KENNETH D. NELSON	)	BRB No. 88-3695
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
MANHATTAN RE-INSURANCE COMPANY	)	DATE ISSUED: _____
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	
KENNETH D. NELSON	)	BRB Nos. 93-1407 and 93-1407A
Claimant-Petitioner Cross-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	

EAGLE PACIFIC INSURANCE COMPANY (Successor to MANHATTAN RE-INSURANCE COMPANY) Employer/Carrier-Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest KENNETH D. NELSON Claimant-Petitioner v. STEVEDORING SERVICES OF AMERICA and EAGLE PACIFIC INSURANCE COMPANY Employer/Carrier-Respondents KENNETH D. NELSON Claimant-Petitioner v. STEVEDORING SERVICES OF AMERICA and	)	BRB No. 93-2149 BRB No. 94-0454

	)	
MANHATTAN RE-INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
KENNETH D. NELSON	)	BRB No. 94-2279
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION AND ORDER

Appeals of the Decision and Order, Decision and Order On Reconsideration, Supplemental Decision and Order - Awarding Attorney's Fees, and Order Awarding Additional Attorney Fees of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor, and the Compensation Orders - Approval of Attorney Fee Applications of Karen P. Goodwin, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams, Fredrickson & Stark, P.C.), Portland, Oregon, for employer/carriers.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the August 31, 1988, Decision and Order (87-LHC-1217, 88-LHC-0001) of Administrative law Judge Ellin M. O'Shea 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). BRB No. 88-3695. In addition, claimant appeals and employer cross-appeals Judge O'Shea's Supplemental Decision and Order - Awarding Attorney's Fees (87-LHC-1217, 88-LHC-0001, 90-LHC-1397) filed on March 22, 1993. BRB Nos. 93-1407 and 93-1407A. Claimant also appeals Judge O'Shea's October 27, 1993, Order Awarding Additional Attorney Fees (87-LHC-1217, 88-LHC-0001), BRB No. 94-0454, and the July 2, 1993 and February 9, 1994, Compensation Orders - Approval of Attorney Fee Applications (14-79399) of District Director Karen P. Goodwin. BRB Nos. 93-2149 and 94-2279. We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and may only be set aside if shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Facts and Procedural History

On August 9, 1983, claimant, a longshoreman, slipped while working for employer and fell on his elbows, injuring his back and shoulders. Subsequently, on July 7, 1984, claimant was standing on the deck of a ship leaning over a hatch coaming, when he was thrown against the coaming and onto the deck and hatch lids, sustaining injury to his right knee and both shoulders. Although no compensation was voluntarily paid for the July 7, 1984, injury, employer voluntarily paid temporary total disability compensation for the August 9, 1983, injury from October 12, 1983 to January 6, 1984, at a rate of $372.28 per week, based on an average weekly wage of $558.42. Claimant sought temporary total, temporary partial, and permanent partial disability compensation under the Act for these injuries, and the two claims were consolidated below.

In her August 31, 1988, Decision and Order, the administrative law judge found that claimant's August 9, 1983, shoulder injury was aggravated by the subsequent July 7, 1984, work accident and she awarded claimant temporary total disability compensation for the periods of July 31, 1984 to November 6, 1984, January 22, 1985 to January 15, 1986, and February 2, 1986 to October 13, 1986. 33 U.S.C. §908(b). In addition, claimant was awarded temporary partial disability compensation from November 7, 1984 to January 22, 1985, and from January 15, 1986 to February 2, 1986, 33 U.S.C. §908(e), and permanent partial disability under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), commencing October 13, 1986. The administrative law judge also awarded claimant medical benefits under 33 U.S.C. §907 and remanded the case for the district director to consider the employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief. Finally, the administrative law judge awarded claimant's attorney $5,501.25 in legal fees and $502.23 in costs for services rendered before the Office of Administrative Law Judges.

On October 26, 1988, employer filed a Notice of Appeal of the administrative law judge's August 31, 1988, Decision and Order and Decision and Order on Reconsideration filed September 26, 1988, and claimant filed a cross-appeal. Both appeals were acknowledged by the Board on December 27, 1988, and assigned Board docket numbers, BRB Nos. 88-3695 and 88-3695A.

Thereafter, employer requested that these appeals be dismissed without prejudice inasmuch as claimant had requested modification under 33 U.S.C. §922 before the administrative law judge. By Order dated June 10, 1991, the Board dismissed the appeals, subject to reinstatement, and remanded the case to the Office of Administrative Law Judges.

In a Decision and Order on Modification issued on May 28, 1992, the administrative law judge awarded claimant permanent total disability compensation commencing September 7, 1989 and scheduled permanent partial disability benefits for his July 7, 1984, right knee injury from January 8, 1989 until September 7, 1989. 33 U.S.C. §908(c)(2), (19). The administrative law judge also denied claimant's claim for medical benefits based on the aggravation of his pre-existing diabetes by the July 7, 1984, work injury, and determined that employer was entitled to Section 8(f) relief.

On July 7, 1992, employer requested reinstatement of its appeal in BRB No. 88-3695. By Order dated March 23, 1993, the Board reinstated this appeal and noted that the case was fully briefed. At this time, the Board also granted employer's motion to consolidate its appeal in BRB No. 88-3695 with claimant's appeal of the district director's denial of a 20 percent assessment under Section 14(f), 33 U.S.C. §914(f), in BRB No. 90-2046.

Meanwhile, on June 23, 1992, claimant's counsel filed a fee petition for work performed before the administrative law judge between March 26, 1990 and June 23, 1992, in which he requested $14,975 for 94 hours of attorney services at $150 per hour, 17.5 hours of legal assistant's services at $50 per hour, plus $1,656.13 in costs. Employer submitted objections. Claimant's counsel responded to employer's objections and, in addition, submitted a Supplemental Affidavit requesting an additional $525 fee for 3.5 hours of services at an hourly rate of $150 for time spent in defending the fee petition. Employer thereafter submitted a response to the Supplemental Affidavit.

In a Supplemental Decision and Order - Awarding Attorney's Fees filed on March 22, 1993, the administrative law judge, addressing employer's objections, awarded the $150 hourly rate requested, but reduced the hours claimed by 14.25 attorney hours and 2 legal assistant hours, and the costs by $586. Accordingly, she awarded counsel a fee of $13,112.50, representing 82.25 hours of attorney services at $150 per hour ($11,962.50), 15.5 hours of legal assistant services at $50 per hour ($775), plus $1,010.13 in costs.

On August 23, 1993, claimant's counsel submitted a fee application to the administrative law judge in which he requested $577.50 for 3.5 hours at $165 per hour for various services performed by counsel in January and February 1988. Employer responded that claimant's attorney should be awarded a fee based on an hourly rate of $125, the rate charged by counsel at the time the services were performed.

In an Order Awarding Additional Attorney Fees filed on October 27, 1993, the

administrative law judge, finding employer's hourly rate argument persuasive, reduced the $165 hourly rate sought to $125 but otherwise approved the fee as requested. Accordingly, she awarded claimant's counsel $437.50, representing 3.5 hours at $125 per hour.

Claimant's counsel also submitted a fee application for services rendered before the district director between November 2, 1986 and June 20, 1992. Counsel requested $3,525 for 21.75 hours of attorney services at $150 per hour, 5.25 hours of legal assistant services at $50 per hour, plus $120.25 in costs. In addition, counsel requested an additional fee of $112.50 for .75 hours at $150 per hour for time spent in defending his fee application. Employer objected, contending that the $150 hourly rate sought was excessive and that the hourly rate awarded should not exceed $135, counsel's historical hourly rate. Employer also challenged the compensability of several itemized entries claimed. In a Compensation Order issued on July 2, 1993, the district director awarded counsel the .75 hours he claimed for defending his fee petition at the $150 hourly rate requested, disallowed the one hour claimed for preparing the fee petition, and allowed only an hourly rate of $135 for the remaining itemized entries. In all other respects, the district director approved the fee as requested, awarding counsel $3,296.50, representing 20.75 hours of attorney services at $135 per hour, .75 hours of attorney services at $150 per hour, 5.25 hours of legal assistant services at $50 per hour, and $120.25 in costs.

Claimant's counsel also submitted a fee petition to the district director for services performed from August 30, 1984 through February 23, 1987, in which he requested $3,913.75 for 30.75 hours of attorney services at $125 per hour and 1.75 hours of legal assistant services at $40 per hour, plus $867.50 in costs.[1] Thereafter, counsel filed two supplemental affidavits in which he requested that the hourly rate be increased to $165 and that an additional fee be awarded for 3.75 hours of services performed between January 29, 1989 and August 17, 1993 in defending the fee petition. Employer objected to the $165 hourly rate requested and to certain itemized hours claimed in the supplemental affidavits. In a Compensation Order issued on February 9, 1994, the district director allowed all of the hours claimed, but reduced the $165 requested hourly rate to $125 for the time claimed through 1987 in the initial fee petition and awarded an hourly rate of $150 for the 3.75 hours claimed in the supplemental application. Accordingly, she awarded counsel a fee of $4,401.25, representing 30.75 hours of attorney services at $125 per hour, 3.75 hours of attorney services at $150 per hour, 1.75 hours of legal assistant services at $40 per hour, plus the $867.50 in requested costs.

[1]The underlying documentation for this fee remains missing from the records despite numerous attempts to obtain it. We have concluded, however, that these documents are not necessary for a decision on this appeal.

Issues Raised

On appeal of the merits of this claim, employer's sole contention is that the administrative law judge erred in her determination of claimant's average weekly wage. BRB No. 88-3695. Claimant responds, urging affirmance of the administrative law judge's average weekly wage finding.

Claimant appeals the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees, arguing that the administrative law judge erred in disallowing the 2.5 hours claimed for preparing his fee petition, in disallowing or reducing other itemized entries claimed, and in reducing the $40 witness fee to $30. BRB No. 93-1407. Employer responds, urging that the administrative law judge's findings regarding the entries contested by claimant be affirmed. On cross-appeal, employer challenges the administrative law judge's decision to award a fee based on an hourly rate of $150, arguing that the fee award should have been limited to counsel's $135 historical billing rate. BRB No. 93-1407A. Claimant responds that the $150 hourly rate awarded by the administrative law judge should be affirmed, as it is reasonable for experienced Longshore Act attorneys on the west coast and there is relevant United States Supreme Court and Ninth Circuit case precedent which specifically permits, and in fact encourages, trial judges to compensate lawyers for delay by allowing a fee based on the current rate for all work done in a case.

Claimant, in addition, appeals the administrative law judge's October 27, 1993, Order Awarding Additional Attorney Fees, BRB No. 94-454, and the fee awards entered by the district director on July 2, 1993 and February 9, 1994, BRB Nos. 93-2149 and 94-2279. In these fee appeals, claimant challenges the administrative law judge's and the district director's decision to limit the hourly rate awarded to counsel's historical billing rate, contending that the fees awarded should have been based on the current hourly rate in effect at the time the fee award was made so as to adequately compensate counsel for the delay in payment. In addition, in BRB No. 94-2149, claimant contends that the district director erred in disallowing the one hour claimed for preparing his fee petition. Employer responds, urging that the fee awards based on counsel's historical hourly rate be affirmed.[2]

[2]On January 7, 1994, the Board consolidated for purposes of decision the appeals in BRB Nos. 93-1407, 93-1407A, 93-2149, and 94-0454 with the previously consolidated appeals in BRB Nos. 88-3695 and 90-2046. By Order dated April 19, 1994, claimant's appeal of the district director's February 9, 1994 fee award, BRB No. 94-2279, also was consolidated with the aforementioned appeals for purposes of decision. Upon further reflection, however, we have determined that claimant's appeal of the district director's denial of a Section 14(f), 33 U.S.C. §914(f), assessment, BRB No. 90-2146, will be considered in a separate decision. Accordingly, we sever the appeal in BRB No. 90-2046 from the remaining appeals. 20 C.F.R. §802.104(b).

Average Weekly Wage--BRB No. 88-3695

Employer initially challenges the administrative law judge's computation of the average weekly wage for claimant's July 7, 1984, work injury. Employer contends that the administrative law judge should have utilized claimant's post-injury wage-earning capacity following a prior work-related lower back injury on October 3, 1978,[3] as the applicable average weekly wage for claimant's July 7, 1984, work injury, rather than determining the average weekly wage based on claimant's actual earnings in the year prior to this injury. We disagree.

The administrative law judge agreed with the basic premise of employer's argument that claimant's average weekly wage for the 1984 injury should account for his earning capacity as affected by his pre-existing permanent partial disability. Nonetheless, she determined that it was unreasonable to adopt Administrative Law Judge Matera's finding of claimant's post-injury wage-earning capacity as of May 2, 1979, five years prior to the July 7, 1984, injury, as the basis for his average weekly wage without any adjustment to reflect intervening contract wage increases. Relying on claimant's actual earnings prior to his injury, the administrative law judge found that claimant's average weekly wage was $918.06 by dividing claimant's actual $35,804.21 in earnings by the 39 weeks he worked prior to the July 7, 1984, injury.[4]

In *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980), the United States Court of Appeals for the District of Columbia Circuit approved a scheme allowing a claimant to receive concurrent permanent partial and permanent total disability awards under Sections 8(a) and 8(c)(21), 33 U.S.C. §908(a), (c)(21), where claimant sustained two injuries. In *Hastings*, claimant received a permanent partial disability award based on earnings prior to a 1971 stroke, after which he returned to work part-time at reduced wages. When claimant thereafter suffered a second injury, resulting in permanent total disability, the court agreed with the Board that this award should be based on his reduced earnings prior to the second injury. In this manner, claimant's two awards fully compensated his loss in wage-earning capacity.

[3]At the time of this injury, Administrative Law Judge Matera found claimant's average weekly wage was $558.42, and that his remaining wage-earning capacity was $502.48, entitling him to permanent partial disability benefits of $37.23 per week.

[4]In so finding, the administrative law judge rejected claimant's contention that his average weekly wage for this period was $1,016.21. Claimant had argued that four weeks in which he worked minimal hours due to the effects of the August 9, 1983, incident should be excluded from the average weekly wage calculation.

Contrary to employer's contention, the decision in *Hastings* does not require use of claimant's remaining wage-earning capacity of $502.28 following the 1978 injury as his average weekly wage in 1984. *Hastings* holds that compensation is computed based on the average weekly wage of the injured employee at the time of the injury. *See* 33 U.S.C. §910. In general, these earnings should reflect claimant's reduced wage-earning capacity. *See Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Crum v. General Adjustment Bureau*, 16 BRBS 101 (1983), *aff'd in pert. part and rev'd and rem. on other grounds*, 738 F.2d 474, 16 BRBS 115 (CRT) (D.C. Cir. 1984).

However, where, as here, claimant's actual earnings increase, his average weekly wage may be ascertainable by the use of claimant's actual wages at the time of the second injury. *See Morgan v. Marine Corps Exchange*, 14 BRBS 784 (1982), *aff'd mem. sub nom. Marine Corps Exchange v. Director, OWCP*, 718 F.2d 1111 (9th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984). In *Morgan*, the Board affirmed the administrative law judge's use of claimant's increased actual earnings prior to the second injury to calculate his average weekly wage. Recognizing the possibility of double recovery due to the concurrent awards, the Board noted that under these circumstances the remedy, consistent with *Hastings*, would be an adjustment to the first award. Concluding that claimant's increased earnings in that case did not reflect an increase in his earning capacity, the Board affirmed the concurrent awards without adjustment. Thus, while claimant's average weekly wage at the time of the second injury may be adjusted to correspond with his residual wage-earning capacity following the first injury, *see Lopez*, 23 BRBS at 299; *Crum*, 16 BRBS at 108, both *Hastings* and the Board's decisions thereafter recognize increased earnings may also be considered, and where earning capacity increases, an adjustment of the initial permanent partial disability award may be made under the modification procedures in 33 U.S.C. §922. *Hastings*, 628 F.2d at 96 n.30, 14 BRBS at 354 n.30; *Morgan*, 14 BRBS at 791. *See also Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *Kooley v. Marine Industry Northwest*, 22 BRBS 142 (1989).

It is clear from these cases that *Hastings* does not set forth a mechanical rule but rather outlines a flexible scheme for compensating loss of wage-earning capacity in cases of multiple injuries based on the facts in a specific case. As *Hastings* holds that average weekly wage is determined in the year prior to the injury, we reject employer's argument that the figure found to represent claimant's wage-earning capacity after his 1978 injury must be used as his average weekly wage for the 1984 injury. In the present case, employer specifically acknowledges that claimant's increased wages before the second injury were due to increases in the contract wage rate and not to an increase in his wage-earning capacity, pointing out in its brief that claimant's average hourly earnings increased from $14.85 per hour in the 1980 payroll year to $19.82 per hour in the year preceding the August 3, 1983 work injury. Employer's Brief at 8. Thus, employer's own argument demonstrates that this case cannot be distinguished from *Morgan. See also Wilson v. Matson Terminals, Inc.*, 21 BRBS 105 (1988). As it is undisputed that claimant's increase in wages prior to the second injury is the result of a general increase in wage rates and not an increase in his earning capacity, the administrative law judge properly concluded that it would be unreasonable to adopt a finding representing 1979 wage-earning capacity without adjustment. The administrative law judge's decision to use claimant's actual earnings prior to the 1984 injury to calculate his average

weekly wage is thus affirmed as it is rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe*, 380 U.S. at 360.

The Administrative Law Judge's Supplemental Decision and Order Awarding Attorney's Fees--BRB Nos. 93-1407 and 93-1407A.

This fee award concerned work performed from March 1990 to June 1992. The administrative law judge allowed the $150 hourly rate requested, reduced the hours and costs claimed, and awarded a fee of $13,112.50. On appeal, claimant challenges the reductions in hours and in the witness fee, and employer cross-appeals the hourly rate awarded.

We reject claimant's argument that the administrative law judge erred in disallowing .75 hours claimed to contest employer's motion to compel a medical examination and in allowing only 1.25 hours of the 2.5 hours claimed to contest postponement of the hearing, notify witnesses, and confer with claimant. Claimant has not met his burden of establishing that the administrative law judge abused her discretion in disallowing or reducing this time. Claimant also contends that the administrative law judge erred in disallowing time spent in preparing his fee petition, asserting that this time is routinely awarded by the United States Court of Appeals for the Ninth Circuit in cases under other fee-shifting statues. This argument, however, has previously been considered and rejected by the Board. *Sproull v. Stevedoring Services of America*, 28 BRBS 271 (1994)(Decision on Recon. *En Banc*). *See also Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979).

We agree with claimant, however, that the administrative law judge erred in finding that she lacked jurisdiction to award a fee for the 2 hours claimed on June 23, 1992, after the filing of the administrative law judge's Decision and Order, for reading the decision and calculating the benefits awarded. Such "wind-up" services are routinely awarded by the administrative law judge, who is in the best position to evaluate the reasonableness of the time claimed. Accordingly, we vacate the administrative law judge's determination that she lacked jurisdiction to address the compensability of the June 23, 1992, entry and remand the case to allow her to consider the reasonableness of the time claimed.[5]

In its cross-appeal, employer asserts that the administrative law judge erred in awarding an

[5]We need not address claimant's argument that the administrative law judge erred in reducing the witness fees claimed from $40 to $30. *See* 28 U.S.C. §1821(2)(b). We agree with employer that as claimant conceded that the proper witness fee figure was $30 while the case was before the administrative law judge, he is precluded from arguing that $40 is the correct figure for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in pert. part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994)(McGranery, J., dissenting)(Decision on Recon.); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

hourly rate of $150 where $135 was counsel's normal billing rate at the time the services were rendered. While we disagree with this proposition for the reasons discussed *infra,* we note that the hourly rate awarded here must be affirmed in any event. In making the fee award, the administrative law judge expressed agreement with employer that a forward-looking factor is assumed to be built into an attorney's fee under the Act. Nonetheless, she concluded that the $150 hourly rate sought was reasonable because most of the services claimed were performed after March 1990, and this rate was the prevailing hourly rate for experienced attorneys at that time, crediting an hourly rate determination made by another administrative law judge in a different case. As employer has failed to establish that the $150 rate awarded is unreasonable, we affirm the administrative law judge's hourly rate determination in this case. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

The Remaining Fee Appeals -- BRB Nos. 93-2149, 94-0454, 94-2279

We now direct our attention to claimant's appeals of the administrative law judge's Order Awarding Additional Attorney Fees, BRB No. 94-454, and the July 2, 1993 and February 9, 1994, Compensation Orders - Approval of Attorney Fee Applications of the district director. BRB Nos. 93-2149 and 94-2279. In these appeals, claimant contends that the administrative law judge and the district director erred in limiting the hourly rate awarded to counsel's historical rate. Claimant argues that given the inordinate delay in counsel's receiving these funds, application of the current hourly rate at the time the fees were awarded is mandated by *Missouri v. Jenkins*, 491 U.S. 274 (1989). In addition, in BRB No. 93-2149, counsel contends that the district director erred in disallowing the one hour claimed for preparing the fee petition.

These appeals raise a common issue, *i.e.*, whether in a case brought under the Act, an attorney's hourly rate may be augmented to account for counsel's delay in receiving payment. In *Hobbs v. Stan Flowers Co., Inc.*, 18 BRBS 65 (1986), *aff'd sub nom. Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987), the Board held that augmentation of the hourly rate to reflect delay is not necessary under the Longshore Act because factors such as risk of loss and delay in payment occur generally in longshore cases and are considered to be incorporated into the normal hourly rate charged by counsel. In affirming the Board's decision in *Hobbs*, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, addressed the Board's reasoning that delay is included in the basic fee structure of attorneys performing work under the Act and stated that the Board's decision implies that awards based upon the standard hourly rates charged by attorneys in Longshore Act cases at the time their services are performed are presumptively reasonable. *Hobbs*, 820 F.2d at 1529. The court noted, however, that other circuit courts had allowed the augmentation of hourly rates to compensate for delay in payment, notably in the context of fee awards under 42 U.S.C. §1988, and suggested that reliance on historical rates may render unreasonable an otherwise reasonable attorney's fee by cutting too deeply into the attorney's ultimate award in cases where the delay in payment is extreme. *Hobbs*, 820 F.2d at 1530. The court,

however, declined to address the question of whether such a situation was possible in the context of fee awards in Longshore Act litigation, finding that, in any event, the delay in the case before it was neither so extreme nor unexpected as to render an otherwise reasonable fee unreasonable. *Hobbs*, 820 F.2d at 1530.

Subsequently, the Board rejected the argument that it should augment rates awarded by the administrative law judge or district director on appeal of the fee award. *Fisher v. Todd Shipyards Corp.*, 21 BRBS 323 (1988); *Blake v. Bethlehem Steel Corp*, 21 BRBS 49 (1988). These cases state that "[a]ugmentation of the hourly rate to reflect delay in payment constitutes an abuse of discretion under the Act . . . ." *Fisher*, 21 BRBS at 328; *Blake*, 21 BRBS at 55. Nonetheless, in *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991), the Board held that an administrative law judge acted within his discretion when he awarded an hourly rate higher than the historical rate due to the unusually protracted course of litigation. The Board discussed the Ninth Circuit's opinion in *Hobbs* and concluded it did not foreclose consideration of an augmented rate where appropriate. *Accord Bennett v. Director, OWCP*, 17 BLR 1-72 (1992) (holding fee may be enhanced to compensate for delay where augmentation is properly raised in a case arising under the Black Lung Benefits Act).

On appeal, the parties dispute the appropriateness of enhanced fees due to delay, focusing much of their arguments on the proper interpretation of the decision of the Ninth Circuit in *Hobbs*. We need not be drawn into the debate regarding *Hobbs*, as intervening decisions of the Supreme Court in *Jenkins*, 491 U.S. at 274, and *City of Burlington v. Dague*, 505 U.S. 557, 112 S.Ct. 2638 (1992), are dispositive. In *Jenkins*, the Court, in considering a fee award made under the Civil Rights Attorney's Fees Awards 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.'" *Jenkins*, 491 U.S. at 282. The Court reasoned that fees are to be based on market rates for services rendered, and compensation received by counsel several years after services are rendered is not equal to the same dollar amount received for services promptly paid when performed. Thus, there must be "an appropriate adjustment for delay in payment -- whether by application of current rather than historic hourly rates, or otherwise . . . ." *Id.* at 284. *See also U.S. Dept of Labor v. Triplett*, 494 U.S. 715, 13 BLR 2-364 (1990)(in upholding the constitutionality of the attorney's fee provisions of the Black Lung Benefits Act, Court indicates that 33 U.S.C. §928 requires that the fees awarded be reasonable, stating that the agency has included a requirement that fees compensate for delay); *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT) (7th Cir. 1982) (regulation at 20 C.F.R. §702.132 is sufficiently broad to include increased fee due to delay in appropriate cases). In *Dague*, the Court reviewed the question of enhancement for contingency, holding that contingency fee enhancement is improper under federal fee-shifting statutes. Significantly, the Court specifically stated that its case law construing what is a "reasonable fee" under the various federal fee-shifting statutes applies uniformly to all of them. *Dague*, 505 U.S. at ___, 112 S.Ct. at 2641.

In light of the Supreme Court's decisions in *Jenkins* and *Dague*, it is clear that enhancement for delay is appropriate in fee awards under Section 28 of the Act. As stated in *Jenkins*, it is within the discretion of the body awarding the fee to award a fee which accounts for delay. While the Board's decision in *Cox*, 25 BRBS at 203, approves an administrative law judge's exercise of his

discretion to award an increased rate due to delay, the prior Board decisions in *Fisher*, 21 BRBS at 328, and *Blake*, 21 BRBS at 55, state that to do so is an abuse of discretion. These statements are inconsistent with *Jenkins*, as well as with the Board's holding in *Cox*, and are overruled. *Accord Goodloe v. Peabody Coal Co.*, ___ BLR ___, BRB No. 92-1738 BLA (June 27, 1995) (same reasoning found applicable in context of black lung case).

To summarize, we hold that where the question of delay is timely raised, *see Goodloe, supra*, the body awarding the fee must consider this factor. A variety of methods are available to do so. In this regard, several opinions of the United States Court of Appeals for the Ninth Circuit applying *Jenkins* in cases under various fee-shifting statutes provide guidance. In *D'Emanuele v. Montgomery Ward & Co., Inc.*, 904 F.2d 1379 (9th Cir. 1990), in considering a fee award made under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(g), the court stated that either current or historical prevailing rates may be used, citing *Jenkins*. The court further stated that "use of current rates may be necessary to adjust for inflation if the fee amount would otherwise be unreasonable," directing the trial court to review all circumstances and relevant factors, including delay. *Id.* at 1384. In *Gates v. Deukmejian*, 977 F.2d 1300 (9th Cir. 1992), a civil rights case involving a three-year delay, the court held, over the defendants' objection, that the district court did not err when it awarded claimants' counsel a fee based on current rather than historical rates. The court noted that counsel had presented evidence that their work on this case precluded them from engaging in substantial work on other cases that would have paid at full market rates and rejected the argument that three years was too short a time to justify an award on current rates, finding the delay "particularly onerous" as the fees were in millions of dollars. *Id.* at 1315. The court also specifically stated that, pursuant to *Jenkins*, the district court has "the discretion to choose the method by which it will adjust the fee to compensate for delay in payment and that it may do so `by adjusting the fee based on historical rates to reflect its present value' or `otherwise.'" *Id.* at 1315, citing *Jenkins*, 491 U. S. at 282. Finally, in *In Re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291 (9th Cir. 1994), a security class action case involving a seven-year delay, the court noted that the district court has discretion to compensate for delay either by applying the attorney's current rates to all hours billed during the course of the litigation, or by using the attorney's historical rates and adding a prime rate interest enhancement. *Id.* at 1305. Thus, the fact-finder may adjust the 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. *See Jenkins*, 491 U.S. at 282, 284.

In this case, as many as 11 years have passed since the services which are the subject of these appeals were rendered. In each instance, the issue of delay was timely raised. We therefore agree with claimant that an augmentation in the hourly rate to account for delay is warranted as a matter of law. As the award of an attorney's fee at a current rate is one method that may be utilized to compensate for delay and the district director, in rendering her fee awards, implicitly determined that $150 was a reasonable rate at the time the award was entered by awarding time claimed for defending the fee petition at this rate, we also agree with claimant that the district director's fee awards may be modified to reflect $150 as the applicable current hourly rate for all attorney services rendered before the district director. Accordingly, in BRB No. 93-2149, we modify the district director's July 2, 1993, Compensation Order to reflect that claimant's attorney is entitled to a fee of

$3,607.75 for 21.5 hours of attorney services at a rate of $150 per hour, 5.25 hours of legal assistant time at $50 per hour, and $120.25 in costs. As we reject claimant's argument that the district director erred in failing to allow the one hour claimed for preparing the fee petition for the reasons stated in our *en banc* decision on reconsideration in *Sproull*, 28 BRBS at 277, the district director's July 2, 1993, Compensation Order is, in all other respects, affirmed.

The district director's February 9, 1994, Compensation Order is similarly modified to reflect that counsel is entitled to a fee of $6,112.50, representing 34.5 hours of attorney services at $150, 1.75 hours of legal assistant services at $40 per hour, plus $867.50 in costs. In all other respects, this Compensation Order is affirmed. BRB No. 94-2279

As for claimant's appeal of the administrative law judge's October 27, 1993, Order Awarding Additional Attorney Fees, claimant requested a fee for 3.5 hours of attorney services performed between January 26, 1988 and February 21, 1988 at an hourly rate of $165.[6] The administrative law judge summarily awarded counsel his historical hourly rate of $125. In light of our determination that augmentation of the hourly rate is necessary to compensate counsel for delay on the facts presented, we vacate the hourly rate determination contained in this Order and remand for the administrative law judge to reconsider the applicable hourly rate and to award a reasonable fee which compensates counsel for delay consistent with this opinion.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are affirmed. BRB No. 88-3695. The administrative law judge's determination that she lacked jurisdiction to award a fee for "wind-up" services claimed on June 23, 1993, contained in the Supplemental Decision and Order - Awarding Attorney's Fees is vacated, and the case is remanded for her consideration of the compensability of the services claimed. In all other respects, the administrative law judge's Supplemental Decision and Order - Awarding Attorney's Fees is affirmed. BRB Nos. 93-1407 and 93-1407A. The hourly rate determination contained in the administrative law judge's Order Awarding Additional Attorney Fees is also vacated, and the case is remanded for reconsideration of the applicable hourly rate consistent with this opinion. In all other respects, the administrative law judge's Order Awarding Additional Attorney Fees is affirmed. BRB No. 94-0454. The district director's July 2, 1993, and February 4, 1994, Compensation Orders - Approval of Attorney Fee Applications are modified to reflect that counsel is entitled to a fee for all attorney services awarded based on an hourly rate of $150, but are otherwise affirmed. BRB Nos. 93-2149 and 94-2279.

SO ORDERED.

[6]Although these services were initially claimed in a fee petition dated February 22, 1989, the administrative law judge indicated in an Order dated September 26, 1988 that no action would be taken on the fee petition at that time. In August 1993, counsel re-applied for these services but requested $165 per hour, his then current hourly rate.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge