

BRB No. 10-0388

DANIEL CONNORS)
)
 Claimant-Petitioner)
)
 v.)
)
 STEVEDORING SERVICES OF AMERICA) DATE ISSUED: 12/14/2010
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 and)
)
 HOMEPORT INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Order Awarding Fees of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Awarding Fees (2007-LHC-0540) of Administrative Law Judge Jennifer Gee 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). This is the second time that this case has come before the Board.

Claimant injured his right knee during the course of his employment. The parties agreed to a settlement of claimant's claim for benefits under the Act, which was approved by the administrative law judge, but were unable to agree on the amount of an attorney's fee. Claimant's attorney sought a fee based upon 32.75 hours of attorney services at a rate of \$375 per hour, 6.25 hours of legal assistant services at a rate of \$120 per hour, and \$1,516.45 in costs.

In her initial Order on Attorney Fees, the administrative law judge reduced the hourly rates sought by claimant's counsel and legal assistant to \$275 and \$110 respectively, disallowed one and one-quarter hours of attorney services and one-quarter hour of legal assistant services, and approved the costs sought by counsel. Consequently, she awarded a total fee and costs to claimant's counsel of \$11,182.70. Claimant appealed the fee award.

On appeal, the Board affirmed the administrative law judge's disallowance of specific entries sought by counsel, vacated the administrative law judge's hourly rate determination for attorney and legal assistant services, and remanded the case for the administrative law judge to determine reasonable hourly rates consistent with the decisions of the United States Court of Appeals for the Ninth Circuit in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) and *Van Skike v. Director, OWCP*, 557 F.3d 104, 43 BRBS 11 (CRT) (9th Cir. 2009). *D.C. [Connors] v. Stevedoring Services of America*, BRB Nos. 08-0811, 09-0261 (Apr. 28, 2009)(unpubl.).¹

On remand, the administrative law judge addressed the Ninth Circuit's holdings in *Christensen* and *Van Skike* and determined that, since counsel's services were rendered during the same time periods which were addressed by the Board in its decision following the Ninth Circuit's remand in *Christensen*, see *Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), on remand from 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), she need not make a new finding as to the relevant community and prevailing market rate. Consequently, utilizing the hourly rate awarded by the Board to claimant's counsel for services performed during the year 2007 in *Christensen*, 43 BRBS 145, the administrative law judge awarded an attorney's fee of \$12,656.33,

¹ The Board's decision in this case, BRB No. 09-0261, was consolidated with an appeal of the fee award entered by the district director, BRB No. 08-0811. The district director's fee award also was vacated and the case remanded for further proceedings.

representing 32.75 hours of attorney services at an hourly rate of \$314.50, 6 hours of legal assistant services at an hourly rate of \$140, and \$1,516.45 in costs.²

On appeal, claimant challenges the hourly rates awarded by the administrative law judge, the decision of the administrative law judge to apply 2007 hourly rate to services performed in 2008, and the administrative law judge's failure to compensate counsel for the delay in the payment of his requested fee. Employer responds, urging affirmance.

Claimant first contends that the rates for workers' compensation attorneys reflected in the 2007 Oregon Bar Survey are not "market" rates, and that consequently the administrative law judge erred in adopting the hourly rates inclusive of such figures as calculated by the Board in *Christensen*, 43 BRBS 145. The Board addressed this contention in claimant's motion for reconsideration of the decision in *Christensen*, 43 BRBS 145. The Board agreed with claimant that the rates for workers' compensation attorneys reflected in the Oregon Bar Survey should not be included in an hourly rate calculation. Accordingly, as the administrative law judge has adopted the Board's decision on this issue and for the reasons stated in *Christensen v. Stevedoring Services of America*, 44 BRBS 39 (2010), *modifying on recon.* 43 BRBS 145 (2009), *recon. denied* ___ BRBS ___, BRB No. 03-0302 (Sept. 23, 2010), we modify the fee award of the administrative law judge to reflect claimant's counsel's entitlement to a fee based upon an hourly rate of \$357.50 for legal services rendered in 2007 and \$370 for legal services rendered in 2008.

Claimant next contends that the administrative law judge erred in awarding a fee for all services at the applicable 2007 hourly rates. We agree. A review of the 32.75 hours approved by the administrative law judge reveals that claimant's attorney performed 16.75 hours of legal services in 2007 and 16 hours of legal services in 2008, while his legal assistant performed 3.25 hours of services in 2007 and 2.75 hours of services in 2008. Accordingly, the amounts due claimant's counsel are to be calculated using the hourly rates appropriate for each year in which the services were performed.³

² After noting that the Board in *Christensen*, 43 BRBS 145, had awarded claimant's legal assistant an hourly rate of \$150 for services performed in 2009, the administrative law judge adjusted this rate for 2007 by using the federal locality pay increases between 2007 and 2009.

³ No party challenges the administrative law judge's determination that claimant's legal assistant's services should be reimbursed based upon an hourly rate of \$140 for services performed in 2007 and \$145 for services performed in 2008.

Claimant further contends that the administrative law judge erred in not compensating counsel for delay in the payment of his requested fee. We reject this contention. The administrative law judge's initial fee award was entered in November 2008 for services rendered in 2007 and 2008. This delay in payment is not so egregious or extraordinary as to require a delay enhancement. *See Christensen*, 557 F.3d at 1056, 43 BRBS at 10(CRT). Moreover, as any further delay in payment was due to the appeals of the fee award, no enhancement for the delay in payment is appropriate. *See Anderson v. Director, OWCP*, 91 F.3d 1322, 1325 n.3, 30 BRBS 67, 69 n.3(CRT) (9th Cir. 1996).

Accordingly, the administrative law judge's fee award is modified to award claimant's counsel an attorney's fee in the amount of \$14,278.33, representing 16.75 hours of attorney services at \$357.50 per hour, 16 hours of attorney services at \$370 per hour, 3.25 hours of legal assistant services at \$140 per hour, 2.75 hours of legal assistant services at \$145 per hour, and \$1,516.45 in costs.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge