

JERRY W. UTTERBACK)	BRB Nos. 10-0693
)	and 10-0693A
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
MID-COAST MARINE, INCORPORATED)	DATE ISSUED: 07/25/2011
)	
and)	
)	
SAIF CORPORATION)	
)	
Employer/Carrier-)	
Petitioners)	
Cross-Respondents)	
)	
JERRY W. UTTERBACK)	BRB No. 11-0302
)	
Claimant-Petitioner)	
)	
v.)	
)	
MID-COAST MARINE, INCORPORATED)	
)	
and)	
)	
SAIF CORPORATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeals of the Orders on Attorney's Fees of Karen P. Staats, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Order on Attorney's Fees dated August 4, 2010, and claimant appeals the Order on Attorney's Fees dated December 30, 2010, of District Director Karen P. Staats (Case No. 14-51204) 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).¹ 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Following the Board's decision on reconsideration in *Utterback v. Mid-Coast Marine, Inc.*, BRB No. 09-0136 (Jan. 25, 2010) (unpub.), *aff'g* BRB No. 09-0136 (Aug. 21, 2009) (unpub.), claimant's counsel filed a fee petition with the district director for work performed before the Office of Workers' Compensation Programs (OWCP) from February 27, 2004 through April 28, 2010.² Claimant's counsel sought a fee of \$6,863.25, representing 16 hours of attorney services at an hourly rate of \$412, plus 1.75 hours of legal assistant services at an hourly rate of \$155. Counsel further sought an additional \$515 fee for responding to employer's objections to the fee petition, representing 1.25 hours of attorney services at an hourly rate of \$412.

¹We consolidate for purposes of decision employer's appeal and claimant's cross-appeal of the district director's Order on Attorney's Fees dated August 4, 2010, BRB Nos. 10-0693/A, with claimant's appeal of the district director's Order on Attorney's Fees dated December 30, 2010, BRB No. 11-0302.

²In its decisions, the Board affirmed the administrative law judge's denial of employer's motion for modification of a compensation award for permanent partial disability. *See* 33 U.S.C. §§908(c)(21), (h), 922. In her decision, the administrative law judge had granted claimant's motion for modification of the permanent partial disability award, and she awarded claimant compensation for permanent total disability commencing on September 27, 2004. 33 U.S.C. §908(a).

In her August 4, 2010, fee order, the district director addressed the decisions of the United States Court of Appeals for the Ninth Circuit in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), the Board's decisions following the Ninth Circuit's remand in *Christensen*, see *Christensen v. Stevedoring Services of America [Christensen I]*, 43 BRBS 145 (2009), *modified on recon. [Christensen II]*, 44 BRBS 39, *recon. denied [Christensen III]*, 44 BRBS 75 (2010), which involved the same claimant's attorney, and the Board's fee order in this case, in which the Board awarded counsel a fee based on an hourly rate of \$384 for work performed in 2009 and \$392 for work performed in 2010 and a paralegal rate of \$150 per hour. See *Utterback*, BRB No. 09-0136 (July 20, 2010) (Order) (unpub.). Consequently, utilizing the hourly rates awarded by the Board in *Christensen II*, 44 BRBS 39, and in this case, and decreasing the rate for each prior year by subtracting the percentage increase provided by the Federal Locality Tables for the Portland, Oregon area, the district director awarded counsel an hourly rate of \$392 for attorney services rendered in 2010, \$349 for attorney services rendered in 2006, \$338 for attorney services rendered in 2005, and \$132 for legal assistant services rendered in 2006. The district director declined to enhance the hourly rates for services rendered in 2005 and 2006 to account for delay in payment of the fee. The district director also denied a fee for six hours of attorney services rendered before December 3, 2005, as well as all paralegal services before 2006, since claimant's counsel did not file his notice of representation with the OWCP until February 16, 2006, when he filed claimant's motion for modification. The district director allowed a fee for attorney time expended beginning on December 3, 2005, on the basis that there was some necessary preliminary preparation for filing for modification. Employer's objection to counsel's quarter-hour minimum billing method was rejected. The district director thus awarded counsel a fee of \$4,211.25.

In its fee order of July 20, 2010, the Board had disallowed 1.75 hours of attorney services and 1.75 hours of legal assistant services expended on issues concerning medical benefits as these services did not relate to the appeal before the Board. On August 23, 2010, claimant's counsel submitted a supplemental fee petition to the district director requesting a fee for these services. Counsel further sought an additional \$103 fee for responding to employer's objection to the supplemental petition, representing a quarter-hour of attorney services at an hourly rate of \$412.

In her December 30, 2010, fee order, the district director denied a fee for the requested services. The district director stated that the supplemental fee affidavit was not timely filed and that no evidence was presented showing that claimant received a benefit as a result of these services.

On appeal, employer challenges the district director's hourly rate determination in the August 4, 2010, fee order. Claimant responds, urging affirmance. Employer filed a reply brief. BRB No. 10-0693. Claimant cross-appeals the district director's denial of an enhancement for delay and her disallowance of a fee for legal services rendered before December 3, 2005. Employer responds, urging affirmance. Claimant filed a reply brief. BRB No. 10-0693A. Claimant also appeals the district director's December 30, 2010 order disallowing a fee for the services related to the medical benefits issues that the Board had disallowed. Employer responds, urging affirmance. BRB No. 11-0302.

In its appeal, employer contends that the district director's August 4, 2010, fee order should be vacated and the case remanded because she failed to address the evidence employer submitted with its objections to the requested hourly rate for attorney services of \$412. Employer avers that its exhibits were not previously considered by the Board in its *Christensen* decisions and, therefore, the district director should have addressed this evidence in her fee order and not merely relied on the Board's rate determinations.

In *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT), involving an appeal of an attorney's fee awarded by the Board, the Ninth Circuit stated that the definition of a "reasonable attorney's fee" is the same for all federal fee-shifting statutes, *id.*, 557 F.3d at 1052, 43 BRBS at 7(CRT) citing *City of Burlington v. Dague*, 505 U.S. 557 (1992), and that most fee-shifting awards are calculated using the lodestar method, which multiplies a reasonable hourly rate by the number of hours reasonably expended.³ *Id.*, 557 F.3d at 1053, 43 BRBS at 8(CRT). The Ninth Circuit held that the Board erred in limiting the relevant community rates to those awarded in longshore cases in a geographic region. The court stated that the Board "must define the relevant community more broadly than simply [as] fee awards under the [Act.]" *Christensen*, 557 F.3d at 1055, 43 BRBS at 8-9(CRT). Thus, a "reasonable" hourly rate must reflect the rate: (1) that prevails in the "community" (2) for "similar" services (3) by an attorney of "reasonably comparable skill, experience, and reputation." *Christensen*, 43 BRBS at 146. This analysis applies as well to attorney's fee awards issued by administrative law judges and district directors. *Van Skike*, 557 F.3d at 1046-1047, 43 BRBS at 13-14(CRT).

In this case, employer submitted as evidence to support its objection to the requested hourly rate of \$412: excerpts from the Oregon Administrative Rules; *Schoch v. Luepold & Stevens*, 987 P.2d 13 (1999); the July 6, 2007 deposition of William B. Crow; excerpts from the Oregon State Bar 2008 hourly rates survey; insurance tables; hearing

³Other factors which could affect the award of the fee include, for example: novelty or difficulty of the issue; skill needed; customary fee; time limitations imposed on attorney; amount involved/results obtained; experience of attorney; and undesirability of the case. *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT).

testimony by claimant's counsel in an Oregon workers' compensation case; *Estate of V.P. v. APM Terminals, et al*, 2008-LHC-00842-847) (Aug. 18, 2009); *Denise A. Graham*, 2010 WL 1003193 (March 17, 2010) (Or. Work. Comp. Bd.); and, affidavits from M. Kathryn Olney and Norman Cole. We agree with employer's assertion that, with the exception of the Oregon Bar Survey and the Crow affidavit, the exhibits it submitted to the district director were not addressed by the Board in its *Christensen* decisions. The district director derived the hourly rates she awarded for work performed in this case before the OWCP based upon the hourly rate the Board awarded claimant's counsel in *Christensen II* and in this case. While the district director has considerable discretion in determining factors relevant to a market rate in a given case, *see generally Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *B&G Mining, Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008), and she has the discretion to determine counsel's hourly rate based on the *Christensen* decision, her fee award should also reflect consideration of the evidence that employer submitted with its objections to counsel's fee petition. *See Van Skike*, 557 F.3d at 1046-1047, 43 BRBS at 14-15(CRT). Accordingly, we vacate the district director's August 4, 2010, fee order and remand for her to re-determine counsel's requested hourly rate in light of this evidence and the pertinent case law.⁴

We next address claimant's cross-appeal of the district director's August 4, 2010, fee order. In her order, the district director denied a fee for services rendered before December 3, 2005, since counsel did not notify the OWCP that he represented claimant until February 16, 2006, when counsel filed claimant's motion for modification.⁵ The district director allowed a fee for services rendered after December 3, 2005. Counsel contends he is entitled to a fee for the services rendered prior to December 3, 2005, that were related to obtaining medical records and evaluating the claim for modification. In its response brief, employer agrees with counsel's contention that, pursuant to *Dyer v. Cenex Harvest States Coop.*, 569 F.3d 1044, 43 BRBS 32(CRT) (9th Cir. 2008), counsel is entitled to a fee for pre-controversion services that were related to claimant's successful pursuit of the modification claim. Emp. Resp. Br. at 3. As the parties agree and the law supports that claimant's counsel is entitled to a fee for reasonable and necessary services provided prior to December 3, 2005, we reverse the district director's disallowance of a fee for services provided from February 27, 2004, to November 27, 2005. We remand the case for the district director to address the services rendered during

⁴On remand, the district director should also consider the exhibits claimant's counsel submitted as support for the requested hourly rate. *See H.S. [Sherman] v. Dept. of Army/NAF*, 43 BRBS 41 (2009).

⁵The district director noted that counsel's fee petition shows that notice of representation was sent to employer's insurance carrier on May 4, 2004.

this period and to award claimant a reasonable attorney's fee in accordance with 20 C.F.R. §702.132.

Counsel further avers the district director erred in denying an enhanced fee to account for the delay in payment for the services rendered from February 27, 2004 to August 7, 2006. It is now well established that counsel is entitled to an augmented fee if claimant timely raises the issue and the delay in the payment of an attorney's fee so warrants. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 21 BLR 2-631 (4th Cir. 1999); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998); *Nelson v. Stevedoring Services of America*, 29 BRBS 30 (1995). In this case, the services for which an enhanced fee is requested were performed before the district director in 2004, 2005, and 2006. In her fee order, the district director noted that the proceedings on the claim have resulted in a delay of over seven years since some of the services were rendered. The district director stated, however, that there has not been inordinate delay since counsel's request for services before the OWCP was received on May 3, 2010. However, the pertinent inquiry is the delay between the date services were rendered and the date the fee order is issued and not the delay between the time the fee petition is filed and an order is issued. *B.C. [Christensen] v. Stevedoring Services of America*, 41 BRBS 107, 113 (2007); *Allen v. Bludworth Bond Shipyard*, 31 BRBS at 97 (1997). As the administrative law judge applied an incorrect standard in addressing counsel's request for a delay enhancement, we remand the case for reconsideration of this issue. *See Johnson*, 183 F.3d 1169, 33 BRBS 112(CRT); *Nelson*, 29 BRBS 30.

We next address claimant's appeal of the district director's Order on Attorney's Fees dated December 30, 2010, in which she denied a fee for 1.75 hours of attorney services and 1.75 hours of legal assistant services on issues concerning medical benefits that were expended while the case was before the Board. The district director stated that counsel's supplemental fee affidavit was not timely filed and that no evidence was presented showing that claimant received a benefit as a result of these services.

In its July 20, 2010, fee order, the Board disallowed a fee for these services since they did not relate to the issues on appeal. Counsel filed his supplemental fee petition for these services with the OWCP on August 23, 2010. Employer filed a letter on September 1, 2010, objecting to its liability for a fee, to the hourly rates, and to an enhancement for delay. Claimant's counsel replied to employer's objections in a letter dated September 13, 2010, in which he explained the nature of the time expended pursuing medical benefits for claimant, and he requested a fee based on his current hourly rates.

In its response brief, employer concedes that a fee may not be denied for the requested services based on the alleged delay in counsel's submission of a supplemental fee petition. Emp. Resp. Br. at 8. We agree. The implementing regulation does not state a time limit for submitting a fee petition, 20 C.F.R. §702.732, the district director did not specify a deadline, and the petition was filed within one month of counsel's receipt of the Board's order denying a fee for these services. Accordingly, the district director erred by denying a fee on this basis. *See generally Johnson*, 183 F.3d 1169, 33 BRBS 112(CRT); *Bellmer*, 32 BRBS 245; *Baker v. New Orleans Stevedoring Co.*, 1 BRBS 121 (1978). Moreover, counsel properly sought a fee for these services from the district director as she is responsible for overseeing the provision of medical care. *See* 33 U.S.C. §907. In his September 13, 2010 letter, counsel provided an explanation from which the district director could determine whether the requested time was reasonable and necessary. *See Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17 (2002). Therefore, we reverse the denial of counsel's request for an attorney's fee for these services, and we remand the case for her to address counsel's supplemental fee petition and employer's response thereto.

Accordingly, the district director's Orders on Attorney's Fees dated August 4, 2010, and December 30, 2010, are vacated. The case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge