

DAVID HARMON)	BRB No. 06-0312
)	
Claimant-Respondent)	
)	
v.)	
)	
McGINNIS, INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED)	DATE ISSUED: 11/20/2006
)	
Employer/Carrier-Petitioners)	
)	
)	
DAVID HARMON)	BRB Nos. 06-631 and 06-631A
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
McGINNIS, INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED)	
)	
Employer/Carrier-Petitioners)	
Cross-Respondents)	DECISION and ORDER

Appeals of the Award of Attorney's Fees Pursuant to Section 28 of the Act of Chris John Gleasman, District Director, and the Order on Claimant's

Supplemental Applications for Attorneys Fees of Thomas F. Phalen, Jr.,
Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longhore Claimants' National Law Center),
Washington, D.C., for claimant.

Gregory P. Sujack (Garofalo, Schreiber, Hart & Storm, Chartered),
Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Employer appeals the Award of Attorney's Fees Pursuant to Section 28 of the Act (Case No. 10-037364) of District Director Chris John Gleasman, and employer appeals and claimant cross-appeals the Order on Claimant's Supplemental Applications for Attorneys Fees (1999-LHC-2969) of Administrative Law Judge Thomas F. Phalen, Jr., 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On July 31, 1998, a crane knocked claimant off a barge, and he fell approximately 12 to 15 feet, sustaining injuries to his back, wrist and head. He filed a claim for benefits in September 1998. The administrative law judge awarded claimant disability and medical benefits. He also awarded claimant's attorney, Steven Schletker, an attorney's fee of \$21,655, plus expenses. Employer appealed, and the Board affirmed all aspects of the administrative law judge's decision except for a portion of the award of medical benefits. *Harmon v. McGinnis, Inc.*, BRB No. 01-0845 (July 25, 2002), *recon. denied* (Jan. 15, 2003). On remand, based on a joint stipulation by the parties, the administrative law judge reduced the awarded medical benefits. Accordingly, he agreed with Mr. Schletker's concession that a 10 percent reduction in the attorney's fee award was reasonable, and he awarded Mr. Schletker an attorney's fee of \$19,489.50, plus expenses. The Board affirmed the administrative law judge's decision on appeal. *Harmon v. McGinnis, Inc.*, BRB No. 04-0753/A (Oct. 15, 2004). On February 10, 2005, the United

¹The Board consolidated these appeals pursuant to an Order dated May 31, 2006.

States Court of Appeals for the Sixth Circuit dismissed employer's appeal as untimely filed.

Following the court's action, Mr. Schletker attempted to enforce the attorney's fees previously awarded by the district director, the administrative law judge, and the Board. Having no success, Mr. Schletker hired a collection firm. On July 19, 2005, he received payment in full of the fees awarded and due. Thereafter, Mr. Schletker hired an attorney, Joshua Gillelan, to file motions with the district director, the administrative law judge, and the Board for augmented fee awards due to the delay in the payment of the initial fee awards. The district director determined that Mr. Schletker timely requested an enhanced fee and that he is entitled to such in the amount of \$1,875, representing an additional \$25 per hour for 75 hours of services, due to the delay between the date the fee was awarded in July 2001 and the date it was paid in July 2005.² Employer appeals this decision, and claimant responds, urging affirmance. BRB No. 06-0312. The administrative law judge also found that Mr. Schletker is entitled to an augmented fee. He awarded Mr. Schletker an enhancement of \$50 per hour for 124.1 hours of services for a total supplemental fee of \$6,205. Order on Supp. Fee Applic. at 6. The administrative law judge's award of an enhanced fee is not challenged.

In his decision, the administrative law judge also addressed Mr. Gillelan's August 19, 2005, request for an attorney's fee in the amount of \$3,200, representing eight hours at an hourly rate of \$400, for his services in seeking an enhanced fee for Mr. Schletker. The administrative law judge found that Mr. Gillelan is entitled to a fee for his work; however, he determined that an hourly rate of \$400 is inappropriate for work performed in the Cincinnati area. The administrative law judge also recited the regulatory criteria for fee awards, 20 C.F.C. §702.132, and found that an hourly rate of \$250 is appropriate given the geographic location, the experience of Mr. Gillelan, and the issues involved. Thus, he awarded Mr. Gillelan an attorney's fee of \$2,000, representing eight hours of services at a rate of \$250 per hour. Order on Supp. Fee Applic. at 7-8. Employer appeals the fee awarded to Mr. Gillelan, challenging the legality of the fee award and the hourly rate. Mr. Gillelan responds, urging the Board to reject employer's arguments. BRB No. 06-631. Mr. Gillelan cross-appeals the fee awarded to him, challenging the reduction of the requested hourly rate. Employer responds, urging the Board to reject Mr. Gillelan's arguments. BRB No. 06-631A.

Employer contends the district director erred in awarding an enhanced fee to Mr. Schletker because there was only a three-month delay between the date the case became final and the fee award became enforceable and the date it paid the awarded fee. It is

²On July 26, 2001, the district director awarded Mr. Schletker an attorney's fee in the amount of \$11,250, representing 75 hours of work at an hourly rate of \$150, plus expenses.

now well established that counsel is entitled to an augmented fee if 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). The "relevant inquiry in determining whether a fee should be augmented to account for delay is the amount of time that has passed between the performance of counsel's services and the payment of his fee." *Allen v. Blutworth Bond Shipyard*, 31 BRBS 95 (1997). In this case, the services performed before the district director occurred in 1998 and 1999. The district director awarded Mr. Schletker an attorney's fee in July 2001 but employer did not pay the fee until July 2005. Thus, there was delay of up to seven years between payment of the fee and some of the services rendered, and accordingly, we affirm the district director's determination that Mr. Schletker is entitled to an enhanced attorney's fee. *Johnson*, 183 F.3d 1169, 33 BRBS 112(CRT). As employer has not challenged the amount of the enhancement, we affirm the district director's supplemental fee award.

Next, employer challenges the administrative law judge's decision to award Mr. Gillelan an attorney's fee for services rendered on Mr. Schletker's behalf. Employer argues that there is no statutory basis for awarding a fee to Mr. Gillelan, as there was no additional award to claimant and therefore the prerequisites of Section 28(b), 33 U.S.C. §928(b), have not been satisfied. We reject employer's argument. An attorney's fee is permitted for work performed by the attorney in preparing or defending an attorney's fee petition. *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). Similarly, an attorney's fee is permitted for work performed in obtaining an enhanced fee. *Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 22 BLR 2-283 (4th Cir. 2001). Had Mr. Schletker sought an enhanced fee himself, he would be entitled to a reasonable fee for his time. *Id.* The case is not distinguishable merely because the work in obtaining an enhanced fee for Mr. Schletker was performed by Mr. Gillelan. Consequently, we reject employer's assertion that Mr. Gillelan is not entitled to a fee for his services. *Id.*

Both employer and Mr. Gillelan contest the hourly rate awarded by the administrative law judge to Mr. Gillelan. Employer contends the rate is excessive in light of the lesser hourly rate awarded to Mr. Schletker, who actually served on claimant's behalf. Mr. Gillelan contends the administrative law judge erred in reducing the hourly rate from \$400 to \$250. We reject both contentions, and we affirm the administrative law judge's award of an attorney's fee to Mr. Gillelan in the amount of \$2,000. The Act and the regulations require that any fee awarded be reasonable and be commensurate with the necessary work performed, taking into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 33 U.S.C. §928; 20 C.F.R. §702.132; *see also Hensley v. Eckerhart*, 461 U.S. 424 (1983).

“Reasonable” rates typically correspond to the prevailing market rates in the relevant community. *Blum v. Stenson*, 465 U.S. 886 (1984).

In this case, the administrative law judge rationally found that the prevailing rates in the relevant geographic area did not exceed \$250 per hour. He further found that there was no compelling reason to award Mr. Gillelan a fee based on higher rates allegedly prevailing in Washington, D.C., when the case was located in the Southern Ohio/Northern Kentucky area. *Story v. Navy Exchange Service Center*, 33 BRBS 111, 120 (1999); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff’d on recon. en banc*, 32 BRBS 251 (1998). Therefore, based on Mr. Gillelan’s experience and the regulatory criteria, the administrative law judge rationally awarded Mr. Gillelan a fee based on the highest local rate. That Mr. Schletker received a fee based on a lesser hourly rate is irrelevant. As neither employer nor Mr. Gillelan has established that the administrative law judge’s fee award to Mr. Gillelan is arbitrary, capricious or an abuse of discretion, and as the administrative law judge’s fee award to Mr. Gillelan was not challenged in any other respect, we affirm the attorney’s fee award to Mr. Gillelan in the amount of \$2,000. *McKnight*, 32 BRBS 165; *Nelson*, 29 BRBS 90; *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986); *see generally Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988).

Accordingly, the district director’s Award of Attorney’s Fees Pursuant to Section 28 of the Act and the administrative law judge’s Order on Claimant’s Supplemental Applications for Attorneys Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge