Reasonable Hourly Rate Determination: Overview of Recent Decisions

"Fee litigation occurs on a case-to-case basis and is often protracted, complicated, and exhausting. There is little doubt that it should be simplified to the maximum extent possible."[1]

by Yelena Zaslavskaya
Senior Attorney for Longshore, Office of Administrative Law Judges
U.S. Department of Labor, Washington, D.C.

A. The Governing Law

Section 28 of the Longshore Act, 33 U.S.C.S. § 928, provides for an award of a "reasonable attorney's fee" to a prevailing claimant's attorney payable by employer (Longshore and Harbor Workers' Compensation Act, 33 U.S.C.S. § 901 et seq.). *See also* 20 C.F.R. §§ 702.132, 802.203. Section 702.132(a) provides that a fee application must indicate the normal billing rate for each person who performed services on behalf of the claimant. The regulations further provide that any attorney's fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded.[2] 20 C.F.R. § 702.132(a), *see also* 20 C.F.R. § 802.203(e).[3] In addition, case law addressing what constitutes a reasonable fee under other federal fee-shifting statutes is also applicable to fee determinations under the LHWCA. *See City of Burlington v. Dague*, 505 U.S. 557, 120 L. Ed. 2d 449, 112 S. Ct. 2638 (1992); *see also Stanhope v. Elec. Boat Corp.*, 44 BRBS 107 (2010) (and cases cited therein).

B. The "Lodestar" Method for Determining a Reasonable Fee[4]

In *Perdue v. Kenny A.*, __ U.S. __ , 176 L. Ed. 2d 494, 130 S. Ct. 1662 (2010), the United States Supreme Court held that the lodestar approach, which looks to the product of

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1 *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 722, 97 L. Ed. 2d 585, 596, 107 S. Ct. 3078, 3085 (1987) (*Delaware Valley II*); *see also Hensley v. Eckerhart*, 461 U.S. 424, 437, 76 L. Ed. 2d 40, 53, 103 S. Ct. 1933, 1941 (1983) (stating that "[a] request for attorney's fees should not result in a second major litigation.")

2 If the attorney's fee is to be assessed against the claimant, the regulations provide that the award should also take into account the financial circumstances of the claimant.

3 Section 802.203(d)(4) provides that "the rate awarded by the Board shall be based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status."

4 Several topics relevant to the determination of a reasonable fee are outside the principal purview of this article, including decisions holding that claimant's fee award is appropriately reduced to account for limited success in pursuing a claim, *see Hensley, supra*, 461 U.S. at 436; *Farrar v. Hobby*, 506 U.S. 103, 114-115, 121 L. Ed. 2d 494, 505, 113 S. Ct. 566, 574-575 (1992); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

hours reasonably expended multiplied by reasonable hourly rate, yields a fee that is presumptively "reasonable" under a federal fee shifting statute and is the preferred method for determining such a fee. The Benefits Review Board recognized the applicability of this holding to cases arising under the LHWCA in its recent decision in *Stanhope, supra*, slip op. at 2. The (confusing) history of the lodestar approach is instructive.[5] The lodestar approach was originally conceived as a two-step inquiry: (1) first, the court was to calculate the "lodestar" by multiplying the hours spent on a case by attorney's reasonable hourly rate; and (2) then adjust the lodestar amount based on such considerations as the "riskiness" of the lawsuit and the quality of representation. *See Lindy Bros. Builders, Inc*. v. *Am. Radiator & Standard Sanitary Corp*., 487 F.2d 161, 168 (3d Cir. 1973). The Fifth Circuit adopted instead a one-step inquiry that determined a reasonable fee by considering 12 factors: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). Thereafter, the Supreme Court adopted what it described as a "hybrid approach," holding that the "lodestar" amount may be adjusted based on the *Johnson* factors. *See Hensley v. Eckerhart*, 461 U.S. 424, 433-434, 76 L. Ed. 2d 40, 50-51, 103 S. Ct. 1933, 1939-1940 (1983). In subsequent jurisprudence, however, the Court modified its approach, holding that the lodestar presumptively subsumes the relevant factors. Most recently, in *Kenny A.*, the Court emphasized that the lodestar includes "most, if not all," of the relevant factors to determine a reasonable fee, 176 L. Ed. 2d at 505 (*citing Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566, 92 L. Ed. 2d 439, 457, 106 S. Ct. 3088, 3099 (1986) (*Delaware Valley I*)) , and that an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation, *id.* (*citing Delaware Valley I*, *supra*, at 566; *Blum v. Stenson*, 465 U.S. 886, 898, 79 L. Ed. 2d 891, 901, 104 S. Ct. 1541, 1548 (1984)).[6] While the Court reiterated the 12 *Johnson* factors, it contrasted the lodestar method with an "alternative" approach set out in *Johnson*, which the Court criticized as lacking objectivity. *Id.* at 1672. The Court stated that the lodestar method is readily administrable; it is also "objective," and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results. *Id*. at 1671-1673.

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For a more detailed overview see, e.g., Jonathan Pines, Overview of Fee-Shifting Cases from *Hensley v. Eckerhart* to *Perdue v. Kenny A.*, in Practising Law Institute - Litigation and Administrative Practice Series, 222 PLI/Crim 147 (2010).

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As the Board acknowledges in its Longshore Deskbook (*see* footnote 35, *infra*), its earlier jurisprudence (and that of several circuit courts) affirmed ALJ decisions allowing claimant's counsel a fee in excess of the lodestar, and thus such precedent must now be viewed in light of the Supreme Court's decision in *Kenny A.* Hopefully, *Kenny A.* will end the confusion in the courts' understanding of whether lodestar analysis generally involves a two-step inquiry.

C. **The *Kenny A.* Decision**

The following guidance provided in *Kenny A.* is particularly relevant in determining a reasonable hourly rate. The Court held that superior performance may justify a lodestar enhancement only in those "rare and "exceptional" cases where it is not adequately taken into account in the lodestar calculation and there is "specific evidence" that the lodestar would not have been adequate to attract competent counsel, such as where the hourly rate used does not measure the attorney's true market value, where counsel's performance includes an extraordinary outlay of expenses and litigation is protracted, and where there is an exceptional delay in the payment of fees.[7] 176 L. Ed. 2d at 504-508. The Court observed that superior results are only relevant insofar as they result from superior attorney performance, and thus should be treated as one factor in considering the propriety of a lodestar enhancement. The Court concluded that the district court's award of a 75 percent enhancement appeared to be arbitrary, as it lacked proper justification. Its effect was to raise counsel's rate to more than $866/hour, absent any evidence that this rate was appropriate for the market, and while the court cited counsels' extraordinary outlays for expenses and delay in reimbursement, it did not calculate the amount of enhancement due to this factor or the cost of the delay. Further, the district court's reliance on the contingency of the outcome as a basis for fee enhancement contravened *Dague*, *supra*. Finally, the district court's reliance on a comparison of the performance of counsel in this case with that in unnamed other cases did not employ a methodology permitting meaningful review. The case was remanded for the trial judge to provide a reasonably specific explanation for all aspects of the fee, including enhancement.

In describing the "virtues" of the lodestar approach, the Court stated that it "looks to 'the prevailing market rate in the relevant community[,]" *id.* at 505 (quoting *Blum*, *supra*, at 895), and produces an award that roughly approximates the fee the attorney would have received from a paying client in a comparable case. A reasonable fee is one that is adequate to attract competent counsel, and there is a strong presumption that the lodestar amount is sufficient to achieve this result. *Id.* at 505. The lodestar includes "most, if not all," of the relevant factors to determine a reasonable fee. *Id.* Thus, "novelty and complexity of a case … 'presumably [are] fully reflected in the number of billable hours recorded by counsel.'" *Id.* (quoting *Dague*, *supra*, at 562-563). Also, the quality of an attorney's performance generally should not be used to adjust the lodestar "[b]ecause considerations concerning the quality of prevailing party's counsel's representation normally are reflected in the reasonable hourly rate." *Id.* (quoting *Delaware Valley I*, *supra*, at 566).

As noted above, one scenario recognized by the Court as potentially justifying a lodestar enhancement is where specific evidence shows that the method used in determining an hourly rate "does not adequately measure the attorney's true market value, as demonstrated in part during the litigation. This may occur if the hourly rate is determined by a formula that takes into account

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The Court contrasted such an exceptional delay with an expected delay in the payment of fees, stating that the latter is generally compensated "'either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value.'" *Id.* at 507 (quoting *Missouri v. Jenkins*, 491 U.S. 274, 282, 105 L. Ed. 2d 229, 239, 109 S. Ct. 2463, 2468 (1989)).

only a single factor (such as years since admission to the bar) or perhaps only a few similar factors. In such a case, an enhancement may be appropriate so that an attorney is compensated at the rate that the attorney would receive in cases not governed by the federal fee-shifting statutes." *Id.* at 507. While sometimes attorney's brilliant insights and critical maneuvers matter more than hours worked or years of experience, "[i]n those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates." *Id*. at 507, n.5, quoting *Blum, supra,* at 898.

D. Determining the Relevant Geographic Market: The "Forum" Rule

The circuit courts and the Board appear to be in agreement that the relevant geographic community for determining the prevailing hourly rate is, presumptively, the litigation forum. *See e.g., Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1053, 43 BRBS 6(CRT) (9th Cir. 2009) (relevant geographic area is "generally" where the district court sits); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009) (discussing a two-step test for applying an exception to the forum rule); *B&G Mining, Inc. v. Dir., OWCP [Bentley]*, 522 F.3d 657, 663, 42 BRBS 25(CRT) (6th Cir. 2008); *Christensen v. Stevedoring Servs. of Am.,* 43 BRBS 145 (2009), *modified in part on recon.,* 44 BRBS 39 (2010); *see also Holiday v. Newport News Shipbuilding and Dry Dock Co.*, 44 BRBS 67 (2010) (Washington, D.C., where claimant's appellate counsel practices, rather than Georgia, where claimant resided and ALJ hearing was held, was the appropriate geographic market for work performed before the BRB);[8] *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009) (same); *see also Maggard v. Int'l Coal Group, Knott County, LLC*, 24 B.L.R. 1-__, BRB No. 09-0271 BLA (Apr. 14, 2010); *Bowman v. Bowman Coal Co.*, 24 B.L.R. 1-__, BRB Bo. 07-0320 BLA (Apr. 15, 2010);[9] *see generally Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182 (2d Cir. 2007) (collecting cases). In applying the forum rule, the Board has recognized an ALJ's discretion in identifying the relevant geographic market. *Compare Christensen*, 43 BRBS 145 (identifying Portland, Oregon as the relevant geographic market) *with Eberly-Sherman v. Dep't of Army/NAF*, BRB No. 10-0387 (Oct. 5, 2010) (unpub.) (affirming the ALJ's use of statewide fee survey data for Oregon).[10]

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8 The Board denied reconsideration of this decision in *Holiday v. Newport News Shipbuilding and Dry Dock*, BRB No. 06-0345 (Jan. 4, 2011) (unpub.).

9 In *Maggard* and *Bowman*, which arose under the Black Lung Benefits Act, the Board stated that counsel in these cases failed to provide "sufficient information relevant to the market rate for services in the geographic jurisdiction of the litigation," and that "the goal is to establish a market rate paid by paying clients in the requesting attorneys' geographic area." *Maggard*, slip op. at 5-6, and *Bowman*, slip op. at 4-5. Responding to counsel's assertion that he knows of "no other firms in Virginia and very few firms nationwide taking new BLA cases," the Board suggested that "[h]ourly rates charged by similarly situated attorneys in Kentucky may assist in establishing a market rate." The Black Lung Benefits Act (30 U.S.C.S. § 901 et seq.), incorporates Section 28 of the Longshore Act, *see* 30 U.S.C.S. § 932(a).

10 In affirming the ALJ's fee award on remand from *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009), the Board stated that "[i]n this case, the district court is located in Portland, Oregon, and its jurisdiction includes the entire state of Oregon. Counsel's office is located in the city of Portland, Oregon. Thus, the appropriate

At the same time, several courts have recognized – with varying degrees of scrutiny – that, in some cases, it is appropriate to consider an extrajurisdictional counsel's home market rates.[11] *See Jeffboat, L.L.C. v. Dir., OWCP [Furrow]*, 553 F.3d 487, 491, 42 BRBS 65(CRT) (7th Cir. 2009) (permitting rate where out-of-town counsel practices), *aff'g L.F [Furrow] v. Jeffboat, Inc.*, BRB No. 07-0417 (Sept. 26, 2007) (unpub.); *see generally Arbor Hill*, *supra*, at 191 (citing case law from the Supreme Court and the Seventh, Fourth and First Circuits); *Holiday*, *supra*, 591 F.3d 219; *Mancini v. Dan P. Plute, Inc.*, No. 08-72537, 2009 U.S. App. LEXIS 26614 (9th Cir. Nov. 6, 2009) (unpub.).[12] In *Jeffboat*, *supra*, the Seventh Circuit deemphasized the forum rule in the Longshore context. The court affirmed an ALJ's award of an attorney's fee based on the documented range of prevailing market rates where out-of-town counsel practices (Connecticut),[13] as opposed to the rate in the litigation forum (Indiana). The court held that, instead of a local market area, the "community" whose prevailing hourly rate must be used can be read as referring to a "community of practitioners," particularly when, as is arguably the case here, the subject matter of the litigation is highly specialized and the market for legal services within that subject matter is a national market.[14] The court stated that an attorney's demonstrated billing rate for similar work is presumptively appropriate[15] and there is a preference for awarding attorneys' fees that are commensurate with what an attorney would otherwise have earned from paying clients. The court held that a claimant need not prove that he first attempted to find local counsel before hiring an out-of-area attorney. Rather, it is within an ALJ's discretion to adjust an out-of-town attorney's rate downward if local counsel could have provided comparably effective legal services and the rate of the out-of-town practitioner was higher than the local market rate;

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community in this case could reasonably be found to be the state of Oregon, the greater Portland metropolitan area, or the city of Portland. *See Christensen*, 43 BRBS at 146." Slip op. at 4-5.

11 Recent Board decisions have also addressed the issue of compensability of out-of-area attorney's travel expenses. *See e.g., B.H. [Holloway] v. Northrop Grumman Ship Systs., Inc.*, 43 BRBS 129 (2009); *Baumler v. Mrinette Marine Corp.*, 40 BRBS 5 (2006).

12 In *Mancini*, the court stated that strict application of the "forum rule" may sometimes yield unreasonable results, so "rates outside the forum may be used if local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case." 2009 U.S. App. LEXIS 26614, at *3-*4, citing *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008).

13 Counsel supported his requested rate with a prior ALJ fee award, citations to the *Connecticut Law Tribune*, *The National Law Journal*, the 1994 *Survey of Law Firm Economics*, and other sources, establishing that billing rates for partners in Connecticut usually ranged from $199 to $420 per hour.

14 *Cf. Eli Lilly & Co. v. Zenith Goldline Pharms., Inc.*, 264 F. Supp. 2d 753, 764 (S.D. Ind. 2003) (stating that, in the Seventh Circuit, "some distinctly 'national' litigation, such as multi-district litigation under 28 U.S.C.S. § 1407, may justify the use of essentially 'national' rates because the location of the forum court is fortuitous."); Alba Conte, Relevant community for rates--Geographical community: Forum, out-of-state, national rates, in 1 Attorney Fee Awards § 4:13 (3d ed.), ATTFEEAW § 4:13 (2010), stating that courts have recognized that a local forum rate is an inappropriate and illogical standard for antitrust and securities plaintiffs' lawyers, in contrast to their customary billing rates or the growing adoption by courts of national rate standards.

15 Notably, it appears that the court was applying a 2-step lodestar inquiry, stating that an adjudicator must calculate a lodestar amount, and is also allowed to consider various discretionary factors, citing 20 C.F.R. § 702.132.

here, the ALJ was entitled to find that claimant would need to seek counsel outside of southern Indiana. Notably, in *Patrick v. Serv. Employers Int'l, Inc.*, 2009-LDA-313, 2009-LDA-426 (ALJ June 1, 2010), the ALJ rejected claimant's counsel's argument that *Jeffboat* reflects the court's recognition that the geographic market for legal services by attorneys who handle Defense Base Act (42 U.S.C.S. § 1651) claims is "not only national but international" in scope, reasoning that:

> ... if the geographic market within which the prevailing rate is determined is national in scope for a DBA attorney, … it would suggest that one prevailing fee rate should apply nationwide. That, however, is not the case. To the contrary, the Court's decision in *Jeffboat* indicates that, while the legal service market may be national in scope, the supply and demand factors in relevant geographic submarkets govern the prevailing rate determinations in individual cases. … Obviously, the *Jeffboat* court recognized the existence of relevant submarkets that are less than national in scope.

Slip op. at 4.

E. Determining Reasonable Hourly Rate for Use in Lodestar

The courts and the Board have emphasized both the claimant's burden of establishing the reasonable rate, and the need for an adjudicator to explain his or her rate determination.[16] *See, e.g., Blum, supra; Perdue, supra,* at 1676 ("[i]t is essential that the judge provide a reasonably specific explanation for all aspects of a fee determination"); *Stanhope, supra* (and cases cited therein). As formulated by the Supreme Court, "the burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum, supra,* at 896 n.11; *see also Stanhope, supra*, slip op. at 2-3 (and cases cited therein). The Board continues to recognize that ALJs are afforded considerable discretion in determining factors relevant to a market rate in a given case, *see, e.g., Holiday, infra, B&G Mining, infra,* and are not bound by the Board's determinations in another case, *Christensen*, 44 BRBS 39 at 40-41 (2010).

Evidence of reasonable rates has traditionally included, *inter alia*, past Longhore fee awards by ALJs and the Board, fee survey data (e.g., *The Survey of Law Firm Economics*, formerly Altman-Weil),[17] and affidavits from other practitioners. Until recently, the Board and

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16 The Board has held that the amount of an attorney's fee award is discretionary and may only be set aside if the challenging party shows the award is arbitrary, capricious, an abuse of discretion, or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980); *Linnell, Choate & Webber v. Heyde*, 330 F. Supp. 170, 173 (D. Me. 1971); *Offshore Food Serv., Inc. v. Murillo*, 1 BRBS 9 (1974), *aff'd sub nom. Offshore Food Service, Inc. v. Benefits Review Bd.*, 524 F.2d 967, 3 BRBS 139 (5th Cir. 1975). At the same time, courts have held that the determination of a prevailing fee rate is a question of fact, subject to clear error standard of review. *See, e.g., Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995); *see also Patrick, infra*, slip op. at 7, n.8 (*citing*, e.g., *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3rd Cir. 2001)).

17 *See, e.g., Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111, 120 (1999); *Fitzgerald v. R.C.A., Int'l Serv. Corp.*, 15 BRBS 345 (1983).

the ALJs routinely had relied on past fee awards in similar Longshore cases in the relevant geographical area in identifying a reasonable hourly rate (often in combination with such factors as complexity of the case, novelty of the issues, and/or vigorousness of defense), and the Board had held such evidence to be sufficient.[18] However, the Ninth Circuit decisions overruling this precedent marked a significant change in Section 28 jurisprudence. *See Christensen, supra*, 557 F.3d 1049; *Van Skike v. Dir., OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). The court stated that, as there is no private market for attorney's fees under the LHWCA, it is necessary that counsel be awarded fees "commensurate with those which they could obtain by taking other types of cases." *Christensen, supra*, 557 F.3d at 1053-1054 (internal citations and quotations omitted). The court further rejected exclusive consideration of prior fee awards, criticizing this approach as a "tautological, self-referential enterprise," which "perpetuate[s] a court-established rate as a 'market' when that rate in fact bears no necessary relationship to the underlying purpose of relying on the marketplace: to calculate a reasonable fee sufficient to attract competent counsel." *Id*. at 1054.[19] The court expressly permitted consideration of prior awards where claimant fails to establish a reasonable rate. It further stated that the Board need not determine the prevailing rate anew in every case, but must "make ... determinations with sufficient frequency that it can be confident-and we can be confident in reviewing its decisions-that its fee awards are based on current rather than merely historical market conditions." *Id.* at 1055.

By contrast, the Fourth Circuit continues to indicate that evidence of Longshore fee awards, alone, may be sufficient to establish the prevailing rates. *Holiday, supra*, 591 F.3d 219 (stating that it is generally appropriate to look to previous awards in the relevant marketplace as a barometer for how much to award counsel; the *Laffey* Matrix is a useful starting point to determine fees, not a required referent). However, the Fourth Circuit also has expressed concern with the sufficiency of evidence underlying findings of prevailing rates, particularly in reference to overbroad fee survey data[20] and dated fee awards.[21] *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010) (noting that there are a variety of "sources" from which to determine a prevailing hourly rate, including evidence of fees received by the attorney in the past, affidavits of other lawyers, and fees awarded in "other administrative proceedings of similar complexity may "also yield instructive information.") It seems hard to deny that current market data tends to respond more quickly to economic fluctuations than adjudicators' self-referential hourly rate determinations. *See Christensen, supra*; *see also Patrick, supra*, slip op. at 10

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18 *See D.V. [Van Skike] v. Cenex Harvest States Coop.*, 41 BRBS 84 (2007) (rejecting counsel's argument that a micro-market, such as the Longshore claimants' bar, cannot set the prevailing community rate), *overruled in pert. part by Van Skike v. Dir., OWCP*, 557 F.3d 1041 (9th Cir. 2009).

19 Citing *Student Pub. Interest Research Group v. AT & T Bell Lab.*, 842 F.2d 1436, 1446 (3d Cir.1988).

20 In *Cox, infra*, a case arising under the Black Lung Benefits Act, the Fourth Circuit accepted the ALJ's rejection of the Altman Weil data as unreliably broad; however, ALJ erred in approving counsel's hourly rate without some other evidence of prevailing market rates.

21 In *Newport v. Holiday, supra*, at 228, the court held that a 10-year old fee award, arbitrarily adjusted with no regard to the facts of the case or the lodestar factors, is not necessarily appropriate today; citing, *inter alia, Christensen, supra*, 557 F.3d at 1054-1055, for the proposition that the Board's fee awards should be based on current market conditions.

(discussing the approaches in *Christensen* and *Brown*,[22] and finding survey data more probative as past LHC awards' "tend toward stagnancy").

Other circuits have also provided guidance as to the relevant factors and the nature of the evidence that may be used in establishing the applicable hourly rate. *See Jeffboat, supra,* 553 F.3d 487 (upholding ALJ's award of counsel's requested rate ($261) based on fee surveys and past awards for the geographic location where out-of-town counsel practices (Connecticut); as the award was in line with reasonable market rates, the ALJ did not adjust it based on quality of representation, which was just an additional factor supporting the award);[23] *B&G Mining, supra* (prior fee awards and state-bar fee surveys provide evidence of a market rate, but do not set the market rate;[24] the "market rate" is not a single figure, but may change to reflect the individual practitioner's experience and the complexity of the case; evidence of the market rate can be established by an affidavit from an experienced attorney in the same or similar field attesting to that attorney's customary rate and the rates prevalent in the market; there was no error in excluding rates paid to defense attorneys); *see also C & D Prod. Servs. v. Dir., OWCP [Campbell],* No. 09-60485, 2010 U.S. App. LEXIS 8629, at *4-*5 (5th Cir. Apr. 26, 2010) (unpub.) (employer's unsupported statements that the rate is excessive and submission of two prior ALJ awards did not demonstrate abuse of discretion in the BRB's fee award).

Recent Board decisions illuminate the Board's views as to the nature and adequacy of evidence of prevailing market rates. In *Stanhope, supra,* a case arising in the Second Circuit, the Board initially held that counsel's failure to identify the normal billing rates sought in similar cases must be cured for the BRB to consider her fee petition (seeking $315/hr). The Board further held that counsel failed to provide sufficient information relevant to prevailing market rate in the relevant community, where counsel relied on a summary assertion regarding hourly rates for specialized legal services in southeastern Connecticut, her years of experience, her Longshore expertise, and the "Adjusted *Laffey* Matrix" adjusted for Hartford, Connecticut. The Board suggested that, to establish prevailing market rates, counsel could submit "affidavits of other lawyers in the relevant community who are familiar with counsel's skill and experience and could attest to the prevailing rates charged in the community by comparable attorneys for similar services," as well as "[e]vidence regarding the fees that counsel has received for work involving cases of similar complexity." Slip op. at 7 (citations omitted). Notably, in rejecting employer's citation to a 2008 Board fee award, the Board stated that while it "may consider the rates awarded in recent cases as some inferential evidence of the prevailing market rates in the relevant community, prior fee awards are not necessarily dispositive of the hourly rate determination in a particular case. Rather, the Board must also consider the evidence submitted by the parties regarding prevailing market rates." *Id.* at slip op. 3, n.5.[25] At the same time, in *Maggard*,

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22 *Newport News Shipbuilding & Dry Dock Co. v. Brown,* 376 F.3d 245, 251, 38 BRBS 37(CRT) (4th Cir. 2004).

23 *See also Amax Coal Co. v. Dir., OWCP [Chubb],* 312 F.3d 882 (7th Cir. 2002) (upholding hourly rate awarded based on counsel's expertise, a letter from the vice president of the local bar association, and prior fee awards; expressly upholding propriety of reliance on past Black Lung awards).

24 The Sixth Circuit observed that if there is a large number of similarly experienced attorneys in a geographic area, it may be less necessary to rely on prior awards than in a small market.

25 The Board cited *Holiday, supra,* 591 F.3d 219; *Christensen, supra,* 557 F.3d 1049; *Van Skike, supra*; *B&G Mining, Inc., supra*; *Beckwith, supra*; *see generally Patterson v. Balsamico,* 440 F.3d 104 (2d Cir. 2006); *Farbotko*

supra, a Black Lung case governed by Sixth Circuit case law, the Board invited submission of, *inter alia*, evidence of the fees that claimant's counsel had received in the past; in his amended fee petition, counsel chose to rely on such evidence, and the Board held that, consistent with *Cox*, 602 F.3d at 290, counsel had provided sufficient evidence relevant to the applicable market rate in the form of prior Black Lung awards from 2006 to 2008, along with evidence of his expertise and experience. *Maggard*, *supra* (Nov. 8, 2010).

Board precedent holds that evidence, such as fee survey data, must be sufficiently specific in terms of its applicability to the relevant geographic market and its identification of rates for services "similar" to Longshore litigation. *Compare Christensen v. Stevedoring Servs. of Am.*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39 (2010) (using data from 2007 Oregon Bar Survey), *with Maggard*, *supra* (Apr. 14, 2010) (rejecting overbroad fee survey data in a case governed by 6th Circuit's case law); *Bowman*, *supra* (same in a case governed by 4th Circuit case law).[26] Further, in *Stanhope*, the Board rejected as unsubstantiated Connecticut-based counsel's reliance on the Adjusted *Laffey* Matrix, stating that "counsel has not demonstrated that the *Laffey* Matrix, which has been accepted as an indicator of the hourly rates of litigation attorneys in Washington, D.C., is a reliable measure of the prevailing market rates in Connecticut or other locations outside of Washington, D.C." Slip op. at 5. The Board distinguished its prior decisions in *Beckwith*, 43 BRBS 156,[27] and *Holiday*, *supra*, 44 BRBS 67 (2010),[28] on the ground that "under the facts of those cases the Washington, D.C.-based attorney, who participated in the cases only at the Board level, had demonstrated the appropriateness of the *Laffey* Matrix as evidence of the prevailing market rates in Washington, D.C." *Id.* The Board stated that it was not deciding the question of whether the *Laffey* Matrix may be appropriately considered in determining the prevailing market rates for a Connecticut-based attorney. *Id*. at 6.[29] However, with reference to the version of the *Laffey* Matrix submitted in this case, the Board clarified that it does not consider the "Adjusted *Laffe*y Matrix," which uses a different

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v. Clinton County, 433 F.3d 204 (2d Cir. 2005).

26 In *Bowman* and *Maggard*, the Board held that counsel, who relied exclusively upon a 2006 Altman Weil fee survey, did not present sufficient information relevant to the market rate for similar services in the geographic jurisdiction of litigation. The Board concluded that the information contained in the survey was insufficient to determine that the listed rates were for services similar to those provided by counsel's firm, as the survey listed rates charged by attorneys in three broad regions, based upon their years of experience, and did not take into account the size of the firms or the nature of the litigation. The Board observed that "claimant's counsel has failed to make any declaration regarding the normal hourly rates that its lawyers seek for cases similar to this one," and held that "[a]t a minimum, this defect must be cured before the Board addresses counsel's fee petition." *Bowman*, slip op. at 4; *Maggard*, slip op. at 4 (Apr. 14, 2010). In these and other cases, the Board has allowed submission of an amended fee petition. *See Stanhope*, *supra*, at 7, citing *Christensen*, 557 F.3d at 1055 (Board should give fee applicant opportunity to cure defect if it could not be reasonably anticipated.).

27 The Board awarded claimant's D.C.-based appellate counsel $460/hr based on the *Laffey* Matrix, in addition to other evidence; overruling *D.V. [Van Skike]*, 41 BRBS 84, on the inapplicability of the Matrix in 9th Circuit cases.

28 In *Holiday*, the Board held that claimant's D.C.-based appellate counsel justified his requested rate of $420/hr based on experience, rates he receives from paying clients and the *Laffey* Matrix; employer's citation to an outdated fee survey did not specifically address D.C. rates or counsel's evidence.

29 *Cf. Gates v. Todd Pacific Shipyards*, BRB No. 10-0262 (Dec. 29, 2010) (unpub.) (declining to use *Laffey* Matrix rates to determine reasonable market rate in Tacoma, Washington).

method for updating the hourly rates for District of Columbia attorneys than that used by the U.S. Attorney's Office, to be a reliable indicator of the prevailing rates for District of Columbia attorneys. *Id*.

At the same time, the Board continues to recognize the discretionary nature of the prevailing market rate determination, including determinations of the relevant legal community providing "similar" services. *Compare Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009) (the Board initially determined the rate by averaging the 90th percentile rates for workers' compensation, plaintiff personal injury civil litigation, and plaintiff general civil litigation cases reported in the 2007 Oregon Bar Survey), *modified in part on recon.*, 44 BRBS 39 (2010) (claimant demonstrated that the survey rates for workers' compensation attorneys should not be used to set counsel's market rate as they are either capped by statute or judicially set),[30] *with DiBartolomeo v. Fred Wahl Marine Constr.*, BRB No. 10-0257 (Aug. 30, 2010) (unpub.) (upholding ALJ's inclusion of workers' compensation survey rates)[31] *and Eberly-Sherman v. Dep't of Army/NAF*, BRB No. 10-0387 (Oct. 5, 2010) (unpub.) (same); *cf. Eberly-Sherman v. Dep't of Army/NAF*, BRB No. 10-0365 (Nov. 10, 2010) (unpub.) (as the ALJ adopted the Board's hourly rate formula set forth in *Christensen*, 43 BRBS 145, the Board modified the ALJ's decision to exclude workers' compensation attorneys' survey rates from the hourly rate determination for reasons stated in its decision on reconsideration, 44 BRBS 39). As the ALJ observed in *Patrick*, *supra*, the case law provides "mixed guidance concerning the appropriate practice specialties to include in a prevailing rate data base provided by cases such as *DiBartolomeo* and *Christensen* on the one hand, and *Beckwith* and *Mancini* on the other." Slip op. at 9. Notably, in *Patrick*, the ALJ determined the applicable prevailing rate by looking to fee survey evidence ranging across an array of 28 specialties. The ALJ concluded that rates for complex litigation should be included in the prevailing rate determination based on the Ninth Circuit and Board case law applying the *Laffey* Matrix – which includes fees in complex federal litigation – in the geographic market of Washington, D.C.;[32] the ALJ considered and rejected the

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30 *See also Christensen v. Stevedoring Servs. of Am.*, 44 BRBS 75, BRB No. 03-0302R (Sept. 23, 2010), *denying recon. of* 44 BRBS 39 (2010), *modifying in part* 43 BRBS 145 (2009) (employer has not demonstrated error in the BRB's exclusion of workers' compensation rates from its hourly rate calculation; the BRB has not excluded fees from a significant part of counsel's practice as he had participated in only six state workers' compensation cases in the last three years and in only one was awarded a fee based on his fee petition as opposed to a fee schedule).

31 The Board affirmed the ALJ's hourly rate determination based on averaging the rates reported in *The Survey of Law Firm Economics* for five practice areas (*i.e.*, employment, maritime, personal injury, and workers' compensation) and the rate reported for attorneys with more than 31 years of experience; claimant failed to substantiate his assertion that survey rates for workers' compensation attorneys did not reflect a market-based rate, and thus the ALJ acted within his discretion in including such rates in his calculation. The Board noted the ALJ's finding that the Oregon State Bar 2007 Economics Survey is less credible since it is published only every four to five years and does not provide the hourly billing rates for attorney practicing maritime or employment law.

32 The ALJ stated that "*Mancini* and *Beckwith* demonstrate that Longshore litigation in Washington, D.C. is, via application of the Matrix, deemed comparable to 'complex federal litigation, which cuts across a variety of legal specialties, including highly specialized areas of antitrust, patent law, and government contract litigation among others," and, therefore, "it would be difficult to conclude that the prevailing rate for Longshore litigation in Florida should not, like the *Laffey* Matrix in D.C., also factor in the rates commanded by complex litigation in a variety of practice areas in this market." *Patrick*, *supra*, slip op. at 8-9. The ALJ stated that the method he applied "provides an average that takes into account not only the rates commanded by counsel involved in high-end, complex

use of locality adjusted *Laffey* Matrix rates outside of D.C. At the same time, the Board has consistently upheld adjudicators' rejection of the argument that fees charged by commercial litigators constitute evidence of the prevailing rates for services similar to those of Longshore practitioners. *See Christensen*, 43 BRBS 145 and 44 BRBS 39; *DiBartolomeo, supra*; *Eberly-Sherman, supra*. Relatedly, where affidavits are offered as evidence of the applicable rate, the adjudicator should consider whether the affiants are familiar with the hourly rates charged by attorneys performing work similar to counsel's actual practice. *See Christensen* (BRB); *B&G Mining, supra*.

Factors such as counsel's years of experience and demonstrated skill and expertise level also factor into consideration of the lodestar hourly rate. *See* 20 C.F.R. § 702.132; *Stanhope, supra*, slip op. at 4 n.6[33] (*citing Newport v. Holiday*, 591 F.3d at 228; *Christensen*, 557 F.3d at 1054 n.5); *Christensen, supra*, 43 BRBS 145 (considering that counsel had 40 years of experience and had successfully handled many Longshore cases, the Board used the survey rates at the 90th percentile level), *modified in part on recon.*, 44 BRBS 39; *see generally Kenny A., supra*; *see also Eberly-Sherman v. Dep't of Army/NAF*, BRB No. 10-0387 (Oct. 5, 2010) (unpub.) (rejecting claimant's counsel's contention that the ALJ erred in relying on survey rates for attorneys in the top 25% vs. top 5%; ALJ's reliance on his own evaluation of counsel's expertise in this case was reasonable, within his discretion, and in accordance with law, citing *Christensen*, 557 F.3d at 1053); *cf. Kenny A., supra*.[34] In its most recent *Christensen* decision, the Board addressed employer' argument that the *Kenny A.* decision "calls into serious question" the assumption that claimant's counsel's years of experience should be compensated in every case by use of the 95th percentile survey rates, stating that:

> [w]e do not disagree with employer that, generally, one factor, like years since admission to the bar, does not control an attorney's hourly rate in every case in which he participates. Hourly rates for the same attorney can vary from case to case and, within one case, from level to level. [*citing B&G Mining, supra*.] However, if an attorney is very experienced and skilled, a higher hourly rate for fewer hours is usually warranted. In this case, claimant ultimately was very successful in both the appeals on the merits and of the

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litigation, as in the *Laffey* Matrix, but a broader cross-section of rates charged by counsel who handle more mundane, less lucrative, but no less important legal matters." *Id.* at 9.

33 In *Stanhope*, the Board noted that:

> [i]n support of the requested hourly rates, claimant's counsel has noted the complex legal and factual issues involved in this case and the benefits obtained for claimant as well as counsel's extensive experience litigating longshore cases …. These are relevant factors that may be considered by the Board in determining a reasonable hourly rate for the work of each person identified in the fee petition.

Slip op. at 4, n.6. The Board did not expressly reconcile this statement with the holding in *Van Skike, supra*, 557 F.3d at 1048, that an hourly rate may not be reduced due to lack of complexity of the case, as novelty of the case and complexity of the issues are considered, instead, in arriving at a reasonable number of hours. *See also H.S. [Sherman]*, 43 BRBS 41; *see generally Kenny A., supra*.

34 In *Kenny A., supra*, at 509, in concluding that the district court's award of a fee enhancement was essentially arbitrary, the Court determined that "insofar as the District Court relied on a comparison of the performance of counsel in this case with the performance of counsel in unnamed prior cases, the District Court did not employ a methodology that permitted meaningful appellate review," and further cautioned that "when a trial judge awards an enhancement on an impressionistic basis, a major purpose of the lodestar method-providing an objective and reviewable basis for fees."

> Board's attorney's fee award. Thus, in this case, employer has not demonstrated error in the Board's selection of the 95th percentile rate from the 2007 Oregon Bar Survey, as adjusted.

Christensen v. Stevedoring Servs. of Am., 44 BRBS 75, BRB No. 03-0302R, slip op. at 2 (Sept. 23, 2010) (internal citations and footnote omitted), *denying recon. of* 44 BRBS 39 (2010), *modifying in part* 43 BRBS 145 (2009).

In addressing the role of "contingency" or "risk of loss" factor – *i.e.*, the fact that claimant's counsel cannot receive a fee unless he successfully prosecutes claimant's claim for benefits – the BRB Longshore Deskbook[35] merely states that this "is a factor incorporated into the lodestar (*see* [*Johnson*] factor (6), *supra*), and thus is not a basis for enhancing a fee. *Dague* , *supra*, 505 U.S. 557."[36] Indeed, one would be hard pressed to find a decision treating this issue in detail in the Longshore context. *Compare Cox, supra*;[37] *B&G M Mining*, *supra*,[38] *with Anderson v. Halter Marine Corp.*, BRB No. 09-0363 (Feb. 4, 2010) (unpub.) (in finding requested rate of $200/hr reasonable for Gulfport, Mississippi, the Board noted counsel's assertion that he had been in practice for 20 years and that his usual rate accounts for

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35 *Available at:* http://www.dol.gov/brb/References/Reference_works/lhca/lsdesk/dbsec28.htm and also in BRBS/Longshore Reporter, Volume B.

36 In *Dague*, the Supreme Court stated that an enhancement for contingency would likely duplicate factors already subsumed in the lodestar. *Id.* at 563, citing *Delaware Valley II, supra,* at 726-727 (plurality opinion). The Court elaborated that risk of loss in a particular case is the product of two factors: the merits of the claim and the difficulty of establishing those merits. The first factor should play no role in the calculation of the lodestar, while "[t]he second factor … is ordinarily reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." *Dague* at 562, citing *Blum, supra,* at 898-899. The court also rejected contingency enhancement on any class-wide basis, noting several problems with this approach, including it being impracticable, leading to overcompensation in all cases having above-class-average chance of success (in addition to double-counting), and resulting in payment for attorney's time in cases where his client does not prevail. *See also Delaware Valley II*, *supra* at 723 ("… a careful reading of *Johnson* shows that the contingency factor was meant to focus judicial scrutiny solely on the existence of any contract for attorney's fees which may have been executed between the party and his attorney"); *Performance-Based Enhancements*, 124 Harv. L. Rev. 350, 124 HVLR 350, 360 n.65 (2010) ("…because an attorney's receiving payment for his or her work is contingent upon the outcome of the case, a lodestar award does not compensate attorneys for the risk that they will not be paid").

37 The Fourth Circuit stated, citing *Dague*, that "once a prevailing market rate is established, that rate is presumed to incorporate considerations of risk of loss" and thus "it would be duplicative to take into account risk of loss as a separate factor in determining the final hourly rate to be awarded."

38 The Sixth Circuit addressed this factor as follows:

> ... claimant's attorney stated that the adjudicators should consider the risk of loss in … [Black Lung] claims when determining a reasonable rate. That is plainly wrong. Federal courts and the BRB have all recognized that compensation for the risk of loss is already factored into any reasonable hourly rate. [Citing *Dague*, *supra*, and a statement in the BRB Black Lung Deskbook that "risk of loss is a constant factor in black lung litigation and is deemed incorporated into the hourly rate."] With that said, there is no indication that any of the adjudicators actually relied upon the risk of loss in determining a reasonable hourly rate.

522 F.3d at 666.

contingency, citing *Dague, supra*); *Kellstrom*, 50 F.3d at 328, n.15.[39] What is clear is that an adjudicator may not rely on contingency as a basis for awarding an enhancement beyond the lodestar amount. *See Kenny A., supra*, at 509 (holding that the district court's reliance on the contingency of the outcome as a basis for fee enhancement contravened *Dague, supra*, at 565).

Finally, the courts and the Board have recognized that adjustment for delay in payment is part of a reasonable attorney's fee in appropriate cases. *Missouri v. Jenkins*, 491 U.S. 274, 105 L. Ed. 2d 229, 109 S. Ct. 2463 (1989); *see, e.g., Nelson v. Stevedoring Servs. of Am.*, 29 BRBS 90 (1995); *cf. Christensen, supra*, 557 F.3d 1049 (holding that the BRB did not abuse its discretion by declining to add a delay enhancement to attorney fee awards since a two-year delay was not egregious or extraordinary). As the Supreme Court observed in *Kenny A.*, delay in payment of fees is generally compensated "either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value."[40] *Id*. at 507 (quoting *Missouri v. Jenkins*, 491 U.S. at 282).

As the foregoing discussion demonstrates, the issue of hourly rate determination under Section 28 represents an active area of the law, and thus may require a re-evaluation of existing practices and a heightened attention to any new developments.

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39 The court contrasted improper "contingency enhancement" with using contingency as a factor in determining a reasonable rate.

40 Once the applicable prevailing market rate is determined for a given year based on the best evidence of record, the Board and ALJs have applied cost of living adjustments to approximate historical applicable rates for subsequent or later years. *Christensen*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39 (applying percentage increase in the federal locality pay table for Portland, OR); *Patrick, supra* (discussing cost-of-living adjustments based on Social Security data and OWCP's percentages of increase in the national average weekly wage); *cf. Capps v. Ceres Marine Terminals, Inc.*, BRB Nos. 09-0747 and 09-0747A (Jul. 23, 2010) (unpub.) (general references to NAWW and city costs rising insufficient to carry counsel's burden of demonstrating market rate).