

TIMOTHY ALLEN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BLUDWORTH BOND SHIPYARD)	DATE ISSUED:_____
)	
and)	
)	
NATIONAL UNION FIRE INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Compensation Order - Award of Attorney's Fee of Marilyn C. Felkner, District Director, United States Department of Labor.

Stephen M. Vaughan (Mandell & Wright, P.C.), Houston, Texas, for claimant.

Peter L. Hilbert, Jr. and Michael J. DeBlanc, Jr., (McGlinchey Stafford Lang), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Compensation Order - Award of Attorney's Fee (No. 8-81092) of District Director Marilyn C. Felkner 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. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

On April 12, 1985, claimant sustained a work-related back injury for which he ultimately underwent a lumbar fusion. On May 3, 1995, the district director approved a Section 8(i) Settlement Application submitted by the parties for \$111,707 plus a reasonable attorney's fee to be determined by the Department of Labor. 33 U.S.C. §908(i). On July 10,

1995, claimant's attorney filed a fee petition for work performed before the district director from May 7, 1985 until March 20, 1995, requesting 91 hours of attorney services at an hourly rate of \$250, 58.75 hours of non-attorney work at \$75 per hour, plus expenses of \$388.53 for a total of \$27,413.53. Employer filed objections and claimant responded. On February 15, 1996, claimant requested that the fee be enhanced by 15 percent to account for the long delay in his receiving payment of his fee.

The district director reduced both the hourly rate and the number of hours requested by claimant's attorney. Specifically, the district director allowed only 45.125 hours of the 58.75 hours requested for non-attorney work at hourly rates between \$35 and \$65,¹ and only 57.875 hours of the 91 hours requested for attorney services at hourly rates between \$100 to \$175.² With regard to claimant's request for enhancement of the fee to account for

¹The fee for services provided by the non-attorneys was reduced as follows: 22 hours billed for services performed between May 21, 1985, and August 21, 1989, were reduced to 17.5 hours at an hourly rate of \$35 for a subtotal of \$612.50; 13.25 hours billed for services performed between September 15, 1989, and August 28, 1991, were reduced to 10.5 hours at an hourly rate of \$45 for a subtotal of \$472.59; 8.75 hours for work performed between September 3, 1991, and August 25, 1993, were reduced to 6 hours at an hourly rate of \$55; and 14.75 hours for work performed between September 7, 1993, and March 24, 1995 were reduced to 11.125 hours at an hourly rate of \$65.

²The fee for services provided by claimant's attorney was reduced as follows: 31.75 hours billed for services performed between May 7, 1985, and August 31, 1989, were reduced to 18.50 hours at an hourly rate of \$100; 16.75 hours for work performed between September 7, 1989, and August 26, 1991, were reduced to 8.625 hours at an hourly rate of \$125; 11.5 hours for work performed between September 6, 1991, and August 12, 1993, were reduced to 7.375 hours at \$150 per hour; and 31 hours for work performed between

delay, the district director concluded that there was no law to support an enhancement of a fee by an arbitrary percentage. Moreover, she noted that she found the hourly rates requested to be excessive in the first instance, and that the time it took to issue the award did not involve a significant delay. Accordingly, she denied claimant's request to augment the fee by 15 percent to account for the delay Fee Award at page 5.

Claimant appeals the fee award, contending that the district director erred in failing to award current hourly rates to account for the extraordinary delay in counsel's receipt of a fee, and suggests that the fee be augmented by either awarding \$175 an hour for all the attorney services, as this was the amount awarded for the most recent time period, or by any other reasonable method. Employer responds, urging affirmance.

We agree with claimant that the district director erred in denying the request to augment his counsel's fee. The Board has previously held that in light of the United States Supreme Court's decisions in *Missouri v. Jenkins*, 491 U.S. 274 (1989), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), it is clear that consideration of enhancement for delay is appropriate for fee awards under Section 28 of the Act, 33 U.S.C. §928. *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). Accordingly, when the question of delay is timely raised, the body awarding the fee must consider this factor. The fact-finder may adjust the fee based on historical rate to reflect its present value, apply current market rates or employ any other reasonable means to compensate claimant for the delay. *Id.* Also pertinent to the instant case, in *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67 (CRT) (9th Cir. 1996), the United States Court of Appeals for the Ninth Circuit found that the failure of the Office of Workers' Compensation Programs to award a delay enhancement when ten years had elapsed between the time the services were rendered and a fee was awarded and 14 years had elapsed since claimant's counsel had been hired was error. To avoid the possibility of further delay, the court mandated that the Office of Workers' Compensation Programs compensate counsel for his delay by awarding Anderson's attorney's fee based on his current rates on remand.

In the case at hand, although the district director correctly noted that the delay between the filing of the fee petition and the issuance of the fee award was not significant, the relevant inquiry in determining whether a fee should be augmented to account for delay is the amount of time that has passed between the performance of counsel's services and the payment of his fee. In the present case, the delay between the date that some of the services were performed and the date of the district director's award of fees has been 11 years. A delay of 11 years was held sufficient to warrant enhancement of the fee to account for delay as a matter of law in *Nelson*, 29 BRBS at 97-98. See also *Anderson*, 91 F.3d at 1325, 30 BRBS at 69 (CRT). Accordingly, we vacate the district director's

September 3, 1993, and March 20, 1995, were reduced to 23.375 hours at an hourly rate of \$175.

determination that enhancement of the fee to account for delay is not warranted in the present case and remand for the district director to exercise her discretion in determining an appropriate method to compensate counsel for his delay in payment of the fee in this case. We note that one way that the district director can achieve this result is to award counsel a fee at his current rate for all services performed: \$175 per hour for attorney services and \$65 per hour for non-attorney work. Alternatively, she could adjust the historical rates to reflect their present value, or employ any other reasonable means. See *Jenkins*, 491 U.S. at 282, 284; *Nelson*, 29 BRBS at 97.

Accordingly, the Compensation Order - Award of Attorney's Fee of the district director is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge