BRB Nos. 92-2002
and 92-2002A

RICHARD B. CAUDILL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SEA TAC ALASKA SHIPBUILDING	)	DATE ISSUED:
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the June 18, 1992 Compensation Order - Approval of Attorney Fee Application and June 19, 1992 Compensation Order - Approval of Attorney Fee Application of Karen P. Goodwin, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Thomas Owen McElmeel (McElmeel & Schultz), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the June 18, 1992 Compensation Order-Approval of Attorney Fee Application and the June 19, 1992 Compensation Order-Approval of Attorney Fee Application, and employer cross-appeals the June 19, 1992 Compensation Order-Approval of Attorney Fee Application (Case No. 14-56841) of District Director Karen P. Goodwin 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 may only be set aside if shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case has a protracted procedural history. Claimant injured his neck on September 24, 1980, while working as a machinist's helper for employer. Claimant was treated for cervical strain and was released for work without restrictions on October 22, 1980, despite his complaints of continuing numbness, headaches, and neck pains. Continuing to suffer from pain, claimant filed a claim for compensation under the Act in January 1982. In February 1982, claimant was diagnosed as having cervical degenerative disc disease which was causally related to his 1980 employment injury and he underwent a cervical diskectomy and fusion at C5-6 in May 1982, followed by a recommendation for a second fusion procedure in February 1987.

In his first decision, the administrative law judge found claimant's claim barred pursuant to Section 13 of the Act, 33 U.S.C. §913, but awarded medical benefits and an attorney's fee. On appeal, the Board held that, as a matter of law, the claim was timely, and remanded the case for consideration on the merits. *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988). On remand, the administrative law judge awarded permanent total disability benefits as of November 1, 1982, the date claimant reached maximum medical improvement, and temporary total disability benefits before that. 33 U.S.C. §908(a), (b). Additionally, the administrative law judge ordered employer to provide claimant with the corrective cervical surgery of his choice. On appeal of this decision, the Board affirmed the award of benefits. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991). The Board's decisions were affirmed by the United States Court of Appeals for the Ninth Circuit. *Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993)(table).

Subsequently, claimant's counsel submitted applications for an attorney's fee for services performed before the district director. For the period of March 21, 1984 through June 7, 1984, he requested a fee at the hourly rate of $125, his rate in effect at time of the petition, noting that his historical rate was $100 per hour. For the period of August 2, 1985 through July 13, 1988, he requested his then-current hourly rates of $135 for services he performed and $45 for services performed by his legal assistant, noting the historical rate for attorney services went from $100 to $125 on January 1, 1985. Prior to the issuance of the orders awarding an attorney's fee, counsel filed a supplemental affidavit requesting an adjustment of the hourly rate requested in the second petition to $150 for services performed by the attorney and to $50 for services performed by the legal assistant. Employer filed objections to the fee petitions.

After consideration of employer's objections, the district director awarded claimant's attorney a fee on the first petition of $450, representing 4.5 hours of legal services performed between March 24, 1984 through June 7, 1984, at the hourly rate of $100, the rate being charged by claimant's attorney at the time the services were provided. June 18, 1992 Compensation Order. In addition, on the second petition the district director awarded claimant's attorney a fee of $1,732 plus $90 in costs, representing 12.25 hours of services performed by the attorney from August 2, 1985 through July 13, 1988, at the hourly rate of $135 and 1.75 hours of services performed by the legal assistant at the hourly rate of $45, the rates being charged by claimant's attorney at the time he filed his fee petition. June 19, 1992 Compensation Order.

On appeal, claimant contends that the district director erred in both the June 18 and June 19 Compensation Orders by awarding an attorney's fee based on counsel's historical hourly rate rather than on the rate applicable at the time of the awards, to allow for the long delay in payment of the fees pursuant to the United States Supreme Court's decision in *Missouri v. Jenkins*, 491 U.S. 274 (1989). Employer responds, urging affirmance of the district director's Compensation Order dated June 18, 1992 as it is in accordance with law. On cross-appeal, employer contends that as claimant's counsel did not charge more than $125 per hour at the time the services were rendered between August 2, 1985 through July 13, 1988, the district director erred in awarding an "enhanced" fee at a $135 hourly rate.

The Board has held that, in light of the Supreme Court's decisions in *Jenkins* and *City of Burlington v. Dague*, 505 U.S. 557, (1992), enhancement of a fee to account for delay in payment is appropriate in fee awards under Section 28 of the Act, 33 U.S.C. §928, where the issue is properly raised. *See Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). Thus, 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 counsel for delay. *Nelson*, 29 BRBS at 97; *see Jenkins*, 491 U.S. at 282, 284.

In the present case, at the time the district director entered her fee awards, as many as 8 years had passed since the services were rendered and claimant's counsel timely raised the issue of delay in payment before the district director. We therefore agree with claimant that it was error for the district director to fail to consider counsel's contention that the fee should be augmented to account for delay in payment. Although the district director awarded counsel his then-current hourly rate in the second fee award, she did not discuss counsel's contention that the fee awards should be further enhanced to account for the delay.[1] Specifically, in his first petition, counsel sought his then-current hourly rate of $125 and he sought a rate of $150 per hour for work itemized in his second fee petition. Therefore, we vacate the district director's two fee awards and remand the case for the district director to reconsider the amount of the fee awards in accordance with law. *See Nelson*, 29 BRBS at 98.

[1]Thus, we reject employer's contention that counsel is limited to his historical hourly rate.

Accordingly, the district director's June 18 and June 19, 1992 Compensation Orders are vacated and the case is remanded for reconsideration of the amount of the fee awards consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge