BRB No. 02-0527

MITCHELL ESTES	)	
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Claimant-Petitioner	)	
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5.	)	
	)	
CASCADE GENERAL INCORPORATED	)	DATE ISSUED: April 17, 2003
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Compensation Order Approval of Attorney Fee of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Ronald W. Atwood, Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Compensation Order Approval of Attorney Fee (14-125209) of District Director Karen P. 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 the law. *See, e.g.*, *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his right knee on May 16, 1997, during the course of his employment. Although employer initially paid compensation to claimant, a controversy arose over claimant=s average weekly wage and compensation due claimant under the schedule. A settlement agreement subsequently reached by the parties was approved by

the district director on January 2, 2002.

Claimant=s attorney submitted an application for an attorney=s fee for services rendered from May 21, 1997, through January 30, 2002, seeking a fee of $4,761.25, plus costs of $275.28. Employer filed objections to the fee petition, arguing that the hourly rates requested for counsel and his legal assistant were excessive. In her Compensation Order, the district director awarded claimant=s counsel a fee of $3,825.50, plus the requested costs.

Claimant appeals, arguing that the district director=s reduction of the hourly rates requested is arbitrary and inconsistent with the law. Employer responds, urging affirmance. Claimant has filed a reply to employer=s response.

Claimant argues on appeal that the district director erred in reducing the hourly rates requested. In her Order, the district director concluded that counsel is not entitled to his current hourly rate of $225, as the delay in payment of the fee did not warrant enhancement above counsel=s historic hourly rates. The district director further found that the requested hourly rate of $225 is excessive given the routine nature of this case. The district director, therefore, reduced counsel=s requested hourly rate to $190 per hour for services rendered from August 8, 2000, through the date of her order (9.5 hours) and to $175 per hour for the attorney services performed between June 19, 1997, and July 8, 1999 (11 hours), to reflect reasonable rates for services performed during the respective periods of time. The district director further reduced the requested fee for counsel=s legal assistant from $85 to $75 for 1.75 hours of services rendered in 1999.

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[1]In his fee petition, counsel requested 20.5 hours of attorney time at his current rate of $225 per hour and 1.75 hours of legal assistant time at her current rate of $85 per hour.

[2]2This represented 11 hours of attorney time at $175 per hour and 9.5 hours of attorney time at $190 per hour, as well as 1.75 hours of legal assistant time at $70 per hour.

Claimant contends the district director erred in awarding counsel his historic hourly rates rather than his current hourly rate. Claimant contends the district director misapprehended the holdings of the cases providing that an attorney=s fee may be enhanced to account for delay in payment of the fee. The Ninth Circuit and the Board have 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 in payment of an attorney=s is appropriate for fee awards under Section 28 of the Act, 33 U.S.C.'928. *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *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. *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997).

[3]3Claimant=s contention that the district director=s application of historic rates to the period of time prior to July 8, 1999, is a violation of his due process rights because the district director raised and applied this standard *sua sponte* without input from the parties is without merit. The issue of the appropriate hourly rate was raised by counsel in his application for a fee in which he sought recompense for all services at his current rate; employer objected to this rate. Moreover, claimant was given an opportunity to address this issue and did so in his Response to Employer/Carrier=s Objections. Thus, the issue was properly before the district director and all parties were afforded an opportunity to address it.

In addressing this issue, the district director recognized that augmentation of a fee award is appropriately granted in cases where there is extreme delay. *See Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). The district director, however, erred in stating that the delay involved must be due to the adjudicator=s failure to act in a timely manner on a submitted fee petition or to an employer=s failure to timely pay an awarded fee. *See* Order at 1. She stated that she acted on counsel=s fee petition within one month of the conclusion of the parties= failed negotiations over the amount of the fee. She also stated that employer had not delayed in paying an awarded fee. *Id.* at 2. As claimant contends, the district director misconstrues the time period from which the delay is measured. The pertinent comparison is between the time counsel performed the services and the time he is paid for those services, *Allen*, 31 BRBS at 97, as it is axiomatic that such delays deprive successful litigants of payment of their fees at Amarket rates.@ *Jenkins*, 491 U.S. at 283. Awarding counsel current, rather than historic, hourly rates is one way of compensating for this delay. *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). Moreover, contrary to the district director=s implication, neither employer nor the district director need have caused the delay in order for an enhanced fee to be assessed against employer, as the purpose of the augmentation is not punitive in nature. *See, e.g., Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff=d mem.*, 202 F.3d 259 (4th Cir. 1999) (table).

In this case, counsel=s first services were performed in May 1997, and he was awarded a fee for these services in March 2002. Thus, there is a delay of four years and ten months in payment for the initial services. We, therefore, vacate the district director=s finding that there was no delay in this case, and we remand for her to reconsider the appropriate hourly rates for both counsel and his legal assistant. *Allen*, 31 BRBS 95. We reject, however, claimant=s contention that the district director is required to augment the fee in this case by awarding current hourly rates, as she retains the discretion to decide if augmentation is appropriate considering the factors of this specific case. *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998); *Nelson*, 29 BRBS at 97. In this regard, we further reject claimant=s contention that the district director erred by reducing his hourly rate merely because the services were performed and the issues resolved at the district director level. The district director reduced the requested hourly rates based upon the lack of complexity of the claim, the experience of claimant=s attorney, the level of

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[4]4For example, the district director noted that counsel did not perform any services for several extended periods: the seven months between September 14, 1998 through April 7, 1999; over one year from July 8, 1999, through August 8, 2000; five months from September 1, 2000, through February 12, 2001; and eight months from February 15 through October 7, 2001.

proceedings, and the usual and reasonable rates awarded in this attorney=s area of practice. Order at 2. The regulation governing fee awards by the district director, 20 C.F.R. '702.132, states, *inter alia*, that AAny fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. . . .@ Thus, the district director appropriately considered these factors in determining the hourly rate, and claimant has not established an abuse of discretion in this regard. *See, e.g., O=Kelley v. Department of the Army/NAF*, 34 BRBS 39 (2000); *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); *see Edwards v. Todd Shipyards Corp.,* 25 BRBS 49 (1991), *rev=d on other grounds sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT)(9th Cir. 1993), *cert. denied,* 511 U.S. 1031 (1994). Thus, on remand, the district director may consider these factors in setting appropriate hourly rates.

Accordingly, the district director=s Compensation Order Approval of Attorney Fee is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge