

BRB No. 11-0356

STEVEN C. COX)
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 Claimant-Petitioner)
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 v.)
)
 MARINE TERMINALS CORPORATION) DATE ISSUED: 12/14/2011
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 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

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

Charles Robinowitz, Portland, Oregon, for claimant.

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

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

PER CURIAM:

Claimant appeals the Order on Attorney's Fees (Case No. 14-144318) 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 it is shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

On July 27, 2005, claimant sustained a work-related injury to his right thumb for which he underwent surgery on August 5, 2005. Employer voluntarily paid permanent partial disability benefits based on its doctor's assessment of a 3 percent impairment. Claimant sought additional compensation and medical benefits for his work-related injury. On May 5, 2009, the district director approved a Section 8(i) settlement agreement in which employer agreed to pay claimant an additional \$5,000, plus a reasonable attorney's fee to be determined by the Department of Labor. 33 U.S.C. §908(i).

On May 15, 2009, claimant's attorney filed a fee petition with the district director seeking a fee of \$4,650,¹ plus costs of \$869,² for services rendered on behalf of claimant from August 4, 2005, through May 15, 2009. Employer filed objections to the fee petition, and claimant filed a reply to employer's objections.³ In an Order on Attorney's Fees, the district director awarded claimant's counsel a fee of \$5,225.22,⁴ but did not award any costs.

Claimant appeals, contending the district director erred in awarding an attorney's fee without accounting for the delay in counsel's receipt of the fees and in failing to award the requested costs of \$869. Employer responds, urging the Board to reject claimant's enhancement for delay argument, but concedes that counsel is entitled to \$869 in costs.

¹This sum represents 11.25 hours of attorney time at a rate of \$400 per hour and 1.25 hours of paralegal time at a rate of \$120 per hour.

²The costs are for the procurement of medical reports and records and employment records.

³Claimant's counsel subsequently requested an additional fee of \$1,000, representing 2.5 hours of attorney time at \$400 per hour for the preparation of his reply to employer's objections.

⁴This fee award represents 2.5 hours of attorney services performed in 2006 at \$349 per hour (\$872.50), 2.25 hours of attorney services performed in 2007 at \$357.50 per hour (\$804.38), 5.25 hours of attorney services performed in 2008 at \$370 per hour (\$1,942.50), 3.75 hours of attorney services performed in 2009 at \$384 per hour (\$1,440), .25 hours of paralegal services performed in 2005 at \$127 per hour (\$31.75), .25 hours of paralegal services in 2006 at \$132 per hour (\$33), and .75 hours of paralegal services in 2007 at \$134.79 per hour (\$101.09), for a total award of \$5,225.22.

We decline to address counsel's request for an attorney's fee augmented for delay in payment. Although consideration of enhancement for delay in the 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), counsel must timely raise his entitlement to an augmented fee. *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997). If the issue is timely raised, 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.*

The record reflects that claimant's counsel did not seek an enhancement for delay before the district director. Although counsel argues in his reply brief that his request for a fee based on his current market rate of \$400 for all services sufficiently raised the delay issue, it is clear from counsel's fee petition and the district director's order that the issue under consideration was not delay but whether claimant's counsel's \$400 per hour request represented the current prevailing market rate. Thus, because counsel did not raise the prospect of delay below, we decline to reach the issue on appeal. *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). As counsel raises no further challenge to the amount of the district director's award of an attorney's fee for legal services rendered, we affirm the award of \$5,225.22 in attorney and paralegal fees.

However, we find merit in counsel's assertion that the district director erred in failing to award the requested costs. As employer did not object to the claim for costs before the district director, and concedes counsel's entitlement to them before the Board, we modify the district director's award to reflect employer's liability for \$869 in costs. 33 U.S.C. §928(d); 20 C.F.R. §702.135; *see generally Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980).

Accordingly, the district director's Order on Attorney's Fees is modified to reflect employer's liability for costs of \$869. In all other respects the Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Jud