

BRB No. 10-0222

TERRY W. HUDSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COASTAL PRODUCTION SERVICES, INCORPORATED/FOREST OIL CORPORATION	)	DATE ISSUED: 07/22/2010
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier- Petitioners	)	DECISION and ORDER

Appeal of the Order Enhancing Attorney Fee of Clement J. Kennington,  
Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster, Metairie, Louisiana, for claimant.

Christopher L. Zaunbrecher (Briney & Foret), Lafayette, Louisiana, for  
employer/carrier.

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

PER CURIAM:

Employer appeals the Order Enhancing Attorney Fee (2004-LHC-0492) of  
Administrative Law Judge Clement J. Kennington 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. *Roach v. New York Protective  
Covering Co.*, 16 BRBS 114 (1984).

Claimant sustained injuries while working for employer on August 11, 2001, on a fixed oil and gas production platform located in the Saturday Island Field in Plaquemines Parish, Louisiana, on Barataria Bay. Claimant filed a claim for benefits, which employer controverted on the ground that claimant is not covered under the Act. In his decision dated May 26, 2005, Administrative Law Judge Richard D. Mills found that claimant was a “maritime employee” who was injured on a covered situs. 33 U.S.C. §§902(3), 903(a). He thus awarded claimant temporary total disability benefits from August 11, 2001. Employer appealed Judge Mill’s award of benefits to the Board, which affirmed his decision, *see Hudson v. Coastal Production Services, Inc.*, 40 BRBS 19 (2006), and then to the United States Court of Appeals for the Fifth Circuit, who likewise affirmed the award of benefits. *Coastal Production Services Inc. v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *petition for rehearing denied*, 567 F.3d 752 (5<sup>th</sup> Cir. 2009).

Meanwhile, claimant’s counsel sought, and Judge Mills awarded, in an Order dated May 5, 2006, an attorney’s fee of \$16,852.50, representing 74.9 hours of work at an hourly rate of \$225, plus an additional \$5,744.88 in costs. Following the completion of the appellate process, counsel filed a motion with the Office of Administrative Law Judges on June 25, 2009, seeking enhancement of the hourly rate awarded to him by Judge Mills. In response, employer argued that counsel’s request was untimely and alternatively that counsel had already been adequately compensated for his services in this case by Judge Mills. The case was reassigned to Administrative Law Judge Clement J. Kennington (the administrative law judge), who enhanced the hourly rate awarded to counsel from \$225 to \$265.

On appeal, employer challenges the administrative law judge’s award of an enhanced fee to claimant’s counsel. Counsel responds, urging affirmance.

Employer initially contends that the administrative law judge erred in finding that claimant’s motion for enhancement was timely. Employer cites *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998), in support of its position that a request for enhancement is timely only if it is filed before the final decision on appeal. Employer thus contends that since the motion for enhancement in this case was filed more than thirty days after the award became both final and enforceable, the motion must be denied as untimely. In *Bellmer*, the administrative law judge awarded a fee in 1993, but the appeals on the merits continued until December 1997. Employer paid the fee awarded in March 1997, and in June 1997, claimant filed a motion for an enhanced fee due to delay in payment of the fee. The administrative law judge denied this motion, stating he did not have jurisdiction. The Board held that the administrative law judge had jurisdiction to address the request for an enhanced fee, stating,

we conclude that requests for fee enhancement should be treated as supplemental fee petitions and not as requests to re-open fee awards which have become final. In this way, the body awarding the fee can ensure that full effect is given to the case law allowing enhancement of a fee to account for the delay in payment.

*Bellmer*, 32 BRBS at 246, citing *Missouri v. Jenkins*, 491 U.S. 274 (1989). The Board held that a request for fee enhancement must be made, at the latest, within a reasonable amount of time after the fee award became enforceable. *Id.* The Board distinguished between the finality of the original fee award and the ability of claimant's counsel to seek an augmented fee due to delay, which may not be apparent until all appeals are exhausted and employer pays the awarded fee. Both the Ninth and Fourth Circuits have found this approach to be reasonable. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9<sup>th</sup> Cir. 1999); *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 21 BLR 2-631 (4<sup>th</sup> Cir. 1999).

We reject employer's interpretation of *Bellmer*, as that decision holds that a request for fee enhancement must be made, at the latest, within a reasonable amount of time after the fee award became enforceable. *Bellmer*, 32 BRBS at 246. Thus, that counsel's motion for a fee enhancement was filed after the final decision on appeal was reached, and thus, after the fee award became enforceable, does not render that motion untimely. In this case, the fee award became enforceable on May 8, 2009, upon the Fifth Circuit's denial of employer's request for a rehearing. Counsel filed his Motion to Enhance on June 25, 2009, 48 days after the decision became final, and approximately two months before employer paid the original fee on August 24, 2009.

In *Johnson*, 183 F.3d 1169, 33 BRBS 112(CRT), the Ninth Circuit noted that the fee award became final and enforceable on November 13, 1996, when employer's right to appeal the Board's decision had expired, that employer paid the fee award on January 7, 1997, and that counsel filed his request for a fee enhancement on January 15, 1997. Based on these facts, the Ninth Circuit held that counsel's request, which was filed a little over 60 days after the award became enforceable, was timely under *Bellmer*. Consequently, the administrative law judge reasonably found that counsel's motion for enhancement in this case was timely. *Johnson*, 183 F.3d 1169, 33 BRBS 112(CRT); *Bellmer*, 32 BRBS at 246.

Employer alternatively argues that the administrative law judge erred in enhancing counsel's hourly rate. Employer contends that enhancement in this case is inappropriate since the hourly rate awarded to counsel, \$225, reflected a thorough consideration of the relevant factors and because it was characterized, at that time, by Judge Mills as the "highest rate" appropriate given counsel's experience and ability. Moreover, employer

argues that the hourly rate awarded to counsel by the Fifth Circuit in this case, \$265, adequately compensated counsel for his past services.

The relevant inquiry in determining whether a fee should be augmented to account for delay is the amount of time that has passed between the performance of counsel's services and the payment of his fee. *See Missouri v. Jenkins*, 491 U.S. 274 (1989); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). In this case, the services performed before Judge Mills occurred between 2003 and 2005, and while Judge Mills awarded the attorney's fee in 2006, employer did not pay the fee until August 24, 2009. Thus, there was a delay of up to six years between payment of the fee and rendering of some of the services. Consequently, the administrative law judge rationally determined that enhancement is appropriate in this case, and we affirm the enhanced hourly rate of \$265. *Johnson*, 183 F.3d 1169, 33 BRBS 112(CRT).

Accordingly, the administrative law judge's Order Enhancing Attorney Fee is affirmed.

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge