

BRB No. 13-0330

JOSEPH PETITT)
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 Claimant-Petitioner)
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 v.)
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 SAUSE BROTHERS) DATE ISSUED: Feb. 26, 2014
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 and)
)
 SEABRIGHT INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Attorney Fee Order of R. Todd Bruininks, District Director,
United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

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

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (Case No. 14-144080) of District
Director R. Todd Bruininks rendered on a claim filed pursuant to 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984);
Marcum v. Director, OWCP, 12 BRBS 355 (1980).

Claimant sustained a lower back injury while working as a welder for employer on
September 24, 2003. The parties agreed on claimant's entitlement to temporary total,
permanent total, and permanent partial, disability benefits but disagreed on whether the

quarterly \$0.25 per hour increases claimant received in his post-injury employment increased his wage-earning capacity. The administrative law judge found that claimant's merit increases and regular quarterly pay raises are reflective of his post-injury wage-earning capacity, and thus, should be used to calculate his permanent partial disability benefits. The administrative law judge thus ordered that claimant's compensation rate be periodically adjusted downward to reflect his increasing wage-earning capacity. The Board affirmed the administrative law judge's Decision and Order Awarding Benefits. *Petitt v. Sause Brothers*, BRB No. 11-0351 (Jan. 19, 2012) (unpub.). However, the United States Court of Appeals for the Ninth Circuit vacated the Board's decision and remanded the case for recalculation of claimant's partial disability payments.¹ *Petitt v. Sause Bros.*, 730 F.3d 1173, 47 BRBS 35(CRT) (9th Cir. 2013).

Meanwhile, claimant's counsel filed an attorney's fee petition with the district director for work performed before the district director in this case, seeking a total fee of \$14,512.50, representing 33.75 hours of attorney work at an hourly rate of \$400 and 6.75 hours of legal assistant work at an hourly rate of \$150. Employer filed objections to the fee petition and claimant thereafter filed a response, as well as a request for an additional \$200 in attorney's fees, representing .5 hours at an hourly rate of \$400 for work performed in preparing that response. The district director awarded claimant's counsel an attorney's fee, payable by employer, totaling \$13,478, representing 31.25 hours of attorney work at an hourly rate of \$370, 3 hours of attorney work at a hourly rate of \$391, plus 6.75 hours of legal assistant work at an hourly rate of \$110.

On appeal, claimant challenges the method used by the district director to calculate the enhanced hourly rate awarded to claimant's counsel to reflect the six to eight year delay in payment of some attorney's fees. Claimant also challenges the district director's failure to account for inflation by awarding hourly rates for services performed in 2011 and 2012 based on 2010, rather than 2013, market rates. Employer responds, urging affirmance of the district director's award of attorney's fees.

Claimant contends that the district director's decision to enhance counsel's attorney's fee for services performed in 2005 and 2007 by using 2008 hourly rates rather than 2013 hourly rates was an abuse of discretion and not in accordance with law. In short, claimant argues that the district director erred by compensating his counsel for only part rather than for the entire delay and, moreover, that he compounded the error by not providing any explanation for reaching his conclusions on this issue.

¹The Ninth Circuit held that scheduled wage increases given by a non-union employer to all employees in a certain class based solely on seniority are a general increase in wages and do not reflect an increase in a claimant's wage-earning capacity. *Petitt v. Sause Bros.*, 730 F.3d 1173, 47 BRBS 35(CRT) (9th Cir. 2013).

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 Supreme Court's decisions in *Missouri v. Jenkins*, 491 U.S. 274 (1989), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), 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). When the question of delay is timely raised, the body awarding the fee must consider this factor and, if enhancement is warranted, 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 the attorney for the delay. *See Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997).

The district director acknowledged that “[a]n eight-year gap between performance of work and payment of the fee is lengthy and deserving of some enhancement, although not necessarily assignment of all petitioned hours at the current rate.”² Attorney Fee Order at 4. Additionally, the district director noted that a delay of six years has been found to justify enhancement, *id.* (citing *Allen*, 31 BRBS 95), but that a two-year delay has been found not deserving of enhancement, *id.* (citing *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009)). Based on this case precedent, the district director stated that “[t]he difference will be split at the 3-year mark, with the 2005-2007 hours paid at 2008 rates of \$370.” *Id.*

The district director reasoned that, if a two-year delay is not so egregious or extraordinary to require an enhancement, but a six-year delay justifies an enhancement, a three-year delay would entitle counsel to an enhanced fee. Accordingly, the district director found that payment for 2005-2007 services at rates in effect in 2008 was sufficient to account for delay. Thus, there is no merit to claimant's assertion that the district director did not explain his rationale for calculating the enhanced fee.³ Given the

²Counsel's fee petition involved services performed from May 15, 2005 through December 26, 2007, November 25 and 28, 2011, and on June 20, 2012.

³Moreover, there is no merit to claimant's assertions that *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), directly conflicts with *Missouri v. Jenkins*, 491 U.S. 274 (1989), and that the case law establishes that *any* delay in the payment of an attorney's fee warrants an enhancement. In this regard, *Jenkins* offered no standard for determining how much time must elapse before a delay justifies an enhancement, while the Ninth Circuit, in *Christensen*, explicitly concluded that a two-year delay was not long enough to justify an enhancement. *See generally Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).

district director's discretion in selecting a method for making an adjustment for delay, and as the formula used in this case, considering all of the circumstances, represents a reasonable means to compensate counsel for delay,⁴ we reject claimant's contention that the district director erred. Thus, we affirm the district director's finding that counsel is entitled to an enhanced hourly rate based on the 2008 market rate of \$370 for services performed between 2005 and 2007, as claimant has not shown this finding to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See generally Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Allen*, 31 BRBS 95; *Nelson*, 29 BRBS 90.

Claimant next contends the district director erred in awarding the same hourly rate for work in 2010 and 2012, because there is no reasonable basis to consider that the inflation rate was at zero percent for the three-year period from 2010 to 2013. Claimant maintains that the district director "must adjust [the market rate for services rendered in 2011 and 2012] by some reasonable amount," as 2010 rates are not appropriate for fees awarded in 2013. In this regard, claimant argues that the district director erred in relying on the lack of an increase in the Federal locality rate in Portland, Oregon, from 2010 to 2012, to deny an enhancement, when other inflationary indexes, such as the national average weekly wage (NAWW) and the Oregon Consumer Price Index, reveal increases in the cost of living during that time frame.

Counsel requested an hourly rate of \$400 for all his services. The district director awarded counsel a fee for 3 hours of work performed in November 2011 (2.5 hours) and on June 20, 2012 (.5 hours) "at the 2010 hourly rate of \$391 as there was no increase in the Federal Locality Pay index for 2011 or 2012." Attorney Fee Order at 5. The district director, after consideration of the factors of 20 C.F.R. §702.132, as well as the relevant case law, based his hourly rate determination for the work performed in 2011 and 2012 on awards to claimant's counsel in other post-*Christensen* decisions. Specifically, the district director observed that those decisions reflect hourly rates of \$370 for 2008, \$384 for 2009, and \$391 for 2010 and 2011,⁵ and he found that as there was no increase in the

⁴There is no evidence that counsel's work on this case precluded him from engaging in substantial work on other cases that would have paid at full market rates. *See generally Gates v. Deukmejian*, 977 F.2d 1300 (9th Cir. 1992).

⁵The district director correctly observed that the Board, in *Christensen II*, used "the percentage increase in the Federal locality pay for Portland" to adjust counsel's 2006 hourly rate upward. *Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009) [*Christensen I*], modified on other grounds on recon. [*Christensen II*], 44 BRBS 39 (2010), recon. denied [*Christensen III*], 44 BRBS 75 (2010), aff'd mem. sub nom. *Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F.App'x 912 (9th Cir. 2011).

Federal locality pay rate from 2011 to 2012, the \$391 rate should also apply to claimant's work performed during that year. Although claimant correctly asserts that the lack of an increase in federal pay is not based on a lack of an increase in the inflation rate, claimant nonetheless has not established that an hourly rate of \$391 for his work in 2012 is based on an abuse of the district director's discretion. Accordingly, we affirm the district director's award of an attorney's fee totaling \$13,478, payable by employer.

Attorney's Fee for Work Performed in BRB No. 11-0351

Claimant's counsel has filed a petition for an attorney's fee totaling \$9,941.25, representing 22 hours of attorney time at \$450 per hour and .25 hours of legal assistant time at \$165 per hour for work performed before the Board in the prior appeal in this case. BRB No. 11-0351. Employer filed objections to the fee request to which claimant filed a reply and appended a supplemental fee application in which counsel requested a fee for an additional 4 hours at \$450 per hour. Employer challenges the hourly rates requested by counsel. As previously noted, the Board's decision in BRB No. 11-0351, affirming the administrative law judge's Decision and Order Awarding Benefits, was vacated by the Ninth Circuit, *Petitt*, 730 F.3d 1173, 47 BRBS 35(CRT), thereby establishing that claimant was ultimately successful in the appellate process, and thus, entitled to an attorney's fee for such work. 33 U.S.C. §928.

Counsel's fee petition reflects services performed during the following periods: 21 hours of attorney work and .25 hours of legal assistant work in 2011; .25 hours of attorney work in 2012; and 4.75 hours of attorney work in 2013. For the reasons discussed in *Christensen v. Stevedoring Services of America*, 44 BRBS 39 (2010), *modifying in part on recon.*, 43 BRBS 145 (2009), *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F.App'x 912 (9th Cir. 2011), we award counsel an hourly rate of \$392 for the 21 hours of attorney work and \$150 for .25 hours of legal assistant work performed before the Board in 2011. As for the remaining 5 hours of attorney work performed in 2012-2013, we will apply the percentage increase in the NAWW from 2011 to 2013 to the 2011 rate of \$392 to reflect a market rate for counsel's services in 2013,⁶ rounded to the nearest dollar, of \$413 (\$392 times 1.054 which equals \$413.17). We approve counsel's request for 26 hours of attorney work and .25 hours of legal assistant work performed before the Board as it is reasonably commensurate with the necessary work performed. 20 C.F.R. §802.203(d). Therefore, we award claimant's counsel an attorney's fee of \$10,334.50, representing 21 hours of attorney work at an hourly rate of \$392, 5 hours of attorney work at an hourly rate of \$413, and .25 hours of legal assistant work at an hourly rate of

⁶The NAWW increased from \$628.42 for fiscal year 2011 to \$662.59 for fiscal year 2013, or \$34.17, which is a 5.4 percent increase during that period.

\$150 for work performed before the Board in BRB No. 11-0351, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the district director's Order on Attorney's Fees is affirmed. Claimant's counsel is awarded an attorney's fee of \$10,334.50 for work performed before the Board in BRB No. 11-0351, payable directly by employer to counsel. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge