



BRB No. 14-0281

JERRY HILL)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CLD PACIFIC GRAIN)	
)	
and)	DATE ISSUED: <u>Apr. 9, 2015</u>
)	
AMERICAN HOME ASSURANCE)	
COMPANY and CHARTIS CLAIMS,)	
INCORPORATED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Granting Attorney's Fees of William Dorsey,
Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

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

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

PER CURIAM:

Claimant appeals the Order Granting Attorney's Fees (2011-LHC-00891) of
Administrative Law Judge William Dorsey rendered on a claim filed pursuant to 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 generally Tahara v. Matson
Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant sustained a groin injury on June 19, 2008, while working as a longshoreman for employer. In his Decision and Order dated June 25, 2012, the administrative law judge found claimant entitled to temporary total disability benefits for his work-related injury. Claimant's counsel, thereafter, filed a petition seeking an attorney's fee totaling \$14,375, representing 32.75 hours of attorney work at an hourly rate of \$400, 8.5 hours of paralegal work at an hourly rate of \$150, and expenses of \$166.55, for work performed before the Office of Administrative Law Judges between May 13, 2011 and August 20, 2012. Employer responded, objecting only to the requested hourly rate.

The administrative law judge reduced the hourly rate requested for attorney work to \$350. He approved an attorney's fee, payable by employer, of \$12,904.05, representing 32.75 hours of attorney work at \$350 per hour, 8.5 hours of paralegal work at \$150 per hour, plus \$166.55 in costs. Claimant challenges the administrative law judge's hourly rate determination on appeal. Employer responds, urging affirmance. Claimant filed a reply brief.

Claimant contends the administrative law judge did not provide a sufficient explanation for his rejection of the evidence counsel submitted in support of the requested market rate for attorney work of \$400 per hour.¹ Claimant also contends the administrative law judge failed to address the evidence he submitted pertaining to the rates approved by the United States Court of Appeals for the Ninth Circuit and the Board.

The Supreme Court of the United States 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. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *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.*, 559 U.S. at 551. The burden falls on the fee applicant to produce

¹Counsel offered the following documents in support of his request of a \$400 per hour rate for attorney work: 1) declaration of Phil Goldsmith dated June 30, 2009; 2) affidavit of David Markowitz dated July 2, 2009; 3) Oregon State Bar Litigation Section Fee Survey from March 2008; 4) Morones Survey dated January 1, 2010; 5) excerpts from the 2009 Small Firm Economic Survey by Incisive Legal Intelligence (ILI Survey); 6) excerpts from the Oregon State Bar 2007 Economic Survey; 7) evidence that the Board awarded counsel an hourly rate of \$392 for work performed before it in 2010; and 8) evidence that the United States Court of Appeals for the Ninth Circuit awarded counsel an hourly rate of \$400 for work performed before it in 2011.

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); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). With regard to market rate evidence, the Ninth Circuit stated, “[n]or do we insist that in every fee award decision the BRB must make new determinations of the relevant community and the reasonable hourly rate. But the BRB must make such determinations with sufficient frequency that it can be confident – and we can be confident – in reviewing its decisions that its fee awards are based on current rather than merely historical market conditions.” *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT). As the Supreme Court stated, “[t]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection.” *Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011).

The administrative law judge found Portland, Oregon, to be counsel’s relevant community and he discussed the reasoning and market rate analysis of other administrative law judges whose hourly rate determinations were affirmed by the Board.² In addition, the administrative law judge addressed the Morones Survey in conjunction with the affidavit and declaration of Mr. Markowitz and Mr. Goldsmith and rationally determined that rates paid to commercial/business litigators in Portland do not provide an appropriate basis for setting a market rate for counsel’s services. *See Christensen v.*

²The administrative law judge cited *Connor v. Fraser Boiler & Ship Repair*, BRB Nos. 13-0341/A (March 14, 2014); *Wilson v. Honeywell Tech. Solutions, Inc.*, BRB No. 11-0762 (June 15, 2012); *DiBartolomeo v. Fred Wahl Marine Constr.*, ALJ No. 2008-LHC-01249 *aff’d*, BRB No. 10-0257 (Aug. 30, 2010); *Castillo v. Sundial Marine Tug & Barge Works, Inc.*, ALJ No. 2010-LHC-0341 (April 22, 2011), *vacated and remanded* BRB Nos. 11-0400, 11-0655 (Feb. 23, 2012), *modified and aff’d after remand*, BRB No. 13-0356 (Apr. 24, 2014); and *Shirrod v. Pacific Rim Envtl. Res., LLC*, ALJ No. 2008-LHC-01585 (Nov. 1, 2011) *aff’d*, BRB No. 12-0085 (Sept. 18, 2012), *recon. denied* (Dec. 19, 2012), *appeal docketed*, No. 13-70613 (9th Cir. Feb. 20, 2013). In *DiBartolomeo*, Judge Etchingham stated that in establishing a proxy for the market rate for counsel’s services, he relied on the Oregon State Bar 2007 Economic Survey “to create a measure that considers both the skills employed in Longshore claims generally and several factors specific to [counsel]; experience, geographic location and overall ability.” Similarly, in *Castillo*, Judge Gee, on remand, considered both the 2007 and 2012 Oregon surveys, as instructed by the Board, in determining the proxy rate for counsel of \$315 for his work in 2009 and \$325 for his work in 2010.

Stevedoring Services of America, 43 BRBS 145, 146 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F.App'x 912 (9th Cir. 2011); *B&G Mining, Inc. v. Director, OWCP*, 522 F.2d 657, 42 BRBS 25(CRT) (6th Cir. 2008). Additionally, this evidence had rationally been rejected as a basis for establishing an hourly rate for counsel in other decisions cited by the administrative law judge. The administrative law judge also stated that he independently reviewed the 2007 and 2012 Bar Surveys. *See Order Granting Attorney's Fees at 5.* The administrative law judge found that the 2012 Survey provides the most recent assessment of Portland rates, and that approximately 60 percent of downtown Portland attorneys reported rates between \$175 and \$299 per hour; approximately 25 percent reported rates between \$300 and \$400; and approximately 14 percent report rates over \$400. In view of counsel's experience and expertise, the administrative law judge awarded counsel a rate of \$350, finding this rate to be well above the average rate for all Portland attorneys. *Id.* at 6.

We reject counsel's contentions of error, as he has failed to demonstrate an abuse of the administrative law judge's discretion in setting a market rate in this case. The administrative law judge did not err in advertent to the decisions of other administrative law judges. *Christensen*, 557 F.3d at 1051, 43 BRBS at 9(CRT). Moreover, the administrative law judge is not bound to award counsel a rate awarded by the Board or the Court of Appeals,³ nor has counsel shown an abuse of discretion in the administrative law judge's failure to explicitly discuss the 2008 survey or ILI Survey in setting the hourly rate for attorney work in this case. *Id.* The administrative law judge's decision to rely on the general results of the 2012 Bar Survey for the Portland area, taking into account counsel's particular qualifications, is not arbitrary or capricious. The administrative law judge rationally found the upper quartile results of this survey reflect market conditions for an attorney of counsel's skills. Accordingly, we affirm the administrative law judge's award of an hourly rate to counsel of \$350 in this case.⁴ *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT).

³The administrative law judge noted that one administrative law judge has awarded counsel the rate of \$375. *See Order Granting Attorney's Fees at 5 n.31.*

⁴We reject counsel's assertion that the administrative law judge misapplied the percentage increases in the consumer price index. The administrative law judge observed that the consumer price index "reflect[ed] changing market conditions," in the time since Judge Berlin's award to counsel in *Shirrod*, ALJ No. 2008-LHC-01585, for work performed in 2010; however, he did not calculate counsel's current market rate with specific reference to the consumer price index. *Order at 7 n.45.* Rather, the administrative law judge merely noted the 2.9 and 2.3 percent increases in 2011 and

Accordingly, the administrative law judge's Order Granting Attorney's Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

2012, and he increased counsel's 2010 market rate from \$340 to \$350. *See generally Fox*, 131 S.Ct. at 2216.