

JERRY UTTERBACK)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MID-COAST MARINE)	DATE ISSUED: 04/18/2012
)	
and)	
)	
SAIF CORPORATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Attorney Fee Order and the Order Denying Reconsideration in Part and Granting Reconsideration in Part and Modifying Attorney Fee Order of Stephen W. Webster, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Stephen E. Verotsky (Sather, Byerly & Holloway LLP), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order and the Order Denying Reconsideration in Part and Granting Reconsideration in Part and Modifying Attorney Fee Order (2006-LHC-1931) of Administrative Law Judge Stephen W. Webster 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, e.g., Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

In an October 1986 decision, Administrative Law Judge Heyer awarded claimant permanent partial disability benefits for a February 1980 work-related back injury. In 2006, claimant filed a motion for modification of Judge Heyer's decision asserting entitlement to compensation for permanent total disability. 33 U.S.C. §922. Employer filed a cross-motion for modification contending that Judge Heyer erred in finding that claimant sustained any permanent disability related to his work injury. On August 14, 2008, Administrative Law Judge Torkington denied employer's motion for modification but found that claimant's back condition had worsened since Judge Heyer's award, and she awarded claimant permanent total disability benefits. Employer filed a motion for reconsideration, which was denied by Judge Torkington on October 2, 2008.

Claimant's counsel filed an affidavit for attorney fees and costs in late 2008, requesting a fee of \$34,578.75, which represented \$2,096.71 in costs, \$1,860.00 in paralegal services (15.5 hours at \$120 per hour), and \$32,718.75 in attorney services rendered between August 20, 2006, and September 10, 2008 (87.25 hours at \$375 per hour). However, based on notification that employer had filed an appeal on the merits, Judge Torkington stayed the matter of the fee in an order dated November 19, 2008. The Board affirmed the administrative law judge's award on modification on August 21, 2009, and denied employer's motion for reconsideration. *J.U. [Utterback] v. Mid-Coast Marine*, BRB No. 09-0136 (Aug. 21, 2009) (unpub.), *aff'd on recon.*, (Order, Jan. 25, 2010). On May 3, 2010, as the appeal on the merits had concluded, claimant's counsel filed a supplemental fee affidavit requesting an enhanced hourly rate to compensate for the delay in the payment of his attorney's fee due to the appeal, a more "appropriate" hourly rate for his legal assistant's time, and an additional 0.5 hour of attorney time spent preparing the affidavit. Thus, counsel requested a fee for 88 hours of attorney services at \$412 per hour and 15.5 hours of paralegal services at \$155 per hour. Employer filed objections on May 14, 2010, and claimant's counsel responded, requesting a fee for an additional one hour of attorney time spent responding to employer's objections.

On March 14, 2011, counsel sent a letter to the Office of Administrative Law Judges, noting that he had been awaiting a decision on his fee petition, that Judge Torkington had not issued a decision before she retired, and that he had not heard anything from another administrative law judge. Counsel reiterated his request for an enhanced hourly rate due to the delay in payment and requested a fee for an additional 0.75 hour spent preparing this letter. Thus, counsel requested a total fee of \$42,390.21, representing \$2,907.71 in costs, \$37,080 for 90 hours of attorney services at a rate of \$412 per hour, and \$2,402.50 for 15.5 hours of paralegal services at a rate of \$155 per hour. On May 31, 2011, Administrative Law Judge Stephen W. Webster (the administrative law judge) awarded all of the requested costs and approved all of the requested hours. The administrative law judge awarded counsel various hourly rates based on the Board's first decision in *Christensen v. Stevedoring Services of America*, 43

BRBS 145 (2009) [*Christensen I*], modified on other grounds on recon. [*Christensen II*], 44 BRBS 39 (2010), recon. denied [*Christensen III*], 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), and denied counsel's request to enhance his hourly rate to compensate for the delay in payment. Pursuant to claimant's motion for reconsideration, the administrative law judge corrected his calculation of the hours awarded.¹ Accordingly, the administrative law judge awarded counsel a total fee of \$34,084.32, representing \$2,906.71 in costs, \$2,325 for 15.5 hours of paralegal services at a rate of \$150 per hour, and \$28,852.61 for 90.75 hours of attorney time at various hourly rates.² Claimant's counsel appeals the fee award. Employer responds, urging affirmance.

In awarding the fee in this case, the administrative law judge determined that, because the fee request included services provided by claimant's counsel between 2006 and 2010, and the Board had already set reasonable hourly rates for counsel's services for work performed between 2006 and 2009 in *Christensen I*, he need not make new hourly rate findings. Using the percentage increase in federal locality pay for Portland, Oregon, the administrative law judge determined that a reasonable hourly rate for work performed in 2010 was \$357.60.³ Because there was no federal locality pay table for 2011 at the time of his decision, the administrative law judge determined that services performed in 2011 should be compensated at the 2010 rate. Further, noting that the Board had awarded a rate of \$150 per hour for paralegal services in *Christensen I*, the administrative law judge awarded that paralegal rate in this case.

Claimant first contends the administrative law judge erred in awarding an attorney's fee based on historical hourly rates without accounting for the delay in the payment of counsel's fee. In this case, counsel performed services before the administrative law judge between 2006 and 2008 on the merits of claimant's case and in 2010 and 2011 related to counsel's fee petition. The United States Court of Appeals for

¹The administrative law judge originally calculated counsel's request as 88.5 hours. On reconsideration, he awarded the remaining 1.5 hours as well as the 0.75 hour counsel requested for time spent on the motion for reconsideration. The administrative law judge summarily denied counsel's remaining contentions.

²The breakdown for the attorney fee award is as follows: \$308 per hour for 2.75 hours in 2006 (\$847), \$314.50 per hour for 68.25 hours in 2007 (\$21,464.63), \$325 per hour for 16.25 hours in 2008 (\$5,289.38), and \$357.60 per hour for 3.5 hours in 2010-2011 (\$1,251.6). See *Christensen I*, 43 BRBS 145.

³The Board set Portland, Oregon, as the relevant community for claimant's counsel. *Christensen II*, 44 BRBS 39; *Christensen I*, 43 BRBS 145.

the Ninth Circuit, within whose jurisdiction this case arises, and the Board have held that, in light of the United States Supreme Court's decisions in *Missouri v. Jenkins*, 491 U.S. 274 (1989), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), consideration of enhancement for delay in payment of an attorney's fee is appropriate for fee awards under Section 28 of the Act, 33 U.S.C. §928. *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). When the question of delay is timely raised, the body awarding the fee must consider this factor and, if enhancement is warranted, 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 the attorney for the delay. *See Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997).

Claimant's counsel timely requested an enhancement of his fee on May 3, 2010, shortly after the conclusion of the appeal on the merits. *See Johnson v. Director, OWCP*, 183 F.3 1169, 33 BRBS 112 (9th Cir. 1999); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998). The administrative law judge found that an enhancement for delay was not warranted because counsel offered no justification for such. Fee Order at 2. Contrary to the administrative law judge's analysis, however, the relevant inquiry for determining whether a fee should be augmented to account for delay is the amount of time that has passed between the performance of the attorney's services and the payment of his fee. *Allen*, 31 BRBS 95; *see Jenkins*, 491 U.S. at 282-284. Here, approximately three to five years elapsed between the time the majority of counsel's services were rendered and the time the administrative law judge issued his fee award.⁴ On the facts of this case, an augmentation of the fee to account for the delay in payment is warranted. *See Anderson*, 91 F.3d at 1323, 30 BRBS at 68-69(CRT); *Nelson*, 29 BRBS at 97-98; *see also Gates v. Deukmejian*, 977 F.2d 1300 (9th Cir. 1992) (holding that the district court did not err in awarding plaintiff's counsel a fee based on current rather than historical rates for three-year delay in civil rights case). Consequently, we vacate the administrative law judge's fee award and remand the case for an enhancement to the fee due to the delay in the payment of the attorney's fee. The administrative law judge has discretion to choose the method by which he will adjust the fee to compensate for the delay in payment. *Allen*, 31 BRBS 95.

⁴Of the hours requested, 3.25 hours of attorney services were rendered between April 28, 2010, and June 16, 2011, within two years of the administrative law judge's attorney fee order. *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) (Court affirms Board's finding that two-year delay does not warrant enhancement). Further, any hours related to obtaining counsel's fee may not be enhanced. *See Anderson v. Director, OWCP*, 91 F.3d 1322, 1325 n.3, 30 BRBS 67(CRT), 69 n.3(CRT) (9th Cir. 1996).

Claimant also contends that the administrative law judge erred in applying the attorney hourly rates established in *Christensen I*, without applying the rates as modified by the Board on reconsideration in *Christensen II*. As the administrative law judge adopted the Board's decision in *Christensen I*, he must apply the decision entirely. For the reasons stated in the decision on reconsideration in that case, 44 BRBS 39, the administrative law judge should have applied the hourly rates set forth in *Christensen II*. Consequently, we vacate the awarded hourly rates, and on remand, the administrative law judge must award hourly rates in accordance with *Christensen II*. *Christensen II*, 44 BRBS 39.

Accordingly, the administrative law judge's fee award is vacated, and the case is remanded for action in accordance with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge