the basis that claimant did not indicate whether those fees were contested or discuss other factors which may have led to awards of those rates. Supp. Order on Remand at 3. The administrative law judge further provided a rational basis for rejecting, as not dispositive, evidence regarding the rates awarded to counsel by the Ninth Circuit in the instant case and by the Oregon Court of Appeals. *Id.* at 3-4; *see D.V. v. Cenex Harvest States Cooperative,* 41 BRBS 84 (2007). Lastly, the administrative law judge properly declined to rely on the "*Laffey* Matrix" and "Morones Survey" submitted by claimant. Supp. Order on Remand at 4; *D.V.*, 41 BRBS at 86-87.

rate of $250 rather than the requested rate of $350.[16] Supp. Order on Remand at 4; *see D.V.*, 41 BRBS at 86-87; *see also Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004). We therefore reject counsel's contention that the administrative law judge erred in determining that claimant failed to meet his burden of demonstrating that the requested $350 hourly rate represents the prevailing community market rate. *See Welch*, 480 F.3d at 947; *D.V.*, 41 BRBS at 87.

Claimant further contends that the administrative law judge erred on remand in failing to compensate claimant's attorney for delays in the payment of his fees. Employer agrees in part with claimant's argument in this regard, and urges the Board to modify portions of the administrative law judge's fee award. 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) (9th Cir. 1996); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997); *Nelson v. Stevedoring Services of America*, 29 BRBS 90, 96-98 (1995). In the present case, claimant's counsel raised the issue of delay in his legal memorandum filed with the administrative law judge on August 11, 2004, following the Board's remand of the attorney's fee award to the administrative law judge. Although the administrative law judge addressed the issue of delay in his fee award on remand, certain of his findings did not adequately take the delay factor into account. First, with respect to claimant's original fee petition dated January 31, 2003, the administrative law judge found that he had previously erred in reducing the requested $237.50 hourly rate to $200 on the basis of claimant's partial success inasmuch as claimant ultimately achieved full success on the merits of his claim. Supp. Order on Remand at 2. The administrative law judge therefore determined that claimant's attorney was entitled to a fee for all of the 63 hours itemized in the original fee petition at his billing rate at the time the fee petition was filed, $237.50. *Id.* The administrative law judge found that because on October 17, 2003, employer had paid in full the attorney's fee originally awarded, claimant's attorney was not entitled to a delay enhancement for the services listed in the January 31, 2003, fee petition.[17] *Id.* at 1-2. In reaching this

[16] In this regard, the Board has rejected claimant's reliance on *Student Public Research Group of New Jersey v. AT&T Bell Laboratories*, 842 F.2d 1436 (3d Cir. 1988), for the proposition that market rates may not be based on court-established rates under fee-shifting statutes. *D.V.*, 41 BRBS at 86 n.4.

[17] Employer concedes that claimant's counsel should have been compensated for the delay in his receipt of a fee for the 2.5 hours that were originally disallowed by the administrative law judge and reinstated on remand; employer urges the Board to modify the fee award to award an hourly rate of $250 for these 2.5 hours. We agree, and accordingly modify the administrative law judge's fee award on remand to reflect a $250 hourly award for these services.

conclusion, however, the administrative law judge neglected to consider the delay in counsel's receipt of the portion of his fee representing the difference between the hourly rate of $200 originally awarded and the higher hourly rate of $237.50 awarded by the administrative law judge on remand pursuant to *Hensley*. As counsel is entitled to compensation for the delay in his receipt of this additional amount, we modify the administrative law judge's fee award on remand to reflect that claimant's attorney is entitled to an hourly rate of $250 for all of the 63 hours of attorney time itemized in his January 31, 2003 fee petition. Next, with respect to the total of 8.75 hours of attorney services related to claimant's reply to employer's objections to the original fee petition and to claimant's motion for reconsideration, employer concedes that counsel is entitled to an hourly rate of $250 for these services. We therefore modify the fee award to reflect that claimant's attorney is entitled to a $250 hourly rate for these 8.75 hours.

Claimant next contends that the administrative law judge erred in disallowing all of the seven hours of attorney time itemized in the fee petition filed by claimant's attorney on August 11, 2004, following the Board's decision remanding the case for reconsideration of the fee award. We agree with claimant that the filing of the claimant's legal memorandum and fee petition on August 11, 2004 was neither premature nor unnecessary, and we therefore hold that the administrative law judge erred in disallowing the time listed in such petition on that basis.[18] Supp. Order on Remand at 3. As acknowledged by the administrative law judge, he had the authority to award an attorney's fee while claimant's appeal was pending before the Ninth Circuit, although any such award of fees would not have become effective, and thus enforceable, until the appellate proceedings were completed. *See, e.g., McKnight v. Carolina Shipping Co.,* 32 BRBS 165, 173, *aff'd on recon. en banc,* 32 BRBS 251 (1998). The Board remanded the case pursuant to *Hensley* for the administrative law judge to determine an appropriate hourly rate in light of the degree of success achieved on the successful issues, *[B.C.],* slip op. at 7-8. The Board held that the measure of counsel's success must reflect work on issues that were resolved in claimant's favor during the period following referral of the case to the administrative law judge and prior to the hearing and stated that the administrative law judge erroneously failed to consider claimant's success in obtaining concurrent ongoing permanent partial disability and permanent total disability awards and medical benefits. *Id.* at 7. Thus, contrary to the administrative law judge's reasoning that his assessment of claimant's success was primarily contingent on the Ninth Circuit's ruling on the Section 6(b)(1) issue, the Board had remanded for consideration of claimant's success on issues wholly independent of the Section 6(b)(1) issue. Under these circumstances, it was neither unreasonable nor premature for claimant's attorney to have submitted his fee petition and legal memorandum addressing the issues remanded by the Board. The administrative law judge's fee award is therefore modified to include

[18] The administrative law judge's discussion of this issue suggests that he failed to consider the eight-page legal memorandum that claimant filed along with the fee petition filed on August 11, 2004.

an additional fee of $1,750, representing seven hours of services listed in the August 11, 2004 fee petition at an hourly rate of $250.

Lastly, claimant assigns error to the administrative law judge's disallowance of the three hours requested for claimant's reply to employer's objections to the October 23, 2006 fee petition. Employer concedes that claimant's reply was partially successful, and, thus, he is entitled to a fee for this work that is proportionate to his degree of success in prosecuting his 2006 fee application. *See Thompson v. Gomez*, 45 F.3d 1365, 1367-68 (9th Cir. 1995). As claimant succeeded in partially defeating employer's objections to the 2006 fee petition, we modify the administrative law judge's fee award to include an additional fee of $500, representing two hours at a $250 hourly rate.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed. The administrative law judge's Supplemental Order on Remand Awarding Attorney's Fee is modified to reflect an hourly rate of $250 for all approved attorney services, an additional fee of $1,750 for the services itemized in the 2004 fee petition and an additional fee of $500 for claimant's reply to employer's objections to the 2006 fee petition. Employer is entitled to a credit for all attorney's fees already paid. In all other respects, the administrative law judge's fee award on remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge