

HARRY HOLIDAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND	)	DATE ISSUED: 08/11/2010
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	ORDER

This case is before the Board on remand from the United States Court of Appeals for the Fourth Circuit. In its decision, the court affirmed the award of benefits to claimant. The court vacated the Board’s award of an attorney’s fee to claimant’s counsel and remanded the case for reconsideration of the appropriate hourly rate. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4<sup>th</sup> Cir. 2009).

The Board awarded claimant’s counsel an attorney’s fee based on an hourly rate of \$250; counsel had requested an hourly rate of \$420. In vacating the award, the court held that the Board erred in summarily stating that \$250 was the prevailing rate in the geographic area of this case. In remanding the case, the Fourth Circuit stated that the Board must assess the fee request in view of factors relevant to a lodestar fee analysis and provide detailed findings with regard to the factors considered. *Id.*, 591 F.3d at 228, 43 BRBS at 71(CRT), *citing Blanchard v. Bergeron*, 489 U.S. 87, 92 n. 5 (1989). In addition, as this case involved “extrajurisdictional appellate counsel,” the Board is to determine: (1) the appropriate geographic location; and (2) the appropriate market rate in that location.<sup>1</sup> *Id.* In this regard, the court referred the Board to its decisions in *Rum*

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<sup>1</sup> Claimant’s claim originated in Newport News, but claimant subsequently moved to Augusta, Georgia. His hearing was held in Savannah, at which time he was represented by local counsel. Claimant appealed the administrative law judge’s decision to the Board. Claimant was represented by counsel located in Washington, D.C. before the Board and the Fourth Circuit.

*Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169 (4<sup>th</sup> Cir. 1994), and *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4<sup>th</sup> Cir. 1988).

In *Hanson*, the Fourth Circuit stated that the “[t]he community in which the court sits is the appropriate point for selecting the proper rate.” 859 F.2d at 317. The court also identified a two-step test to determine if extrajurisdictional counsel is entitled to his home market rates. “First, tribunals should ask if extrajurisdictional counsel rendered services that were truly available in the visited market.” *Holiday*, 591 F.3d at 229, 43 BRBS at 71(CRT). This inquiry concerns whether the case was complex and specialized such that local counsel with the requisite skills may have been unavailable. *Hanson*, 859 F.2d at 317. “Second, tribunals should ask if the party that hired extrajurisdictional attorney chose reasonably, or whether they chose an unnecessarily expensive attorney.” *Holiday*, 591 F.3d at 229, 43 BRBS at 71(CRT). In *Hanson*, local counsel with expertise was unavailable in Raleigh, efforts to retain the Sierra Club Defense Fund were unsuccessful, and the nearest counsel with the requisite skills and willingness to forgo payment at least for awhile were in Washington, D.C. Thus, in *Hanson*, the trial court’s use of Washington, D.C., rates for trial counsel was upheld.

In *Rum Creek*, a West Virginia coal company hired a Richmond, Virginia law firm for both trial and appellate work. With regard to the trial work, the Fourth Circuit found that the Richmond firm satisfied the *Hanson* factors.<sup>2</sup> In *Rum Creek*, some of the work performed involved appellate litigation before the Fourth Circuit in Richmond. With regard to the fee for work performed before it, the court stated that the *Hanson* test “need not even be considered,” *Rum Creek*, 31 F.3d at 179, because the rates requested were Richmond rates for work before a court sitting in Richmond.

In this case, the fee petition is for work performed by a Washington, D.C.-based attorney for work before the Board in Washington, D.C. Counsel participated in this case only at the appellate level and thus did not have any contacts with the local area where claimant resides and the hearing was held. See *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009). Under these circumstances, the decisions in *Hanson* and *Rum Creek* support the conclusion that Washington, D.C. is the appropriate geographic market for setting counsel’s hourly rate, as it is the community in which the Board sits. *Hanson*, 859 F.2d

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<sup>2</sup> Specifically, constitutional issues were presented by the case, the party paying the fee was using its usual law firm from Richmond, and it was necessary to use out-of-state counsel because the plaintiff was seeking injunctive relief against the governor and the state police during a coal miners’ strike, which made it unlikely, politically, for local counsel to be retained. *Rum Creek*, 31 F.3d at 179.

at 317; see *Rum Creek*, 31 F.3d at 179. See also 20 C.F.R. §802.203(d)(4);<sup>3</sup> *Jeffboat, LLC v. Director, OWCP*, 553 F.3d 487, 42 BRBS 65(CRT) (7<sup>th</sup> Cir. 2009). We reject employer's contention that it should not be required to pay rates applicable in the District of Columbia because it does not do business there, as this factor is not relevant.

We next address the appropriate hourly rate for counsel's services in the Washington, D.C., market. In its decision, the Fourth Circuit addressed counsel's contention that if Washington, D.C. is the appropriate geographic market, then the Board would be constrained to consider the *Laffey* Matrix. The court rejected the contention, stating that "the mere fact that [counsel] practices in Washington, D.C. is insufficient to accord him . . . any rate within [that market]... the *Laffey* Matrix is a useful starting point to determine fees, not a required referent." *Holiday*, 591 F.3d at 229, 43 BRBS at 72(CRT). In support of his requested rate of \$420, counsel notes his over 35 years of experience in appellate work under the Longshore Act and his status as a lecturer and author on various topics arising under the Longshore Act. Counsel asserts that his hourly rate is inclusive of expenses that are not separately billed, such as copying, postage, telephone calls and on-line legal research charges. In addition, counsel cites the *Laffey* Matrix, which provides a reference for District of Columbia hourly rates for use by the United States Attorney's Office in cases in which the prevailing party is entitled to an attorney's fee under federal fee-shifting statutes. Counsel also avers that in those very limited cases in which he bills a non-claimant client, he has been paid hourly rates of \$350 in 2005, \$400 in 2006, and \$420 in 2007.

In response, employer contends that the *Laffey* Matrix should not be applied because it is applicable only to limited types of complex litigation. Employer notes that under the Equal Access to Justice Act, which is a federal fee-shifting statute, hourly rates are capped at \$125 unless special factors justify a higher fee. 28 U.S.C. §2412. In addition, employer avers that the 2002 Altman Weil *Survey of Law Firm Economics* suggests a national rate for experienced workers' compensation attorneys of \$200. Thus, employer suggests a rate of \$225 is appropriate for counsel's services.

We find that counsel has adequately justified his request for a rate of \$420. Counsel provided sufficient evidence of a "market rate" that he receives from paying clients in view of his expertise and experience. See *Westmoreland Coal Co. v. Cox*, 602

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<sup>3</sup> Section 802.203(d)(4) states, in pertinent part:

The rate awarded by the Board shall be based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status.

F.3d 276 (4<sup>th</sup> Cir. 2010); *Robinson v. Equifax Information Services, LLC*, 560 F.3d 235, 244 (4<sup>th</sup> Cir. 2009); *Spell v. McDaniel*, 824 F.2d 1380 (4<sup>th</sup> Cir. 1987). Employer’s citation to the outdated 2002 Altman Weil survey fails to address with specificity the Washington, D.C. market or counsel’s assertion that he is entitled to his requested rate based on his expertise. Moreover, the Supreme Court has stated that a “reasonable attorney’s fee” is calculated in the same manner in all federal fee-shifting statutes. *City of Burlington v. Dague*, 505 U.S. 557, 561 (1992); *see also Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9<sup>th</sup> Cir. 2009). Thus, we find appropriate counsel’s reference to the *Laffey* Matrix as support for his hourly rate request, as the Matrix applies to fee-shifting statutes, such as the Longshore Act, where the prevailing party may recover a reasonable attorney’s fee. *See* 33 U.S.C. §928(a), (b); *see also Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9<sup>th</sup> Cir. 2007); *B&G Mining, Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6<sup>th</sup> Cir. 2008). Contrary to employer’s contention, the fact that certain fee-shifting statutes set attorney’s fees in a different manner does not render the Matrix inapplicable to cases arising under the Longshore Act.<sup>4</sup> As counsel’s expertise and the *Laffey* Matrix support counsel’s request for an hourly rate of \$420, we award him an attorney’s fee based on this rate. *See Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4<sup>th</sup> Cir. 2004); *Beckwith*, 43 BRBS 156.

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<sup>4</sup> “This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia. The matrix is intended to be used in cases in which a ‘fee-shifting’ statute permits the prevailing party to recover ‘reasonable’ attorney's fees. *See, e.g.,* 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412 (b) (Equal Access to Justice Act). The matrix does not apply in cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).”

[http://www.justice.gov/usao/dc/Divisions/Civil\\_Division/Laffey\\_Matrix\\_8.html](http://www.justice.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_8.html)

Accordingly, we award claimant's counsel an attorney's fee of \$8,799, representing 20.95 hours at \$420 per hour, payable directly to claimant's counsel by employer.<sup>5</sup> 33 U.S.C. §928.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>5</sup> The Court of Appeals affirmed the award for 20.95 hours. *Holiday*, 591 F.3d at 229-230, 43 BRBS at 72(CRT).