

MARY A. CURLOTT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CLUB SYSTEM, KINGS BAY)	
NAVAL STATION, GEORGIA)	
)	
and)	
)	
EMPLOYERS SELF INSURANCE)	
SERVICE, INCORPORATED)	DATE ISSUED:
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Compensation Order - Award of Attorney's Fees of N. Sandra Ramsey, District Director, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

B. Anne Smith (Zirkle & Smith), Atlanta, Georgia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order - Award of Attorney's Fees (6-86097) of District Director N. Sandra Ramsey 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 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 is before the Board for the third time. Claimant sought permanent total disability compensation under the Act for a left shoulder injury she sustained while working for employer as a bartender foreman on February 1, 1985. In his initial Decision and Order, the administrative law judge awarded claimant temporary total disability compensation through May 29, 1986, and found that she was capable of returning to her usual work thereafter without restrictions. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from February 2, 1985

through May 29, 1986, less the \$11,782.60 in benefits which employer had already paid. In a Supplemental Decision and Order dated May 23, 1988, the administrative law judge awarded claimant's counsel a fee of \$2,745 for 18.3 hours of services at \$150 per hour. Claimant appealed the administrative law judge's Decision and Order, and employer appealed the administrative law judge's Supplemental Decision and Order to the Board.

On appeal, the Board determined that the administrative law judge erred in failing to discuss whether he found claimant's complaints of pain credible and whether claimant's pain prevents her from performing her usual work and accordingly remanded the case for the administrative law judge to consider these issues. In addition, the Board affirmed the fee award made by the administrative law judge. *See Curlott v. Club System, Kings Bay Naval Station, Georgia*, BRB Nos. 88-739/A (May 31, 1990) (unpublished).

On remand, the administrative law judge, finding claimant's complaints of pain inconsistent and of dubious credibility, reaffirmed his prior award of temporary total disability compensation. Claimant again appealed the administrative law judge's credibility determinations. In a Decision and Order dated September 28, 1992, the Board held that the administrative law judge's decision to reject claimant's testimony and to credit the testimony of Drs. Mullen, McAuley, and Hawkins was within his discretion and accordingly affirmed his denial of additional compensation subsequent to May 29, 1986. *Curlott v. Club System, Kings Bay Naval Station, Georgia*, BRB No. 91-618 (Sept. 28, 1992)(unpublished).

Meanwhile, by letter dated March 13, 1992, claimant's counsel, attaching the fee petition he had previously submitted to the administrative law judge, requested a fee from the district director for the 11.2 hours of services performed prior to referral, based upon a \$175 hourly rate. Claimant's counsel argued that the higher hourly rate sought was warranted because employer had the use of this money over this period.

In a Compensation Order - Award of Attorney's Fees dated April 1, 1992, the district director allowed the full 11.2 hours requested but reduced the hourly rate, finding an hourly rate of \$125 to be "fair, reasonable and consistent with rates approved for other attorneys with similar expertise and experience." Compensation Order at 1. Accordingly, the district director awarded claimant's counsel a fee of \$1,400, representing 11.2 hours at an hourly rate of \$125. Claimant's counsel appeals the district director's determination of the applicable hourly rate, and employer responds, urging affirmance.

On appeal, claimant argues that the district director acted arbitrarily in awarding a fee based on an hourly rate of \$125, given that four years previously the administrative law judge entered a fee award based on a \$150 hourly rate and given that there has been a six to seven year delay in counsel's receiving payment for these services. Citing *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203, 208 (1991), claimant's counsel further asserts that the rule has been adopted that the appropriate hourly rate is the rate at the time of the award, rather than the time the work was performed. In response, employer initially notes that in entering its August 1, 1991, fee award in the instant case, the Board reduced the \$150 hourly rate requested to \$125. In addition, employer argues that there is absolutely no legal support for claimant's assertion that the district director must award the same hourly rate as that awarded by the administrative law judge and that the hourly rate

determination is solely within the discretion of the body awarding the fee. In his reply brief, claimant reiterates the arguments previously made regarding augmentation of the hourly rate to account for delay, citing *Gusman v. Unisys Corp.*, 986 F.2d 1146 (7th Cir. 1993), a civil rights case, as supporting authority.¹

Initially we reject claimant's assertion that the district director was required at a minimum to award the \$150 hourly rate awarded by the administrative law judge. The determination of the applicable hourly rate is within the discretion of the tribunal awarding the fee. 33 U.S.C. §928(c); 20 C.F.R. §702.132; *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42, 44 n.4 (1995); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying on recon.* 28 BRBS 27 (1994); *Revoir v. General Dynamics Corp.*, 12 BRBS 524, 526 (1980). Thus, neither the Board's use of a \$125 hourly rate nor the administrative law judge's \$150 rate is controlling.

We agree with counsel that the delay in payment of the fee for work performed before the district director must be considered in determining an appropriate fee. See *Missouri v. Jenkins*, 491 U.S. 274 (1989); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). Claimant's counsel timely raised the issue of augmentation of the hourly rate to compensate for delay in receiving payment for work performed before the district director, and the district director did not consider this factor. As this factor must be considered when raised, we vacate the hourly rate determination. On remand, the district director should enter a fee based on an hourly rate which reasonably compensates counsel for, at this point, the 9 year delay in receiving payment, consistent with *Jenkins* and the Board's decision in *Nelson* and the cases cited therein.

Accordingly, the district director's Compensation Order - Award of Attorney's Fees is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

¹In his reply brief, claimant also contends that since employer has not paid the attorney's fee awarded by on the Board on August 1, 1991, and apparently has no intention of doing so, the Board should withdraw that award and make another at an increased hourly rate and require employer to pay it. Inasmuch, however, as the Board's August 1, 1991 fee award, was not timely appealed, it became final sixty days after it was issued. 20 C.F.R. §802.410. Claimant's remedy is to seek enforcement pursuant to 33 U.S.C. §921(d) in the applicable United States District Court, *Wells v. International Great Lakes Shipping Corp.*, 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982), since the underlying award is also final; no party appealed the decision of the United States Court of Appeals for the Eleventh Circuit in *Curlott v. Club System, Kings Bay Naval Station, Georgia*, 25 F.3d 1060 (11th Cir. 1994) (unpublished), which affirmed the Board's September 28, 1992, Decision and Order in this case. We note that although claimant was not ultimately successful on appeal in obtaining additional disability benefits, the fee award is for work on the initial appeal, in which claimant successfully defended against employer's appeal of the administrative law judge's fee award.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge