

BRB Nos. 09-0173
and 09-0173A

S.J.)	
)	
Claimant-Petitioner)	
Cross-Petitioner)	
)	
v.)	
)	
LABOR READY, INCORPORATED)	DATE ISSUED: 05/27/2009
)	
Self-Insured)	
Employer-Respondent)	
Cross-Respondent)	DECISION and ORDER

Appeals of the Order Awarding Attorney Fees of Eric L. Richardson,
District Director, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center),
Washington, D.C., for claimant.

Eric A. Dupree (Dupree Law, PLC), San Diego, California, for claimant.

John J. Rabalais, Janice B. Unland, Robert T. Lorio and Deanne B.
McCauley (Rabalais, Unland & Lorio), Covington, Louisiana, for self-
insured employer.

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

PER CURIAM:

Claimant's co-counsel, Joshua T. Gillelan II and Eric A. Dupree, respectively
appeal the Order Awarding Attorney Fees (Case No. 18-75727) of District Director Eric
L. Richardson 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).

Claimant's co-counsel, having successfully represented claimant in a claim for additional compensation pursuant to Section 14(f) of the Act, 33 U.S.C. §914(f), each filed fee petitions for work performed before the district director. Specifically, Mr. Gillelan filed four fee applications with the district director requesting 16.5 hours of attorney services at an hourly rate of \$420, and 10.5 hours of attorney services at an hourly rate of \$460, for a total fee of \$11,760. Mr. Dupree filed a fee petition for work performed before the district director requesting 130.3 hours of attorney services at an hourly rate of \$385 for Mr. Dupree and hourly rates of \$175 and \$100 for his associate Mr. Myers. Employer responded to the fee requests of Mssrs. Gillelan and Dupree, challenging the hourly rates sought and making specific objections.

In his Order Awarding Attorney Fees, the district director rejected claimant's co-counsel's use of the *Laffey* Matrix in determining the market rate to be awarded counsel for services performed under the Longshore Act. Rather, the district director found that "[t]he [Longshore Act] 'community' has a long and robust history, with an ample amount of case law and statutory guidance for attorney fees, and that is where we will turn." Order at 5. After next citing Section 702.132(a), 20 C.F.R. §702.132(a), the district director reduced the hourly rates sought by Mr. Gillelan to \$275, and by Mr. Dupree to \$250. The district director then discussed employer's remaining objections to the number of hours sought by counsel in their respective fee petitions, and approved 16.3 hours of services for Mr. Gillelan, 25.05 hours of services for Mr. Dupree, and 6.95 hours of services for Mr. Myers. Consequently, Mr. Gillelan was awarded a fee of \$4,482.50, representing 16.3 hours of services at an hourly rate of \$275, Mr. Dupree was awarded a fee of \$6,262.50, representing 25.05 hours of services at an hourly rate of \$250, and Mr. Myers was awarded a fee of \$1,216.25, representing 6.95 hours of services at an hourly rate of \$175. Order at 6, 8.

Mr. Gillelan appeals, contending that the district director erred in relying only on the range of hourly rates previously awarded to longshore counsel by district directors in setting an hourly rate, and in reducing the number of hours sought by counsel. BRB No. 09-0173. Employer has filed a response brief, urging affirmance of the district director's fee award to Mr. Gillelan in its entirety. Mr. Gillelan has filed a reply brief. Mr. Dupree also appeals the district director's fee order, averring that the district director's determination of the prevailing market rate is contrary to recent Ninth Circuit decisions; additionally, Mr. Dupree challenges the district director's reduction in the number of hours sought. BRB No. 09-0173A. Employer has responded to this appeal.

On March 12, 2009, Mr. Gillelan filed a Motion for Summary Vacatur and Remand, contending that the district director's fee award should be vacated and the case remanded for reconsideration in light of two recent decisions of the United States Court

of Appeals for the Ninth Circuit. Employer has filed a response in opposition to Mr. Gillelan's motion.

We first address employer's contentions, raised in its two response briefs, that the appeals of Mssrs. Gillelan and Dupree are untimely. A notice of appeal to the Board from a decision or order must be filed within 30 days from the date upon which the decision or order has been filed. *See* 20 C.F.R. §802.205(a). The Board's implementing regulations further establish that, if the notice of appeal is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of appeal rights, the notice of appeal will be considered to have been filed as of the date of mailing and that, if a postmark is not present or legible, a certificate of service and affidavits may be used to establish the mailing date. 20 C.F.R. §802.207(b). In the instant case, the district director's Order Awarding Attorney Fees was filed in the Office of the District Director on October 7, 2008, and employer acknowledges that Mr. Gillelan's certificate of service is dated November 6, 2008. Consequently, Mr. Gillelan's appeal of the district director's order is timely. The regulations further provide that where, as in this case, a timely notice of appeal has been filed by a party, any other party may initiate a cross-appeal within 14 days of the date on which the first notice of appeal was filed. *See* 20 C.F.R. §802.205(b). As employer in its response brief concedes that Mr. Dupree's appeal was filed with the Board on November 14, 2006, that appeal is also timely.

In their respective appeals, Mssrs. Gillelan and Dupree argue that, pursuant to recent decisions issued by the United States Court of Appeals for the Ninth Circuit, the district director's decision to reduce the hourly rates requested cannot be affirmed based upon his use of only prior hourly rate determinations made in other longshore cases. In his Order, the district director acknowledged that counsel had provided documentation to support their hourly rate requests, but he rejected that evidence and specifically relied on the Longshore Act community in addressing the hourly rates to be awarded to claimant's co-counsel. *See* Order at 5, 7. For the reasons stated in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049 (9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041 (9th Cir. 2009), we vacate the hourly rate determinations made by the district director. We remand the case for the district director to determine a reasonable hourly rate in the "relevant community" consistent with these decisions, taking into account the evidence and arguments offered by the parties. *See also H.S. v. Dept. of Army*, ____ BRBS ____, BRB Nos. 08-0533, 08-0596 (Apr. 10, 2009). Additionally, we vacate the district director's reduction in the number of hours sought by claimant's co-counsel for the preparation and defense of their respective fee petitions. On remand, the

district director must reconsider whether the hours sought in this regard were reasonably necessary in light of his new determination of the hourly rates awarded to counsel.¹

Mr. Dupree additionally contends that the district director erred in reducing the number of hours sought by Mr. Myers and himself between January 22 and June 28, 2007. In his order, the district director summarily reduced the requested hours sought during this period of time from 27.7 to 13.85 for Mr. Dupree, and from 7.3 to 3.65 for Mr. Myers, stating only that while the services rendered were not necessarily duplicative or unrelated, a 50 percent reduction was warranted since Mr. Dupree's firm had shifted to a "supporting role" during this period of time. *See* Order at 7. The mere fact, however, that one attorney's services were in support of others is in itself an insufficient basis on which to disallow those services; rather the test for whether legal services were necessary is whether the attorney, at the time the work was performed, could reasonably regard the work as necessary in order to establish entitlement. *See generally Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). Accordingly, on remand, the district director must specifically determine whether the services performed by Mssrs. Dupree and Myers between January 22 and June 28, 2007, were reasonably necessary in order to establish claimant's entitlement to additional benefits pursuant to Section 14(f) of the Act. *See Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008)(court states that it cannot affirm a 50 percent reduction in the number of hours sought without a clear explanation for it to review).

Lastly, Mr. Gillelan has filed a statement requesting a fee of \$5,980, representing 13 hours of legal services performed at a rate of \$460 per hour, for services performed before the Board. The Act provides that claimant's counsel is entitled to an attorney's fee for success in review proceedings before the Board. 33 U.S.C. §928(b); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). As this case is being remanded, the degree of counsel's success before the Board, if any, has yet to be determined. Thus, as the award of a fee for services performed before the Board is premature, Mr. Gillelan's fee request is denied at this time. *See generally Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997). Should counsel ultimately be successful, he may refile his fee petition with the Board. 20 C.F.R. §802.203(c).

¹ Pursuant to our decision, Mr. Gillelan's Motion for Summary Vacatur and Remand is moot.

Accordingly, the fee awards of the district director are vacated, and the case is remanded for reconsideration consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge