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April 22, 2016

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Workers' Compensation Board
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RE: Attorney Fees - OAR Chapter 438 & HB 2764

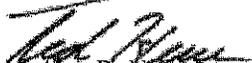
Dear Board Members,

I intend for the information and analysis I submit to the Board to be as accurate and complete as possible. However, since submitting my April 18, 2016 letter, I became aware that one of the cited longshore orders awarding fees had been appealed, and the \$391 per hour fee awarded was ultimately reduced to \$330 per hour for Mr. Bunnell's services in 2010. Specifically, the Benefits Review Board vacated the director's order in *McKinney v. Georgia-Pacific Corp.*, BRB 11-0116 (Aug 3, 2011), and affirmed the subsequently awarded \$330 per hour fee in *McKinney v. Georgia Pacific Corp.*, BRB 12-0496 (Apr 12, 2013). I have attached those decisions.

Although those decisions do not affect my proposed fee range¹, I want the information weighed to be as accurate as possible. If you have any concerns, please contact me.

Sincerely,

PRESTON BUNNELL, LLP


Theodore P. Heus
tedh@prestonbunnell.com

Enclosures: *McKinney v. Georgia-Pacific Corp.*, BRB 11-0116 (Aug 3, 2011)
McKinney v. Georgia Pacific Corp., BRB 12-0496 (Apr 12, 2013)

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

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¹ According to the CPI, \$330 in 2010 dollars is \$349.50, eerily close to the lower end of the range I propose for WC attorneys of \$350-\$550 per hour.

BRB No. 11-0116

TRAVIS L. McKINNEY)

Claimant-Respondent)

v.)

GEORGIA-PACIFIC CORPORATION)

DATE ISSUED: 08/03/2011

and)

INDEMNITY INSURANCE COMPANY OF)
NORTH AMERICA)

Employer/Carrier-)
Petitioners)

DECISION and ORDER

Appeal of the Attorney's Fee Order of Karen P. Staats, District Director,
United States Department of Labor.

Gregory A. Bunnell (Preston Bunnell & Flynn, LLP), Portland, Oregon, for
claimant.

Norman Cole (Sather, Byerly & Holloway, LLP), Portland, Oregon, for
employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Attorney's Fee Order of District Director Karen P. Staats
(Case No. 14-150950) rendered on a claim filed pursuant to the provisions of the
Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*
(the Act). The amount of an attorney's fee award is discretionary and will not be set
aside unless shown by the challenging party to be arbitrary, capricious, an abuse of
discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock*
Co., 12 BRBS 272 (1980).

Claimant's counsel filed a fee petition with the district director for work performed before the Office of Workers' Compensation Programs (OWCP) from January 14, 2010 through June 15, 2010. Claimant's counsel sought a fee of \$3,342.25, representing 8.5 hours of attorney services at an hourly rate of \$391, plus .125 of an hour of legal assistant services at an hourly rate of \$150. Employer filed objections to the fee petition, to which it appended 10 exhibits.

In her fee order, the district director addressed the decisions of the United States Court of Appeals for the Ninth Circuit in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), the Board's decisions following the Ninth Circuit's remand in *Christensen*, see *Christensen v. Stevedoring Services of America [Christensen I]*, 43 BRBS 145 (2009), *modified on recon. [Christensen II]*, 44 BRBS 39, *recon. denied [Christensen III]*, 44 BRBS 75 (2010), *aff'd mem.*, No. 10-73574 (9th Cir. Aug. 1, 2011), and the Board's fee order in an unpublished case, which, the district director stated, awarded Attorney Charles Robinowitz a fee based on an hourly rate of \$384 per hour for work in 2009 and \$392 for work in 2010 and a paralegal rate of \$150 per hour. The district director determined that, similarly, counsel in this case is entitled to a fee based on the average hourly rate earned by the 95th percentile of general plaintiff civil litigation attorneys in the Portland, Oregon area. Consequently, relying on *Christensen II*, 44 BRBS 39, the district director awarded counsel the requested hourly rates of \$391 for attorney services and \$150 for legal assistant services rendered in 2010.

On appeal, employer challenges the fee award. Employer contends that the district director's fee order should be vacated and the case remanded because claimant failed to present evidence of a market rate for his services and the district director failed to address the exhibits employer submitted with its objections to the requested hourly rates. Employer avers that these exhibits were not previously considered by the Board in its *Christensen* decisions and, therefore, the district director should have addressed this evidence and not merely relied on the Board's rate determination for another attorney in Portland. Employer also asserts that the district director's determination that counsel is entitled to a fee based on the average hourly rate earned by the 95th percentile of general plaintiff civil litigation attorneys in the Portland, Oregon, area cannot be affirmed. Claimant responds, urging affirmance of the district director's fee award.

In *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT), involving an appeal of an attorney's fee awarded by the Board, the Ninth Circuit stated that the definition of a "reasonable attorney's fee" is the same for all federal fee-shifting statutes, *id.*, 557 F.3d at 1052, 43 BRBS at 7(CRT) *citing City of Burlington v. Dague*, 505 U.S. 557 (1992), and that most fee-shifting awards are calculated using the lodestar method, which multiplies a

reasonable hourly rate by the number of hours reasonably expended.¹ *Id.*, 557 F.3d at 1053, 43 BRBS at 8(CRT). The Ninth Circuit held that the Board erred in limiting the relevant community rates to those awarded in longshore cases in a geographic region. The court stated that the Board “must define the relevant community more broadly than simply [as] fee awards under the [Act.]” *Christensen*, 557 F.3d at 1055, 43 BRBS at 8-9(CRT). Thus, a “reasonable” hourly rate must reflect the rate: (1) that prevails in the “community” (2) for “similar” services (3) by an attorney of “reasonably comparable skill, experience, and reputation.” *Christensen*, 43 BRBS at 146. This analysis applies as well to attorney’s fee awards issued by administrative law judges and district directors. *Van Skike*, 557 F.3d at 1046-1047, 43 BRBS at 13-14(CRT).

Employer contends that claimant’s counsel failed to present evidence of a market rate for his services. We reject this contention. Counsel submitted as evidence to support his requested hourly rates: the Board’s decisions in *Christensen I* and *Christensen II*; three fee orders issued by the district director in which the applicable hourly rate was determined pursuant to the aforementioned decisions by the Board;² and an affidavit attesting to his experience, areas of expertise, and the average hourly rate of \$432.59 he has earned in the past five years in his non-longshore practice. Given the relative currency of the Board’s *Christensen* decisions, we reject employer’s contention that they are not evidence of a market rate that is pertinent to determining a reasonable hourly rate in this case. See *Christensen*, 557 F.3d at 1055, 43 BRBS at 8(CRT); see also *Stanhope v. Electric Boat Co.*, 44 BRBS 107, 108 n.5 (2010). Counsel also provided sufficient other information from which the district director can derive an appropriate market rate.

We agree with employer, however, that the district director did not adequately address the evidence employer offered relevant to the market rate for an attorney of claimant’s counsel’s standing. Employer submitted as evidence to support its objection to the requested hourly rates of \$391 for attorney work and \$150 for legal assistant services: excerpts from the Oregon Administrative Rules; *Schoch v. Luepold & Stevens*, 987 P.2d 13 (1999); the Oregon State Bar 2007 Economic Survey; insurance tables; *Estate of V.P. v. APM Terminals, et al*, 2008-LHC-00842-847 (Aug. 18, 2009); *Denise A. Graham*, 2010 WL 1003193 (March 17, 2010) (Or. Work. Comp. Bd.); *Steven M. Swearingen*, WCB Case No. 07-02810 (Dec. 18, 2009) (Or. Work. Comp. Bd.); the Motion for Reconsideration submitted by the employer in *Christensen III*, 44 BRBS 75;

¹Other factors which could affect the award of the fee include, for example: novelty or difficulty of the issue; skill needed; customary fee; time limitations imposed on attorney; amount involved/results obtained; experience of attorney; and undesirability of the case. *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT).

²The fee orders are: *Flintoff v. Kinder Morgan*, Case No. 14-149771 (Apr. 28, 2010); *Simms v. Kinder Morgan*, Case No. 14-151587 (May 21, 2010); and *Scott v. Portland Lines Bureau*, Case No. 14-151194 (May 28, 2010).

and, affidavits from M. Kathryn Olney and Norman Cole. We agree with employer's assertion that, with the exception of the Oregon Bar Survey and the motion for reconsideration in *Christensen III*, the exhibits it submitted to the district director were not addressed by the Board in its *Christensen* decisions. The district director derived the hourly rates she awarded for attorney and legal assistant work performed in this case before the OWCP based upon the hourly rates the Board awarded another claimant's counsel in *Christensen II* and in an unpublished Board fee order,³ and her determination that counsel in this case is similarly entitled to a fee based on the average hourly rate for the 95th percentile of general plaintiff civil litigation attorneys in the Portland, Oregon area. While the district director has considerable discretion in determining factors relevant to a market rate in a given case, *see generally Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *B&G Mining, Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008), and she has the discretion to determine counsel's hourly rate with reference to the *Christensen* decisions, her fee award should also reflect consideration of the evidence that both parties submitted in support of their hourly rate calculations. *See Van Skike*, 557 F.3d at 1046-1047, 43 BRBS at 14-15(CRT). Accordingly, we vacate the district director's fee order and remand for her to re-determine counsel's requested hourly rate in light of this evidence and the pertinent case law.

³We are unable to discern from the district director's fee order the unpublished Board fee award she relied on in her hourly rate determination. Should the district director refer to a Board's fee order on remand, for purposes of judicial review, she must provide its citation.

Accordingly, the district director's Attorney's Fee Order is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

TRAVIS L. MCKINNEY)
)
 Claimant-Petitioner)

v.)

GEORGIA-PACIFIC CORPORATION)

DATE ISSUED: 04/12/2013

and)

INDEMNITY INSURANCE COMPANY)
OF NORTH AMERICA)

Employer/Carrier-)
Respondents)

DECISION and ORDER

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

Gregory A. Bunnell and Meagan A. Flynn (Preston Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, LLP), Portland, Oregon, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order on Attorney's Fees (Case No. 14-150950) of District Director R. Todd Bruininks rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

This is the second time this case is before the Board. To briefly recapitulate the facts underlying this appeal, claimant's counsel, Gregory A. Bunnell, filed a fee petition

with District Director Karen P. Staats for work performed before the Office of Workers' Compensation Programs (OWCP) from January 14, 2010 through June 15, 2010. Specifically, claimant's counsel sought a fee of \$3,342.25, representing 8.5 hours of attorney services at an hourly rate of \$391, plus .125 hour of legal assistant services at an hourly rate of \$150, and submitted evidence in support of his requested hourly rate. Employer filed objections to the fee petition, challenging the hourly rates requested for both the attorney and legal assistant services, and appended 10 exhibits.¹

In her fee order, District Director Staats found instructive the decisions of the United States Court of Appeals for the Ninth Circuit in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), and the Board's decisions following the Ninth Circuit's remand in *Christensen*, see *Christensen v. Stevedoring Services of America [Christensen I]*, 43 BRBS 145 (2009), modified on recon. [*Christensen II*], 44 BRBS 39, recon. denied [*Christensen III*], 44 BRBS 75 (2010), *aff'd mem.*, No. 10-73574 (9th Cir. Aug. 1, 2011). Specifically, District Director Staats noted that the attorney who represented the claimant in *Christensen*, Charles Robinowitz, was awarded an hourly rate of \$392 for work performed before the Board in 2010 in that case. *Christensen II*, 44 BRBS 39. District Director Staats determined that, similarly, counsel in this case is entitled to a fee based on the average hourly rate earned by the 95th percentile of general plaintiff civil litigation attorneys in the Portland, Oregon area. Consequently, relying on *Christensen II*, 44 BRBS 39, she awarded counsel the requested hourly rates of \$391 for attorney services and \$150 for legal assistant services rendered in 2010. Thus, District Director Staats awarded counsel his requested fee of \$3,242.25.

Employer appealed District Director Staats's fee award to the Board, contending that claimant's counsel failed to present evidence of a market rate for his services and that District Director Staats failed to address all of the evidence submitted by the parties when addressing this issue. Employer further assigned error to District Director Staats's determination that claimant's counsel is entitled to a fee based on the average hourly rate earned by the 95th percentile of general plaintiff civil litigation attorneys in the Portland, Oregon, area. In its Decision and Order, the Board rejected employer's contention that claimant's counsel failed to present any evidence of a market rate for his services. The Board agreed with employer, however, that District Director Staats did not adequately address the evidence submitted by the parties relevant to the market rate for an attorney of claimant's counsel's standing. The Board therefore vacated District Director Staats's

¹Claimant's counsel filed a reply to employer's objections. Employer in turn submitted the recently-issued fee order in *Preskey v. Portland Lines Bureau*, Case Nos. 2009-LHC-01909/01910 (June 30, 2010), in which Judge Gee awarded a fee to Mr. Bunnell for his services before the Office of Administrative Law Judges in that case.

fee order and remanded the case for her to re-determine counsel's requested hourly rate in light of both parties' evidence and the pertinent case law. *McKinney v. Georgia-Pacific Corp.*, BRB No. 11-0116 (Aug. 3, 2011)(unpub.).

Since District Director Staats had retired, the case was assigned on remand to District Director Bruininks (the district director). In his fee order, the district director first considered the evidence submitted by employer in support of its position that the market rate for claimant's counsel should be based on the rates for Oregon workers' compensation practice attorneys rather than on the rates for personal injury and general civil litigation practice attorneys. Fee Order at 1-2. Citing the Board's reasoning in *Christensen II*, 44 BRBS 39, the district director found that employer's evidence did not rebut the conclusion that Oregon workers' compensation rates, which may be based on volume discounts or may be subject to statutory caps, do not represent relevant market rates commensurate with the fees claimant's counsel could obtain by taking other types of cases. *Id.* at 2. Next, the district director addressed employer's argument that the hourly rate for claimant's counsel, who was admitted to the Oregon State Bar in 1991, should be based on the upper quartile rate rather than on the 95th percentile rate utilized by the Board in determining Mr. Robinowitz's hourly rate for his work before the Board in *Christensen*.² *Id.* at 1, 3. The district director agreed with employer that claimant's counsel should receive a rate at the 75th percentile of the relevant portion of the Oregon Bar Survey, and therefore found counsel entitled to an hourly rate of \$330 for work performed in 2010. *Id.* at 3. Consequently, the district director awarded claimant's counsel a fee of \$2,823.75, representing 8.3 hours of attorney services at an hourly rate of \$330 and .125 hour of legal assistant services at an hourly rate of \$150.

On appeal, claimant challenges the district director's hourly rate determination.³ Employer responds, urging affirmance of the district director's fee award in its entirety.

²In *Christensen*, the Board based Mr. Robinowitz's hourly rate on the 95th percentile rate for general plaintiff civil litigation attorneys in the 2007 Oregon Bar Survey on the basis of his 40 years of experience and demonstrated skill in the successful representation of many claimants before the Board and the Ninth Circuit. *Christensen II*, 44 BRBS at 40; *Christensen I*, 43 BRBS at 147.

³Claimant's counsel has submitted to the Board billing rate data from an updated 2012 version of the Oregon State Bar Survey which he asks the Board to consider as a supplement to his fee petition filed with the district director in this case. Employer filed a letter in response to claimant's submission of this billing rate data. We decline to consider this survey as it was not submitted to the district director in the first instance.

Claimant first avers that the district director exceeded the scope of the Board's remand order by redetermining District Director Staats's finding that counsel should receive the 95th percentile rate for Portland attorneys. We reject claimant's assignment of error. Contrary to claimant's assertion on appeal, the Board did not affirm District Director Staats's determination that claimant's counsel should receive the 95th percentile rate.⁴ After stating that District Director Staats did not adequately address all of the evidence "relevant to the market rate for an *attorney of claimant's counsel's standing*," see *McKinney*, slip op. at 3 (emphasis added), the Board vacated District Director Staats's fee award in its entirety and remanded the case for reconsideration of the evidence submitted by both parties regarding the appropriate hourly rate. *Id.* at 4. Thus, the district director properly reconsidered on remand the issue of the percentile in which claimant's counsel should be placed.

Claimant argues, in the alternative, that the district director's determination that claimant's counsel should receive the 75th percentile, rather than the 95th percentile, rate does not reflect his consideration of all the evidence relevant to the market rate for counsel's services. It is well-established that the burden is on the fee applicant to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984)). In this case, the district director considered the information regarding counsel's credentials and experience contained in counsel's fee petition and supporting exhibits, as well as the arguments presented in counsel's reply to employer's objections to his fee petition. See Order on Attorney's Fees at 1-2. The district director determined that claimant's counsel, who has approximately 20 years of experience, falls within the 75th percentile of the Oregon Bar Survey. *Id.* at 3. While the Board has stated that, generally, a single factor, such as years in practice, does not control an attorney's rate in every case in which he participates, see *Christensen III*, 44 BRBS at 76, we cannot say that the district director unreasonably determined that counsel is not entitled to the same hourly rate as an attorney with at least 20 more years of experience. As the district director gave a valid explanation for his rejection of counsel's assertion that he is entitled to an hourly rate equivalent to the uppermost tier of attorneys in the Portland area, we decline to disturb this finding. See generally *Fox v. Vice*, 563 U.S. 2 (2011); *McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011). Thus, as counsel has failed to establish that the district director's award of an hourly rate of \$330 is arbitrary, capricious, not in accordance with law, or based on an abuse of discretion, we affirm the hourly rate awarded.

⁴Rather, the Board rejected employer's contention that claimant failed to submit any evidence of a market rate for his services. *McKinney*, slip op. at 3.

Accordingly, the District Director's Order on Attorney's Fees is affirmed.
SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge