

RICHARD SHIRROD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PACIFIC RIM ENVIRONMENTAL)	DATE ISSUED: 09/18/2012
RESOURCES, LLC)	
)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Order Awarding Attorney Fees and Costs of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for employer.

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

PER CURIAM:

Claimant appeals the Order Awarding Attorney's Fees and Costs (2008-LHC-01585) of Administrative Law Judge Steven B. Berlin 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 Marcum v. Director, OWCP*, 12 BRBS 355 (1980).

Claimant was injured during the course of his employment, and while the case was before the administrative law judge, the parties agreed that claimant is entitled to compensation and medical benefits and that his condition was permanent. However, they disputed the date of maximum medical improvement, claimant's average weekly wage, and the extent of claimant's disability. The administrative law awarded temporary total disability benefits from November 1, 2005, through January 21, 2007, and permanent total disability from January 22, 2007, onward, based on an average weekly wage of

\$569.23. The administrative law judge denied claimant's motion for reconsideration, and claimant appealed. The Board remanded the case to the administrative law judge for further consideration of the average weekly wage issue. *Shirrod v. Pac. Rim Envtl. Res.*, BRB No. 11-0487 (Feb. 14, 2012) (unpub.), *recon. denied* (July 16, 2012).

In the interim, claimant's counsel filed with the administrative law judge a petition for an attorney fee of \$38,786.17, representing 86.75 hours of attorney services at \$400 per hour, 8.25 hours of legal assistant services at \$150 per hour, and \$2,848.67 in costs. Employer did not file any specific objections but asked only that the fee be "appropriate." The administrative law judge reduced counsel's requested hourly rate to \$340 and approved the remaining petition. Consequently, the administrative law judge awarded a fee in the amount of \$33,581.17. Claimant appeals the administrative law judge's fee award, challenging his hourly rate determination. Employer responds, urging affirmance of the fee award.

Counsel contends the administrative law judge erred in awarding him an hourly rate of \$340 based upon decisions rendered by other administrative law judges. Counsel maintains that the hourly rate awarded therein was based on statewide data and data from an "unidentified community" that included workers' compensation rates. Counsel also argues that the administrative law judge erred in using an Oregon state average rate rather than the market rate prevailing in Portland. Counsel also appeals the administrative law judge's finding that he should not be paid the rate for attorneys in the 95th percentile of the relevant market. We reject counsel's contentions of error as he has not demonstrated that the administrative law judge abused his discretion in awarding a fee of \$33,581.17 in this case. *See Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011).

The United States Court of Appeals for the Ninth Circuit has stated that the failure of a fee applicant to carry his burden to produce satisfactory evidence of the relevant market rate may justify a tribunal's looking to what others have awarded a fee applicant in contemporaneous cases. *See Van Skike v. Director, OWCP*, 557 F.3d 1041, 1047, 43 BRBS 11, 14(CRT) (9th Cir. 2009); *see also Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1051, 43 BRBS 6, 9(CRT) (9th Cir. 2009). As counsel submitted the same evidence in this case as he did in the cases on which the administrative law judge relied, it was within the administrative law judge's discretion to adopt the reasons Judges Etchingham and Gee gave for rejecting that evidence.

As the administrative law judge found that counsel failed to produce satisfactory evidence of the relevant market rate in this case, the administrative law judge reasonably relied on rates other administrative law judges awarded counsel in contemporaneous longshore cases. *See Van Skike*, 557 F.3d at 1047, 43 BRBS at 14(CRT); *see also Christensen*, 557 F.3d at 1051, 43 BRBS at 9(CRT). Further, the Ninth Circuit has made

clear that market rate determinations need not be made in every case so long as they are made “with sufficient frequency” such that the court can be confident that the fee awards are based on current market conditions. *Christensen*, 557 F.3d at 1055, 43 BRBS at 8-9(CRT). Here, the administrative law judge accounted for current market conditions by increasing the rate Judges Etchingham and Gee awarded from \$316 to \$340.¹ *Id.* Moreover, the administrative law judge did not err in relying on statewide rates, and he fully explained his reasons for rejecting counsel’s assertion that workers’ compensation rates should not be considered. The administrative law judge is afforded considerable discretion in determining factors relevant to a market rate in a given case and claimant has not established an abuse of that discretion. *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).

We also reject counsel’s contention that his hourly rate should be based on rates of attorneys in the top five percent of statewide litigation attorneys rather than the upper quartile. Although the administrative law judge found counsel to be a “fine lawyer and a real asset to the Longshore bar,” he concluded, based on his familiarity with counsel’s performance at trial level in longshore cases, that counsel’s work does not always warrant a fee based on a rate equivalent to the uppermost tier of attorneys. Order at 4. Consequently, the administrative law judge used the upper quartile rate. Order at 4. Section 702.132, 20 C.F.R. §702.132, provides, *inter alia*, that the fee award shall account for the quality of counsel’s representation. As the administrative law judge assessed counsel’s abilities at the trial level and found it did not meet his expectations for an attorney in the top five percent of the profession, the administrative law judge acted within his discretion in using the top quartile rates. Therefore, we affirm the administrative law judge’s awarded hourly rate of \$340. *See generally Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *B&G Mining*, 522 F.3d 657, 42 BRBS 25(CRT). Therefore, as claimant has not shown that the administrative law judge abused his discretion in awarding this fee, we affirm it. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

¹The administrative law judge noted that the rate awarded by Judges Etchingham and Gee was for work performed in 2008; that the Bureau of Labor Statistics Consumer Price Index for Portland showed an increase in 2009 and 2010; and that since Judges Etchingham and Gee issued their decision, counsel had given a significant presentation at a longshore conference and argued a longshore case in a Ninth Circuit *en banc* oral argument, accomplishments which “elevate [his] standing as an Oregon trial lawyer.” Order at 4.

Accordingly, the administrative law judge's Order Awarding Attorney's Fees and Costs is affirmed.²

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

²Counsel also asserts that the administrative law judge should allow a fee for the two hours he spent preparing his motion for reconsideration on the merits. He claims he did not originally request a fee for this time because the motion was denied by the administrative law judge; however, because the Board remanded this case to the administrative law judge for further consideration of the average weekly wage issue, he contends that this time was reasonable and necessary. This request must be made to the administrative law judge in the first instance. *See generally Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).