

BRB No. 11-0116

TRAVIS L. MCKINNEY)
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 Claimant-Respondent)
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 v.)
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 GEORGIA-PACIFIC CORPORATION) DATE ISSUED: 08/03/2011
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 and)
)
 INDEMNITY INSURANCE COMPANY OF)
 NORTH AMERICA)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

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

Gregory A. Bunnell (Preston Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, LLP), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals the Attorney's Fee Order of District Director Karen P. Staats (Case No. 14-150950) 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant's counsel filed a fee petition with the district director for work performed before the Office of Workers' Compensation Programs (OWCP) from January 14, 2010 through June 15, 2010. Claimant's counsel sought a fee of \$3,342.25, representing 8.5 hours of attorney services at an hourly rate of \$391, plus .125 of an hour of legal assistant services at an hourly rate of \$150. Employer filed objections to the fee petition, to which it appended 10 exhibits.

In her fee order, the district director addressed the decisions of the United States Court of Appeals for the Ninth Circuit in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), the Board's decisions following the Ninth Circuit's remand in *Christensen*, see *Christensen v. Stevedoring Services of America [Christensen I]*, 43 BRBS 145 (2009), *modified on recon. [Christensen II]*, 44 BRBS 39, *recon. denied [Christensen III]*, 44 BRBS 75 (2010), *aff'd mem.*, No. 10-73574 (9th Cir. Aug. 1, 2011), and the Board's fee order in an unpublished case, which, the district director stated, awarded Attorney Charles Robinowitz a fee based on an hourly rate of \$384 per hour for work in 2009 and \$392 for work in 2010 and a paralegal rate of \$150 per hour. The district director determined that, similarly, counsel in this case is entitled to a fee based on the average hourly rate earned by the 95th percentile of general plaintiff civil litigation attorneys in the Portland, Oregon area. Consequently, relying on *Christensen II*, 44 BRBS 39, the district director awarded counsel the requested hourly rates of \$391 for attorney services and \$150 for legal assistant services rendered in 2010.

On appeal, employer challenges the fee award. Employer contends that the district director's fee order should be vacated and the case remanded because claimant failed to present evidence of a market rate for his services and the district director failed to address the exhibits employer submitted with its objections to the requested hourly rates. Employer avers that these exhibits were not previously considered by the Board in its *Christensen* decisions and, therefore, the district director should have addressed this evidence and not merely relied on the Board's rate determination for another attorney in Portland. Employer also asserts that the district director's determination that counsel is entitled to a fee based on the average hourly rate earned by the 95th percentile of general plaintiff civil litigation attorneys in the Portland, Oregon, area cannot be affirmed. Claimant responds, urging affirmance of the district director's fee award.

In *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT), involving an appeal of an attorney's fee awarded by the Board, the Ninth Circuit stated that the definition of a "reasonable attorney's fee" is the same for all federal fee-shifting statutes, *id.*, 557 F.3d at 1052, 43 BRBS at 7(CRT) *citing City of Burlington v. Dague*, 505 U.S. 557 (1992), and that most fee-shifting awards are calculated using the lodestar method, which multiplies a

reasonable hourly rate by the number of hours reasonably expended.¹ *Id.*, 557 F.3d at 1053, 43 BRBS at 8(CRT). The Ninth Circuit held that the Board erred in limiting the relevant community rates to those awarded in longshore cases in a geographic region. The court stated that the Board “must define the relevant community more broadly than simply [as] fee awards under the [Act.]” *Christensen*, 557 F.3d at 1055, 43 BRBS at 8-9(CRT). Thus, a “reasonable” hourly rate must reflect the rate: (1) that prevails in the “community” (2) for “similar” services (3) by an attorney of “reasonably comparable skill, experience, and reputation.” *Christensen*, 43 BRBS at 146. This analysis applies as well to attorney’s fee awards issued by administrative law judges and district directors. *Van Skike*, 557 F.3d at 1046-1047, 43 BRBS at 13-14(CRT).

Employer contends that claimant’s counsel failed to present evidence of a market rate for his services. We reject this contention. Counsel submitted as evidence to support his requested hourly rates: the Board’s decisions in *Christensen I* and *Christensen II*; three fee orders issued by the district director in which the applicable hourly rate was determined pursuant to the aforementioned decisions by the Board;² and an affidavit attesting to his experience, areas of expertise, and the average hourly rate of \$432.59 he has earned in the past five years in his non-longshore practice. Given the relative currency of the Board’s *Christensen* decisions, we reject employer’s contention that they are not evidence of a market rate that is pertinent to determining a reasonable hourly rate in this case. See *Christensen*, 557 F.3d at 1055, 43 BRBS at 8(CRT); see also *Stanhope v. Electric Boat Co.*, 44 BRBS 107, 108 n.5 (2010). Counsel also provided sufficient other information from which the district director can derive an appropriate market rate.

We agree with employer, however, that the district director did not adequately address the evidence employer offered relevant to the market rate for an attorney of claimant’s counsel’s standing. Employer submitted as evidence to support its objection to the requested hourly rates of \$391 for attorney work and \$150 for legal assistant services: excerpts from the Oregon Administrative Rules; *Schoch v. Luepold & Stevens*, 987 P.2d 13 (1999); the Oregon State Bar 2007 Economic Survey; insurance tables; *Estate of V.P. v. APM Terminals, et al*, 2008-LHC-00842-847 (Aug. 18, 2009); *Denise A. Graham*, 2010 WL 1003193 (March 17, 2010) (Or. Work. Comp. Bd.); *Steven M. Swearingen*, WCB Case No. 07-02810 (Dec. 18, 2009) (Or. Work. Comp. Bd.); the Motion for Reconsideration submitted by the employer in *Christensen III*, 44 BRBS 75;

¹Other factors which could affect the award of the fee include, for example: novelty or difficulty of the issue; skill needed; customary fee; time limitations imposed on attorney; amount involved/results obtained; experience of attorney; and undesirability of the case. *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT).

²The fee orders are: *Flintoff v. Kinder Morgan*, Case No. 14-149771 (Apr. 28, 2010); *Simms v. Kinder Morgan*, Case No. 14-151587 (May 21, 2010); and *Scott v. Portland Lines Bureau*, Case No. 14-151194 (May 28, 2010).

and, affidavits from M. Kathryn Olney and Norman Cole. We agree with employer's assertion that, with the exception of the Oregon Bar Survey and the motion for reconsideration in *Christensen III*, the exhibits it submitted to the district director were not addressed by the Board in its *Christensen* decisions. The district director derived the hourly rates she awarded for attorney and legal assistant work performed in this case before the OWCP based upon the hourly rates the Board awarded another claimant's counsel in *Christensen II* and in an unpublished Board fee order,³ and her determination that counsel in this case is similarly entitled to a fee based on the average hourly rate for the 95th percentile of general plaintiff civil litigation attorneys in the Portland, Oregon area. While the district director has considerable discretion in determining factors relevant to a market rate in a given case, *see generally Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *B&G Mining, Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008), and she has the discretion to determine counsel's hourly rate with reference to the *Christensen* decisions, her fee award should also reflect consideration of the evidence that both parties submitted in support of their hourly rate calculations. *See Van Skike*, 557 F.3d at 1046-1047, 43 BRBS at 14-15(CRT). Accordingly, we vacate the district director's fee order and remand for her to re-determine counsel's requested hourly rate in light of this evidence and the pertinent case law.

³We are unable to discern from the district director's fee order the unpublished Board fee award she relied on in her hourly rate determination. Should the district director refer to a Board's fee order on remand, for purposes of judicial review, she must provide its citation.

Accordingly, the district director's Attorney's Fee Order is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge