

RODNEY L. ULFERTS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SERVICE EMPLOYEES)	DATE ISSUED: 02/23/2012
INTERNATIONAL, INCORPORATED)	
)	
and)	
)	
INSURANCE COMPANY OF THE)	
STATE OF PENNSYLVANIA)	
)	
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.

Kenneth J. Shakeshaft, Colorado Springs, Colorado, for claimant.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order on Attorney’s Fees (Case No. 02-177255) 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

Following an award of temporary total and permanent total disability compensation and medical benefits to claimant by the administrative law judge, claimant’s counsel filed a fee petition for work performed before the district director. Specifically, counsel sought an attorney’s fee of \$4,368.75, representing 11.65 hours of

legal services at an hourly rate of \$375, rendered between November 27, 2007 and November 14, 2008. Employer responded, objecting to the requested hourly rate, and claimant's counsel replied.

In his award of an attorney's fee, the district director reduced the hourly rate requested by counsel to \$275, approved the 11.65 hours of services requested, and thus awarded claimant's counsel a fee in the amount of \$3,203.75.

On appeal, claimant contends that the district director erred in his determination of the applicable hourly rate, averring that the district director failed to adequately address the documentation presented in support of the requested rate of \$375. Employer has not responded to this appeal.

In support of his request for an hourly rate of \$375 for services performed before the district director, claimant's counsel submitted a personal affidavit regarding his experience as an attorney and an affidavit of another attorney in the same geographic location attesting to market hourly rates in Colorado. In response, employer summarily asserted that an hourly rate of \$200 would represent a reasonable rate for the services performed by claimant's counsel. In his Order, the district director found that counsel's affidavit and the affidavit of another attorney in the Colorado Springs area failed to meet counsel's burden to produce satisfactory evidence regarding the relevant market hourly rate for attorneys in that area. Order at 2. The district director then determined that "a reasonable rate of \$275 per hour is justified in light of the relevant community and rates awarded for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* at 3. We cannot affirm the district director's hourly rate determination as he did not state on what his finding of an hourly rate of \$275 was based.

The United States Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a federal fee-shifting statute, such as the Longshore Act.¹ See *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v.*

¹A "reasonable attorney's fee" is calculated in the same manner in all federal fee shifting statutes, including the Longshore Act. See *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 227 n.8, 43 BRBS 67, 70 n.8(CRT) (4th Cir. 2009); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1054, 43 BRBS 6, 8-9(CRT) (9th Cir. 2009); *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657, 662 (6th Cir. 2008); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 159 (2009).

Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895; see also *Kenny A.*, 130 S.Ct. at 1672. The burden falls 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." *Blum*, 465 U.S. at 896 n.11; *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1053, 43 BRBS 6, 8(CRT) (9th Cir. 2009);² see also *Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010); *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 (6th Cir. 2008); *Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010).

Claimant's counsel presented to the district director two affidavits supporting his contention that \$375 represents the applicable market rate in the Colorado Springs, Colorado, area where he has his practice.³ The district director summarily stated that counsel's documentation was "lacking in probative value," provided "very little detail," and did not constitute "satisfactory evidence" regarding the relevant market rate in the relevant area. Order at 2 – 3. The district director instead determined that "a reasonable rate of \$275 per hour is justified in light of the relevant community and rates awarded for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* at 3. The district director did not explain the basis for his determination that counsel's affidavits provided "very little detail," nor did he explain his rationale for determining that an hourly rate of \$275 is "reasonable" and justified "in light of . . . rates awarded for similar services" in the relevant community. Therefore, we must vacate those determinations and remand the case for further consideration. The district director did not specifically define the relevant geographic market, nor did he provide an explanation as to how he concluded that \$275 represented the prevailing market rate in the community for services performed between November 27, 2007 and November 14,

²In *Christensen*, the Ninth Circuit recognized that there is no private market for attorney's fees under the Longshore Act and thus it is necessary that counsel be awarded fees "commensurate with those which they could obtain by taking other types of cases." *Christensen*, 557 F.3d at 1053-1054, 43 BRBS at 8(CRT) (internal citations and quotations omitted); see also *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 157 (2009).

³On appeal, claimant's counsel also avers that the hourly rate awarded by the administrative law judge for services performed before that official in this case constitutes evidence in support of his requested hourly rate for services performed before the district director. Claimant's counsel did not present this argument for the district director's consideration.

2008. While the district director may consider the hourly rates awarded in recent cases arising under the Act as some “inferential evidence” of the prevailing market rates in the relevant community, the district director must explain the basis for his findings. *See generally Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *B&G Mining, Inc.*, 522 F.3d 657. Thus, on remand, the district director must provide an explanation for his hourly rate determination which accords with case precedent of the Ninth Circuit.⁴

Accordingly, the district director’s hourly rate determination is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴As the Seattle, Washington, district director filed and served the administrative law judge’s decision, Ninth Circuit law applies in this case. 42 U.S.C. §1651(b); *Service Employees Int’l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2^d Cir. 2010); *Pearce v. Director, OWCP*, 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979).