

BRUCE CHRISTENSEN)
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 Claimant-Petitioner)
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 v.)
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 STEVEDORING SERVICES OF AMERICA) DATE ISSUED: 05/13/2010
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 and)
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 HOMEPORT INSURANCE COMPANY)
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 Employer/Carrier-)
 Respondents) ORDER

Claimant has filed a timely motion for reconsideration of the Board’s Order awarding claimant’s counsel an attorney’s fee. *Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *on remand from* 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); 20 C.F.R. §802.407(a). Employer has filed a response in opposition to claimant’s motion, to which claimant has replied.

In its Order, the Board held that the city of Portland, Oregon is the relevant community for which a market rate for counsel’s services should be determined. The Board rejected counsel’s contention that rates paid to commercial or business litigators provide the “market” for his services. The Board turned to the 2007 Oregon Bar Survey, used by the United States Federal District Court for the District of Oregon, which provides hourly rates for various types of work. The Board stated that the average of three types of work will be the basis for counsel’s market rate: workers’ compensation, plaintiff personal injury civil litigation, and plaintiff general civil litigation. The Board stated that these types of cases account for the actual nature of counsel’s practice as well as rates he could receive from paying clients for similar services. *Christensen*, 43 BRBS at 146-147. The Board averaged the hourly rates reported at the 95th percentile, due to counsel’s 40 years of experience. In 2006, the year reported in the 2007 bar survey, the average hourly rate for these three types of work was \$308. For the ensuing years, the Board used the percentage increase in the Federal locality pay tables for Portland, resulting in hourly rates of \$314.50 in 2007, \$325.50 in 2008, and \$338 in 2009. *Id.* at 147. The Board awarded counsel a fee based on 2006 and 2009 rates. *Id.*

In his motion for reconsideration, claimant asserts that the Board's analysis of an appropriate market rate results in an artificially low hourly rate. *Compare Christensen*, 43 BRBS 145 with *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009). In this regard, claimant contends the Board erred in ignoring the affidavits he supplied as support for his claimed hourly rate of at least \$400, in including non-market based rates, such as those for workers' compensation cases, in the calculation, and in failing to account for his years of experience as a longshore attorney. Claimant further avers that the Board erred in failing to augment the fee award for the delay in payment of the attorney's fee.

Claimant contends that the rates for workers' compensation attorneys reflected in the Oregon Bar Survey are not "market" rates, as the rates for defense work are based on volume discounts. Claimant asserts that attorney's fee awards for claimants' attorneys under the state workers' compensation statute are judicially set and thus are not market rates. Claimant therefore contends this work should not be included in the market hourly rate calculation.¹

Upon reconsideration of this issue, we agree that the workers' compensation rate should not be included in the hourly rate calculation. The Ninth Circuit observed that there is no private market under the Longshore Act, and that, therefore, it is necessary that counsel be awarded a fee "commensurate with those which [he] could obtain by taking other types of cases." *Christensen*, 557 F.3d at 1053-1054, 43 BRBS at 8(CRT), citing *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973 (9th Cir. 2008). Pursuant to the Oregon workers' compensation statute, the amount of a "reasonable fee" payable to a claimant's attorney is a capped amount, "absent extraordinary circumstances." See Or. Rev. Stat. §§656.308(2)(d), 656.382, 656.385, 656.386, 656.388 (2009).² Moreover, the fee is often paid out of claimant's compensation award. *Id.* Thus, fees obtained by a claimant's attorney for this type of work are not based on a market rate.

Moreover, we are persuaded that rates for workers' compensation defense attorneys do not establish a market rate. Counsel has attached a portion of the 2009 Survey of Small Law Firm Economics which states that "lawyers who litigate for insurers

¹ Similarly, counsel contends that plaintiff personal injury work is compensated based on a percentage of recovery, and thus is not a market rate. However, as the bar survey reflects a rate for this work that is the same as the rate for general plaintiff civil litigation, this contention need not be addressed.

² The capped amount is either \$2,500 or \$3,000, depending on the type of case. The cap is raised each July 1 in accordance with the percentage increase in the average weekly wage, if any.

and workers' compensation tend to show lower hourly rates." Cl. Recon. at Ex. 2. Similarly, in his deposition in a companion case, Mr. Skerritt stated that insurers are able to negotiate lower rates with its attorneys due to the steady source of work available to those attorneys. Cl. Reply at Ex. 5. Given that the rates in the Oregon Bar Survey for this type of work in Portland are significantly lower than those for all other specialties, we accept counsel's explanation as to why this is not a "market rate" within in the meaning of the Ninth Circuit's decision in *Christensen*. See generally *Norman v. Housing Authority of the City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988). Therefore, we modify the market rate for counsel's services to eliminate workers' compensation rates from the calculation. According to the 2007 Oregon Bar Survey, the base hourly rate for 2006 is \$350, based on the 95th percentile rate for general plaintiff civil litigation, both personal injury and non-personal injury. Use of the percentage increase in the Federal locality pay for Portland results in these rates: (1) 2007 – 2.11% - \$357.50; (2) 2008 – 3.45% - \$370; (3) 2009 – 3.76% - \$384; (4) 2010 - 2.04% - \$392. Therefore, we modify the prior fee award as follows: 12.5 hours are now awarded at the 2006 rate of \$350 and 13.5 hours are now awarded at the 2009 rate of \$384. This totals \$9,559, with a credit to employer for the amounts it has previously paid on this fee award.

In this regard, we reject claimant's contention that the Board erred in "ignoring" the various affidavits he submitted to support a rate of at least \$400. The Board did not ignore the affidavits, but found, based on employer's affidavits, that the rates asserted were not for comparable work that counsel could realistically obtain from paying clients in Portland, Oregon. *Christensen*, 43 BRBS at 146. Moreover, the Board expressly accounted for counsel's many years of experience as a longshore attorney by utilizing the 95th percentile hourly rate figure for the practice areas that constitute counsel's market. *Id.* at 147. Counsel's rate is not determined only with respect to his years of experience, as this would negate the requirement that the rate be based on the appropriate "market."

Counsel further contends that the Board erred in not awarding the fees at current rates to account for delay in payment of the fee. Counsel contends that although the Ninth Circuit held that the Board had the discretion in 2006 to award the same rate as in 2004, the Supreme Court held in *Missouri v. Jenkins*, 491 U.S. 274 (1989), that delay in payment of an attorney's fee should be compensated, whether by use of current rather than historical rates, or otherwise. Thus, counsel contends the Board should have awarded the entire fee at the 2009 rate.

We reject this contention. In his appeal to the Ninth Circuit, counsel asserted that the Board erred in not awarding a delay enhancement for the initial two-year delay in payment of an attorney's fee. The court stated that the Board did not err in finding that this delay is "not so egregious or extraordinary as to require a delay enhancement," having adequately considered the issue of delay. *Christensen*, 557 F.3d at 1056, 43

BRBS at 10(CRT). The Board first awarded a fee in *Christensen* in 2006. There is no contention that the fee awarded was not paid promptly at that time, as the underlying award had become final. Since that time, the delay in payment of any additional fee has been due to appeals of the fee award itself. The Ninth Circuit has stated that an attorney

cannot recover for delay due to appeals of the fee award. As *Hobbs [v. Director, OWCP]*, 820 F.2d 1528 (9th Cir. 1987)] explained, a fee award under the LHWCA is not a final judgment entitled to interest under 28 U.S.C. § 1961 and the Act does not otherwise provide for post-judgment interest; therefore, any enhanced recovery for the extraordinary time of taking an appeal would amount to an award of interest unauthorized by statute. 820 F.2d at 1531.

Anderson v. Director, OWCP, 91 F.3d 1322, 1325 n.3, 30 BRBS 67, 69 n.3(CRT) (9th Cir. 1996). The Ninth Circuit's decision in *Anderson* addressing enhancements for delay was based on the Supreme Court's decision in *Missouri v. Jenkins*. As the court found delay in the payment of a fee award distinguishable from a delay in payment of fees due on the merits of a case, we reject claimant's contention that he is entitled to the fee award at his current rate as the delay was due to the appeals of the fee award.

Counsel has filed a fee petition for work on this motion for reconsideration and on his reply to employer's response to the motion. Counsel requests a fee of \$4,700, representing 11.75 hours at \$400 per hour. We award a fee for eight hours of services, as claimant's motion for reconsideration was largely, but not wholly, successful. We award six hours at the 2009 rate of \$384 and two hours at the 2010 rate of \$392, for a total fee of \$3,088.

Accordingly, claimant's motion for reconsideration is granted in part, and the Board's fee award is modified as stated herein. 20 C.F.R. §802.409. Claimant's counsel is awarded a fee of \$3,088 for work on the motion for reconsideration, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge