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| TONY RICHARDS |) | BRB No. 05-0581 |
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| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| STEVEDORING SERVICES |) | |
| OF AMERICA |) | |
| |) | |
| and |) | |
| |) | |
| HOMEPORT INSURANCE |) | DATE ISSUED: 04/05/2006 |
| COMPANY |) | |
| |) | |
| Employer/Carrier- |) | |
| Respondents |) | |
| |) | |
| TONY RICHARDS |) | BRB Nos. 05-0582 |
| |) | and 05-0582A |
| Claimant-Petitioner |) | |
| Cross-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| STEVEDORING SERVICES |) | |
| OF AMERICA |) | |
| |) | |
| and |) | |
| |) | |
| HOMEPORT INSURANCE |) | |
| COMPANY |) | |
| |) | |
| Employer/Carrier- |) | |
| Respondents |) | |
| Cross-Petitioners |) | DECISION and ORDER |

Appeals of the Order Awarding Reduced Attorney Fees of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor, and the Compensation Order-Approval of Attorney Fee of Karen P. Staats, District Director, United States Department of Labor. Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Awarding Reduced Attorney Fees (2001-LHC-00926) of Administrative Law Judge Gerald M. Etchingham, BRB No. 05-0581, and claimant appeals, and employer cross-appeals, the Compensation Order-Approval of Attorney Fee (Case No. 14-131169) of District Director Karen P. Staats, BRB Nos. 05-0582/A, 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).¹ 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).

On May 10, 1999, claimant sustained work-related head, neck and upper back injuries for which he ultimately underwent a cervical fusion. Claimant sought compensation and medical benefits for his work-related neck injury, as well as for his recurrent drug addiction which he alleged was aggravated by his May 10, 1999, work injury. On December 21, 2004, the district director approved a Section 8(i) settlement application submitted by the parties in which employer agreed to pay claimant \$80,000, plus a reasonable attorney's fee to be determined by the Department of Labor. 33 U.S.C. §908(i).

On January 26, 2005, claimant's attorney filed a fee petition with the administrative law judge seeking a fee of \$20,706.25,² plus costs of \$1,324.15, for services rendered on behalf of claimant from January 18, 2001 through January 24, 2005. Employer filed objections to the fee petition, and claimant filed a reply to employer's objections.³ In an Order Awarding Reduced Attorney Fees, the administrative law judge

¹ The Board consolidated these appeals by Order dated September 28, 2005, for purposes of this decision. *See* 20 C.F.R. §802.104.

² This sum represents 71.75 hours of attorney time at a rate of \$275 per hour and 9.75 hours of legal assistant time at a rate of \$100 per hour.

³ Claimant's counsel subsequently requested an additional fee of \$1,031.25, representing 3.75 hours of attorney time at \$275 per hour for the preparation of his reply to employer's objections.

awarded claimant's counsel a fee of \$18,022.50,⁴ plus costs of \$727.00, for a total sum of \$18,749.50.

Claimant's attorney additionally filed a fee petition with the district director for services rendered from August 30, 1999 through December 20, 2000 and from June 24, 2003 through January 26, 2005,⁵ seeking a fee of \$8,206.25, plus \$100 in costs. Employer filed objections, and claimant replied to those objections.⁶ In a Compensation Order-Approval of Attorney Fee, the district director awarded claimant's counsel a fee of \$7,181.25.⁷

Claimant appeals the fee awards of both the administrative law judge and the district director, challenging their reduction of the hourly rates requested, and additionally challenging the administrative law judge's disallowance of the costs related to his drug addiction claim. BRB Nos. 05-0581, 05-0582. In its appeal, employer assigns error to the district director's failure to consider its argument that a fee for the preparation of claimant's reply to employer's objections to the fee petition is allowable only in an amount proportionate to claimant's success in defending the original fee petition. BRB No. 05-0582A. Both claimant and employer have filed response briefs, and claimant has filed reply briefs.

Initially, claimant contends that both the administrative law judge and the district director erred in awarding an attorney's fee based on historical hourly rates without accounting for the delay in counsel's receipt of the fees. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, 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),

⁴ The fee of \$18,022.50 approved by the administrative law judge represents 69.50 hours of attorney services performed from 2001 through 2003 at \$225 per hour and six hours of attorney services performed in 2004 and 2005 at \$235 per hour, as well as 9.75 hours of legal assistant time at the requested hourly rate of \$100.

⁵ This sum represents 22.75 hours of attorney time at a rate of \$275 per hour and 19.50 hours of legal assistant time at a rate of \$100 per hour.

⁶ Claimant then requested an additional fee of \$550, for his reply to employer's objections, representing two hours of attorney time at \$275 per hour.

⁷ This fee award represents seven hours of attorney services performed in 1999 through 2000 at \$210 per hour and 17.75 hours of attorney services performed in 2003 through 2005 at \$225 per hour, as well as 2.5 hours of legal assistant services performed in 1999 through 2000 at \$75 per hour and 17 hours of legal assistant services performed from 2003 through 2005 at \$90 per hour. The district director did not award the \$100 in costs requested by claimant's attorney.

consideration of enhancement for delay in payment of an attorney's fee 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). The fact-finder may adjust the fee based on historical rates to reflect its present value, apply current market rates, or employ any other reasonable means to compensate claimant for the delay. *Id.*

In the instant case, claimant timely raised the issue of delay in the fee applications which he filed with both the administrative law judge and the district director. *See* Cl. Affidavit of Attorney Fees and Costs (Fee Petition – ALJ level) at 10-11, 13; Cl. Reply to Employer's Objections (Cl. Reply-ALJ level) at 4-5; Cl. Affidavit of Attorney Fees and Costs (Fee Petition-District Director level) at 8-9, 11; Cl. Reply to Employer's Objections (Cl. Reply-District Director level) at 2-3. Moreover, in both of its responses to claimant's fee petitions, employer acknowledged that there was "unusual" delay in this case, and that, on the facts of this case, it was appropriate to adjust claimant's counsel's reasonable historical hourly rate in order to compensate counsel for the delay. *See* Emp. Response to Application for Attorney Fees and Costs (Emp. Response – ALJ level) at 7-8; Emp. Response to Application for Attorney Fees and Costs (Emp. Response – District Director level) at 2-3.⁸ As neither the administrative law judge nor the district director discussed the issue of enhancement for delay in payment of the attorney fees, which was timely raised, we remand the case for findings whether and in what manner it is appropriate to compensate counsel for the delay in payment of the fee award.⁹ *See Allen*, 31 BRBS 95.

⁸ In its consolidated response brief filed with the Board, employer acknowledges that it conceded below that an adjustment was appropriate for the unusual delay in the payment of attorney's fees in this case. *See* Emp. Resp. Br. at 3, 6-7, 9-10, 18. However, employer contends that the administrative law judge did in fact enhance claimant's counsel's fee for delay. *See* Emp. Resp. Br. at 6-7. Specifically, employer states that the "use of reasonable *current* hourly rates, in this case \$225 and \$235, is a proper measure of compensation for delayed payment" Emp. Br. at 7. The administrative law judge, however, did not find that the range of \$225-\$235 represents a reasonable *current* hourly rate; rather, he cited these rates as the usual billing rates that were allowed by the Office of Administrative Law Judges for work performed by Portland attorneys in 2001-2003 and 2004-2005 respectively. *See* ALJ Order at 3.

⁹ We reject, however, claimant's contention that the district director committed legal error by reducing counsel's requested hourly rates on the basis of the lack of complexity of the case. The regulation governing fee awards by the district director, 20 C.F.R. §702.132, states, *inter alia*, that "Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the

Claimant further contends that the administrative law judge erred in failing to hold employer liable for reimbursement of the costs related to his drug addiction claim. We disagree. In preparing claimant's case, claimant's attorney expended funds for the acquisition of records from Dr. Bovee and the Serenity Lane Treatment Center regarding claimant's post-injury drug addiction treatment. Counsel subsequently sought to recoup these costs. It is undisputed that these costs, which were disallowed by the administrative law judge, relate solely to claimant's drug relapse. In a case in which an attorney's fee is awarded against employer, the reasonable and necessary costs incurred in litigating the case also can be assessed against employer. *See* 33 U.S.C. §928(d); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 31 (1999). It is inherent in the Act that reasonable and necessary costs must be related to a compensable claim. In the instant case, the administrative law judge rationally determined that, pursuant to the terms of the parties' settlement application, claimant's drug addiction claim "did not remain as a viable claim in settlement...." ALJ Order at 4. In this regard, the administrative law judge found that claimant not only agreed to an order dismissing with prejudice the addiction claim, *see* Application for Approval of Agreed Settlement (Settlement Application)-Paragraph 30, but also assented to inclusion of the statement that "the parties agree that Richards' recurrent heroin addiction is unrelated to his injury of May 10, 1999," Settlement Application-Paragraph 31. As the administrative law judge rationally found that the drug addiction claim did not represent a compensable claim under the Act, he properly concluded that the costs that were solely related to that condition could not be considered reasonable and necessary and thus payable by employer. We therefore affirm the administrative law judge's disallowance of the \$897.15 in costs related to that condition. 33 U.S.C. §928(d).

representation, the complexity of the legal issues involved, and the amount of benefits awarded. . . ." Thus, the district director appropriately considered the complexity of the case in accordance with Section 702.132, and reduced the requested hourly rates on the basis of the lack of complexity of the claim. *See, e.g., Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995). Contrary to claimant's argument on appeal, the decision of the United States Supreme Court in *Blum v. Stenson*, 465 U.S. 886, 896 (1984), supports the principle that the complexity of a case is reflected not only in the number of hours expended but also in a reasonable hourly rate.

We further reject claimant's assignment of error to the district director's reduction of the requested hourly rates on the basis that the services performed at the district director level generally are less complex. The district director appropriately considered the factors enumerated in Section 702.132 in determining reasonable hourly rates, as well as the geographic area in which the claim arose, and did not reduce the requested hourly rates solely on the basis that the services were performed at the district director level.

Lastly, in its cross-appeal, employer argues that the district director erred in failing to consider its contention that the fee for claimant's attorney's preparation of a reply to employer's objections to the fee petition must be proportionate to claimant's success in defending the original fee petition. Employer avers, and claimant agrees, that this case is controlled by the decision of the United States Court of Appeals for the Ninth Circuit in *Thompson v. Gomez*, 45 F.3d 1365, 1367-68 (9th Cir. 1995), that supplemental attorney fees for work performed in attorney fee litigation are allowable only in an amount proportionate to counsel's success in prosecuting the initial fee application. *See also Hensley v. Eckerhart*, 461 U.S. 421 (1983). In the instant case, the district director awarded a fee for the requested two hours for claimant's attorney's reply to employer's objections to the fee petition without addressing employer's contention that, consistent with *Thompson*, the fee for this work must be proportionate to the degree of claimant's success on the original fee petition.¹⁰ As the district director did not consider employer's specific objections, we vacate the district director's award of \$450 for claimant's reply to employer's objections; on remand, the district director must reconsider this requested fee in light of the degree of claimant's ultimate success in pursuing his original fee petition. *See Thompson*, 45 F.3d at 1367-62.

Accordingly, we remand the case to the administrative law judge for consideration of claimant's contention that the fee award should be enhanced due to delay in payment of the fee. The administrative law judge's Order Awarding Reduced Attorney Fees is otherwise affirmed in its entirety. BRB No. 05-0581. The case also is remanded to the district director to address the enhancement issue. That portion of the district director's Compensation Order-Approval of Attorney Fee relating to the fee awarded for replying to employer's objections is vacated, and the case is remanded for

¹⁰ Claimant's attorney requested a supplemental fee of \$550 for two hours at a \$275 hourly rate. The district director approved the two hours but reduced the hourly rate to \$225 and accordingly awarded \$450 for this work.

findings consistent with this decision. In all other respects the district director's fee award is affirmed. BRB Nos. 05-0582/A.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge