

MARTIN NELSON)	BRB Nos. 10-0518 and 10-
)	0518A
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
MARINE TERMINALS CORPORATION)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION)	
)	
Employer/Carrier-Petitioners)	
Cross-Respondents)	
)	
MARTIN NELSON)	BRB No. 11-0371
)	
Claimant-Respondent)	
)	
v.)	
)	
MARINE TERMINALS CORPORATION)	DATE ISSUED: 05/19/2011
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION)	
)	
Employer/Carrier-Petitioners)	DECISION and ORDER

Appeals of the Order on Attorney's Fees of Clyde Taylor, Acting District Director, United States Department of Labor, and the Attorney Fee Order of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Robert E. Babcock, Lake Oswego, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Order on Attorney's Fees (Case No. 14-127685) of Acting District Director Clyde Taylor, and employer appeals the Attorney Fee Order (2009-LHC-1578) of Administrative Law Judge Russell D. Pulver, 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). In an Order dated March 10, 2011, the Board consolidated these appeals for purposes of decision.

Following a settlement between the parties in this case, claimant's counsel filed fee petitions with both the district director and the administrative law judge for work performed before those respective offices. Specifically, before the district director, counsel sought a fee of \$6,490, representing 15 hours of attorney services at an hourly rate of \$412, plus two hours of legal assistant services at an hourly rate of \$155. Before the administrative law judge, counsel sought a fee of \$6,747, representing 16 hours of attorney services at an hourly rate of \$412, plus one hour of legal assistant services at an hourly rate of \$155.

In their respective fee orders, the district director and the administrative law judge addressed the decisions of 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 1041, 43 BRBS 11(CRT) (9th Cir. 2009), and determined that, since counsel's services were rendered during the same time periods addressed by the Board in its decision following the Ninth Circuit's remand in *Christensen*, *see Christensen v. Stevedoring Services of America [Christensen I]*, 43 BRBS 145 (2009), *modified on recon. [Christensen II]*, 44 BRBS 39, *recon. denied [Christensen III]*, 44 BRBS 75 (2010), they need not make new findings regarding the market hourly rate to be awarded to claimant's counsel. Consequently, utilizing the hourly rates awarded by the Board in *Christensen II*, 44 BRBS 39, the district director awarded counsel an attorney's fee of

\$4,549.88.¹ In his Attorney Fee Order, the administrative law judge awarded claimant's counsel an attorney's fee of \$6,102.²

Employer appeals, and claimant cross-appeals, the district director's fee award; specifically, employer challenges the hourly rates awarded to claimant's counsel, while claimant challenges the decision to reduce the number of compensable attorney hours and the failure to compensate counsel for the delay in the payment of his requested fee. BRB Nos. 10-0518/A. Employer also appeals the administrative law judge's fee award, arguing that the administrative law judge erred in determining the hourly rates to be awarded to claimant's counsel. BRB No. 11-0371.

In its orders in *Christensen*, the Board set Portland, Oregon, as the relevant community for claimant's counsel. The Board used the 95th percentile rates for 2006, as thereafter adjusted for cost-of-living increases, from certain categories of work set forth in the 2007 Oregon Bar Survey in determining counsel's hourly rates. *Christensen II*, 44 BRBS 39; *Christensen I*, 43 BRBS 145. In awarding counsel a fee in this case, the district director stated:

In light of the fact that the instant case involves services provided by claimant's counsel in the same time frame already addressed by the BRB in its decision in *Christensen*, I see no reason to make a new determination as to the relevant community and prevailing market rate that should be applied to his services in this case.

Order on Attorney's Fees at 3. Similarly, the administrative law judge stated:

¹This award represents 1.75 hours of attorney services performed in 2006 at an hourly rate of \$350, 3.25 hours of attorney services performed in 2007 at an hourly rate of \$357.50, 1.5 hours of attorney services performed in 2008 at an hourly rate of \$370, 2.75 hours of attorney services performed in 2009 at an hourly rate of \$384, 2 hours of attorney services performed in 2010 at an hourly rate of \$392, one hour of legal assistant services performed in 2006 at an hourly rate of \$136, 1.5 hours of legal assistant services performed in 2007 at an hourly rate of \$139, and one-quarter hour of legal assistant services performed in 2008 at an hourly rate of \$144.

²This award represents 15.5 hours of attorney services performed in 2009 at an hourly rate of \$384, and one hour of legal assistant services performed in 2009 at an hourly rate of \$150.

I see no reason not to apply the BRB's rates in the instant matter, given that the BRB's *Christensen* decision was made only recently and the similarity of the contested issues regarding Mr. Robinowitz's hourly rate.

Attorney Fee Order at 5.

In its appeals, employer contends the district director and administrative law judge erred in relying on the hourly rates awarded by the Board to claimant's counsel in *Christensen*, rather than basing a rate finding on their own analysis of the market data. Citing the recent decision of the United States Supreme Court in *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010), employer avers that an appropriate lodestar figure must be determined based upon the hourly rate needed to induce capable attorneys to represent employees in cases arising under the Act. Employer thus challenges the Board's holding that counsel's years of experience should be compensated by use of the 95th percentile rates in the Oregon Bar Survey and avers that a case-specific hourly rate must be calculated at each adjudicatory level of proceedings.

We reject employer's contentions of error. The Ninth Circuit does not require that a new determination of the relevant community and market hourly rate be made in every case.³ *Christensen*, 557 F.3d at 1051, 43 BRBS at 9(CRT). Moreover, the Board has recently addressed the Supreme Court's decision in *Perdue* in an Order issued after employer filed its pleadings in these appeals. *Christensen III*, 44 BRBS 75. While acknowledging, based on *Perdue*, that hourly rates for one attorney can vary from case to case and, within one case, from level to level, the Board declined to overturn its prior decision utilizing the 95th percentile rate from the Oregon Bar Survey, stating that the employer did not demonstrate error in that case. *Id.* at 76.

In their fee orders, the district director and the administrative law judge addressed the issues raised by the parties regarding the hourly rates to be awarded to claimant's counsel in this case, discussed the applicable Ninth Circuit law regarding this issue, and concluded that they need not redetermine counsel's hourly rate in light of the Board's orders in *Christensen*. See Order on Attorney's Fees at 1–3; Attorney Fee Order at 2–5. The documents offered by the parties in support of their positions below on the applicable market rate are largely the same as those offered to the Board in *Christensen*, see 43 BRBS 145, and the decision in *Perdue* does not undermine the market rate analysis

³The court stated, “Nor do we insist that in every fee award decision the BRB must make new determinations of the relevant community and the reasonable hourly rates,” so long as fee awards are based on current, rather than historical, market conditions. *Christensen*, 557 F.3d at 1051, 43 BRBS at 9(CRT).

undertaken by the Board in *Christensen*. Employer has not demonstrated error or an abuse of discretion in the decisions of the district director and the administrative law judge to rely on the rates in *Christensen II* in determining the hourly rates to be awarded to claimant's counsel in this case, which involves the same attorney, location, and market data as the former case. Accordingly, the hourly rates awarded are affirmed. *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Christensen II*, 44 BRBS 39; *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella*, 12 BRBS 272.

In his cross-appeal of the district director's fee award, BRB No. 10-0518A, claimant contends it was error to disallow or reduce various services itemized in counsel's fee petition. Claimant assigns error to the decision to award three quarter-hour entries as legal assistant services rather than at the requested attorney rate. Specifically, the district director awarded the one-quarter hours on October 10, 2006, February 26, 2007, and August 11, 2008, as legal assistant services, stating that these services "could clearly have been performed by claimant's counsel's legal assistant."⁴ Order on Attorney's Fees at 4. We agree with claimant that services such as reviewing the file and writing letters concerning medical issues are attorney services. *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994). The district director's Order on Attorney's Fees is therefore modified to reflect counsel's entitlement to a fee at attorney rates for the three one-quarter hour services performed on October 12, 2006, February 26, 2007, and August 11, 2008.

Claimant also assigns error to the district director's reduction of two hours of the time sought for counsel's response to employer's objections to the fee request. Order on Attorney's Fees at 4 – 5. While counsel is entitled to reply to employer's objections, he must exercise discretion in doing so. *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 157 (2009); *see also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)(fee request should not

⁴These services are described in counsel's fee petition as follows:

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|-------------------|--|
| October 12, 2006 | Review file and send follow-up letter to Dr. Kim for records |
| February 26, 2007 | Review file and prepare letter to Dr. Kim regarding the cause of claimant's hearing loss and request PMA records |
| August 11, 2008 | Review file and telephone OWCP regarding records sent previously. |

result in second major litigation); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). In this case, the district director determined that the amount of time claimed for work related to the defense of counsel's fee petition was excessive. As claimant has not established error in this regard, we affirm the reduction made by the district director.

Claimant lastly contends that the district director erred in not compensating counsel for the delay in the payment of his requested fee. Counsel did not seek an hourly rate enhanced for delay in his fee petition to the district director. Consequently, we decline to address this issue, as it is being raised for the first time on appeal. *See Van Skike*, 557 F.3d 1041, 1048-1049, 43 BRBS 11, 15-16(CRT).

Accordingly, the administrative law judge's Attorney Fee Order is affirmed. BRB No. 11-0371. The district director's Order on Attorney's Fees is modified to award claimant's counsel an attorney's fee in the amount of \$4,714.50, representing 2 hours of attorney services at \$350 per hour, 3.5 hours of attorney services at \$357.50 per hour, 1.55 hours of attorney services at \$370 per hour, 2.75 hours of attorney services at \$384 per hour, 2 hours of attorney services at \$392 per hour, three-quarters of an hour of legal assistant services at \$136 per hour, and 1.25 hours of legal assistant services at \$139 per hour. In all other respects, the district director's fee award is affirmed. BRB Nos. 10-0571/A.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge