

Preston/Bunnell, LLP
Trial Lawyers

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2016 APR 20 PM 12:44

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April 18, 2016

WCB-SALEM

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Workers' Compensation Board
2601 25th St. SE, Ste 150
Salem, Oregon 97302

RE: Attorney Fees - OAR Chapter 438 & HB 2764

Dear Board Members,

I reviewed Norman Cole's March 10, 2016 letter to the board, which characterizes my October 30, 2016 letter as "misleading, inaccurate, or both." I intended my letter to offer a broad perspective of how fee shifting statutes work in other contexts, under federal law generally, using longshore as an example. I also offered my unique perspective, having recently gone from representing employers to representing workers in Oregon workers' compensation cases. Mr. Cole may not fully appreciate that perspective, having served on the defense for his entire career.

Mr. Cole suggests that I inaccurately characterized the Benefits Review Board's (BRB) decision in *Christensen* as "excluding" Oregon workers' compensation fees from its analysis. See *Christensen v. Stevedoring Services of America*, 44 BRBS 39 (BRB (2010)). To be clear, the board expressly stated, "[W]e modify the market rate for counsel's services to eliminate workers' compensation rates from the calculation." *Id.* (emphasis added). I'm confident the board can read and comprehend the BRB's reasoning if it is interested, but I assure the board that it did not "eliminate" Oregon workers' compensation rates from consideration because they were artificially inflated.

Mr. Cole also implies that longshore attorneys do not earn around \$400 per hour.¹ He asserts that *Christensen* was based on Mr. Robinowitz's unique circumstances and that other attorneys earn less, supporting that assertion with a case in which Judge Berlin awarded Mr. Bunnell \$336 per hour. I have not surveyed every case in which a longshore attorney earned fees, or even every case in which Mr. Bunnell earned fees. However, Mr. Bunnell was kind enough to share three examples in which he earned an hourly rate of \$391 and \$392 per hour for legal services performed in 2010, *six years ago*. See Order on Attorney's Fees, 7/22/2010; Order on Attorney's Fees, 9/16/10; Order on Attorney's Fee, 12/27/10. I have also included affidavits from Mr. Bunnell and Mr. Preston of Preston Bunnell, LLP, explaining why a reasonable fee for their work is currently *over* \$400 per hour in longshore cases. See Affidavit of Peter Preston, 2/24/16; Stipulated Application for Attorney Fees And Costs, Greg Bunnell, 3/15/16.

¹ Mr. Cole incorrectly quotes my October 30, 2015 letter, stating that longshore attorneys "earn \$400 for prevailing at hearing." But my October 2015 letter states that longshore workers "earn *around* \$400 per hour." (Emphasis added). See Correspondence, Theodore P. Heus, p. 3 (Oct 30, 2015). I consider Mr. Cole's misquotation inaccurate and it is misleading, considering the topic and his position.

I am not an expert in attorney fees, either in longshore or generally. If I had intended to provide expert analysis in my October 30, 2015 letter, I would have deferred to Phil Goldsmith, an expert on attorney fees in Oregon. See Declaration of Phil Goldsmith, June 2009. In 2009, Mr. Goldsmith explained why \$400 per hour was reasonable for Mr. Robinowitz's services representing injured longshore workers, *seven years ago*. Indeed, even Mr. Cole has recently agreed to offer \$400 per hour to settle disputed fees in a longshore case. See Correspondence, Norman Cole, 2/22/16. Of course, Mr. Cole was careful to add the offer was not a concession that the rate was reasonable, because, well... it may be in his client's interest to settle for an unreasonable rate.²

Mr. Cole's recitation of the attorney fee procedure in longshore cases does not warrant a response, as my goal in submitting the letter was to outline what happens in federal fee-shifting cases under identical "reasonable fee" language in federal statutes. To be sure, there are similarities and differences between the Oregon and federal procedures. However, portions of Mr. Cole's analysis are interesting.

Mr. Cole asserts that "[t]he risk an attorney's efforts may go uncompensated is *not* considered [in longshore awards]." (Emphasis in original). That is not accurate, and some may consider it misleading.

Longshore is unquestionably a contingent fee-shifting system. If a longshore attorney does not obtain benefits for his client, he is not paid a fee and cannot charge his client a fee. In *City of Burlington v. Dague*, 505 US 557 (1992), the Supreme Court addressed whether contingency multipliers or "enhancements" are appropriate in *addition* to the lodestar calculation. In doing so, the court considered the difference between the contingency risk of cases as a class, and the contingency risk of a specific case. It concluded that neither is an appropriate basis for a specific *enhancement*, because class-based contingency was already accounted for in the "reasonable rate" component of the lodestar formula, and case-based contingency did not comport with the policy of fee-shifting. There was no dispute in *Dague* that federal fee shifting cases generally, or longshore cases in particular, were not contingent, just that the contingent nature of the cases were already accounted for in the lodestar calculation. *Id.* at 562 ("[A]n enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar.").

The Board does not use the lodestar calculation, as it does not consider an attorney's reasonable hourly rate when awarding a fee. See OAR 438-015-0010(4); *Robert L. Lininger*, 67 Van Natta 1712, 1718 (2015); *Brad L. Emerson*, 67 Van Natta 1550, 1552 (2015). But it must consider the contingent nature of both the specific case being litigated and the nature of the practice. ORS 656.388(5); OAR 438-015-0010(4)(g). That language requires the Board to adjust reasonable fees based on the contingent nature of the practice, so non-contingent rates should be modified upward. The contingent nature of the practice that justifies my proposed *effective* rate of \$350-\$550 per hour.

² Mr. Cole's email shows he is not being entirely straightforward with the Board. Settling disputed fees for \$400 per hour, while simultaneously arguing that longshore attorneys are paid far less is misleading, at best.

Mr. Cole outlines the findings of the 2012 OSB Economic Survey, but that survey does not specifically address the contingent or non-contingent nature of the fees discussed. That is why I outlined the 95th percentile rates in legal fields that do not generally operate on a contingent basis. See Correspondence, Theodore P. Heus, p. 3 n4 (Oct 30, 2015) (noting the rates of Business/Corporate Litigation attorneys, Civil Litigation Defense attorneys, Business/Corporate Transaction attorneys, and Real Estate/Land Use/Environmental attorneys). But if the Board desires more concrete evidence, consider the surveyed rates charged by private criminal defense attorneys, who cannot ethically enter into a contingent fee arrangement with their clients.

For example, in 2011, criminal defense attorneys' rates range from \$194 to \$429 per hour.³ OSB Survey at 32. If criminal attorneys operated on a contingent basis, winning exactly half of their cases, they would need to charge clients an *effective* rate of exactly two times their currently hourly rate, or \$388 to \$858 per hour, to maintain their current non-contingent earnings.

I do not know the current overall win-loss statistics in workers' compensation cases, though I suspect the rate is to historical rates. Historically, injured works prevailed at hearing 43.7 percent of the time between 2002 and 2011.⁴ Administrative Law Judge Darren Otto's more recent win-loss analysis for cases brought in front of him states that "all injured workers won 45.05% of the time."⁵

Even if the win-loss rate has not changed since 2013, the Board should determine what that rate is, and award fees commensurate with that percentage to account for the contingent nature of the practice. Thus, if the win-loss percentage is 43.7%, claimants' attorneys must earn *at least* an effective hourly rate of \$340 per hour just to be equal with the 25th percentile of the private criminal defense bar.

Mr. Cole balks at the notion that an injured worker would pay \$550 per hour for representation. Mr. Cole's statement betrays a very poor understanding of the Oregon workers' compensation system. It is precisely because a worker making \$15 per hour — unable to work due to his injury and denied temporary disability — would not be able to pay a lawyer even \$30 per hour to overturn a denied claim that the legislature adopted a contingent fee-shifting scheme "allowing the broadest access to attorneys by injured workers." ORS 656.388(5); Or Laws 2015 c. 521 § 8.

Mr. Cole should recognize this underlying policy, because the purpose of federal fee-shifting statutes is not different; it is to ensure that private citizens seeking to enforce statutory rights can retain competent counsel. *Dague*, 505 US at 568. Fee-shifting accomplishes that task because "many potential plaintiffs lack sufficient resources to hire attorneys" and "statutes to which Congress attached fee-shifting provisions typically will generate either no damages or only small recoveries; accordingly, plaintiffs bringing cases under these statutes cannot offer attorneys a share of a recovery sufficient to justify a standard contingent-fee arrangement." *Id.* That reasoning is equally applicable to Oregon worker's compensation, and is spelled out in the legislature's amendments to Chapter 656.

³ The OSB 2012 Economic Survey can be found at: <http://www.osbar.org/docs/resources/Econsurveys/12EconomicSurvey.pdf>

⁴ See http://actprod.cbs.state.or.us/iportal/report_catalog.html

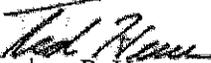
⁵ See *Injured Workers' Won/Loss Percentage Involving Denied Claims January 2013 – June 2015*; Darren Otto

Finally, Mr. Cole and I agree on one point: Oregon workers' compensation practice "it is not as lucrative as other areas of the law." But the Oregon legislature intended to fix that disparity when enacting HB 2764. Again, I do not suggest the Board adopt wholesale the federal fee-shifting system; some of the rationale and reasoning is pertinent to Oregon fee analysis and some is not. The Board, however, should be aware of how the federal system evolved in the context of identical statutory language, and consider the reasoning and policy supporting that system. It should also consider what attorneys earn under federal fee-shifting statutes, because that type of work is similar to Oregon workers' compensation. And it should also consider other areas of the law generally, because young lawyers will not choose to become workers' compensation attorneys if that field is not competitive with other fields.

Ultimately, I expect the Board to increase worker's compensation attorneys' fees to accomplish the goals of the legislature. That means making the practice lucrative enough — even as lucrative as other legal fields — to maintain and staff an office, and attract and retain young talent in the form of associates. Thus, I urge the Board to promulgate rules that result in real increases to fees awarded to attorneys in Oregon workers' compensation cases.

Sincerely,

PRESTON BUNNELL, LLP


Theodore P. Heus
tedh@prestonbunnell.com

Enclosures: Order on Attorney's Fees, 7/22/10
 Order on Attorney's Fees, 12/27/10
 Order on Attorney's Fees, 12/27/10
 Stipulated Application for Attorney Fees, Greg Bunnell, 3/15/16
 Affidavit of Peter Preston, 2/24/16
 Correspondence, Norman Cole, 2/22/16;
 Declaration of Phil Goldsmith, June 2009
 Injured Workers' Won/Loss Percentage Involving Denied Claims January 2013 – June 2015; Judge
 Darren Otto

CC w/o encl: Normal Cole, Sather Byerly Holloway, LLP.

U.S. DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAMS
14TH COMPENSATION DISTRICT

RECEIVED

JUL 26 2010

PRESTON, BUNNELL & FLYNN

ORDER ON ATTORNEY'S FEES

In the matter of the claim for
compensation under the Longshore
and Harbor Workers' Compensation
Act.

Michael Palmer
Claimant

v.

Knight, Inc. (Kinder Morgan)
Employer

Case No.: 14-150689

ACE American Insurance Company
Insurance Carrier

Such investigation in respect to the above-entitled case having been made as considered necessary, the District Director makes the following:

FINDINGS OF FACT

On 5/4/10 claimant's counsel submitted an attorney fee application for services rendered before OWCP for the period 9/16/09 through 5/4/10 for 8.5 hours of attorney time at the rate of \$391.00 per hour and .5 hours of paralegal time at \$150.00 per hour for a total of \$3,398.50. Objections were filed on 5/19/10 by the attorney for the employer/carrier. Claimant's counsel responded to the employer/carrier's objection on 5/28/10. In addition, he is requesting an additional 3 hours of attorney time for his response to the employer carrier's objections. The employer/carrier's objections and claimant's counsel's response can be summarized as follows:

HOURLY RATE

Objection: That the hourly rate charged for attorney time is excessive. Claimant's counsel hourly rate should be consistent with the rate awarded in Christensen v. Stevedoring Services of America, 557 F.3d 1049 (9th Cir. 2009). However, the attorney in Christensen has twice the experience of claimant's counsel and claimant's counsel's work experience does not support that he engages in more complex litigation. Accordingly, he should not be considered to fall into the 95th percentile of the 2007 Oregon bar survey. Those hourly rates of \$53.50 for 2009 and \$258.07 for 2010 or 75 percent of those awarded in Christensen would be more appropriate.

Response: That there is no basis for finding claimant's counsel services to be 25 percent less valuable than those awards in Christensen. Since the Board's decision on remand in Christensen, the district director has recognized that a reasonable rate for services of claimant's counsel is the same as for the attorney in Christensen.

Finding: Employer/carrier's counsel accepts that the fees in this case should be based upon the Board's determination in Christensen but does not equate the experience of claimant's counsel to warrant ranking him in

the 95th percentile of the 2007 Oregon Bar Survey. We agree that the employer/carrier has provided no justification for awarding claimant's counsel only 75 percent of the rates awarded in Christensen. As noted in claimant's counsel's response we have determined the claimant's counsel is entitled to the same rates as were awarded in Christensen, Filtroff v. Knight, Inc and Brown v Portland Line Bureau.

On May 13, 2010 the Board issued an order on reconsideration in Christensen. They found that the appropriate base hourly rate applicable to claimant's counsel in that case was \$350.00. Based upon the percentage increase in the Federal locality pay for Portland the Board further determined that claimant's counsel was entitled to increased hourly rates as follows: (1) 2007 - 2.11% - \$357.50; (2) 2008 - 3.45% - \$370.00; (3) 2009 - 3.76% - \$384.00; (4) 2010 - 2.04% - \$392.00.

The Ninth Circuit also stated in Christensen that a new determination of the relevant community and reasonable hourly rate did not have to be made for every fee award decision as long as the determination was made with sufficient frequency that the fee awards were based on current and not historical market conditions. In light of the fact that the instant case involves services provided by Mr. Bunnell in the same time frame already addressed by the BRB in its remand decision in Christensen, I see no reason to make a new determination as to the relevant community and prevailing market rate that should be applied to Mr. Bunnell's services. Accordingly, we find that he is entitled to an hourly rate of \$384.00 for 2009 and \$392.00 for 2010.

EMPLOYER/CARRIER'S RESPONSIBILITY FOR ATTORNEY FEES

Objection: That the employer/carrier disputes that it declined to provide medical treatment or services. That claimant's counsel was advised on 9/29/09 to contact the insurance carrier regarding preferred vendors for the purchase of hearing aids. That claimant's counsel ignored this request and on 12/14/09 submitted a request for authorization to provide hearing aids from a provider not selected by the employer. On 1/14/10 claimant's counsel was advised that claimant was not cooperating with the employer's choice of vendor as per Potter v Electric Boat Corp., 41 BRBS 69 (2007). That subsequent attorney time related to claimant's counsel's continued demand that employer provide hearing aids from the provider selected by the claimant. In addition, claimant received invoices from two providers and payment could not be made until 4/28/10 at which time the employer/carrier was able to establish that the claimant had not been provided with two sets of hearing aids at and payment was immediately authorized. Claimant's counsel is not entitled to an attorney fee as the employer/carrier voluntarily offered to provide medical services and promptly issued payment once confusion as to which provider had provided the claimant with hearing aids has been resolved. If the district director determines that fees are appropriate then under Section 28(b) the employer is not responsible for any time before a controversy developed. This did not occur until 3/5/10 when claimant counsel first submitted a request for reimbursement to counsel for the employer/carrier.

Response: The Board has held in previous cases that the employer/carrier owes a fee under Section 28(a) for time spent securing medical benefits and compensation because the employer had controverted the entire claim initially. A.M. v. Electric Boat Corp., 42 BRBS 30 (2008) and W.G. v. Marine Terminal Corp., 41 BRBS 13 (2007). The claimant has the right to be seen by a provider of his choice. The employer/carrier's has no right to refuse to authorize payment based upon their insistence that the claimant be seen by a preferred provider. Although the employer/carrier may have been "ready, willing and able" to provide payment for hearing aids they declined to tender any payment until 4/24/10.

Finding: A review of the file indicates that the sole issue was the authorization of payment for hearing aids under the provision of Section 7 of the Act. Contrary to the employer's carrier's position claimant's counsel has clearly established that a controversy existed and that he need to intervene on the claimant's behalf in order to

insure that the claimant was provided with hearing aids.

As per the Board's decision in William Gordon v. Marine Terminal Corp., we agree with the claimant's counsel that he is entitled to attorney fees under the provisions of Section 28(a). In addition as per Dyer v. Cenex Harvest States, we agree that claimant's counsel is entitled to fees both before and after the employer declined to pay compensation. The employer in this case had declined to authorize purchase of the hearing aids. However, one hour of time spent from 9/18/09 through 10/19/09 and prior to Judge Berlin's order issued 10/21/09 cannot be considered by the District Director.

Claimant's counsel first wrote the employer/carriers' counsel on 12/14/09 inquiring as to when the employer was going to authorize hearing aids per a 12/4/09 request for authorization from Willoughby Hearing Aids Centers. Employer's counsel alleges in his response that this request was not received by the appropriate carrier nor did they respond to the claimant's counsel until 1/13/10. At that time they stated that the claimant was not cooperating as he has not been to one of their preferred vendors for hearing aids and they continued to insist on having the claimant use a vendor of their choice. As a consequence of the employer/carrier's continued refusal to authorize payment, the claimant on 3/4/10 elected to purchase the hearing aids himself at Costco at a substantially reduced cost. A copy of the paid invoice was provided to employer/carrier's counsel on 3/5/10. Employer's counsel did not respond by letter until 4/22/10. At that time they advised that it appeared that the claimant had apparently been provided with two sets of hearing aids as they had received the invoice from Willoughby's as well and stated that no payment would be issued until the matter had been "investigated".

There is nothing in the Act or case law to support that the claimant does not have the right to his choice of hearing aid providers. In addition, upon receiving verification that the claimant had purchased hearing aids from another provider and a substantially reduced cost the employer/carrier continued to refuse to make payment when a simple telephone call to Willoughby's Hearing Aid Center would have quickly resolved that the claimant has in fact only received one set of hearing aids. Therefore, the employer/carrier is found responsible for reasonable and necessary attorney time from 11/2/09 subsequent to Judge Berlin's Order through 4/28/10 when the employer/carrier agreed to reimburse the claimant for the aids purchased at Costco as well as time necessary to prepare the fee petition on 5/4/10.

Claimant's counsel is requesting an additional 3 hours for his response to the employer/carrier's objections. We find that claimant's counsel has prevailed on objections raised with respect to his hourly rate and to the majority of the time he is spent in response to the employer/carrier's inordinate delay in providing the claimant with hearing aids. We find that claimant's counsel response to the objections raised to time spent had been essentially covered in his letter dated 4/26/10. Furthermore, his response to objections to the hourly rate is essentially no different from that which he has already presented in several other recent cases as well as those which were already included with his initial application in this case. In consideration of the above a total of 1.5 hours are considered sufficient to have prepared a response to the employer/carrier's objections and therefore 1.5 hours are disallowed.

EXCESSIVE AND DUPLICATIVE ENTRIES

Objection: That claimant's counsel should not be entitled to one hour of attorney time for services prior to 11/2/09 as fees through that date were included in the Decision and Order issued on 10/29/09. The entries for 1/14/10 and 1/20/10 only noted as "letter to claimant" appear to be duplicative and unnecessary. The .375 hours on 4/29/10 to review and forward a check to claimant appears unnecessary.

Response: The fee in this case arises out of the original Controversion of the hearing loss claim and nothing in

the prior agreement of the parties precludes claimant from recovering fees for time spent on other issues that were resolved later. In addition, the Ninth circuit has determined that under Section 28(a) claimant's counsel is entitled a fee for all time spent both before and after an employer declines to pay compensation. Dyer v Cenex Harvest States Cooperative, 43 BRBS 32 (CRT) 563 F.3d 1044 (9th Cir. 2009)

Finding: We have previously determined for the reasons cited that the claimant's counsel is entitled to a fee for reasonable and necessary services provided between 11/2/09 - 4/28/10. With respect to the specific entries cited in the employer/carer's objections and absent any response from the claimant's counsel we find as follows: The entry dated 1/20/10 would appear to be duplicative of the 1/14/10 entry and therefore .25 hours are disallowed. For the entry dated 4/29/10, .25 minutes would appear to be adequate to listen to a voice trial and dictate a two line fax and therefore .125 minutes are disallowed. The entry dated 4/29/10 (.375 minutes) is disallowed as it was for time subsequent to the employer's agreement to issue payment of the hearing aids and simply involved the forwarding of a check which would normally have been sent directly to the claimant.

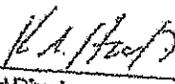
Pursuant to Section 702.132 of the regulations and Section 28(a) of the Act, considering the time spent, experience of counsel, benefit gained, complexity of issues and the other arguments of the parties, I am approving one hour of attorney time in 2009 at \$384.00 per hour, 8.125 hours in 2010 at \$392.00 per hour, plus 25 hours of legal assistant's time at \$150.00 per hour for a total of \$3,606.50.

Upon the foregoing findings of fact, the District Director makes the following:

DETERMINATION

The employer Knight, Inc. (Kinder Morgan), and the insurance carrier, ACE American Insurance Company, shall pay Gregory A. Bunnell, Esq, attorney's fees in the amount of \$3,606.50 for services provided the injured worker

Given under my hand at Seattle,
Washington this 22nd day of
July, 2010.



District Director
14th Compensation

U.S. DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAMS
14TH COMPENSATION DISTRICT

RECEIVED

SEP 23 2010

PRESTON, BUNNELL & FLYNN

In the Matter of the Claim for
Compensation under the Longshore
And Harbor Workers' Compensation Act

Travis L. McKinney
Claimant

ATTORNEY'S FEE ORDER

Vs

Georgia-Pacific Corporation
Employer

Indemnity Insurance Company of North America
Carrier

OWCP File No: 14-150950

Such investigation in respect to the above-entitled case having been made as considered necessary, the District Director makes the following:

FINDINGS OF FACT

On June 21, 2010 claimant's counsel submitted an Application for Attorney Fees and Costs for services rendered before the OWCP for the period January 14, 2010 through June 15, 2010 for 8.5 hours of attorney time at the rate of \$391 per hour totaling \$3,323.50 and .125 hour of legal assistant time at the rate of \$150 per hour totaling \$18.75 for a total amount of \$3,342.25. Objections were filed by counsel for employer/carrier on July 1, 2010. On July 16, 2010 claimant's counsel submitted a reply to employer/carrier's objections. On July 22, 2010 employer/carrier's counsel filed an additional submission which was responded to by claimant's counsel on July 28, 2010. The employer/carrier's objection/submissions and claimant's replies can be summarized as follows:

Objection: No costs were itemized

Findings: Claimant's counsel did not bill for costs, making this objection unnecessary.

Objection: The hourly rates requested, \$391 for attorney time and \$150 for paralegal time are not based on market rates for the relevant community as required by the Ninth Circuit in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049 (9th Cir. 2009) and *Van Skike v. Dir.*, OWCP, 557 F.3d 1041 (9th Cir. 2009). The BRB decision on reconsideration of *Christensen* is in error for excluding rates for workers' compensation attorneys in determining the market rate. Mr. Bunnell should be compensated at the 75th percentile of workers' compensation attorneys in Portland, Oregon, which would result in a rate of \$195 per hour. No evidence of the market rate for paralegals was provided by Mr. Bunnell. The attached recent fee order from Administrative Law Judge Gee awards Mr. Bunnell \$332.17 per hour for work done in 2010. Additionally, \$100 per hour is a reasonable rate for paralegals in the Portland, Oregon area.

Response: The BRB decision in *Christensen* is entirely correct since fees on workers' compensation claims are usually capped and therefore do not represent market rates as required by the Ninth Circuit in

Christensen. The OWCP has recently awarded Mr. Bunnell the same hourly rate awarded to Mr. Robinowitz in Christensen. Those awards are attached to the fee petition. The BRB reconsideration on Christensen also sets the market rate for paralegals in Portland, Oregon at \$150 per hour for 2009.

Findings: The Ninth Circuit and the BRB have recently issued decisions which shed significant light on the question of hourly rates for attorneys representing Longshore claimants generally. In two recent decisions involving attorney fees under the Longshore Act, the Ninth Circuit has stated that "reasonable attorney's fees under the Longshore Act must be calculated in the same manner as other fee-shifting statutes. Christensen v. Stevedoring Services of America, 557 F.3d 1049 (9th Cir. 2009) and Van Skike v. Dir., OWCP, 557 F.3d 1041 (9th Cir. 2009). In Van Skike, the court explained that "the rationale behind fee-shifting statutes in general" is "to encourage able counsel to undertake" cases under those statutes by awarding counsel "fees commensurate with those which they could obtain by taking other types of cases." Van Skike at 1047.

The Ninth Circuit further stated in Christensen that the attorney's hourly rate should be calculated with reference to the "prevailing market rates in the relevant community", but rejected limiting the relevant community to rates awarded other attorneys under the Longshore Act as had been previously done. Christensen at 1053. However, the Ninth Circuit declined to "dictate to the BRB" what the relevant community should be or what a reasonable hourly rate in that community should be. Christensen at 1055. The Ninth Circuit remanded the case back to the BRB with instructions to reevaluate its decisions and orders awarding attorney fees and to make the appropriate findings regarding the relevant community and prevailing market rate.

After receiving the remand, the BRB issued a decision on November 18, 2009 finding that the relevant "community" in that case was the city of Portland. Using the 2007 Oregon Bar Survey submitted in that case, the BRB calculated the subsequent hourly rate increases using the Federal locality pay table for Portland. Then, on March 13, 2010, upon Motion for Reconsideration, the BRB issued still another Order stating as follows:

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.

The Ninth Circuit also stated that a new determination of the relevant community and reasonable hourly rate did not have to be made for every fee award decision as long as the determination was made with sufficient frequency that the fee awards were based on current and not historical market conditions. Christensen at 1055.

The BRB issued an Order dated July 20, 2010 awarding \$384 per hour for work done in 2009 and \$392 for work done in 2010. Mr. Bunnell's fee petition and supporting documentation supports his contention that he be placed in the 95th percentile in the Portland, Oregon area similar to the attorney in Christensen. Additionally, the BRB awarded a paralegal rate of \$150 per hour for 2009.

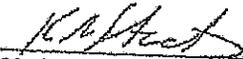
Using the BRB Order of July 20, 2010 as a guide, Mr. Bunnell is awarded his requested hourly rate of \$391 for 8 hours totaling \$3,328.50. The paralegal is awarded an hourly rate of \$150 for .125 hour totaling \$18.75. Total fees awarded are \$3,347.25.

Upon the foregoing findings of fact, the District Director makes the following:

DETERMINATION

That the above named employer and carrier shall pay Gregory A. Bunnell, Esq. attorney fees and paralegal fees in the total amount of \$3,342.25 for legal services provided the claimant.

Given under my hand and filed at
Seattle, Washington this 16th day
September, 2010.


District Director
Fourteenth Compensation District

APPEAL RIGHTS:

Any notice of appeal shall be sent by mail or otherwise presented to the Clerk of the Benefits Review Board, PO Box 37601, Washington D.C. 20013-7601, within 30 days from the date upon which a decision and order has been filed in the Office of the District Director, or within 30 days from the date final action is taken on a timely petition for reconsideration. If a timely notice of appeal is filed by a party, any other party may initiate a cross-appeal or protective appeal by filing a notice of appeal within 14 days of the date on which the first notice of appeal was filed or within the 30 day period described above, whichever period last expires. A copy shall be served upon the District Director and on all other parties by the party who files a notice of appeal. Proof of service shall be included with the notice of appeal.

I hereby certify that a copy of the foregoing compensation order was sent by regular mail to the claimant, attorneys, employer and the insurance carrier at the last known address of each as follows:

Gregory Bunnell, Esq.
1500 SW First Avenue, Suite 770 ✓
Portland, OR 97201-5837

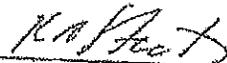
Norman Cole, Esq.
111 Fifth Ave, Suite 1200
Portland, OR 97204-3613

Travis L. McKinney
1812 SE 156th Avenue
Portland, OR 97233

Indemnity Insurance Company of North America
c/o Sedgwick CMS
PO Box 578
Negaunee, WI 49866

Georgia-Pacific Corporation
2214 North Hendrickson Drive
Kafama, WA 98825

Mailed 9/16/10


KAREN P. STAATS
District Director
Fourteenth Compensation District

RECEIVED

DEC 8 0 2010

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs
Fourteenth Compensation District

PRESTON, BUNNELL & FLYNN

Felix Brown
Claimant

Portland Lines Bureau
Employer

Commerce & Industry Insurance
Insurance Company

ORDER ON ATTORNEY'S FEES

Case No. 14-149966

Such investigation in respect to the above-entitled case having been made as considered necessary, the District Director makes the following:

FINDINGS OF FACT

On March 5, 2010 claimant's counsel submitted an attorney fee application for services rendered before OWCP for the period May 22, 2008 through January 22, 2010 for 32.375 hours of attorney time at the rate of \$391.00 per hour and 4.75 hours of paralegal time at \$150.00 per hour plus \$205.50 in costs for a total of \$13,576.63.

Objections were filed on March 25, 2010 by the attorney for the employer/carrier. Claimant's counsel's response to the employer/carrier's objections was received on April 1, 2010. Claimant's counsel is requesting an additional 3 hours of attorney time at \$391.00 per hour for time spent in preparing his response to the employer/carrier's objections. The employer/carrier's objections and claimant's counsel's response can be summarized as follows:

Time Expended

Objections: That the employer/carrier does not dispute attorney time and costs prior to January 30, 2009. However as of January 30, 2009 the claim had been accepted and all compensation due and related medical bills had been paid. In the absence of a controversy any attorney services subsequent to that date should not be the responsibility of the employer/carrier.

Response: That as of January 30, 2009 the employer/carrier had not filed Forms LS-206 and LS-208 indicating that compensation had been paid nor did they otherwise advise in writing that the claim had been accepted. That there were several outstanding medical bills subsequent to that date which required intervention by claimant's counsel in order to be successfully resolved. This included an unpaid balance of \$40,000 due Kaiser Permanente which was not paid until December 7, 2009. In addition, claimant's counsel's efforts subsequent to January 30, 2009 resulted in the claimant being paid both penalties and interest on compensation due.

Finding: A review of the file does support that all temporary total disability compensation due had been paid by January 31, 2009. However, based upon correspondence and payment information provided by claimant's counsel it is quite apparent that all outstanding medical bills including the \$40,000 due Kaiser Permanente had not been paid. The available evidence also reflects that claimant's counsel had to intervene on behalf of the claimant in order to resolve the outstanding medical bills. Contrary to the employer's carrier's position claimant's counsel has clearly established that a controversy continued to exist as medical bills remained

unpaid and required the ongoing efforts of claimant's counsel to insure that the all bills were paid. In addition, on December 9, 2009 claimant's counsel raised the issue of claimant's entitlement to penalties and interest and as a result \$512.15 in penalties and interest were found to be due and payable.

Other than taking the position that attorney time beginning January 30, 2009 was not the responsibility of the employer/carrier no specific objections have been raised to attorney time billed between January 30, 2009 and January 20, 2010. However, claimant counsel's January 22, 2010 entry indicates that 2 hours were expected to be required to complete outstanding bill issues and finalize the fee petition. Claimant's counsel cannot bill for time not actually spent. One hour to prepare the fee petition is considered adequate. Accordingly, 1 hour is disallowed.

Claimant's counsel's response to the employer/carrier's objections did require some time to review the file, locate supporting documents and prepare his letter. However time spent in defending his hourly rate had already been addressed and billed for in the original fee application and could have been addressed simply by reference to his initial application. I find that 1.5 hours is considered adequate to complete counsel's response and therefore 1.5 hours are disallowed.

Hourly Rate

Objection: That the hourly rate charged for both attorney time and paralegal time is excessive. The appropriate hourly rate for attorney time should be \$247.00 and for paralegal time \$100.00 which is consistent with the rates awarded in Longshore and state workers' compensation cases. If a higher rate is allowed it should not exceed the \$308.00 and \$338.00 rates awarded in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049 (9th Cir. 2009).

Response: That the Ninth Circuit in *Van Skike v. Director, OWCP*, 557 F.3d 1041, 1046-1047 (9th Cir. 2009) and the Board in *Christensen* has clearly rejected determining reasonable rates based upon attorneys solely handling Longshore and state workers' compensation cases. In addition, if *Christensen* is followed then the correct hourly rates are \$325.50 for 2008, \$338.00 for 2009 and \$344.80 for 2010. Claimant's counsel requests that all hours be compensated at the 2010 rates "to account for the fact that no compensation will be paid for those services until 2010." *Anderson v. Director*, 30 BRBS 67(CRT) (1996) Claimant's counsel amended his fee application on June 17, 2010 to request an hourly rate of \$391.00 pursuant to the BRB's order on reconsideration dated May 13, 2010 in *Christensen v. Stevedoring Services of America*, BRB No. 03-0302. However, the total amount of attorney's fee claimed on the initial fee application was calculated based on an hourly rate of \$391.00.

Finding: As noted by both counsel for employer/ carrier and counsel for the claimant, the Ninth Circuit and the BRB have recently issued decisions which shed significant light on the question of hourly rates for attorneys representing Longshore claimants generally. The Ninth Circuit has stated that "reasonable attorney's fees under the Longshore Act must be calculated in the same manner as other fee-shifting statutes. *Christensen v. Stevedoring Services of America*, 557 F.3d 1049 (9th Cir. 2009); *Van Skike v Dir., OWCP*, 557 F.3d 1041 (9th Cir. 2009). In *Van Skike*, the court explained that "the rationale behind fee-shifting statutes in general" is "to encourage able counsel to undertake" cases under those statutes by awarding counsel "fees commensurate with those which they could obtain by taking other types of cases."

The Ninth Circuit further stated in *Christensen* that the attorney's hourly rate should be calculated with reference to the "prevailing market rates in the relevant community", but rejected limiting the relevant community to rates awarded other attorneys under the Longshore Act as had been previously done. *Christensen*, 57 F.3d at 1053. However, the Ninth Circuit declined to "dictate to the BRB" what the relevant community should be or what a

reasonable hourly rate in that community should be. *Christensen*, 557 F.3d at 1055. The Ninth Circuit remanded the case back to the BRB with instructions to reevaluate its decisions and orders awarding attorney fees and to make the appropriate findings regarding the relevant community and prevailing market rate.

After receiving the remand, the BRB issued a decision on November 18, 2009 finding that the relevant "community" in that case was the city of Portland. Using the 2007 Oregon Bar Survey submitted in that case and calculating the subsequent hourly rate increases using the Federal locality pay table for Portland, the BRB further stated that the rate for 2007 would be \$314.50 and \$325.50 for 2008. Using the same methodology, the BRB stated that the 2009 rate would be \$388.00 and awarded fees for the legal assistant in 2009 at a rate of \$150.00. Similarly, applying the 2.04 percent Federal locality pay increase for 2010 the rate would be \$345.00.

This decision was amended as stated above (*Christensen v. Stevedoring Services of America*, BRB No.03-0302 (May 13, 2010)) to change the hourly rates as follows:

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.

The Ninth Circuit also stated that a new determination of the relevant community and reasonable hourly rate did not have to be made for every fee award decision as long as the determination was made with sufficient frequency that the fee awards were based on current and not historical market conditions. *Christensen*, 55 F.3d at 1055. In light of the fact that the instant case involves services provided by Mr. Bunnell in the same time frame already addressed by the BRB in its remand decision in *Christensen*, I see no reason to make a new determination as to the relevant community and prevailing market rate that should be applied to Mr. Bunnell's services.

Claimant's counsel has requested that all attorney fee hours be compensated at \$391.00 because of delay in payment pursuant to *Anderson*. In this case there has not been a delay in payment because an order has not been issued. There is no basis to pay all attorney time at \$391 per hour.

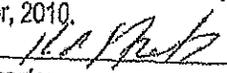
Accordingly, pursuant to Section 702.132 of the regulations, considering the time spent, experience of counsel, benefit gained, complexity of issues, customary hourly rate and the other arguments of the parties, I am approving 18.25 hours of attorney time in 2008 at \$370.00 per hour, 10.125 hours in 2009 at \$384.00 per hour, 4.5 hours in 2010 at \$391.00 per hour, 4.75 hours of legal assistant's time at \$150.00 per hour plus \$205.50 in costs for a total of \$13,317.50.

Upon the foregoing findings of fact, the District Director makes the following:

DETERMINATION

That the employer, Portland Lines Bureau, and the insurance carrier, Commerce & Industry Insurance, shall pay to Gregory Bunnell, Esq., attorney's fees of \$13,112.00 and costs of \$205.50 for services provided the claimant.

Given under my hand and filed at
Seattle, Washington this 27th day of
December, 2010.


District Director
Fourteenth Compensation District

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAMS
SEATTLE, WASHINGTON

In the matter of

GREG NELSON,

Claimant,

vs.

SSA-PACIFIC,

Employer,

and

HOMEPORT INSURANCE CO.,

Carrier.

OWCP NO.: 14-303194

STIPULATED APPLICATION FOR
CLAIMANT'S ATTORNEYS' FEES AND
COSTS

Claimant, by and through his attorneys, Preston Bunnell, LLP, and pursuant to the provisions of 33 USC 928(a), 928(b) and 20 CFR §702.132, submits this Stipulated Application for Attorney Fees and Costs for allowance and assessment of fees and costs. The following

Stipulated Application for Attorneys Fees and Costs is submitted by claimant's attorneys for work before the Office of Workers' Compensation Programs in the prosecution of claimant's claim for compensation and benefits. The Ninth Circuit has emphasized that reasonable fees "are to be calculated according to the prevailing market rates in the relevant community" and that the relevant community must be defined more broadly than just what members of the LHWCA bar have been awarded in recent decisions. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 1046-47 (9th Cir. 2009) (quoting *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)). As the Court emphasized, determining a "reasonable fee" means respecting "the congressional intent animating fee-shifting statutes"; "[i]n order to encourage able counsel to undertake [LHWCA] cases, as congress intended, it is necessary that counsel be awarded fees commensurate with those which they could obtain by taking other types of cases." 557 F.3d at 1047 (quoting *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 981 (9th Cir. 2008)). Accordingly, claimant requests that his attorneys be compensated at rates commensurate with those they could obtain through other types of cases given their skill and experience, as detailed below.

In *Christensen v. Stevedoring Services of America*, the Board applied the Ninth Circuit's ruling to fees awarded to an attorney practicing in Portland, Oregon. The Board concluded that the relevant "community" for a lawyer with his office in Portland is the city of Portland. 43 BRBS 145, 146 (2009). On reconsideration, the Board found that the fees paid for attorneys handling Oregon workers' compensation cases are not based on a market rate and, under the Ninth Circuit's requirement, should not be used as a comparison to determine a reasonable rate for longshore counsel. 44 BRBS 39 (2010). The Board also held that the amount based on 2006 data needed to be annually increased according to the Federal locality pay for Portland, although those rates have been artificially frozen since 2010. 43 BRBS at 147.

In determining the "market" rate in its post-remand decisions in *Christensen*, the Board primarily relied on information from an Oregon Bar Survey of 2006 lawyer billing practices, citing the United States Federal District Court's use of this survey as a *baseline* for attorney fee rates. *Christensen v. Stevedoring Services of America*, 43 BRBS 145, 146 (2009). That Survey is attached as Exhibit A. However, that reference to "baseline" is key. As the Supreme Court subsequently emphasized, in fee shifting cases, "an enhancement may be appropriate where the method used to determine the 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 formula takes into account only a single factor (such as years since admission to the bar) or perhaps only a few similar factors. In such a case, the trial judge should adjust the hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate." *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1668, 176 L. Ed. 2d 494 (2010). This decision construing "reasonable fees" "'applies uniformly'" to fee-shifting statutes such as the LHWCA." See *Van Skike v. Dir., Office of Workers' Comp. Programs*, 557 F.3d 1041, 1046 (9th Cir. 2009). The measure of fees paid on average to other Portland attorneys cannot trump direct evidence of the fees earned by claimant's when handling cases other than cases under the Act. The Board in *Christensen* ultimately determined that the market rate for services of that attorney were comparable to the rates earned by the highest 5% in the categories of practice similar to what he would maintain apart from longshore cases, plaintiff's civil and plaintiff's personal injury. Those rates as reflected in the 2006 OSB economic survey – at the time the most recent survey – if brought up to date through the federal locality pay increases, as the Board directed, would be \$392 in 2010-2012. The Oregon State Bar has just issued an updated 2012 fee survey that, in fact, shows an average of \$392.50 for the rates earned by the highest 5% in the categories of plaintiff's civil and plaintiff's personal injury. (Ex A at 32). Moreover, the most recent fee

survey indicates that for lawyers in practice 21-30 years, rates for the top 5% were \$470 per hour, and for the top 25%, \$399 per hour.

Like the attorney in *Christensen*, claimant's counsel has significant experience successfully handling longshore claims, but also devotes a significant portion of their practice to complex personal injury litigation, as detailed in the attached affidavit.

In his Supplemental Decision and Order of October 26, 2012, Judge William Dorsey agreed that Mr. Bunnell's requested fees were reasonable. *See Miner v. Jones Stevedoring Co.*, OWCP NO. 14-155688 and OALJ No. 2012-LHC-00784.

Moreover, former Director Staats repeatedly emphasized that there was no basis for valuing a lower market rate for Mr. Bunnell than the rate held by the Board to be reasonable for Mr. Robinowitz, the attorney in *Christensen*. *See Flintoff v. Kinder Morgan*, OWCP No. 14-149771, *Simms v. Kinder Morgan*, OWCP No. 14-151587, *Scott v. Portland Lines Bureau*, OWCP No. 14-151194, *Palmer v. Knight, Inc. (Kinder Morgan)*, OWCP No. 14-150689, *McKinney v. Georgia-Pacific Corporation*, OWCP No. 14-150950, *Brown v. Portland Lines Bureau*, OWCP No. 14-149966, and *Moeller v. Georgia-Pacific*. (Exhibit B). While a new District Director is not bound by the views of his predecessor, absent the opportunity to develop an independent familiarity with the skill level of Mr. Bunnell, it would be reasonable to defer to Ms. Staats' assessment.

Based on the framework of *Christensen* and *Van Skyke*, rates of \$392 per hour is a realistic measure of the "market" rate available to claimant's counsel as set out in the attached affidavit.

STATE OF OREGON)
) ss.
County of Multnomah)

I, Gregory A. Bunnell, being first duly sworn on oath, depose and state:

I am currently a partner in the firm of Preston Bunnell, LLP, and state my firm was responsible for the representation of claimant on his claim under the Act, as amended, before the Office of Workers' Compensation Programs. I submit this affidavit as to the extent and character of the necessary work done on behalf of claimant.

Affiant received a Bachelor of Science degree in Biology and a minor in Chemistry from the University of Oregon in 1987. Affiant spent the next year working for both Lane County Legal Aid and the Institute of Molecular Biology (University of Oregon). Affiant attended Northwestern School of Law at Lewis and Clark beginning in the fall of 1988 and commenced work, as a law clerk, for the law firm of Pozzi Wilson Atchison O'Leary and Conboy in January 1989. Affiant prepared and filed over 200 briefs before the Benefits Review Board (LHWCA) and Workers' Compensation Board (OWCA). Affiant was also involved in extensive research and case preparation for claims filed under the Longshoremen and Harbor Workers' Compensation Act and Oregon Workers' Compensation Act. In addition to affiant's extensive practice, affiant also co-published an article in the University of San Francisco Maritime Law Journal entitled "Epidemic-Type Claims in the Maritime Workplace."

Since admission to the Oregon State Bar in October, 1991 affiant has been successfully representing injured workers under the Longshoreman and Harbor Workers' Compensation Act for longshoremen and harbor workers.

Affiant also practices in the area of personal injury litigation and specializes in complex tort claims for wrongful death, construction claims under the ELA, medical malpractice and federal maritime claims. Given the resources of multiple paralegals and three attorneys, including an in-house appellate specialist, affiant has been able to successfully litigate complex and high-value civil claims.

Affiant was also admitted to the Washington State Bar in 2003 and is admitted to practice before all state and federal courts in both Oregon and Washington. Affiant is also admitted to

practice before the US Court of Appeals for the Ninth Circuit. Affiant is also a past Board Member of the Oregon Trial Lawyers' Association. Affiant's firm was selected as one of the Best Law Firms in Portland by U.S. News – Best Lawyers' "Best Law Firms" for 2014: Tier 3 for plaintiff's personal injury litigation, Tier 1 for appellate practice, honors reserved for a small fraction of the attorneys in each state. American Lawyer Media and Martindale-Hubbe selected affiant as a 2013 Top Rated Lawyer in Personal Injury Law. Affiant was invited into The National Trial Lawyers: Top 100 Trail Lawyers for the year 2015. The National Trial Lawyers: Top 100 is an invitation-only organization composed of the premier trial lawyers from each state in the nation who meet stringent qualifications as civil plaintiff and/or criminal defense trial lawyers. Selection is based on a thorough multi-phase process which includes peer nominations combined with third-party research. Membership is extended solely to the select few of the most qualified attorneys from each state who demonstrate superior qualifications of leadership, reputation, influence, stature and public profile. I have been assigned an AV rating from Martindale Hubbe in 2015. I received the Top 10 Attorney Award for the State of Oregon for 2015 from the National Academy of Personal Attorneys, Inc.

Affiant's firm, and predecessor firms (Pozzi Wilson Atchison/Preston Bunnell & Stone/Preston Bunnell & Flynn), has represented the members of various locals of the ILWU, including local eight (Portland), local forty (Portland), local fifty (Astoria), local twelve (Coos Bay), local ninety-two (Portland) local fifty-four (Newport), local twenty-one (Longview, Washington), local four, (Vancouver, Washington) local nineteen (Seattle, Washington) and local twenty three (Tacoma, Washington). Affiant's law firm also represents many other categories of injured workers under the Act, including union members of the Steamfitters, Piledrivers, Boilermakers, and Sheet Metal Workers' Unions.

The reasonable fee for my services is \$425 per hour. The reasonableness of my rate is supported by the Oregon State Bar's most recently published survey of billing rates. For the year

2012, billing rates for Portland private practice attorneys with 21-30 years experience were \$470 per hour for the 95th percentile and \$399 for the 75th percentile and billing rates for the highest Portland earners in the practice areas of plaintiff's civil litigation and plaintiff's personal injury, averaged \$392 per hour. My skills and experience and demonstrated earning record place me within this 95th percentile of earners. Pertinent portions of the Oregon State Bar survey are attached as Exhibit A. A complete copy of the survey is available at <http://www.osbar.org/docs/resources/Econsurveys/12EconomicSurvey.pdf>.

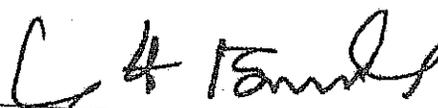
Karen Barry-Gazzo has been a paralegal at the firm of Preston Bunnell, LLP since 2001 and was responsible for work on this file. Her time is billed at \$150.00 per hour. This is an increase over the previous rate of \$100.00 per hour. Due to a heavy concentration in Longshore & Harbor Workers' Compensation Act cases, her expertise has increased. In addition, this is consistent with the annual increases granted to claimants under the Longshore & Harbor Workers' Act, consistent with cost of living increases. This rate is supported by recent awards to this office at fee of \$150 per hour in *Flintoff v. Kinder Morgan*, OWCP No. 14-149771, *Stmms v. Kinder Morgan*, OWCP No. 14-151587, *Brown v. Portland Lines Bureau*, OWCP No. 14-149966 and *Moeller v. Georgia-Pacific*, OWCP No. 14-154907. (Exhibit B)

Karen Stringer has been a paralegal with our firm since November 1999. Prior to that time, she worked as a paralegal for Pozzi Wilson Atchison, LLP since January 1995. She has worked as a paralegal, representing injured workers for various firms in Oregon and Washington for over 20 years. Ms. Stringer's time is currently billed at \$100.00 per hour. This is an increase over the previous rate of \$95.00 per hour, which has been in effect for over two years. Since that time, due to a heavy concentration in Longshore & Harbor Workers' Compensation Act cases, her expertise has increased. In addition, this is consistent with the annual increases granted to claimants under the Longshore & Harbor Workers' Act, consistent with cost of living increases. In the past year, that rate was 2.53%.

Affiant and his office have expended a total of 13.75 hours to date on claimant's behalf in this matter since the interim agreement. Affiant seeks and will accept a reduced and compromised fee of \$4,306.00, which includes fees deferred as per the afore-mentioned interim agreement. We have also incurred recoverable costs in amount of \$494.00. Please see Exhibits A, B, C and D attached and incorporated herein.

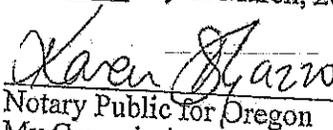
DATED: March 15, 2016

PRESTON BUNNELL, LLP



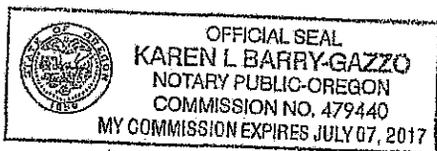
Gregory A. Bunnell, OSB 912226
Of Attorneys for Claimant

SUBSCRIBED and SWORN to before me this 15 day of March, 2016.



Notary Public for Oregon
My Commission Expires:

July 7, 2017



AFFIDAVIT OF PETER W. PRESTON

STATE OF OREGON)
) ss.
County of Multnomah)

PETER W. PRESTON, being first duly sworn on oath, deposes and states:

I am a partner in the law firm of Preston Bunnell, LLP. I represented claimant, WARD KRUSE, on the recently resolved claim referenced in the Stipulated Petition for Approval of Claimant's Attorneys' Fees and Costs to which this affidavit is attached.

Affiant is a member of the Oregon State Bar, having been admitted to practice in the state of Oregon on April 22, 1982. I have practiced for over 27 years in the personal injury and compensation field, including the Longshoremen's and Harbor Workers' Act and the Oregon Workers' Compensation Act. I was formerly a partner with the law firm of Pozzi Wilson Atchison, LLP, which represented the members of the ILWU, including Local 8 (Portland), Local 40 (Portland), Local 92 (Portland), Local 4 (Vancouver), Local 21 (Longview), Local 50 (Astoria), Local 53 (Newport) and Local 12 (Coos Bay) since 1958 and all other types of claimants under the Longshore Act.

I was recently nominated and elected as a member of the American Board of Trial Advocates, an honor limited to attorneys with significant and quality jury trial experience. I have also recently been included as a member of the Best Lawyers in America. Both of these honors are limited to the most highly skilled attorneys in their regions.

Affiant is also a member of the American Association for Justice, Oregon Trial Lawyers Association (Past Member, Board of Governors), the Oregon Workers' Compensation Attorneys Association (Past President), and the American Board of Trial Advocates. Your affiant is a past

member of the Judicial Selection Committee of the Multnomah Bar Association, a past Chair of the Affirmative Action Committee of the Oregon State Bar Association, a past member of the Uniform Jury Instruction Committee of the Oregon State Bar, a volunteer Hearings Officer of the Multnomah Bar Association, and has served on various other committees of the Organization of Workers' Compensation Attorneys in the State of Oregon and the Multnomah County Bar Association. Your affiant's time was billed at \$392.00 per hour until December 31, 2015, when it was adjusted to \$425.00 per hour.

Karen Stringer has been a paralegal with our firm since November 1999. Prior to that time, she worked as a paralegal for Pozzi Wilson Atchison, LLP since January 1995. She has worked as a paralegal, representing injured workers for various firms in Oregon and Washington for over 30 years. Ms. Stringer's time is billed at \$150.00 per hour. Due to a heavy concentration in Longshore and Harbor Workers' Compensation Act cases, her expertise has increased. In addition, this rate is consistent with the annual increases granted to claimants under the Longshore and Harbor Workers' Compensation Act, and consistent with cost of living increases. This rate is supported by recent awards to this office.

These hourly charges are fair and reasonable, and commensurate with the fees charged for legal services by attorneys and staff with the same expertise and experience as affiant. Affiant's law firm is located in the downtown area of Portland, Oregon, the largest metropolitan area of the state, and costs of operating our law firm continue to spiral upward.

Given the resources of multiple paralegals and three attorneys, including an in-house appellate specialist, counsel has been able to successfully litigate a significant number of cases under the Jones Act and general maritime jurisdiction. In addition, affiant has an active practice involving asbestos diseased claimants. Counsel also handles medical negligence cases, automobile

injury cases, product liability cases, and other types of personal injury cases. Affiant typically does not bill by the hour, except in longshore cases. I have primarily a contingent fee practice. The longshore cases make up a portion of affiant's case load.

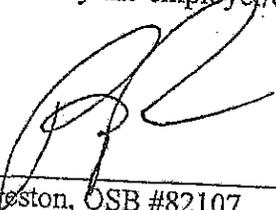
Until the Ninth Circuit's decisions in *Van Skike v. Director, OWCP*, 557 F.3d 1041 (9th Cir. 2009), and *Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 1053 (9th Cir. 2009), counsel's fee applications in longshore cases limited their requested rates according to the reality of the artificial rate caps being applied by the Deputy Director and most ALJ's. However, outside the sphere of longshore cases, counsel was able to earn attorney fees at higher rates. In counsel's personal injury practice, the compensation in attorneys' fees received exceeds \$400.00 per hour. For example, affiant recently settled a Jones Act cases for \$100,000.00, from which he took a fee of only \$25,000.00. However, on an hourly basis, this fee represented at least \$500.00 per hour, probably closer to \$750.00 per hour. That case was mediated by an attorney, Richard S. Yugler, who bills at the rate of \$400.00 per hour. For these particular mediations, he had a reduced hourly rate of \$350.00 per hour for the first five hours, pursuant to an agreement with the Court of Appeals for the State of Oregon in its mediation service. Mr. Yugler is a contemporary of affiant's with similar experience, but he does not practice in the specialized area of "maritime" law. His is a traditional personal injury practice, as well as a business litigation practice. Attached as **Exhibit A** is the formal billing affiant received from Mr. Yugler's office for the mediation services he provided to him and his client.

Additionally, in March 2010, counsel was authorized by Administrative Law Judge Donna Montano to receive fees on a Social Security Disability Claim, based on charges of \$400.00 per hour. (See fee petition and order, attached hereto as **Exhibit B**.)in

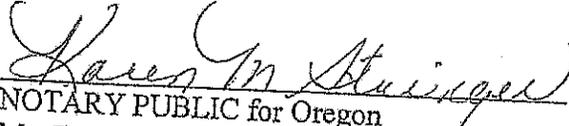
Further, In October 2012, Administrative Law Judge Russell D. Pulver issued a Decision and Order approving payment to your affiant of \$350.00 per hour as a fee on a claim brought pursuant to the Longshore and Harbor Workers' Compensation Act. (See Decision and Order, attached as Exhibit C.)

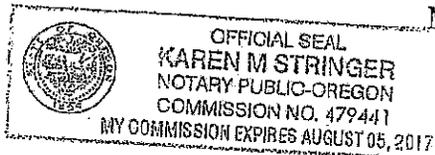
Exhibit D itemizes the time expended by your affiant and his staff on behalf of claimant in the prosecution of the claim before the Office of Workers' Compensation Programs and the Office of Administrative Law Judges, a total of 39.25 hours.

The parties have agreed that fees and costs in the total amount of \$20,000.00 (costs itemized on Exhibit E) should be paid to affiant's law firm by the employer/carrier. It is fair, just and most reasonable under the circumstances.


Peter W. Preston, OSB #82107
Attorneys for Claimant

SUBSCRIBED AND SWORN to before me this 24th day of February, 2016.


NOTARY PUBLIC for Oregon
My Commission Expires: 08/05/2017



Peter Preston

From: Norm Cole <ncole@sbhlegal.com>
Sent: Monday, February 22, 2016 8:13 AM
To: Peter Preston
Subject: [REDACTED]

I have been authorized to offer the following to settle medicals and disability per Section 8(i):

1. [REDACTED]
2. [REDACTED]
3. Up to \$20,000 to pay for fees and costs, based on itemization in a petition that requests no more than \$400 per hour (solely for purposes of this settlement, and not as a concession regarding a reasonable rate) with no more than 2 additional hours to finalize settlement documents;
4. [REDACTED]
5. [REDACTED]

Thank you.

Norman Cole
Sather Byerly & Holloway LLP
US Bancorp Tower
111 S.W. Fifth Avenue, Suite 1200
Portland, Oregon 97204
503-595-2131 (direct number)
971-235-9817 (cell)
503-721-9272 (fax)
ncole@sbhlegal.com
www.sbhlegal.com

This e-mail may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. If you are not the addressee, or if it appears from the context or otherwise that you have received this e-mail in error, please advise me immediately by reply e-mail, keep the contents confidential, and immediately delete the message and any attachments from your system. Thank you.

DECLARATION OF PHIL GOLDSMITH

I, Phil Goldsmith, under penalty of perjury under the laws of the United States, declare as follows:

I.

INTRODUCTION

I make this declaration to explain my opinions (1) that the \$400 hourly rate requested by claimant's counsel Charles Robinowitz for his services is slightly below market rates in Portland for lawyers of comparable skill, experience and reputation and (2) that the \$150 hourly rate requested for his paralegals is consistent with the rates prevailing in the community. I will first summarize my credentials to give these opinions.

II.

THE BASIS FOR MY EXPERTISE

I am a 1978 admittee to the Oregon State Bar and have specialized since 1980 in class action and financial institution litigation. A copy of my cv is attached as Exhibit A.

Because most of my compensation comes from court-awarded attorney fees, I carefully follow developments in the attorney fee case law and monitor evidence of local market rates. I have spoken on attorney fees in class actions at two national conferences, the 1994 National Consumer Law Center's annual consumer law conference (held in Boston) and the 2000 National Association of Consumer Advocates class action conference (held in Chicago). The latter national presentation was subsequently published as Goldsmith, "Attorney Fee Awards in Class Actions," 6 Consumer Advocate 22 (May/June 2000). I have also spoken locally on a variety of attorney fee issues. I periodically testify as an expert witness on attorney fees.

I have known Mr. Robinowitz for many years. He and I have served together on

the Oregon Trial Lawyers Association amicus committee for more than a decade. We once jointly wrote an amicus brief for OTLA to the Oregon Court of Appeals. At some point in the 1990s, he asked me to co-counsel a consumer class action with him, but I ultimately decided not to participate in that case. I have not had any other co-counsel relationships with Mr. Robinowitz's firm. I have never previously been retained by his firm as an expert.

III.

REASONABLENESS OF THE REQUESTED HOURLY RATES

A. Appropriate Methodology

The Ninth Circuit's decision in Christensen v. Stevedoring Services of America, 557 F3d 1049 (9th Cir 2009), provides the starting point for determining the applicable hourly rates. Christensen observes that the definition of a reasonable fee under the Longshore and Harbor Workers' Compensation Act ("LHWCA") "has evolved toward the definition of 'reasonable' used in all federal fee-shifting statutes." Id. at 1052. The United States Supreme Court has explained that the hourly rate component of a reasonable fee must be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum v. Stenson, 465 US 886, 896 n11 (1984), quoted in Christensen, supra, 557 F3d at 1053.¹

Christensen establishes that "the [Benefit Review Board] must define the relevant community more broadly than simply fee awards under the LHWCA." Id. at 1055. At the same time, the Ninth Circuit left for this tribunal to determine "what that relevant community should

¹ Although Blum deals specifically with civil rights attorney fees, the Supreme Court has subsequently made clear that "our case law construing what is a 'reasonable' fee applies uniformly to all" federal fee-shifting statutes. City of Burlington v. Dague, 505 US 557, 562 (1992).

be [and] what a reasonable hourly rate in that community should be.” Id.

In federal court litigation, the relevant community “is generally defined as the forum in which the district court sits.” Id. at 1053, initial quotations and citations omitted. Of course, this case is not in a federal district court. In all events, I believe the relevant community should be defined as Portland rather than the state of Oregon for the following reasons.

The cost of practicing law is higher in Portland. The rent Mr. Robinowitz pays for his office in a high rise in downtown Portland is significantly greater than what he would have to pay if he were practicing in a small Oregon town. And the cost of living in Portland is higher, which means that Mr. Robinowitz has to pay his staff higher salaries.

These facts are reflected in the higher hourly rates charged by Portland lawyers. The most recent Oregon State Bar economic survey² shows that, in December, 2007, the median billing rate of all responding Oregon lawyers was \$200 an hour. But the median billing rate of all Portland respondents was \$230 an hour. Oregon State Bar 2007 Economic Survey, 27.

The disparity is even greater for lawyers like Mr. Robinowitz with over 30 years experience. The median billing rate in December, 2007 of all such responding lawyers in Oregon was \$210 an hour. The median billing rate of all such Portland respondents was 43% higher, \$300 an hour. Id., 28.

The remaining question is what are reasonable hourly rates in Portland for Mr. Robinowitz and his paralegals. The Ninth Circuit has dictated the methodology this tribunal must use in making that determination.

Van Skike v. Director, OWCP, 557 F3d 1041 (9th Cir 2009), explains that “the

² Available at <http://www.osbar.org/docs/resources/07EconSurvey.pdf>, visited May 27, 2009.

rationale behind fee-shifting statutes in general” is “to encourage able counsel to undertake” cases under those statutes by awarding counsel “fees commensurate with those which they could obtain by taking other types of cases.” Id. at 1047, quoting in part from Camacho v. Bridgeport Financial, Inc., 523 F3d 973, 981 (9th Cir. 2008). This holding rests on a Congressional directive that statutory attorney fees “be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases.” Blum, supra, 465 US at 893, quoting S. Rep. No. 94-1011, 6 (1976).

Unless statutory fees are set in this fashion, competent lawyers will tend to practice in other fields where they can receive greater compensation for their time. Mr. Robinowitz, for example, also handles wrongful death, serious injury and medical malpractice cases. Lawyers handling such cases almost always receive a percentage of their client’s recovery as compensation; this often results in hourly compensation significantly in excess of the lawyer’s regular hourly rate. See Griffin v. Tri-Met, 112 Or App 575, 831 P2d 42, 48 (1992). In addition, Mr. Robinowitz handles employment cases and class actions, where fees are set by a court or other tribunal. As will be discussed below at page 8 n7, he has previously received rates as high as \$375 an hour for such work.

Because the question is what Mr. Robinowitz could make handling other types of cases, it is irrelevant that lawyers are paid less an hour to defend LHWCA cases than to defend commercial claims. As the language quoted two paragraphs above indicates, the function of a statutory fee award is not to subject claimant’s counsel to the market forces applicable to longshore defense counsel. Instead it is to encourage counsel to represent claimants in longshore cases by paying them what they could receive handling other kinds of cases.

Moreover, as the Oregon Supreme Court noted in Dockins v. State Farm

Insurance Co., 330 Or 1, 997 P2d 859, 863 (2000), the rates of defense counsel do “not assist us materially in setting a reasonable rate” for claimants’ counsel because defense counsel “often have long-term relationships with the insurance companies that they represent – a fact that tends to drive down their billing rates in comparison to lawyers * * * who commonly represent a client in a single matter.”

B. Appropriate Rates

Given Congress’s specific reference to antitrust cases, the Oregon State Bar antitrust section’s March, 2008 hourly rate fee survey³ is potentially a source for evaluating the reasonableness of Mr. Robinowitz’s requested hourly rates. But that survey has limited utility for the following reasons.

To begin with, only one of its 29 respondents had more than 30 years experience in antitrust cases.⁴ Consequently, its participants are not reasonably comparable in experience to Mr. Robinowitz, who has handled LHWCA cases for more than 30 years. Beyond that, this antitrust section survey does not correlate hourly rates with years of experience.

Nevertheless, this section survey shows that the rate Mr. Robinowitz is requesting for his time is not inconsistent with prevailing market rates for antitrust litigation. Specifically, of the 24 responses by litigators handling antitrust and unfair competition/unfair business practices cases, over 20% (5) reported hourly rates of \$450 or greater, the highest category in the survey. All told, 10 (over 40%) of the respondents reported rates of \$400 an hour or greater.

³ Available at http://www.osbar.org/_docs/resources/HourlyRatesSurvey/Antitrust/AntitrustReport.pdf, visited May 27, 2009.

⁴ Unlike the other surveys discussed in this declaration, the antitrust section survey correlates rates with years of experience in a particular field, rather than years of experience as a lawyer.

Given the limitations of the antitrust section survey and the fact that antitrust is a sub-speciality of commercial litigation, I believe the best source for determining applicable market rates is the survey of commercial litigation attorney fee rates as of January 1, 2008 conducted by forensic accountant Serena Morones. As explained in Ms. Morones' declaration, the average rate at that time for lawyers with experience comparable to Mr. Robinowitz was \$446 an hour and the average rate for paralegals was \$154 an hour. Since Mr. Robinowitz's paralegals each have more than 30 years experience, they certainly should command hourly rates at least equal to the average paralegal.

These rates likely reflect fees which business people or their insurers agree to pay from business assets. They are not made inapplicable here by the fact that Mr. Robinowitz was prohibited by law from negotiating fees with his clients. This conclusion follows from Blum, 465 US at 895 and 895 n11, where the United States Supreme Court held that "the rates charged in private representations" had to be used in setting fees awarded to legal services organizations, which by law are prohibited from charging their clients. See also Valentine v. Equifax Information Services, LLC, , 543 F Supp 2d 1232, 1235-1236 (D Or 2008) (using commercial litigation rates for attorneys representing Fair Credit Reporting Act plaintiff on a contingent basis).

In my judgment, the Morones survey rates are applicable to a sole practitioner like Mr. Robinowitz even though Ms. Morones only surveyed firms having several commercial litigation lawyers. Of course, Mr. Robinowitz cannot delegate work to junior partners or associates (although he can and does delegate work to paralegals).

But the Ninth Circuit has held that prevailing market rates are not affected by the staffing structure of a case, Moreno v. City of Sacramento, 534 F3d 1106, 1115 (9th Cir 2008), or

by the complexity of the tasks performed by a particular lawyer. Van Skike, supra, 557 F3d at 1048. Instead, the question is whether the overall fee requested is "justified for the particular work performed and the results achieved," Moreno, supra, 534 F3d at 1115, recognizing that an experienced lawyer with a high hourly rate is expected to take less time to perform a particular task.⁵

In addition, Oregon State Bar staff analyzing the results of the 2008 Litigation Section survey found "no real correlation between firm size and high rates," i.e., rates over \$400. Memorandum from Dustin Dopps to Litigation Section Executive Committee (October 30, 2008) ("Dopps Memo"), 2.⁶ Instead, it found "attorneys that specialize in a specific niche (such as IP law or UCC/Commercial) * * * charge a higher rate. * * * [M]any charge just as much working for smaller firms." Id.

Mr. Robinowitz's requested rate is in line with rates awarded to or charged by lawyers with comparable expertise. For example, I have personal knowledge that, in 2007, 1974 bar admittee Dave Markowitz charged \$475 an hour to serve as a mediator. Last year 1971 bar admittee Charlie Hinkle was awarded a \$400 hourly rate in Kelley v. Bradbury, Marion County Circuit Court Case No. 07C-18570, Supplemental Judgment for Costs and Attorney Fees (February 20, 2008) at 1.

Mr. Robinowitz's requested rate is also consistent with rates awarded lawyers who have about a decade less experience, after adjusting for the fact "that hourly rates tend to

⁵ Since I do not handle LWHCA cases, I have not been asked to express an opinion on the reasonableness of Mr. Robinowitz's time.

⁶ Available at http://www.osbar.org/_docs/resources/HourlyRatesSurvey/Litigation/LitigationMemo.pdf, visited June 24, 2009.

increase \$50 per hour on average for every 10 years of experience.” Dopps Memo, 2. Earlier this year Keith Dubanevich, a lawyer with “twenty-five years of experience,” was awarded \$375 an hour in Kraft v. Arden, 2009 US Dist LEXIS 19445 at *20 (D Or 2009). And in 2006, Bob Bonaparte, a member of a three-lawyer firm who began practicing law in 1981, was awarded \$369.50 an hour in Chau v. Farmers Insurance Exchange, Multnomah County Circuit Court Case No. 0306-06618, Opinion & Order Regarding Defendant’s Objections to Plaintiff’s Updated Verified Petition for Attorney Fees (May 31, 2006) at 11-12.⁷

I also examined the 2007 Oregon State Bar general economic survey but concluded that it is not probative of current market rates principally for the following reasons:

1. That survey states at page 27 that it includes “attorneys in private practice working full-time, part-time by choice, or part-time due to lack of legal work,” capitalization

⁷ The rates Mr. Robinowitz charges hourly clients are of less significance to my opinion for two reasons. First, hourly representation is not a significant part of Mr. Robinowitz’s practice. Beyond that, federal law focuses on “the prevailing market rates in the relevant community,” not the actual rate normally charged by the specific lawyer. Blum, *supra*, 465 US at 895. Accord: Welch v. Metropolitan Life Insurance Co., 480 F3d 942, 946 (9th Cir 2007).

I recognize some lower federal courts have defined the inquiry as “what the lawyer would receive if he were selling his services in the market rather than being paid by court order.” In re Continental Illinois Securities Litigation, 962 F2d 566, 568 (7th Cir 1992). But those decisions, which propose an extremely simple inquiry for those lawyers who normally bill on an hourly basis, cannot be reconciled with Blum’s lengthy footnote explaining the Supreme Court’s view that “determining an appropriate ‘market rate’ for the services of a lawyer is inherently difficult.” 465 US at 895 n 11.

I do find some relevance in the fact that defense counsel agreed to Mr. Robinowitz receiving \$375 an hour in a settled ERISA case. Because Mr. Robinowitz had worked a small number of hours on that case, I recognize defense counsel might have decided that it was not cost effective to challenge his rate. However, in my experience, defense counsel often seek to bargain down rates in such circumstances, recognizing that plaintiff’s counsel may also deem litigation over this issue not to be cost effective. Thus, it is likely that the agreement to pay this rate reflects the judgment of defense counsel that it is not in excess of prevailing market rates.

omitted. Lawyers who do not have the skill and reputation to attract sufficient work at prevailing market rates will charge lower rates to attract employment from those who prefer low price to quality. Including lawyers working part-time due to lack of legal work "results in an underestimation of the prevailing market rate for skilled full-time attorneys with good reputations." Miranda v. City of Cornelius, Civil No. 04-CV-241-AA, Opinion and Order (March 8, 2006), 5.

2. The bar survey simply calculates median rates of all lawyers in Portland with a certain level of experience, without taking into consideration "important factors such as skill and reputation." Id. In early 2005, for example, civil rights and employment lawyer Tom Steenson was awarded \$73 an hour above the average rate for Portland lawyers of his experience in the previous (2002) edition of the bar survey based on his skill, significant expertise in complex litigation, reputation for obtaining favorable results and the evidence in that record "that the prevailing market rate for attorneys with Steenson's levels of expertise is considerably higher than the averages indicated in the economic survey." Kunnert v. Baker County, Civil No. 02-0043-HA, Order (January 7, 2005), 3-4. See Morales v. City of San Rafael, 96 F3d 359, 364 n9 (9th Cir 1996) ("the special skill and experience of counsel" one factor taken into consideration in setting hourly rates). Mr. Robinowitz obviously has substantial expertise and expertise in LHWCA cases.

There are two additional reasons why I deemed the hourly rates of workers' compensation lawyers as shown in the 2007 bar general economic survey not to be relevant. The Oregon workers' compensation statute, like the LHWCA, prohibits a claimant's lawyer from directly negotiating fees with a client. Liberty Northwest Insurance Corp. v. Watkins, 224 Or App 599, 198 P3d 960, 963 (2008). Accordingly, to the extent the bar survey reflects the hourly

rates received by claimants' counsel, it reflects awards made by "the agency or appellate court."

Id. As the Ninth Circuit said in Van Skike, supra, 557 F3d at 1047, "[a]rbitrarily holding the line at past court-generated fee awards does not respect the congressional intent animating fee-shifting statutes."

Nor is it correct to assume in addressing Van Skike's requirement that counsel receive "commensurate" fees in LHWCA cases that state workers' compensation cases are the other cases LHWCA lawyers would handle. Id. As I discuss above at page 4, this is certainly not true for Mr. Robinowitz.

IV.

CONCLUSION

For the foregoing reasons, it is my opinion that the requested rate of \$400 an hour for Mr. Robinowiz is a little below the rates prevailing in the community for lawyers of reasonably comparable skill, experience and reputation and the requested rate of \$150 an hour for his paralegals is consistent with the rates prevailing in the community.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on the date set forth below.

Signed this _____ day of June, 2009 at Portland, Oregon.

Phil Goldsmith

Injured workers' won/loss percentage involving denied claims
Before ALJ Otto between January 2013 and June 2015
Prepared by Darren Otto

Female

Won

1. Melanie Brown/1201127 (1/7/13)
2. Melissa Stratton/1302779 (9/16/13)
3. Lorna D. Huston/1301707 (9/26/13)
4. Dianna Ross/1301887 (10/22/13)
5. Jessica M. Green/1100591 (12/31/13)
6. Ramona L. Reyes/1303076 (1/6/14)
7. Carmen Stewart/1304806 (1/28/14)
8. Shannon Gozzi/1304144 (3/12/14)
9. Patricia L. Casteel/1302954 (4/10/14)
10. Elizabeth Beck/1302430 (7/9/14)
11. Stephanie J. Rose/1400304 (8/15/14)
12. Latesha Lawrence/1306219 (8/21/14)
13. Rita Tompkins/1304665 (8/21/14)
14. Lili Ristagno/1303024 (9/12/14)
15. Theresa Hansen-Weber/1401913 (11/6/14)
16. Holly Fay/1402389 (11/25/14)
17. Erin R. Morrison/1404296 (4/14/15)
18. Virginia Marting/1405247 (5/11/15)
19. Mindi Holstein/1405259 (5/14/15)
20. Rebecca Frederick/1305048 (5/26/15)

Lost

1. Seferina Deleon-Dale/1202861 (2/14/13)
2. Tonya R. Dixon/1203254 (3/15/13)
3. Delia Hurtado/1300002 (4/16/13)
4. Luzmaria Galindo/1300293 (4/25/13)
5. Amy Briggs/1300370 (4/25/13)
6. Alicia Christy/1205490 (6/4/13)
7. Frances L. Ellis/1201939 (7/5/13)
8. Barbara J. Lovejoy/1204360 (8/8/13)
9. Tamara R. Bain/1300384 (9/17/13)
10. Juana Venegas/1305144 (11/22/13)
11. Maria S. Arreola/1206440 (12/19/13)
12. Blanca E. Perez-Estrella/1201207 (3/18/13)
13. Maria Mendez-Arciga/1206359 (2/6/14)

14. Nichon R. Greene/1303304 (2/12/14)
15. Melissa Hartvigsen/1106234 (2/19/14)
16. Sussan J. Duncan/1304122 (3/4/14)
17. Kristina M. Bottcher/1301113 (4/10/14)
18. Randy A. Goossen/1305363 (3/16/14)
19. *Taraleigh Lentz/1400869 (9/23/14)
20. Kathleen M. Quigley/1306280 (10/31/14)
21. Vivian C. Regalado/1404442 (12/18/14)
22. Linda J. Preble/1402577 (12/15/14)
23. *Christina Angell/1305271 (3/20/15)

Male

Won

1. Larry Krueger, Jr./1203473 (1/16/13)
2. Douglas L. Franz/1201359 (2/7/13)
3. Cobey Goodman/1205683 (3/15/13)
4. Matthew T. Roberts/1203279 (3/1/13)
5. Lester E. Boyle/1204463 (3/15/13)
6. Brian C. Dennis/1204528 (8/12/13)
7. Francisco A. Jaramillo/1302509 (9/6/13)
8. John P. Barry/1206013 (10/22/13)
9. Marc A. Waters/1202696 (11/20/13)
10. *Darryl S. Applegate/1302832 (12/19/13)
11. Jesus Pena/1302783 (2/6/14)
12. Eric Perry/1304840 (2/6/14)
13. Steven E. Leben/1300595 (2/14/14)
14. Claudio Modesto-Vasquez/1105268 (3/4/14)
15. Clay A. Grassman/1300996 (4/22/14)
16. Chancy Hull/1305241 (5/15/14)
17. Robert R. Harris/1400564 (5/23/14)
18. Jose Aguilar-Cruz/1401043 (6/17/14)
19. Justin Johns/1401221 (12/4/14)
20. Dmitriy Yashchenko/1403798 (4/3/15)
21. Mark Pilling/1400270 (5/21/15)

Lost

1. Joshua L. Lane/1200726 (1/24/13)
2. Charles D. Erickson/1104397 (3/27/13)
3. Linas V. Cernius/1203144 (5/9/13)
4. Adrian T. Sutor/1201006 (4/16/13)
5. Randal S. Cicero/1200792 (8/9/13)
6. Brian A. Bundy/1203197 (6/27/13)
7. Moises Quintana/1205165 (7/31/13)

8. David A. Tornblad/1103081 (9/6/13)
9. Gary L. Thornton/1300317 (12/4/13)
10. Jeffrey E. Miller/1303049 (4/29/14)
11. Dave H. Wherley/1206266 (5/9/14)
12. Justin J. Donnelly/1303708 (6/24/14)
13. Richard R. Lal/1304115 (8/7/14)
14. Philip Pierce/1305721 (9/4/14)
15. Cecil P. Larracas/1305074 (9/12/14)
16. Larry A. Neis/1302884 (9/17/14)
17. Joseph Martinez/1401149 (9/9/14)
18. Randall Etter/1400899 (10/23/14)
19. Neftali Soto/1400663 (12/12/14)
20. Cozmin I Gadalean/1403356 (1/15/15)
21. Terence H. Moore/1402214 (3/17/15)
22. Robert J. Vandenbogaard/1404934 (4/3/15)
23. Ray Park/1303147 (4/22/15)
24. Andrew C. Kahl/1304383 (4/16/15)
25. John A. Benson/1500331 (4/29/15)
26. John Wihandojo/1401463 (4/29/15)
27. Michael J. Fedr/1500641 (5/26/15)

(*Jodie Phillips Polich's cases involving denied claims before ALJ Otto).

From January 1, 2013 until June 2015, female injured workers won 20 of 43 cases involving denied claims before ALJ Otto. Therefore, female injured workers won 46.5 % of the time.

From January 1, 2013 until June 2015, male injured workers won 21 of 48 cases involving denied claims before ALJ Otto. Therefore, male injured workers won 43.75% of the time.

From January 1, 2013 until June 2015, female and male injured workers together won 41 of 91 cases involving denied claims before ALJ Otto. Therefore, all injured workers won 45.05% of the time.

According to the WCD statistics compiled regarding cases involving denied claims at the WCB Hearings Division from 2002 through 2011, male and female injured workers prevailed at hearing 43.7% of the time (See DCBS-internal website/WCD-external/Statistics & Reports/WC System/Litigation/WCB Hearings Division Statistical Report (Calendar year 2011)/ page 7).¹ In comparison to the Agency as a whole, ALJ Otto has found more in favor of all injured workers, but even more so with regard to female injured workers, than did all other ALJs on average, during the past two and a half years.

¹ The percentage of cases won by injured workers each year during that ten-year period was added together and divided by ten.