

BRITTNEY J. GOODELL	)	BRB No. 10-0570
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: 05/24/2011
	)	
Employer/Carrier-Petitioners	)	
	)	
BRITTNEY J. GOODELL	)	BRB Nos. 10-0696
	)	and 10-0696A
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Order Awarding Attorney's Fees and Costs and the Order Modifying Award of Attorney's Fees of Steven B. Berlin, Administrative Law Judge, United States Department of Labor, and the Order on Attorney's Fees of Karen P. Staats, District Director, the Order Amending

Order on Attorney's Fees of Clyde Taylor, Acting District Director, and the Order on Reconsideration on Attorney's Fees of Karen P. Staats, District Director, 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 the Order Awarding Attorney's Fees and Costs and the Order Modifying Award of Attorney's Fees (2008-LHC-01544) of Administrative Law Judge Steven B. Berlin, and employer appeals and claimant cross-appeals the Order on Attorney's Fees of District Director Karen P. Staats the Order Amending Order on Attorney's Fees of Acting District Director Clyde Taylor, and the Order on Reconsideration on Attorney's Fees of District Director Karen P. Staats (Case No. 14-143892) 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 October 15, 2010, 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 \$10,236.75, representing 24 hours of attorney services at an hourly rate of \$412, plus 2.25 hours of legal assistant services at an hourly rate of \$155. Before the administrative law judge, counsel sought a fee of \$16,444.25, representing 37.75 hours of attorney services at an hourly rate of \$412, plus 5.75 hours of legal assistant services at an hourly rate of \$155.

In their 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) (9<sup>th</sup> Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9<sup>th</sup> Cir. 2009), and determined that, in light of the Board's decisions 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), which involved the same claimant's attorney, 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 \$7,057.63.<sup>1</sup> After similarly taking into consideration the Board's decision in *Christensen II*, the administrative law judge awarded claimant's counsel an attorney's fee of \$15,283.50.<sup>2</sup>

Employer appeals the administrative law judge's fee award, arguing that the administrative law judge erred in determining the hourly rate to be awarded to claimant's counsel. BRB No. 10-0570. Employer also appeals, and claimant cross-appeals, the district director's fee award; 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. 10-0696/A.

In its orders in *Christensen*, the Board set Portland, Oregon, as the relevant community for claimant's counsel. The Board used the 95<sup>th</sup> 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 administrative law judge adopted the hourly rates calculated by the Board in its decisions following the Ninth Circuit's remand in *Christensen*, stating:

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<sup>1</sup>In an Order on Attorney's Fees dated May 5, 2010, the district director awarded counsel a fee utilizing the hourly rates awarded by the Board in *Christensen I*, 43 BRBS 145. In an Order Amending Order on Attorney's Fees dated May 19, 2010, the district director amended counsel's fee award to reflect the Board's decision on reconsideration in *Christensen II*, 44 BRBS 39. Accordingly, the district director's award represents 9.5 hours of attorney services performed in 2006 at an hourly rate of \$350, 5.25 hours of attorney services performed in 2007 at an hourly rate of \$357.50, one hour of attorney service performed in 2008 at an hourly rate of \$370, three 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, and 1.25 hours of legal assistant services performed in 2007 at an hourly rate of \$139. The district director denied employer's motion for reconsideration of the amended award.

<sup>2</sup>This award represents 37.75 hours of attorney services performed in 2009 at an hourly rate of \$384 and 5.25 hours of legal assistant services performed an hourly rate of \$150.

I find no reason to undertake the [hourly rate] analysis anew or to adjust the rates that the Board set. . . . any calculation of a prevailing market rate is a rough approximation in that there is no real market; I can do no more than draw inferences from analogous markets, and the Board has done that.

I have reviewed the exhibits that the parties submitted to look for newly available evidence that would bring into question the Board's determination. If anything, I read the parties' submissions, taken together, to suggest that the Board got it right.

Order Awarding Attorney's Fees and Costs at 4. Similarly, 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 remand decision in *Christensen* and *Van Skike*, 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 2.

In its appeals, employer contends the administrative law judge and the district director 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 95<sup>th</sup> 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.<sup>3</sup> *Christensen*, 557 F.3d at 1051, 43 BRBS at 9(CRT). Moreover, in *Christensen III*, 44 BRBS 75, the Board addressed the Supreme Court's decision in *Perdue*; specifically, while acknowledging, based on *Perdue*, that hourly rates for one attorney can vary from

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<sup>3</sup>The 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).

case to case and, within one case, from level to level, the Board declined to overturn its prior decision utilizing the 95<sup>th</sup> percentile rate from the Oregon Bar Survey, stating that the employer did not demonstrate error in that case. *Christensen III*, 44 BRBS at 76.

In their fee orders, the administrative law judge and the district director 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 Awarding Attorney's Fees and Costs at 2–4; Order on Attorney's Fees at 1–3. 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 undertaken by the Board in *Christensen*. Employer has not demonstrated error or an abuse of discretion in the decisions of the administrative law judge and the district director 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 by the administrative law judge and the district director 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. 10-0696A, claimant challenges the district director's decision to disallow or reduce various services itemized in counsel's fee petition. Specifically, claimant assigns error to the district director's reduction, from two hours to one hour, of the time sought for preparing counsel's three-page fee petition, and the reduction of 4.25 hours of the time sought for counsel's response to employer's objections to the fee request. In her Order on Attorney's Fees, the district director addressed and rejected claimant's contention that his fee petition preparation work involved providing a more complete description of the services performed and that 6.25 hours were necessary to respond to employer's objections to counsel's fee request. Order on Attorney's Fees at 3 – 5. Only necessary attorney work is compensable and fees for services reasonably found to be “excessive, redundant or otherwise unnecessary” may be properly reduced or disallowed. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 955, 41 BRBS 53, 57(CRT) (9<sup>th</sup> Cir. 2007). 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 result in second major litigation); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9<sup>th</sup> Cir. 1996). In this case, the district director engaged in a thorough examination of the hours claimed by counsel and rationally determined that the amount of time claimed for these services was excessive. See Order on Attorney's Fees at 3-4. Claimant has not

established an abuse of discretion in this regard. We, therefore, affirm the reductions 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 Order Awarding Attorney's Fees and Costs and Order Modifying Award of Attorney's Fees, and the district director's Order on Attorney's Fees, Order Amending Order on Attorney's Fees, and Order on Reconsideration on Attorney's Fees, are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge