

GEORGE K. AHUNA )  
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 Claimant-Petitioner )  
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 v. )  
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 STEVEDORING SERVICES OF ) DATE ISSUED: 08/26/2003  
 AMERICA )  
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 and )  
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 HOMEPORT INSURANCE COMPANY )  
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 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Supplemental Compensation Order Denial of Request for Enhancement of Attorney's Fee of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

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

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

PER CURIAM:

Claimant appeals the Supplemental Compensation Order Denial of Request for Enhancement of Attorney's Fee (14-120393, 14-123602) of District Director Karen P. Staats 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 the law. *See, e.g., Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

In the underlying action, claimant sustained work-related injuries to both of his knees. The administrative law judge accepted the parties' stipulation that claimant has a 37 percent left knee impairment and a 30 percent right knee impairment, and he subsequently awarded claimant continuing permanent total disability benefits resulting from both knee injuries and medical benefits related to claimant's left knee condition. 33 U.S.C. §§908(a), 907.

Claimant's counsel thereafter submitted a fee petition to the district director requesting a fee of \$3,993.75, representing 18.75 hours of attorney services at \$200 per hour, 3.25 hours of paralegal services at \$75 per hour, plus costs of \$40. The district director reduced the hourly rate for attorney services to \$190 and disallowed one-quarter hour from the 1.25 hours requested to prepare the fee petition. Claimant's counsel was therefore awarded a fee of \$3,758.75, plus costs of \$40. On December 1, 2000, the district director awarded claimant's counsel an additional fee of \$618.75, representing 3 hours at \$200 per hour, and .25 hours at \$75 per hour.

Employer appealed the administrative law judge's award of benefits to the Board, which issued a decision on January 5, 2001, affirming the administrative law judge's decision. *Ahuna v. Stevedoring Services of America*, BRB Nos. 00-0429/A, 00-0666/A (Jan. 5, 2001)(unpub.). Employer appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit, which rejected employer's argument on appeal. *Stevedoring Services of America v. Jones Stevedoring Co.*, No. 01-70369 (9<sup>th</sup> Cir. June 10, 2002) (unpub.).<sup>1</sup> On June 19, 2002, employer paid the fee awards entered by the district director.

On June 28, 2002, claimant requested a supplemental fee to account for the delay in his receipt of the fees awarded by the district director; specifically, counsel sought an amount equal to the difference between the hourly rates applied in the district director's prior orders and his current hourly rate of \$237.50 for his attorney services, and \$85 for the services of his legal assistants.<sup>2</sup> Employer objected to the supplemental fee request. On August 23, 2002, the district director, in a Supplemental Compensation Order Denial

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<sup>1</sup> The court held that the Board correctly determined that Stevedoring Services of America, rather than Jones Oregon Stevedoring Company, was the responsible employer in this case.

<sup>2</sup> Claimant thus requested a supplemental fee of \$1,501.25, which includes \$991.25 of attorney time, \$35 of legal assistants' time, and \$237.50 for one hour to prepare the supplemental fee request. Claimant also requested \$237.50 for a one-hour conference on August 18, 2001, where claimant's counsel advised him of the status of the appeal before the Ninth Circuit, an action to which claimant was not a party.

of Request for Enhancement of Attorney's Fee, set forth at length the chronology of events in this case and thereafter found that as she had awarded counsel fees on March 23, 2000, and December 1, 2000, and employer paid those fees on June 17, 2002, there was no "prolonged" or "unusual" delay in payment in this case. The district director consequently denied counsel's supplemental fee request. The district director also denied a fee for the one hour conference counsel's attorney held with claimant to explain the status of the case before the circuit court.

Claimant appeals the denial of the supplemental fee request, contending that the district director erred in denying the requested supplemental fee award based on the difference between counsel's current and historic hourly rates. Employer responds, urging affirmance. Claimant has filed a reply to employer's response.

We agree with claimant that the district director erred in her consideration of the request to augment his counsel's fee. The Board has previously 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), it is clear that consideration of enhancement for delay is appropriate for fee awards under Section 28 of the Act, 33 U.S.C. §928. See *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). Accordingly, when the question of delay is timely raised, the tribunal awarding the fee must consider this factor. The fact-finder 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 claimant for the delay. *Id.*; see *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67 (CRT) (9<sup>th</sup> Cir. 1996).

In the case at hand, the district director found that the delay between the issuance of her respective fee awards and the payment of these awards by employer was not prolonged or unusual. The relevant inquiry, however, 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 *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997), as it is axiomatic that such delays deprive successful litigants of payment of their fees at market rates. See *Jenkins*, 491 U.S. at 283. Awarding counsel current, rather than historic, hourly rates is one way of compensating for this delay. *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). Accordingly, as the district director did not consider the appropriate length of time in the case at bar, we vacate the district director's determination that enhancement of the fee to account for

delay is not warranted and remand the case for the district director to reconsider this issue.<sup>3</sup>

Lastly, we affirm the district director's denial of a fee for the one-hour conference with claimant regarding the status of employer's appeal before the circuit court, as the work was performed while the case was pending before another body. *See generally Director, OWCP v. Palmer Coking Coal Co.* [Manowski], 867 F.2d 552 (9<sup>th</sup> Cir. 1989); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001).

Accordingly, the Supplemental Compensation Order Denial of Request for Enhancement of Attorney's Fee of the district director is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>3</sup> Should the district director find on remand that claimant is entitled to a fee enhancement, she should consider claimant's request for a fee for the one hour claimant spent preparing his supplemental fee petition. The Board has held that requests for fee enhancements are to be treated as supplemental fee petitions. *See Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998). Moreover, attorneys are entitled to a reasonable fee for time spent preparing fee applications under the Act. *See Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd*, 195 F.3d 790, 33 BRBS 184(CRT) (5<sup>th</sup> Cir. 1999), *cert. denied*, 120 U.S. 2215 (2000); *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996).

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