



BRB No. 16-0132

MARK B. HARDMAN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MARINE TERMINALS CORPORATION)	DATE ISSUED: <u>Aug. 29, 2016</u>
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order on Attorney’s Fees of R. Todd Bruininks, District Director, United States Department of Labor.

Charles Robinowitz (Law Office of Charles Robinowitz), Portland, Oregon, for claimant.

James R. Babcock (Holmes Weddle & Barcott, P.C.), Lake Oswego, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Order on Attorney’s Fees of District Director R. Todd Bruininks (Case No. 14-149888) 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, based on an abuse of discretion or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Following the parties' settlement of claimant's claim for benefits, claimant's counsel filed a petition for an attorney's fee for work performed before the Office of Workers' Compensation Programs between September 25, 2007 and May 18, 2014. Counsel requested a fee of \$14,178, representing 30.5 hours of attorney time at an hourly rate of \$450 and 3.7 hours of legal assistant time at an hourly rate of \$165, plus \$536.98 in costs. Employer filed objections, challenging as excessive a few of the itemized entries and the hourly rates for attorney and legal assistant services. Claimant's counsel filed a reply to the objections, and he included a request for an additional fee of \$675 for 1.25 hours of attorney time.

The district director reduced the requested hourly rate to \$385 for attorney services and the hourly rate for legal assistant services to \$140 for time expended from 2007 to 2012. The district director used the 2014 Federal locality rate increase of one percent for Portland, Oregon, to award counsel an hourly rate of \$389 and his legal assistant a rate of \$141.40 for work performed in 2014. The district director reduced by one hour the time counsel requested to correct clerical errors in claimant's request for mileage reimbursement and 1.5 hours expended for preparing the fee petition and counsel's reply to employer's fee objections. Accordingly, the district director awarded counsel a fee of \$12,298.58, representing 24.2 hours at \$385 per hour, 4.95 hours at \$389 per hour, 2.95 legal assistant hours at \$140 per hour, .75 of legal assistant time at \$141.40 per hour, and costs of \$536.98.

Claimant's counsel appeals the fee award, challenging the hourly rates awarded for his services. Employer responds that the awarded hourly rates are reasonable and within the district director's discretion. Counsel filed a reply brief.

Claimant's counsel asserts that the district director erred by awarding an hourly rate based on rates paid to plaintiffs' personal injury attorneys in Portland, Oregon, as reported in the 2012 Oregon State Bar Survey (OSBS). The district director found that claimant's counsel did not meet his burden to prove entitlement to the requested hourly rate of \$450, nor did employer show that its proposed hourly rate of \$340 is a reasonable market rate. Order at 3-4. The district director found inapplicable the rates listed in the 2012 OSBS for complex civil litigation, which typically involves difficult liability issues, more parties, and much greater levels of discovery. *Id.* at 4. The district director found that counsel's work under the Act compares favorably with plaintiffs' personal injury cases, "with a single client, a few issues, two or three parties, maybe a few experts, and relatively little discovery." *Id.* The district director found that, pursuant to *Christensen v. Stevedoring Services of America, Inc.*, 43 BRBS 145, 146 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd mem sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 455 F.App'x 912 (9th Cir. 2011), claimant's counsel's practice locale is Portland, and that, given counsel's experience and expertise,

he is entitled to an hourly rate commensurate with the 95th percentile of plaintiffs' personal injury attorneys in Portland, which was \$385 in the 2012 OSBS. *Id.*

The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, recently reiterated that, in awarding a fee under the Act, the adjudicator must define the relevant community and consider market rate information tailored to that market.¹ *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1086, 49 BRBS 93, 95(CRT) (9th Cir. 2015). Consequently, in *Shirrod*, the court vacated the Board's affirmance of an administrative law judge's fee award, concluding it was erroneous because, even after finding Portland to be the relevant community, the administrative law judge awarded an hourly rate based, inter alia, on state-wide rate information rather than on rate information tailored to the Portland community. The Ninth Circuit noted that the OSBS provides "attorney's fee information specific to . . . Portland." *Id.*, 809 F.3d at 1088-1089, 49 BRBS at 96-97(CRT).

In this case, the district director correctly identified Portland as the relevant market, and the district director relied on rates paid to Portland plaintiffs' personal injury attorneys as reported in the 2012 OSBS. *Id.* Although counsel avers that such rates are not market-based rates, counsel does not challenge the district director's rationale that cases under the Act compare favorably with plaintiffs' personal injury cases, "with a single client, a few issues, two or three parties, maybe a few experts, and relatively little discovery." Order at 4. Moreover, the Board has relied, in part, on such rates in setting a market rate in Portland. *Christensen*, 43 BRBS at 146-147, *modified in part on*

¹ The Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a federal fee-shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). The Court has also held that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895; *see also Kenny A.*, 559 U.S. at 551. The burden falls on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). Claimant's counsel does not appeal the district director's finding that he did not meet his burden of showing his entitlement to his requested hourly rate of \$450.

recon., 44 BRBS at 40. Accordingly, as counsel has not established that the district director's reliance on the 95th percentile hourly rate paid to plaintiffs' personal injury lawyers in Portland, as reported in the 2012 OSBS, is contrary to law or based on an abuse of discretion, we affirm the district director's use of this data for setting the base rate for counsel's services.² *Shirrod*, 809 F.3d at 1088-1089, 1088 n.7, 49 BRBS at 96-97, 96 n.7(CRT).

Claimant's counsel next challenges the district director's methodology for enhancing the \$385 hourly rate awarded to account for delay. Counsel argues that the district director should have compensated all time awarded at the 2015 market rate when the Order was entered and that the district director erred by augmenting the hourly rate by the increase in Federal locality pay in Portland from FY 2011 to 2014.

In his Order, the district director found that claimant's counsel is entitled to a delay enhancement for work performed from 2007 to 2012, which he stated should be paid at counsel's 2012 rate of \$385.³ Order at 5. The district director then utilized the increase in Federal locality pay to adjust, by one percentage point to \$389, counsel's hourly rate for work performed in FY 2014.⁴

The issue of a delay enhancement concerns the lapse in time between the performance of the legal services and the award of a fee for those services. *Missouri v. Jenkins*, 491 U.S. 274 (1989). Where, as here, counsel timely raises the issue of delay, this factor must be considered in determining a reasonable attorney's fee. See *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Anderson v.*

² Regarding counsel's raising of the anomaly that the hourly rate for these attorneys is lower in Portland than the rest of the state, the *Shirrod* court noted that, "[W]e have no reason to doubt the reliability of the data in the Bar Survey, as it supplies the benchmark for attorney's-fee awards in the District of Oregon . . . and the BRB and ALJs have relied on it in the past." *Shirrod*, 809 F.3d at 1088 n.7, 49 BRBS at 96 n.7(CRT).

³ Both parties agree that, inasmuch as the 2012 OSBS is based on data compiled in 2011, counsel's awarded rate of \$385 reflects the 2011 hourly rate for plaintiffs' personal injury attorneys in the Portland area. Cl. Brief at 5; Emp. Resp. Brief at 2 n.1. Counsel's fee petition does not itemize any services rendered from June 22, 2011 to November 25, 2013.

⁴ The district director stated that no increase was applicable for FY 2011 through 2013 due to the freeze in Federal locality pay during those years. Order at 5.

Director, OWCP, 91 F.3d 1322, 1323-1325, 30 BRBS 67, 68-69(CRT) (9th Cir. 1996). In *Modar v. Maritime Services Corp.*, 632 F.App'x 909, 49 BRBS 91(CRT) (9th Cir. 2015), vacating BRB No. 13-0319 (Jan. 17, 2014), the district director awarded a delay enhancement that, in 2012, awarded 2008 rates for services performed and 2004 and 2005, which the Board affirmed. *Modar*, 632 F.App'x at 909, 49 BRBS at 91-92(CRT). The Ninth Circuit vacated the Board's affirmance and remanded the case, holding that it was erroneous to affirm an award that reflected neither current rates nor present value of historical rates. *Id.*

In view of *Modar*, we must remand this case for the district director to award counsel an hourly rate that compensates him for the delay in payment of the fee. The district director awarded a fee for services from 2007 to 2011 only at the 2011 rate, *see* n. 3, *supra*; *Modar*, 632 F.App'x 909, 49 BRBS 91(CRT), and also did not consider whether to award a current rate for all services performed after 2011. *Id.*; *see generally Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) (affirming Board's finding that two years' delay was "ordinary" and did not require delay enhancement). Moreover, claimant's counsel is correct that use of the percentage increase in Federal locality pay is improper to the extent that the increase or lack thereof is based on political or budgetary considerations rather than on cost-of-living considerations.⁵ *See generally Christensen*, 43 BRBS at 147 (Board used increase in Federal locality pay for 2007-2009). On remand, the district director may utilize any reasonable method for determining how to compensate counsel for the delay in payment of the attorney's fee. *See Anderson*, 91 F.3d at 1322, 30 BRBS at 69(CRT).

⁵ As noted by the district director, there was no increase in federal pay from FY 2011 to FY 2013.

Accordingly, the case is remanded to the district director for further findings regarding an appropriate hourly rate for counsel's services in accordance with this opinion. In all other respects, the district director's Order on Attorney's Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

RYAN GILLIGAN
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judges:

I respectfully dissent from the majority's instruction that the district director address the issue of a delay enhancement to the extent that it concerns services rendered from November 2013 to May 2014. *See* n.3, *supra*. The district director's fee order was entered in October 2015. Thus, the delay in counsel's receipt of a fee for services rendered in 2013 and 2014 is merely ordinary delay such that the fee award for these services need not be "enhanced" in some way. In *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), the Ninth Circuit affirmed the Board's conclusion that two years' delay was "ordinary" and did not require a delay enhancement, stating that "[t]he two-year delay complained of by [counsel] is not so egregious or extraordinary as to require a delay enhancement." Therefore, I would limit the remand instruction to the period between 2007 and 2011. In all other respects, I concur in my colleagues' decision.

GREG J. BUZZARD
Administrative Appeals Judge