

BRB No. 13-0319

GREGORY MODAR)
)
 Claimant-Petitioner)
)
 v.)
)
 MARITIME SERVICES CORPORATION) DATE ISSUED: Jan. 17, 2014
)
 and)
)
 SAIF CORPORATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Order on Attorney's Fees and Reconsideration 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 Order on Attorney's Fees and Reconsideration (Case No. 14-127525) 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, while working as a construction laborer for employer on September 21, 1997, sustained neck, shoulder, and psychological injuries, for which Administrative Law Judge William Dorsey ultimately awarded claimant disability and medical benefits.

Following Judge Dorsey's award of benefits, claimant's counsel filed a fee petition for work performed before the district director, seeking \$6,625.00, representing 13.75 hours of attorney services at an hourly rate of \$400, 1.5 hours of paralegal work at an hourly rate of \$150, and expenses of \$900, rendered from February 22, 2004 through July 5, 2011. Employer responded, objecting to the requested hourly rate and specific time entries, and claimant's counsel replied.

In his award of an attorney's fee issued in September 2012, the district director approved 10.75 hours of attorney work performed in 2004 and 2005 at an "enhanced" hourly rate of \$365.39, 3 hours of attorney work performed in 2011 at an hourly rate of \$391.83, 1.9 hours of paralegal work performed in 2004 and 2005 at an "enhanced" hourly rate of \$143.47 and \$900 in expenses, for a total attorney's fee of \$6,218.64. Nonetheless, the district director ordered employer to pay claimant's counsel an attorney's fee of \$5,957.99.¹ The parties' requests for reconsideration were denied by the district director's letter dated March 11, 2003.

On appeal, claimant challenges the method used by the district director to enhance the hourly rates awarded to claimant's counsel to reflect the seven to eight year delay in payment of those fees. Employer responds, urging affirmation of the district director's award of attorney's fees. Claimant has filed a reply brief.

Claimant contends that the district director's decision to enhance counsel's attorney's fee for services performed in 2004 and 2005 by using 2008 hourly rates rather than 2012 hourly rates was an abuse of discretion and not in accordance with law. In short, claimant argues that the district erred by compensating his counsel for only half, rather than for the entire, delay and moreover, that he compounded that error by not providing any explanation for reaching his conclusions on this issue.

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*

¹No explanation is provided for the \$260.65 discrepancy between the amount of the attorney's fee "approved" by the district director and the amount which the district director determined that employer "shall pay" to claimant's counsel. Further reflection reveals that the discrepancy constitutes the amount of the enhancement which the district director found claimant's counsel entitled to as a result of the delay in the payment for services rendered in 2004-2005. Neither party specifically raises this discrepancy on appeal. *See* discussion, *infra*.

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, having observed that work was performed in 2004 and 2005,² that the fee petition was submitted in 2011, and that a fee would be awarded in 2012, acknowledged that the “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.” Order on Attorney’s Fees at 4. Specifically, the district director noted that a delay of six years has been deemed sufficient to justify enhancement, *id.* (citing *Allen*, 31 BRBS 95), but that a delay of two years has been found “not deserving” of any 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 4-year mark, with the 2004-05 hours paid at 2008 rates, extrapolating from the Federal locality pay table from Portland, working backwards from 2011-2012.” *Id.* Accordingly, the district director concluded that the appropriate market rate was \$391.83 for services performed between 2010 and 2012. Using the same methodology, the district director found that the appropriate rate for attorney services in 2004-2005 is \$342.85. However, to account for delay, the district director awarded an hourly rate for attorney work at the 2008 rate of \$365.39. Applying the same formula, the district director found that the reasonable paralegal rate of \$150 for work performed in 2011-2012, results in an “appropriate and reasonable” rate of \$131.24 in 2004-2005, and, when adjusted to the 2008 rate, yields a rate of \$143.47.³

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

²Counsel’s fee petition involved services performed before the district director from February 22, 2004 through September 7, 2005, and from May 26, 2011 through July 5, 2011.

³The district director’s attorney/paralegal hourly rate determinations in this case, i.e., \$391.83/\$150 for work performed in 2010-2012, \$342.85/\$131.24 for work performed in 2004-2005, or \$365.39/\$143.47 representing the prevailing rates for such work as of 2008, are affirmed as unchallenged on appeal. See generally *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

four-year delay would entitle counsel to an enhanced fee. Accordingly, the district director found that payment for 2004 and 2005 services at rates in effect in 2008 was sufficient to account for the delay.⁴ Thus, there is no merit to claimant's assertion that the district director did not explain his rationale for calculating the enhanced fee.⁵ Given the 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,⁶ we reject claimant's contention that the district director erred. However, we modify his order to reflect that employer is also liable for an additional fee of \$260.65 as calculated by the district director. *See* Order on Attorney's Fees at 5; n. 1, *supra*; *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.

⁴In addressing claimant's request for reconsideration, the district director, after noting that he "has considerable leeway in the calculation of enhancement for delay," reiterated verbatim his rationale for arriving at his "reasonable" formula for enhancing claimant's counsel's fee for the delay in the payment of the 2004-2005 work.

⁵Moreover, 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 *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).

⁶Moreover, there 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).

Accordingly, the district director's order is modified to reflect claimant's counsel's entitlement to, and employer's liability for, an attorney's fee totaling \$6,218.64. In all other regards, the district director's Order on Attorney's Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge