



BRB No. 16-0074

MICHAEL S. AYERS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JONES STEVEDORING COMPANY)	DATE ISSUED: <u>Sept. 26, 2016</u>
)	
and)	
)	
RED SHIELD INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Order on Attorney's Fees and the Order Denying Motion for Reconsideration of R. Todd Bruininks, District Director, United States Department of Labor.

Charles Robinowitz (Law Office of Charles Robinowitz), Portland, Oregon, for claimant.

David Fournier (Jones Stevedoring Company), Seattle, Washington, for employer/carrier.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order on Attorney's Fees and the Order Denying Motion for Reconsideration of District Director R. Todd Bruininks (Case No. 14-154563) 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, based on an abuse of discretion or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Following the issuance, in 2015, of a Decision and Order awarding claimant compensation benefits under the Act, claimant's counsel filed a petition for an attorney's fee for work performed before the Office of Workers' Compensation Programs (OWCP) from February 25 through July 14, 2011. Counsel requested a fee of \$3,480, representing 7.8 hours of attorney time at an hourly rate of \$425 and one hour of legal assistant time at an hourly rate of \$165, plus \$53.00 in costs.¹ Employer filed objections to counsel's fee petition.

In his Order on Attorney's Fees, the district director reduced the requested hourly rates to \$392 for attorney services, and to \$150 for legal assistant services, for work performed in 2011. The district director used the 2014 and 2015 Federal locality rate increases, specifically one percent each year for Portland, Oregon, to award counsel an hourly rate of \$396 for work performed in 2015 for the preparation of his fee petition.² The district director awarded counsel the 6.05 hours sought for attorney services performed in 2011, but reduced the time requested for preparation of the fee petition. Accordingly, the district director awarded counsel a fee of \$2,971.60, representing 6.05 hours at \$392 per hour, 1.25 hours at \$396 per hour, .7 hour at \$150 per hour, and costs of \$53.00.

Counsel filed a motion for reconsideration, contending, *inter alia*, that the district director erred in failing to award him his claimed hourly rate of \$425 for all services,

¹ The 7.8 hours of attorney time sought by counsel consisted of 6.05 hours of services performed before the OWCP during the period from February 25 to July 14, 2011, and 1.75 hours spent preparing his fee petition between May 9 and 11, 2015.

² The district director stated that no increase was applicable for FY 2011 through 2013 due to the freeze in Federal locality pay during those years. Order at 4.

which would account for the delay in payment of the fee. The district director denied claimant's counsel's motion for reconsideration.

Claimant's counsel appeals the district director's fee award, challenging the hourly rates awarded for his services. Employer responds, urging affirmance of the district director's Orders. The Director, OWCP, filed a response brief in support of claimant's counsel's contention that the case should be remanded for further consideration.

Claimant's counsel challenges the district director's finding on reconsideration that the delay in counsel's receipt of an attorney's fee did not warrant the award of an "enhanced" fee. Additionally, claimant's counsel avers that the district director erred in utilizing the percentage increase in Federal locality pay to calculate counsel's 2015 hourly rate. The Director agrees that the Board should vacate the district director's hourly rate awards and remand the case for further consideration. Claimant's counsel's contentions have merit and, for the reasons that follow, we vacate the district director's Orders and remand the case for reconsideration.

In his Order Denying Motion for Reconsideration, the district director denied claimant's counsel's request for a fee enhancement, finding that "the delay in this case is not so egregious that it warrants a delay enhancement." Order Denying Reconsideration at 1.³ The issue of a delay enhancement concerns the lapse in time between the performance of the legal services and the award of a fee for those services. *Missouri v. Jenkins*, 491 U.S. 274 (1989). Where counsel timely raises the issue of delay, this factor must be considered in determining a reasonable attorney's fee. See *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). In *Modar v. Maritime Services Corp.*, 632 F.App'x 909, 49 BRBS 91(CRT) (9th Cir. 2015), vacating BRB No. 13-0319 (Jan. 17, 2014), the district director awarded a delay enhancement that, in 2012, awarded 2008 rates for services performed in 2004 and 2005, which the Board affirmed. *Modar*, 632 F.App'x at 909, 49 BRBS at 91-92(CRT). The Ninth Circuit vacated the Board's affirmance and remanded the case, holding it was erroneous to affirm an award that reflected neither current rates nor present value of historical rates. *Id.*

This case involves a delay of over four years in counsel's receipt of a fee for services rendered in 2011. In view of *Modar*, we remand this case for the district director to reconsider counsel's entitlement to a fee that accounts for the delay in payment of his

³ The district director also denied counsel's petition for an attorney's fee for filing the motion for reconsideration because "this office finds no reason why the request for a delay enhancement was not included in the original fee petition." Order on Recon. at 1.

fee. *Modar*, 632 F.App'x 909, 49 BRBS 91(CRT); *see Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT).

Moreover, with regard to the 2015 hourly rate awarded to claimant's counsel, claimant's counsel is correct that use of the percentage increase in Federal locality pay to calculate that rate is improper to the extent that the increase or lack thereof is based on political or budgetary considerations rather than on cost-of-living considerations. *See generally Christensen v. Stevedoring Services of America, Inc.*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd mem sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 455 F.App'x 912 (9th Cir. 2011) (Board used increase in Federal locality pay for 2007-2009). On remand, the district director must reconsider the 2015 hourly rate to which claimant's counsel is entitled based on market-based factors. *See Shirrod v. Director, OWCP*, 809 F.3d 1081, 49 BRBS 93(CRT) (9th Cir. 2015); *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT).

Accordingly, the district director's hourly rate awards for attorney services are vacated, and the case is remanded for further findings in accordance with this opinion. In all other respects, the district director's Order on Attorney's Fees and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge