BRB Nos. 11-0475
and 11-0475A

JESUS AZUA	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL STEEL & SHIPBUILDING COMPANY	)	DATE ISSUED: 04/12/2012
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Compensation Order Award of Attorney Fees, Order on Reconsideration Award of Attorney Fees, and Order on Reconsideration Awarding Attorney Fees of Eric L. Richardson, District Director, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Eric A. Dupree, San Diego, California, for claimant.

Roy D. Axelrod, Solana Beach, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Compensation Order Award of Attorney Fees, Order on Reconsideration Award of Attorney Fees, and Order on Reconsideration Awarding Attorney Fees (Case No. 18-84475) of District Director Eric L. Richardson 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 shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Roach v. New York Protective Covering Co.,* 16 BRBS 114 (1984).

On August 24, 2004, claimant fell down stairs in the course of his employment, injuring his buttocks and back. He performed light-duty work at employer's facility until he was terminated in October 2004. Subsequently, claimant began working as a welder in non-covered employment. Claimant sought, but employer declined, authorization for spinal fusion surgery to treat his continuing complaints of back pain. Claimant then brought the issue before the district director, who recommended that the surgical procedure "be authorized by the employer without further delay." Employer rejected the district director's recommendation, prompting the transfer of the case to the Office of Administrative Law Judges. At this juncture issues arose regarding the calculation of claimant's average weekly wage and as to the nature and extent of any work-related disability. The administrative law judge found that employer is responsible for the payment of medical expenses associated with claimant's spinal fusion surgery. 33 U.S.C. §907(a). Additionally, the administrative law judge found claimant entitled to periods of temporary total and temporary partial disability benefits, as well as an ongoing nominal award from August 6, 2006 of $1.50 per week.[1]

Subsequently, claimant's attorney submitted to the district director a fee petition for work performed from June 7, 2006 to March 28, 2007, in the amount of $18,190.57, representing 19.60 hours of legal services provided by Eric A. Dupree at the hourly rate of $400 and 48.90 hours of legal services provided by his associate, Paul R. Myers, at the hourly rate of $200, plus costs of $570.57. Employer filed objections to the fee petition.

In his fee order issued on September 29, 2008, the district director awarded Mr. Dupree an hourly rate of $265 and Mr. Myers a rate of $175. The district director granted employer's objection to 31.6 hours expended by counsel in opposition to employer's successful Motion to Quash and/or Limit Subpoena. The district director declined to further reduce the number of compensable hours awarded, pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Specifically, he rejected employer's contention that the fee should be reduced based on claimant's lack of success before the administrative law judge on the issue of average weekly wage. Accordingly, claimant's counsel were awarded a fee of $8,221.50, representing 19.60 hours at $265 per hour and 17.30 hours at $175 per hour.

[1]The administrative law judge found claimant entitled to temporary total disability benefits for the period from October 21 to October 31, 2004, temporary partial disability benefits in the amount of $103.20 per week for the period from November 1, 2004 through August 15, 2005, and temporary partial disability benefits in the amount of $76.53 per week from August 16, 2005 through August 6, 2006. 33 U.S.C. §908(b), (e), (h).

Claimant requested reconsideration of the district director's hourly rate determinations. In his order on reconsideration issued on July 20, 2010, the district director stated that Mr. Dupree is entitled to the requested hourly rate of $400 and that Mr. Myers is entitled to the requested hourly rate of $200, pursuant to the decisions of the United States Court of Appeals for the Ninth Circuit in *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). Moreover, the district director stated that although the delay in payment of the fee was not extraordinary, counsel is entitled to a delay enhancement; the district director awarded Mr. Dupree an adjusted hourly rate of $422 and Mr. Myers an adjusted hourly rate of $211.[2] Additionally, the district director awarded the requested costs of $570.57, which he had neglected to award in his initial order. Accordingly, the district director awarded a fee of $12,492.07, representing 19.60 hours at $422 per hour, 17.30 hours at $211 per hour, plus costs of $570.57.

Employer requested reconsideration of the revised hourly rates, and it also requested reconsideration of specific time entries allowed in the initial fee order. The district director addressed this motion in an Order dated February 28, 2011. He declined to reduce additional hours, noting that employer had not previously requested reconsideration of the hours allowed in the initial order nor had employer filed a response to claimant's motion for reconsideration. The district director also declined to modify the awarded hourly rates.

On appeal, claimant challenges the district director's initial fee award in which he denied a fee for 31.6 hours expended by counsel in opposition to employer's Motion to Quash and/or Limit Subpoena. Employer filed a response to which claimant filed a reply brief. Employer cross-appeals the district director's declining to reduce the number of compensable hours awarded based on claimant's lack of success before the administrative law judge, and his award of an enhanced hourly rate. Claimant did not file a response brief.

Claimant contends the district director erred in denying a fee for the time expended in opposing employer's motion to quash claimant's subpoena. Claimant contends the district director mischaracterized the ultimate outcome of this discovery dispute, and thus erred in finding claimant was not successful on this issue.

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[2]The district director used the percentage change in the national average weekly wage, as calculated for purposes of Section 10(f), 33 U.S.C. §910(f).

Claimant sought a subpoena for employer's surveillance videotapes of claimant, and the associated reports and billings. Employer turned over the videotapes, but it sought to quash the request for reports and billings on the ground that these documents were attorney work product. In her Order on employer's motion to quash, Administrative Law Judge Gee found that the documents are discoverable; however, she stated that the information sought also was discoverable by deposing the surveillance investigator, unless that method of discovery would result in undue hardship to claimant. *See* 29 C.F.R. §18.14(c). As claimant had not attempted to depose the investigator, the administrative law judge found that claimant failed to show such hardship, and she, therefore, granted employer's motion to quash. March 8, 2007 Order at 2.

On appeal, claimant states that, at his deposition, the investigator could not remember the details counsel sought to obtain. Thereafter, employer submitted to claimant the investigative reports and billings without claimant's resubmitting his request for a subpoena.[3] *See* Claimant's Petition for Review EX A. Based on these facts, claimant argues the district director erred by finding that his opposition to employer's motion to quash was unsuccessful and in therefore disallowing the time expended. Claimant avers that the time is compensable since he ultimately obtained the discoverable documents for which he had requested the subpoena.

The district director specifically denied the 31.6 hours on the basis that, as a result of Judge Gee's decision to grant employer's motion to quash, claimant did not prevail on this issue. However, claimant ultimately obtained the evidence he requested through his subpoena and also was wholly successful on his claim for medical benefits. Claimant's ultimate success on this issue renders employer liable for all necessary work performed leading to that success. *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*). The surveillance evidence was related to claimant's assertion that he required surgery for his back condition. Accordingly, the time spent by counsel on the discovery dispute arising over the surveillance evidence is not a severable claim as the time was incurred in relation to the wholly successful claim for medical benefits. *See Hensley*, 461 U.S. at 434-435.

[3]In a fax dated August 24, 2007, employer's attorney stated that he would provide the requested documents and that claimant's attorney had agreed to stipulate to the admissibility of the surveillance films taken by Lee Childress without the need for him to testify at the hearing. Claimant's Petition for Review EX A.

The proper test for determining the necessity of the 31.6 hours of work performed by counsel responding to employer's motion to quash is whether, at the time it was performed, the attorney reasonably believed it was necessary to establish entitlement. *See, e.g., O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000); *Maddon v. Western Asbestos Co.,* 23 BRBS 55 (1989). The administrative law judge stated that, while the surveillance reports and billings were discoverable, pursuant to 29 C.F.R. §18.14(c), claimant's counsel should have first attempted to obtain the requested information by deposing the investigator(s). Thus, the district director must determine in the first instance whether, at the time the work was performed, it was reasonable for counsel to subpoena the requested documents and then oppose employer's motion to quash rather than to initially seek to depose the investigator(s). Accordingly, we vacate the district director's denial of the 31.6 hours expended by counsel in opposition to employer's motion, and we remand for findings on the compensability of these hours.

Employer cross-appeals the district director's rejection of its contention that the overall fee should be reduced based on claimant's failure to prevail on the issue of average weekly wage before the administrative law judge, pursuant to *Hensley.* The district director stated that, "[T]he main issue addressed at the district director's level was medical care (need for surgery), and claimant was fully successful on this issue. Further, claimant also prevailed on the additional issue of compensation benefits." Order at 2. Employer argues that *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000), supports its contention that the district director erred by not accounting for claimant's lack of success on the average weekly wage issue before the administrative law judge.

In *Hensley*, the Supreme Court held that a fee award, under a fee-shifting scheme, should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *Hensley*, 461 U.S. at 434. In *Berezin*, the Board affirmed a district director's reduction of a requested attorney's fee by one-third to account for the claimant's subsequent limited success before the administrative law judge.[4] *Berezin*, however, does not compel the result employer seeks, as, in that case,

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[4]"[W]e affirm this finding. Contrary to claimant's contention, it is his ultimate success that is relevant in determining a fee award, and not merely his success before the district director, as the district director lacks the authority to issue a final award on a disability claim when the parties are not in agreement. *See generally Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); 20 C.F.R. §702.316. Moreover, the district director rationally accounted for claimant's limited success by reducing the fee request in proportion to the success achieved. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983)*; Ezell v. Direct Labor, Inc.*, 33 BRBS 19

claimant's counsel failed to establish an abuse of the district director's discretion, given the claimant's limited success. In this case, similarly, employer has not established an abuse of the district director's discretion in finding that the work counsel performed before his office was on the issue claimant successfully prosecuted before the administrative law judge. That is, the work performed the district director related to the fully successful medical benefits issue and not to the unsuccessful average weekly wage issue.[5] Therefore, as the district director fully considered employer's contention and employer has not established error, we reject employer's contention.

Employer next challenges the "inflation adjustments" that the district director applied to the hourly rates he awarded on reconsideration. In his initial fee order, the district director awarded hourly rates of $265 and $175 to claimant's counsel. On reconsideration, the district director awarded "market" rates of $400 and $200 per hour, which were the rates claimed in the 2008 fee petition. The initial fee order was issued in September 2008 and the first order on reconsideration was issued in July 2010. The district director stated, "[T]he delays associated with the litigation of this case are not extraordinary, however, it is appropriate to applying (sic) inflationary adjustments to the hourly rates awarded." July 20, 2010 Order on Reconsideration at 2. The district director, therefore, applied the 2008 and 2009 percentage increases in the national average weekly wage to adjust the hourly rates to $422 for Mr. Dupree and to $211 for Mr. Myers. *See* 33 U.S.C. §910(f).

Claimant's counsel, in April 2008, submitted a fee petition for work performed before the district director from June 7, 2006 to March 28, 2007. Since the district director's initial fee order was entered in September 2008, the district director did not err

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> (1999). As claimant has not established an abuse of discretion in this regard, we affirm the district director's fee award."

Berezin, 34 BRBS at 167.

[5]The district director correctly noted that the administrative law judge reduced counsel's requested fee to account for claimant's limited success on the average weekly wage and disability issues. *See Azua v. Nat'l Steel & Shipbuilding Co.*, BRB No. 10-0669 (Aug. 18, 2011); *J.A. [Azua] v. Nat'l Steel & Shipbuilding Co.*, BRB Nos. 08-0824/A (July 23, 2009). Moreover, although claimant only obtained a small disability award beyond that which employer had paid, claimant established before the administrative law judge that he was unable to return to his usual work and the administrative law judge based claimant's temporary partial disability award on his actual post-injury earnings and not on the higher earnings employer set forth in its labor market survey.

in stating that the delay in counsel's receipt of a fee award for services provided in 2006 and 2007 was not so egregious or extraordinary as to require a delay enhancement. *See Christensen,* 557 F.3d at 1056, 43 BRBS at 10(CRT). Any additional delay was due to counsel's seeking on reconsideration a higher fee than that awarded. Under such circumstances, a delay enhancement is not warranted. *See Anderson v. Director, OWCP,* 91 F.3d 1322, 1325 n. 3, 30 BRBS 67, 69 n. 3(CRT) (9th Cir. 1996); *Christensen v. Stevedoring Services of America*, 44 BRBS 39, 40-41 (2010), *modifying in part on recon.* 43 BRBS 145 (2009), *recon. denied,* 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP,* 445 F. App'x 912 (9th Cir. 2011). Thus, the district director erred in adjusting the hourly rates for inflation. Therefore, we reverse these delay adjustments and modify the district director's fee order to reflect the awarded hourly rates of $400 to Mr. Dupree and $200 to Mr. Myers.

Accordingly, we vacate the district director's disallowance of 31.6 hours expended by counsel in opposition to employer's Motion to Quash and/or Limit Subpoena, and we remand the case for findings consistent with this decision. We reverse the inflation adjustments to the hourly rates, and we modify the fee award to reflect counsel's entitlement to hourly rates of $400 and $200. In all other respects, the district director's Compensation Order Award of Attorney Fees, Order on Reconsideration Award of Attorney Fees, and Order on Reconsideration Awarding Attorney Fees are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge