

RICHARD B. CAUDILL)	BRB Nos. 96-0755
)	and 96-0755A
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
SEA TAC ALASKA SHIPBUILDING)	DATE ISSUED:
)	
and)	
)	
CIGNA, INSURANCE COMPANY OF)	
NORTH AMERICA)	
)	
Employer/Carrier-)	
Petitioners)	
Cross-Respondents)	
)	
)	
RICHARD B. CAUDILL)	
)	
Claimant-Respondent)	
)	
v.)	BRB No. 96-1074
)	
SEA TAC ALASKA SHIPBUILDING)	
)	
and)	
)	
CIGNA, INSURANCE COMPANY OF)	
NORTH AMERICA)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Daniel A. Sarno, Jr., Administrative Law Judge, and the Compensation Order - Approval of Attorney Fee Application on Remand of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Thomas Owen McElmeel, Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order on Remand (82-LHC-1894) awarding attorney's fees of Administrative Law Judge Daniel A. Sarno, 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). Employer also appeals the Compensation Order - Approval of Attorney Fee Application on Remand (14-56841) of District Director Karen P. Staats. The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case has a lengthy procedural history. Claimant, who sustained a work-related cervical injury on September 24, 1980, was ultimately awarded permanent total disability benefits by the administrative law judge in August 1990. On October 17, 1991, the Board affirmed the award of benefits, *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), and the Board's decision was subsequently 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). The present appeal deals solely with attorney's fee awards before the district director and the administrative law judge.

Claimant's counsel submitted two fee applications for services performed before the district director. On April 26, 1989, counsel requested a fee of \$562.50, representing 4.5 hours of services performed from March 21, 1984 through June 7, 1984, at \$125 per hour, his then-current rate, noting that his historical hourly rate at the time the services were rendered was \$100. On September 21, 1990, counsel requested \$1,732, representing 12.25 hours of attorney services performed from August 2, 1985 through July 13, 1988, at his then-current hourly rate of \$135, and 1.75 hours of legal assistant time at \$45 per hour, plus \$90 in expenses. On May 21, 1992, counsel filed a supplemental affidavit, seeking an adjustment of the hourly rates requested in the second fee petition to \$150 for attorney services and \$50 for legal assistant services, to reflect his intervening hourly rate increases while the fee award was pending. Employer filed objections to the fee petitions.

In a Compensation Order dated June 18, 1992, the district director awarded a fee of \$450 on the first petition, representing 4.5 hours of attorney services at counsel's historical hourly rate of \$100. In a Compensation Order dated June 19, 1992, the district director awarded counsel a fee of \$1,732 plus \$90 in expenses, representing 12.25 hours of attorney services at \$135 per hour and 1.75 hours of legal assistant services at \$45 per hour, the rates charged at the time counsel filed his second fee petition. Both claimant and the employer appealed the district director's fee awards.

On appeal, the Board rejected employer's contention that counsel was limited to his historical hourly rate and agreed with claimant that the district director erred in failing to consider counsel's contention that the fee should be augmented to account for delay in payment. Consequently, the Board vacated the fee awards and remanded the case for the district director to reconsider the amount of the fee in accordance with *Missouri v. Jenkins*, 491 U.S. 274 (1989), and *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). *Caudill v. Sea Tac Alaska Shipbuilding*, BRB Nos. 92-2002/A (Feb. 5, 1996) (unpublished).

On remand, the district director awarded counsel \$562.50 for the services listed in the first petition based on an hourly rate of \$125, and \$1,925 plus \$90 in expenses for services listed in the second petition based on an hourly rate of \$150. In the present appeal, BRB No. 96-1074, employer contends the district director erred in failing to explicitly determine whether an enhancement for delay was necessary in order to award a reasonable attorney's fee. Claimant responds, urging the Board to remand for application of an hourly rate of \$150 for all services rendered before the district director. Employer replies, asserting that the Board should not consider claimant's arguments because they were not properly raised in a cross-appeal.

Claimant also filed multiple fee petitions for services performed before the administrative law judge.¹ In a Supplemental Order Awarding Attorney Fees issued on March 27, 1991, Administrative Law Judge James Butler awarded counsel \$7,695, representing 57 hours of attorney services performed between June 1, 1982 and March 10, 1994 at an hourly rate of \$135, having augmented the \$100 which counsel had requested initially based on the contingent nature of the case and the quality of the legal representation. In addition, he awarded legal assistant fees of \$247.50, representing 5.5 hours at \$45 per hour, plus expenses of \$831.75. In a Supplemental Order Awarding Additional Attorney Fees issued February 5, 1992, Judge Butler approved a fee of \$18,967.50 plus costs of \$2,822.33 for further services performed by counsel; this award included

¹On March 12, 1984, claimant's counsel filed a fee petition requesting \$5,920, representing 57 hours of attorney services between June 1, 1982, and March 10, 1984, at an hourly rate of \$100, and 5.5 hours of legal assistant services at an hourly rate of \$40, plus costs of \$831.75. Counsel's fee petition of May 18, 1989, requested \$675 for 5 hours of attorney services performed between June 18, 1984, and September 30, 1985, at an hourly rate of \$135. On October 6, 1989, counsel filed an affidavit in which he consolidated his two prior petitions and requested that all fees be paid at an hourly rate of \$135. Counsel's September 21, 1990, fee petition again consolidated his earlier petitions and requested payment for all attorney services at the rate of \$135 per hour and legal assistant services at the rate of \$45 per hour, and additional fees of \$11,565, representing 82.25 attorney hours and 10.25 legal assistant hours, plus costs of \$2,822.33 for services performed between June 18, 1984 and September 30, 1985. Counsel's petition of December 27, 1991 requested a fee of \$1,920, representing 11 hours of attorney services at an hourly rate of \$150 and 6 hours of legal assistant services at an hourly rate of \$45. Lastly, counsel's petition of September 22, 1995 sought fees for an additional 16.75 hours of attorney services and 4 hours of legal assistant services, and requested that an hourly rate of \$175 for all attorney services and \$60 for legal assistant services be approved.

an enhanced fee of one-third, based on both the contingent nature of the claim and the quality of the legal work, which had been requested by counsel in a letter dated November 29, 1991. Employer appealed the administrative law judge's Supplemental Order Awarding Attorney Fees and the Supplemental Order Awarding Additional Attorney Fees and claimant cross-appealed the Supplemental Order Awarding Additional Attorney Fees.

On appeal, the Board vacated the administrative law judge's fee awards, agreeing with employer that the administrative law judge had abused his discretion in awarding an enhancement based on the contingent nature of the case and remanded the case for him to make appropriate findings in light of *City of Burlington v. Dague*, ___ U.S. ___, 112 S.Ct. 2638 (1992), and *Bennett v. Director, OWCP*, 17 BLR 1-72 (1992). The Board also rejected employer's argument that counsel should have been limited to a fee based on his historical rate and affirmed the administrative law judge's award of an hourly rate of \$135 and his award of costs as otherwise reasonable. The Board agreed with claimant that it was necessary to remand for the administrative law judge to address claimant's contention that he was entitled to a fee for time spent defending his fee petition, but rejected claimant's contention that he was entitled to a fee for time spent in preparation of his fee petitions. *Caudill v. Sea Tac Alaska Shipbuilding*, BRB Nos. 90-2283/S/A (Apr. 12, 1993) (unpublished).

In a Decision and Order On Remand dated February 13, 1996, Administrative Law Judge Daniel A. Sarno, Jr., awarded counsel a fee of \$25,874.08, representing 139.25 attorney hours at \$135 per hour and 15.75 legal assistant hours at \$45 per hour for the services itemized in the fee petitions for work from March 12, 1984, through September 21, 1990, 16.75 attorney hours at \$150 per hour² and 4 legal assistant hours at \$50 per hour for the services itemized in the December 27, 1991 and September 22, 1995, fee petitions; and \$3,654.08 in costs.

²The administrative law judge determined that the \$175 hourly rate for attorney services and \$75 for legal assistant services that counsel had requested were excessive.

In the present appeal, employer challenges the administrative law judge's award of fees, contending that the administrative law judge erred in awarding counsel more than his historical rate. BRB No. 96-0755. Claimant cross-appeals, contending that the administrative law judge erred in failing to adjust the hourly rate for services rendered prior to September 21, 1990, from \$135 to \$150; in omitting an award for 11 hours of attorney services and 6 hours of legal assistant services requested in the December 27, 1991, fee petition; in disallowing a fee for time spent preparing counsel's fee petitions; and in disallowing interest on the attorney's fee award and costs. BRB No. 96-0755A.

I. ATTORNEY'S FEE FOR SERVICES RENDERED BEFORE THE DISTRICT DIRECTOR -
BRB No. 96-1074

Employer urges the Board to again remand this case to the district director, directing her either to award a fee based on counsel's historical rates, or to exercise her discretion to determine whether, and why, anything other than historical rates should be awarded. We decline to do so, because we view further remand as unnecessary. As the prevailing party in a suit under the Act, claimant is entitled to receive "a reasonable attorney's fee against the employer." 33 U.S.C. §928(a). The United States Supreme Court, in considering a fee award made under the Civil Rights Act of 1976, 42 U.S.C. §1988, held that "enhancement for delay in payment is, where appropriate, part of a reasonable attorney's fee." *Missouri v. Jenkins*, 491 U.S. at 274. In *Nelson*, 29 BRBS at 90, the Board held that enhancement for delay is appropriate in fee awards under Section 28 of the Act, and that the body awarding the fee must consider this factor where the question of delay is timely raised. In *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67 (CRT)(9th Cir. 1996), the United States Court of Appeals for the Ninth Circuit, within whose appellate jurisdiction this claim arises, adopted the Board's position in *Nelson*. In so doing, the court held that its decision in *Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987), upon which employer relied in support of its argument that counsel should be limited to his historical rate, was no longer good law in that circuit insofar as it concerned the availability of delay awards.

In the present case, as counsel timely raised the argument that his fee should be augmented to account for delay in payment in the prior appeal of the district director's fee awards, the Board remanded the case for the district director to determine whether enhancement for delay was appropriate, noting that a fact-finder may adjust an attorney's 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. *Caudill*, BRB Nos. 92-2002/A, slip op. at 3. On remand, after considering the case consistent with the Board's decision, the district director found that an enhancement for delay was warranted. She therefore awarded counsel \$125 per hour for services performed between March 21, 1984, and June 7, 1984, and \$150 per hour for the services performed between August 2, 1985 and July 13, 1988, consistent with counsel's request in his May 21, 1992, supplemental affidavit.

Inasmuch as the district direct considered the issue of delay and found that augmentation of the hourly rate was warranted, we affirm the hourly rates deemed reasonable by the district director as employer has failed to establish an abuse of discretion made by the district director in this regard.³ See *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). While employer maintains that claimant is precluded from recovering for delay beyond June 1992 because pursuant to *Anderson*, 91 F.3d at 1325 n.3, 30 BRBS at 69 n.3 (CRT), a claimant's attorney cannot recover for delay due to appeals of the fee award, we note that the hourly rates awarded by the district director do not exceed counsel's rate in 1992, prior to appeals of the fee award and are reasonable for the work performed in this case.

II. ATTORNEY'S FEE FOR SERVICES RENDERED BEFORE THE ADMINISTRATIVE LAW JUDGE - BRB Nos. 96-0755/A

Employer also challenges the administrative law judge's failure to use historical hourly rates in his February 13, 1996, Decision and Order On Remand. Employer argues that counsel should be limited to his historical rates because the delay in this case has been due primarily to counsel's lack of success in obtaining an award of disability compensation until 1990, and counsel has failed to meet his burden of showing that an adjustment is necessary in order to achieve a reasonable fee. Moreover, employer asserts that pursuant to *Anderson*, 91 F.3d at 1325 n.3, 30 BRBS at 69 n.3 (CRT), counsel is not entitled to an enhancement for delay due to subsequent appeals of the fee award. Claimant concedes that the administrative law judge acted within his discretion in reducing the hourly rates requested in the December 27, 1991, and September 22, 1995, fee petitions from \$175 to \$150 for attorney services and from \$60 to \$50 for legal assistant services, but contends that these hourly rates should also have been awarded for all attorney and legal assistant services rendered since 1982. Moreover, claimant asserts that he is entitled to an additional 11 hours of attorney services and 6 hours of legal assistant services pursuant to the fee petitions of December 27, 1991 and September 22, 1995. Claimant also challenges the administrative law judge's disallowance of a fee for preparation of counsel's fee petitions, interest on the attorney's fee award, and interest on costs.

Employer's objections to the hourly rates awarded are rejected. Employer has not met its burden of showing that the administrative law judge abused his discretion in awarding a fee based on enhanced rates or that the hourly rates awarded exceed that which is reasonable given the delay between the time the services were performed and the resolution of the merits of the claim. See *Anderson*, 91 F.3d at 1324, 1325, 30 BRBS at 68, 69 (CRT); *Nelson*, 29 BRBS at 97, 98.

Claimant's argument that the administrative law judge erred in failing to increase counsel's hourly rate from \$135 to \$150 and his legal assistant's hourly rate from \$45 to \$50 for services itemized in the fee petitions from March 12, 1984, through September 21, 1990, fails under similar

³We decline to address claimant's arguments which challenge the district director's findings because they were raised in a response brief, rather than in a cross-appeal. See *Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988).

reasoning. The administrative law judge's decision to employ the hourly rates of \$135 and \$40 for attorney and legal assistant work, respectively, is rational and adequately compensates counsel for delay. Moreover, the Board held in its prior decision that, while remand was necessary due to the administrative law judge's use of a contingency factor, the rates were otherwise reasonable. In addition, claimant's assertions on appeal are insufficient to meet his burden of proving any abuse of discretion made by the administrative law judge regarding the hours awarded for the time claimed in the December 27, 1991, and September 22, 1995, fee petitions. *See generally Brown v. Marine Terminals Corp.*, 30 BRBS 29, 33 (1996)(en banc)(Brown and McGranery, JJ., concurring and dissenting). Inasmuch, however, as the administrative law judge disallowed a fee for time spent in preparing counsel's fee petitions, and such work was subsequently held to be compensable in *Anderson*, 91 F.3d at 1325, 30 BRBS at 69 (CRT), we agree with claimant that he is entitled to a fee for these services. Accordingly, we modify the administrative law judge's Decision and Order on Remand to reflect that claimant is entitled to an additional fee of \$475, representing 1.5 hours of attorney services at an hourly rate of \$150 and 5 hours of legal assistant services at an hourly rate of \$50 for time spent in preparing counsel's fee petitions.

Claimant's final contention that the Board should allow interest on all attorney's fee awards and costs is rejected. The United States Court of Appeals for the Ninth Circuit has held that an attorney's fee award under the Act is not a final judgment entitled to interest under 28 U.S.C. §1961. *See Anderson*, 91 F.3d at 1325 n.3, 30 BRBS at 69 n.3 (CRT); *Hobbs*, 820 F.2d at 1528. Inasmuch as costs are awarded under subsection (d) of Section 28 of the Act, 33 U.S.C. §928(d), the section pertaining to attorney's fees, we conclude that interest on costs assessed against employer is likewise not available to claimant under the Act, and affirm the administrative law judge's denial of interest on counsel's attorney's fees and costs.

In summary, claimant's counsel has been amply compensated for the time spent on this case, based on reasonable rates considering the delay in payment. "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 438, 103 S.Ct. 1933, 1941 (1983). The fee awards here have already generated two appeals and numerous fee orders. As both the district director and administrative law judge have entered reasonable fee awards, further consideration of the awards is not warranted, and the fee awards are affirmed.

Accordingly, the district director's Compensation Order on remand is affirmed. BRB No. 96-1074. The administrative law judge's Decision and Order on Remand is modified to reflect that counsel is entitled to a fee for time spent in preparing the fee applications, but is otherwise affirmed. BRB Nos. 96-0755/A.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge