



BRB No. 18-0246

CHARLOTTE OCHOA)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 11/09/2018
)	
JONES STEVEDORING COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Attorney Fee Order After Remand of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz and Genavee Stokes-Avery (Law Offices of Charles Robinowitz), Portland, Oregon, for claimant.

James McCurdy and Bradley J. Krupicka (Lindsay Hart, LLP), Portland, Oregon, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Law Judge:

Claimant appeals the Attorney Fee Order After Remand (2011-LHC-00623) of Administrative Law Judge Christopher Larsen 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 will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007). This case is before the Board for the third time.

Claimant and employer reached a Section 8(i) settlement, 33 U.S.C. §908(i), in February 1992 for claimant's 1990 work-related injuries. The parties did not settle claimant's entitlement to future medical benefits under Section 7 of the Act, 33 U.S.C. §907. In 2010, employer refused claimant's request for authorization for an MRI of her back. On March 1, 2013, Administrative Law Judge Pulver awarded claimant the requested medical benefits, as well as any reasonable follow-up treatment for her back condition.

Subsequently, claimant's counsel filed a petition for an attorney's fee for work performed between May 9, 2011 and April 5, 2013, before the Office of Administrative Law Judges. Counsel requested a fee of \$20,775, representing 42.75 hours of attorney time at an hourly rate of \$450 and 10.25 hours of legal assistant time at an hourly rate of \$150, plus \$2,343.70 in costs. Employer filed objections, challenging as excessive the requested hours and the hourly rate for attorney services.

Pertinent to this appeal, Administrative Law Judge Larsen (the administrative law judge), in his order dated November 13, 2014, awarded claimant's counsel a rate of \$360 per hour for his work,¹ which counsel appealed. The Board vacated the awarded \$360 hourly rate, as well as the administrative law judge's denial of counsel's request for a fee that accounted for the delayed payment of the fee, and remanded the case for further consideration of these issues. *Ochoa v. Jones Stevedoring Co. [Ochoa I]*, BRB No. 15-0097 (Jan. 21, 2016) (unpub.). On remand, the administrative law judge found that counsel is entitled to a fee based on an hourly rate of \$350. The administrative law judge further found that any delay in payment of the fee was not significant enough to warrant an enhanced hourly rate.

Claimant's counsel again appealed, challenging the hourly rate awarded and the denial of a delay enhancement. The Board affirmed the administrative law judge's finding that the proxy market rate for counsel in 2011 was \$350 per hour, but vacated the denial of a delay enhancement because the administrative law judge did not consider that issue in terms of the relevant time period.² *Ochoa v. Jones Stevedoring Co. [Ochoa II]*, BRB No.

¹The administrative law judge approved all hours requested in counsel's original fee petition, and awarded counsel a fee payable by employer of \$16,927.50 and \$2,343.70 in costs.

²The Board stated the administrative law judge considered the time period between the date counsel submitted his petition on April 12, 2013, and the dates most of his services were provided in 2011 and 2012, rather than the relevant time period between "the performance of the legal services and the award of a fee for those services," which in this case is "the period between May 9, 2011 and April 5, 2013, and the issuance of the

17-0085 (July 27, 2017) (unpub.). In his Attorney Fee Order After Remand, the administrative law judge found claimant's counsel entitled to an enhancement for delay, which he calculated at an hourly rate of \$365. The administrative law judge thus ordered employer to pay claimant's counsel an attorney's fee based on an hourly rate of \$365.

On appeal, claimant's counsel challenges the hourly rate awarded by the administrative law judge as a delay enhancement, as well as the Board's prior affirmance of the administrative law judge's finding that the proxy market rate for counsel in 2011 is \$350 per hour. Employer responds, urging affirmance of the administrative law judge's Attorney Fee Order After Remand. Claimant's counsel has filed a reply brief.

After consideration of the administrative law judge's decision, the arguments raised on appeal, and the evidence of record, we affirm the administrative law judge's Attorney Fee Order After Remand as claimant has not shown that the award of an enhanced hourly rate of \$365 is arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *Tahara*, 511 F.3d 950, 41 BRBS 53(CRT). The Board fully addressed the administrative law judge's awarded proxy market rate of \$350 per hour in affirming that finding in its second decision in this case. *See Ochoa II*, slip op. at 3-4. The holding in that decision constitutes the law of the case, as there is no basis for finding that doctrine inapplicable. *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010); *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005). Therefore, we decline to further address claimant's contention regarding the 2011 proxy rate. We now turn to claimant's contentions regarding the administrative law judge's award of an enhanced hourly rate of \$365.

The body awarding an attorney's fee has considerable discretion in selecting a reasonable method to compensate for the delay. *Anderson v. Director, OWCP*, 91 F.3d 1322, 1325, 30 BRBS 67, 69(CRT) (9th Cir. 1996); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95, 97 (1997); *Nelson v. Stevedoring Services of America*, 29 BRBS 90, 97-98 (1995). The fact-finder may award current rates, historic rates adjusted to reflect present values, or may employ *any other reasonable method* to compensate counsel for the delay in payment of the attorney's fee. *See Missouri v. Jenkins*, 491 U.S. 274, 283-284 (1989); *Anderson*, 91 F.3d at 1325, 30 BRBS at 69(CRT); *Allen*, 31 BRBS at 97; *Nelson*, 29 BRBS at 97. Findings in this regard are reviewed on appeal under an abuse of discretion standard. *See Anderson*, 91 F.3d at 1325, 30 BRBS at 68-69(CRT).

The administrative law judge used the Portland-Salem, Oregon Consumer Price Index (CPI-U) as the framework for calculating the enhanced hourly rate. He initially

administrative law judge's fee award on November 13, 2014." *Ochoa v. Jones Stevedoring Co. [Ochoa II]*, BRB No. 17-0085 (July 27, 2017) (unpub.), slip op. at 5.

recognized that the increase in the CPI-U between 2011 and 2014 corresponded to an increase of the 2011 proxy market rate of \$350 to \$375.90 in 2014. He then reduced the hourly rate figure to \$365, however, to reflect that the delay between the time counsel performed the majority of his services and when the administrative law judge awarded counsel an attorney's fee was less than three years. *See generally Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) (two-year delay is "ordinary" and does not require enhancement). Contrary to claimant's contention, the administrative law judge thus adequately explained his rationale for awarding an enhanced hourly rate of \$365 rather than the \$375.90 a full three-year delay would have warranted: the delay in payment for the vast majority of the work was less than three years. No more is required. *Jenkins*, 491 U.S. at 283-284.

The method employed by the administrative law judge in compensating counsel for the delay in payment of his attorney's fee is reasonable, and is not arbitrary, capricious, based on an abuse of discretion or contrary to law. *See Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Anderson*, 91 F.3d at 1325, 30 BRBS at 68-69(CRT); *Nelson*, 29 BRBS at 97. We therefore affirm the administrative law judge's finding that counsel is entitled to an enhanced hourly rate of \$365 for all work. We also reject counsel's contention that he is entitled to further enhancement of his fee due to the delays caused by the appeals in this case as counsel cannot recover for delay due to appeals of the fee award. *See Anderson*, 91 F.3d at 1325 n.3, 30 BRBS at 69 n.3(CRT); *Hobbs v. Director, OWCP*, 820 F.2d 1528, 1531 (9th Cir. 1987). In addition, contrary to claimant's assertion, an award of interest on an attorney's fee is not permitted. *Id.*

Accordingly, the administrative law judge's Attorney Fee Order After Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with my colleagues' statement that the law of the case doctrine applies to the administrative law judge's awarded proxy market rate of \$350 per hour and thus, renders moot claimant's present contentions regarding that rate. I also concur with their rejection of counsel's contentions that he is entitled to further enhancement of his fee due to the delays caused by the appeals and to an award of interest on the awarded attorney's fee, as those contentions are contrary to law. However, I respectfully dissent from my colleagues' decision to affirm the administrative law judge's finding that counsel is entitled to an enhanced hourly rate of \$365. Rather, I would modify the administrative law judge's award of an enhanced hourly rate to reflect the full 7.4 percent increase in the CPI-U from 2011 to the second half of 2014.

The administrative law judge found that the length of the litigation in this case, approximately three and one-half years, warranted an enhancement of the 2011 proxy market rate to account for the delayed payment of claimant's counsel's fee. He referenced the 7.4 percent increase in the CPI-U as the multiplier for calculating this enhancement, which would result in an enhanced rate of \$375.90. Order After Remand at 3. The administrative law judge, however, declined to award the full 7.4 percent increase because

the bulk of the services performed by counsel occurred in years two and three, which he found is insufficient delay to warrant an enhancement. Thus, he awarded a rate of \$365.

I believe the administrative law judge's decision to grant only a partial enhancement in this case is arbitrary because he neither fully applied the CPI-U, on which he purported to rely, nor identified any other valid basis for arriving at the \$365 rate. I would, therefore, modify the administrative law judge's award of an enhanced hourly rate of \$365 to \$375.90, to account for the full three and one-half year period from when counsel first performed services for claimant in this case to the date of the administrative law judge's initial fee award.

RYAN GILLIGAN
Administrative Appeals Judge