



BRB No. 14-0282

GREGORY D. MODAR)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MARITIME SERVICES CORPORATION)	
)	DATE ISSUED: <u>Apr. 7, 2015</u>
and)	
)	
SAIF CORPORATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Granting Attorney's Fees and the Order Denying Motion for Reconsideration of 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 and the Order Denying Motion for Reconsideration of Attorney's Fees (2006-LHC-00022) 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, a construction laborer for employer, sustained neck, shoulder, and psychological injuries as a result of an accident at work on September 21, 1997. In his Decision and Order dated May 2, 2011, the administrative law judge found claimant entitled to total disability and medical benefits for his work-related injuries.¹ Claimant's counsel, thereafter, filed a petition seeking an attorney's fee totaling \$98,168.33, representing 190.5 hours of attorney work at an hourly rate of \$400, 19 hours of paralegal work at an hourly rate of \$150, and expenses of \$9,308.33, for work performed before the Office of Administrative Law Judges (OALJ) between February 8, 2006 and May 26, 2011. Employer responded, objecting to the requested hourly rate and specific time entries, and claimant's counsel replied.

The administrative law judge reduced the hourly rate requested for attorney work and disallowed or reduced time for some attorney and paralegal work. He approved an attorney's fee, payable by employer, of \$75,733.33, representing 181.75 hours of attorney work at \$350 per hour, 18.75 hours of paralegal work at \$150 per hour, plus \$9,308.33 in costs. Claimant filed a motion for reconsideration of both the hourly rate awarded, and denial of interest on the costs awarded. The administrative law judge denied the motion.

On appeal, claimant's counsel challenges the administrative law judge's hourly rate determination and the denial of interest on the award of costs. Employer responds, urging affirmance of the administrative law judge's decisions. Claimant's counsel has filed a reply brief.

Claimant's counsel 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.² Claimant maintains that while the administrative law judge adopted in part the reasons given by other administrative

¹Specifically, the administrative law judge found claimant entitled to temporary partial disability benefits from October 13, 1997 to November 16, 1997, temporary total disability benefits from November 17, 1997 to September 15, 1998, and to ongoing permanent total disability benefits thereafter, as well as to medical benefits.

²Counsel 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 and 2012 Economic Surveys; and 7) evidence that the Board awarded counsel an hourly rate of \$392 for work performed before it in 2010.

law judges for rejecting much of his market rate evidence, the administrative law judge did not discuss evidence pertaining to the rates approved by the United States Court of Appeals for the Ninth Circuit and the Board. Additionally, claimant contends that the administrative law judge did not explain why he rejected the 2007 and 2012 Oregon State Bar Economic Surveys of Portland attorneys with over 30 years of experience or the 2009 Incisive Legal Intelligence Survey.

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 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 8-9(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 relied on the reasoning and market rate analysis of other administrative law judges, whose hourly rate determinations were subsequently affirmed by the Board, to find counsel entitled to a \$350 hourly rate for attorney work performed in this case in 2012.³ Specifically, the administrative law judge relied on the \$340 hourly

³The administrative law judge cited *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.

rate used in *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), and he applied the 2.9 percent increase in the Bureau of Labor Statistics Consumer Price Index for Portland, Oregon, from 2010 to 2011, to the \$340 hourly rate. The administrative law judge, thus, adjusted that figure to \$350 for services performed by counsel in 2011 and 2012. He concluded that “in light of all the evidence presented to me,” counsel is entitled to an hourly rate for the attorney work performed in this case of \$350. Order Granting Attorney’s Fees 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 with reference to other fee awards. In the decisions cited by the administrative law judge in support of his hourly rate determination in this case, the respective administrative law judges rejected the statements proffered by Mr. Goldsmith and Mr. Markowitz, as well as the Morones Survey, as a basis for establishing an hourly rate for counsel. The Board affirmed these determinations. *See* n. 3, *supra*. As for the Oregon State Bar information, Judges Etchingham and Gee ultimately relied, in part, on the 2007 and 2012 bar survey information in making their determinations regarding counsel’s market rate. *Id.* Moreover, in his Order Denying Motion for Reconsideration, the administrative law judge acknowledged higher rate awards by the Court of Appeals, the Board and an administrative law judge; however, he correctly found he is not bound by such rates. As counsel submitted much 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 reasoning of Judges Etchingham, Berlin and Gee. *See generally Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). The administrative law judge correctly observed that he “need not revisit de novo the reasoning that supports an hourly rate every time a claimant’s lawyer prevails,” and the fact that he adjusted counsel’s market rate upward to reflect the percentage change in the local consumer price index indicates that the \$350 hourly rate awarded for 2011 and 2012 is based on current, rather than historical, market conditions. *Christensen*, 557 F.3d at 1055, 43 BRBS at 8-9(CRT); *Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *modified in part*

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.

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).

Counsel further contends that even if the administrative law judge validly rejected all of the evidence supporting his market rate, the award of a proxy rate of \$350 cannot be affirmed, because it is based on general rates awarded to attorneys with less experience and skills than he possesses. In this case, the administrative law judge addressed counsel's experience and skills in reaching his hourly rate determination. Specifically, in reaching his hourly rate determination, the administrative law judge recognized that counsel has: 1) spent more than four decades effectively representing longshore clients; 2) he recently was involved in longshore litigation before the Supreme Court of the United States and the Ninth Circuit, sitting en banc; and 3) that counsel has provided education to other members of the longshore bar. Order Granting Attorney's Fees at 6. The administrative law judge found that the \$350 rate takes these factors into consideration, citing the *Shirrod* decision. Order Granting Attorney's Fees at 5; Order Denying Motion for Reconsideration at 2. As the administrative law judge addressed relevant factors, and claimant has not established any abuse of the administrative law judge's discretion, we affirm the administrative law judge's award of an hourly rate to counsel of \$350 in this case. *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT).

Counsel also avers that the administrative law judge's denial of interest on the costs awarded to claimant is legally incorrect. Counsel maintains that the four-year gap between the February 2009 date on which counsel last provided claimant with an advance of costs and the March 2013 date on which employer paid these costs to counsel, warrants an award of interest. In support of his position, counsel refers to the court's authority to impose prejudgment interest on awards of benefits on equitable grounds without explicit statutory authority, *see e.g., Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). The Ninth Circuit has held that an attorney's fee award under the Act is not a final judgment entitled to interest under 28 U.S.C. §1961. *See Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Inasmuch as costs are awarded under subsection (d) of Section 28 of the Act, 33 U.S.C. §928(d), the section pertaining to attorney's fees, we reject counsel's contention and conclude that interest on costs assessed against employer is likewise not available to claimant under the Act. We therefore affirm the administrative law judge's denial of interest on counsel's costs. *Anderson*, 91 F.3d at 1325 n.3, 30 BRBS at 69 n.3(CRT).

Accordingly, the administrative law judge's Order Granting Attorney's Fees and the Order Denying Motion for Reconsideration of Attorney's Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge