U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0359

DANIEL R. KUPKE Claimant-Petitioner v. SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Employer/Carrier-Respondents FLUOR DANIEL CORPORATION and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Employer/Carrier-Respondents	)	DATE ISSUED: Apr. 5, 2018 DECISION and ORDER

Appeal of the Attorney Fee Order of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett, Lerner, Karsen & Frankel, P.A.), Ft. Lauderdale, Florida, for claimant.

Melissa M. Goins and Monica F. Markovich (Brown Sims), Houston, Texas, for Service Employees International, Incorporated and the Insurance Company of the State of Pennsylvania.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for Fluor Daniel Corporation and the Insurance Company of the State of Pennsylvania.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order (2014-LDA-00153, 00549, 00814, 2016-LDA-00368) of Administrative Law Judge Jennifer Gee 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.* as extended by the Defense Base Act, 42 U.S.C. §1651 *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, based on an abuse of discretion, or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant filed a claim against Service Employees International, Incorporated (SEII) for work-related hearing loss arising from a roadside bombing on April 20, 2006. He also filed a claim against Fluor Daniel Corporation (Fluor) for physical and psychological injuries that arose from a second bombing on June 1, 2012. SEII joined Fluor to the hearing loss claim, contending that some of claimant's hearing loss was attributable to the second bombing. On April 6, 2016, the administrative law judge approved the settlement of the claims against both employers.[1] The parties did not settle the amount of the attorney's fee to which claimant's counsel was entitled.

Claimant's counsel, David Barnett, filed an initial fee petition with the administrative law judge combining both claims (Combined Petition), in which he requested a fee of $108,850.50 for 222.6 hours of attorney time by four attorneys for services performed from 2013 to 2016 at an hourly rate of $485,[2] 2.8 hours of attorney time by Liza Lima at $300 per hour, and .3 hour of paralegal time at an hourly rate of $165, plus costs of $2,295.93. Claimant's counsel filed a second fee petition for time

[1] The SEII settlement provided for a lump sum payment of $17,500; the Fluor settlement provided for a $400,000 payment to resolve all claimed injuries, with future medical benefits left open. Attorney Fee Order at 2.

[2] The fee petition requested 168.5 hours by David Barnett, 25.3 hours by Barry Lerner, 26.8 hours by Brian Karsen, and 2 hours by Ana Castro at $485 per hour.

expended solely on the Fluor claim (Fluor Petition). Counsel sought a fee of $17,217.50, based on an hourly rate of $485, for 23.7 hours of attorney time by Barnett and 11.8 hours by Ana Castro. SEII and Fluor filed objections to the attorney's fee petitions, and claimant's counsel filed a reply brief. In his reply, counsel conceded that 19.9 hours of attorney time on the Combined Petition was non-compensable, but he requested an additional 36.1 hours for time expended on the reply brief. The total fee requested on the Combined Petition and the Fluor Petition was $133,925, plus costs of $2,295.93. *See* Attorney Fee Order at 75, 75 n.75.

In her Attorney Fee Order (Order), the administrative law judge determined that South Florida is the relevant community for determining market-based hourly rates. Order at 19-22. The administrative law judge rejected counsel's contentions that a higher hourly rate is warranted for Defense Base Act litigation and that the firm bills at an hourly rate of $485 for non-contingent commercial litigation work. *Id*. at 24-26. She also rejected attorney affidavits counsel submitted,[3] and a $350 hourly rate awarded to Barnett in 2005 for maritime litigation case and $450 hourly rate awarded him in 2011 for non-longshore litigation because counsel did not establish that these fee awards were for work similar to longshore litigation. *Id*. at 26. The administrative law judge rejected as immaterial claimant's counsel's reliance on the Laffey Matrix and the hourly rates paid to non-legal professionals in longshore claims, such as doctors. *Id*. at 29-30.

The administrative law judge found that none of the longshore fee awards claimant's counsel submitted established a market rate because they did not determine an actual market rate for "suitably similar work in a recent enough period to properly represent current market conditions." Order at 34. She stated that counsel's request for the same hourly rate for the partners and senior attorneys "is not in accord with market realities." *Id*. She concluded that counsel did not carry his burden of establishing entitlement to the claimed hourly rates. *Id*. The administrative law judge also rejected employers' contentions that the attorney hourly rates should range from $285 to $215.

The administrative law judge next summarized prior awards under the Act to Barnett, $425 per hour in 2012, $450 an hour in 2014, and $435 an hour in 2015, and to

[3] Specifically, the administrative law judge rejected a 2008 statement by Gloria Pomerantz agreeing to pay an hourly rate of $400 to Barnett for expert testimony in her claim for attorney fees; attorney affidavits from 2010 by Eric Stettin, David Gold, and Paul Ansel as to hourly rates in the South Florida market; and a 2010 affidavit by Sergio Casiano, Jr., stating the hourly rates for admiralty cases. The administrative law judge found that the attorney statement and affidavits are "too dated and formulaic and none sketched the contours of the relevant market with the sort of particularity that would make the evidence informative." Order at 29.

Lerner in 2016, $350.38 per hour.[4] Order at 37-38. She found that these prior decisions "give some insight into the market," but "[W]hat is [] missing is some sense of the current general contours of the market for legal services in Southern Florida." *Id*. at 38. The administrative law judge identified 40 cases from the District Court for the Southern District of Florida issued between January 2015 and November 2016, in which the fee award included a lodestar analysis. *Id*. at 39-43. She found that these cases do not establish a proxy market rate because many of the cases are not similar to longshore litigation. *Id*. at 43. But she found that these cases provide "a *sense* of the local market." *Id*. (italics in original). The administrative law judge determined that these fee awards allow her to determine whether the hourly rates requested by claimant's counsel are "in line with the prevailing market rates for similar sorts of legal services by similarly situated professionals in the Southern District of Florida." *Id*. She found, "[H]aving reviewed all of the evidence submitted as well as the relevant Longshore fee awards not submitted and recent fee awards in the Southern District of Florida," that the hourly rates sought by petitioner are not in accord with the prevailing market rates. *Id*. Giving weight to 12 of the fee awards issued by the district court, the administrative law judge found that the relevant market range for Barnett is from $350 to $400 per hour. *Id*. at 44. She found that the quality of the representation by Barnett in this case entitles him to a fee based on an hourly rate of $350. *Id*. at 45. The administrative law judge also awarded Lerner a fee based on an hourly rate of $350. She found Karsen entitled to a fee based on an hourly rate of $320 and Castro a fee based on an hourly rate of $300. *Id*. at 45-46. She determined that the associate hourly rate for Lima is $225 per hour and that the hourly rate for paralegal work is $125. *Id*. at 46.

The administrative law judge also addressed objections by SEII and Fluor to the itemized entries. SEII made 171 line item objections and Fluor made 132. Order at 47. They objected to a fee for, inter alia, items they viewed as clerical, excessive/duplicate time, time billed to the wrong claim, and time expended on the reply brief. *Id*. at 48-76. The administrative law addressed the specific objections, and found compensable 243.5 hours of attorney time and .3 hour for paralegal work.[5] *Id*. at 75-76.

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[4] The cited fees relate to the following cases: *Tobias v. L-3 Communications*, 2009-LDA-00272 (Sept. 20, 2012); *Petro v. Mission Essential Personnel*, 2012-LDA-00180, 00181, 00182 (Jul. 18, 2014); *Ibrahim v. ITT Indus.*, 2014-LDA-00101 (Aug. 14, 2015); and *Yunis v. Academi, LLC*, 2015-LDA-00399 (Oct. 27, 2016). We note that the hourly rate in *Yunis* was vacated on appeal to the Board, and the case was remanded. *Yunis v. Academi, LLC*, BRB No. 17-0058 (Sept. 28, 2017) (unpub.).

[5] Specifically, the administrative law judge allowed Barnett 157.1 hours of the time requested on the combined fee petition, 19.2 hours for time expended on the Fluor petition, and 18 hours for the reply brief. Order at 76. Castro was allowed 11.4 hours for time expended on the Fluor petition. *Id*. For time expended on the combined petition,

SEII further argued that any attorney time expended after June 2, 2014, should be denied because, at that time, it was willing to settle the hearing loss claim for the amount claimant ultimately received, $17,500. Fluor similarly argued that its fee liability should be terminated as of June 30, 2015, when it agreed to settle the claim from the June 2012 bombing and the ensuing litigation did not result in any further benefits for claimant. The administrative law judge found that a reduced number of hours was warranted after the parties agreed to settle based on Barnett's unreasonable refusal to provide SEII and Fluor with fee petitions, which compounded the number of attorney hours expended. *Id*. at 79. She found that SEII and Fluor also bore responsibility for prolonging the litigation after the parties agreed to settle the claims by refusing to settle without resolution of counsel's attorney's fee. *Id*. Accordingly, the administrative law judge reduced by 50 percent the number of hours allowed that were expended after June 30, 2015, "due to Petitioner's primary role in unreasonably and unnecessarily compounding the litigation." *Id*. at 80. This resulted in a further reduction of 48.75 hours. *See id*. at 81. Accordingly, the administrative law judge awarded claimant's counsel a fee for 195.05 hours, based on hourly rates of $350 for Barnet and Lerner, $320 for Karsen, $300 for Castro, $225 for Lima, and $125 for Fichtel.[6] *Id*. at 86. Fluor was ordered to pay counsel a fee of $30,972.35, and SEII was ordered to pay a fee of $37,932.34. *Id*. at 87.

On appeal, claimant's counsel challenges the hourly rates awarded and the reduction by half of the hours billed after June 30, 2015.[7] SEII and Fluor each respond that the fee order should be affirmed. Claimant's counsel filed reply briefs.[8]

Lerner was allowed 15.3 hours, Karsen was allowed 17.8 hours, Castro was allowed 2 hours, Lima was allowed 2.7 hours, and Fichtel was allowed .3 of an hour. *Id*.

[6] The administrative law judge reduced the costs requested in the combined petition from $2,295.93 to $2,204.19. Order at 84. She subtracted $11.82 for postage, $36 for photocopies, $32 for facsimiles, and $11.91 for "Paradies," due to vagueness. *Id*. at 82-84.

[7] In his reply to Fluor's response brief, claimant's counsel raises the proper circuit law for determining the market rate. Cl. Reply Br. to Fluor Resp. Br. at 12-14. The issue of the proper forum is well settled. The administrative law judge's decision was filed and served by the district director's office in San Francisco; therefore, this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. *Service Employees Int'l, Inc. v. Director, OWCP* [*Barrios*], 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011).

[8] Claimant's counsel also filed on October 20, 2017, a copy of the Board's decisions in *Yunis v. Academi*, BRB No. 17-0058 (Sept. 28, 2017), and *Abassi v. Mission*

Claimant's counsel contends that the administrative law judge erred by disregarding his hourly rate evidence to establish a market rate for South Florida, and by using her own methodology to derive her hourly rate determinations.

The Supreme Court 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); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). The Court also has held that 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 Perdue*, 559 U.S. at 551. Once the administrative law judge determined that the South Florida is the relevant community for determining counsel's hourly rate, the burden was on claimant's counsel 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; *see also Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015).

In this case, the administrative law judge permissibly found that many of the longshore fee awards submitted by counsel lacked sufficient recency to reflect current market conditions and did not include a market rate analysis. Order at 33-34. Counsel submitted approximately 16 fee awards to him or to lawyers at his firm. Combined Petition at EX A at 1-121; Fluor Petition at EX A at 1-121; Appendix to Cl. Reply to Employers' Objections. Six of the 16 fee awards are dated from 2014 to 2016; the remaining 10 awards date from 2007 to 2013.[9] None of the awards contains a market rate analysis. Moreover, the administrative law judge permissibly rejected the affidavits dated from 2008 and 2010 because they are outdated and do not contain sufficient information from which she could conclude that the rates claimed were appropriate for the type of work counsel practices.[10] *See generally Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010). On appeal, counsel, in essence, seeks to persuade the Board of the

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Essential Personnel, BRB No. 17-0059 (Sept. 28, 2017). Employer filed briefs in response, asserting these cases are distinguishable from the present case. *See* n. 11, *infra*.

[9] The attorney services in this case were rendered from 2013 to 2016.

[10] The administrative also noted that some of the affidavits are identical to each other and were signed on the same day. She thus rationally determined that this reduces the evidentiary value of the affidavits. Order at 28.

sufficiency of his market rate evidence. That, however, is the role of the administrative law judge. Here, the administrative law judge's rejection of the attorney affidavits and prior longshore awards based on their lack of recency and absence of a market rate analysis is rational and fully within her discretion. Accordingly, we affirm the administrative law judge's finding that counsel failed to submit sufficient evidence of his current market rate in South Florida. *See Widrig v. Apfel*, 140 F.3d 1207 (9th Cir. 1998).

The administrative law judge found that 12 of the 40 district court cases, arising under various practice areas, establish the relevant market range for Barnett as $350 to $400 per hour.[11] The administrative law judge stated that the fee awards in these cases were to attorneys with "similar profiles." Order at 44. In this regard, the administrative law judge listed the hourly rates awarded to partners; in seven of the cases the partner had over 20 years of experience. *Id*. at 39-43. Barnett had approximately 26 years of experience at the time the Order was issued in February 2017.[12] *Id*. at 22.

The administrative law judge also addressed the quality of Barnett's representation in this case. She found that claimant, rather than Barnett, determined that the settlement offer by SEII in 2013 was inadequate, the time records show that claimant's attorneys spent time "babysitting (the) claim," and the fee petitions were not timely filed. *Id*. at 44-45. The administrative law judge also found that Barnett repeatedly confused the correct employer for each claim, and did not travel to Las Vegas for either the mediation or the hearing, which thereby resulted in claimant's being represented there by an attorney less familiar with the issues. *Id*.

Based on these findings, the administrative law judge awarded Barnett a fee based on an hourly rate of $350. The administrative law judge also awarded Lerner a rate of $350 taking into account his experience in longshore practice, the district court fee awards, the $465 rate awarded him in *Essar v. All World Language Consultants*, 2014-LDA-00752 (July 15, 2015), and $350.38 rate awarded him in *Yunis v. Academi, LLC*, 2015-LDA-00399 (Oct. 27, 2016), *vacated and remanded*, BRB No. 17-0058 (Sept. 28, 2017) (unpub.). Order at 44-45. The administrative law judge found that Karsen fits into the "junior partner" category as he is less experienced that Barnett and Lerner, and she awarded him an hourly rate of $320. *Id*. The administrative law judge determined that,

[11] These cases are in the practice areas of: employment, Fair Labor Standards Act, sanctions, unfair trade practices, copyright, trademark/business litigation, civil rights, contract/business litigation, Fair Debt Collection Practices Act/class action, contract, and construction surety. Order at 39-44.

[12] Experience is one of relevant factors, along with skill and reputation. *Blum*, 465 U.S. at 896 n.11.

although Castro has 21 years of experience, she has only three years practicing with the other attorneys at the firm and is relatively new to longshore work. *Id*. at 46. She found that Castro is entitled to a fee based on an hourly rate of $300. *Id*. The administrative law judge relied on the district court awards to find that the associate hourly rate for Lima is $225 per hour and that the hourly rate for paralegal work is $125. *Id.*

We reject counsel's contentions of error with regard to the hourly rates awarded by the administrative law judge. The administrative law judge gave very detailed and specific reasons for her rejection of counsel's (and employer's) evidence and for her conclusions concerning the range of market rates applicable in south Florida. The rates awarded in this case fall within the range established by the evidence the administrative law judge permissibly deemed relevant. Counsel has failed to establish that the administrative law judge's findings are arbitrary, capricious, contrary to law or based on an abuse of her discretion.[13] *See generally Ingram v. Oroudjian*, 647 F.3d 925 (9th Cir. 2011); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Consequently, we affirm the administrative law judge's hourly rate findings.[14]

Claimant's counsel also challenges as a "double reduction" the administrative law judge's reduction of half the attorney time expended after June 30, 2015, totaling 48.75 hours, in addition to the sustained line item objections of SEII and Fluor during this period.

[13] The administrative law judge's reliance on the subsequently vacated *Yunis* decision is not reversible error in this case, as she relied on a sufficient amount of other evidence that supports her conclusion. Moreover, we agree with employers that *Yunis* and *Abassi* are distinguishable. Unlike those cases, the administrative law judge here analyzed many more cases from the district court and explained her methodology for selecting them. She stated that the cases have substantive discussions of the lodestar analysis, and the cases have a "potential comparison to either the type of work . . . or the billing professionals in this case." Order at 38.

[14] With respect to counsel's contention that the administrative law judge is "holding the line" at a $350 hourly rate, the administrative law judge is undoubtedly aware that this practice is contrary to law. *See Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). While the *Christensen* court stated that a new rate determination need not be made in every case, the applicable rate still must be reviewed with sufficient frequency so it can be stated that the rate is "current." *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT); *see also Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008).

On June 30, 2015, the parties attended mediation and agreed to settle the claims for the April 2006 hearing loss and injuries from the June 2012 bombing. The administrative law judge determined that all the parties were partially responsible for time expended by claimant's counsel after the June 2015 mediation. She faulted claimant's counsel for the delay in resolving the attorney's fee issue because of his unreasonable refusal to provide fee petitions to SEII and Fluor and found that none of the time expended over attorney fees benefited claimant. Order at 78-79. The administrative law judge also found that SEII and Fluor bore some responsibility because they refused to execute the June 2015 settlements until the attorney's fee issue was resolved. *Id*. at 79. Rather than parse the individual fee liability of SEII and Fluor from June 30, 2015, the administrative law judge chose to reduce by half the hours itemized on the Combined Petition expended after that date that are otherwise compensable. *Id*. at 80. She concluded that all the parties were responsible notwithstanding claimant's counsel's "primary role in unreasonably and unnecessarily compounding the litigation." *Id*.

We reject claimant's counsel's contentions of error. The administrative law judge thoroughly discussed the differing claims histories provide by counsel, SEII and Fluor to explain the delayed resolution of the claims after reaching a settlement on the merits in June 2015. Order at 9-16. She concluded that the unresolved issue of fees resulted in the delay in executing the settlements. *Id*. at 15. The administrative law judge agreed with claimant's counsel's contention that SEII's insistence that Fluor remain potentially liable for all fees and costs related to the hearing loss claims caused, in part, the continued litigation. *Id*. at 13-14. However, counsel does not challenge the administrative law judge's finding that he did not provide an attorney's fee petition until January 2016, despite prior requests from SEII and Fluor after the June 2015 settlement.[15] *Id*. at 13; *see* SEII Objections at 10-11; SX A, 31-36. Counsel also does not dispute the administrative law judge's finding that SEII and Fluor were willing to move forward and compromise on fees in order to effectuate the agreed settlements, but counsel created a stalemate by insisting that the attorneys for SEII and Fluor provide him with their billing records before he would submit a fee petition. *Id*. at 15; SEII Objections at SX A, 33; Fluor Objections at FX 36 at 32-33.

Section 702.132, 20 C.F.R. §702.132, provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *see also Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS

[15] The January fee petition failed to specify the hourly rates sought by the various attorneys. Supplemental fee petitions were provided in late April and early May 2016. Order at 13.

434 (1989). The administrative law judge has a "superior understanding" of the underlying litigation. *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); *see also Barbera v. Director, OWCP*, 245 F.3d 282, 289, 35 BRBS 27, 32(CRT) (3d Cir. 2001). The administrative law judge permissibly found that claimant's counsel contributed to the unnecessary prolonging of the litigation over fees after the June 30, 2015 settlements were reached and that, as a result, time was unnecessarily expended in pursuit of the fee award. *Id.*; *see* Order at 79. Claimant's counsel has not established that the administrative law judge abused her discretion by disallowing half the allowable time expended by claimant's counsel after settlement of the claims when the only remaining issue concerned the attorney's fee. *Tahara*, 511 F.3d 950, 41 BRBS 53(CRT). Therefore, we affirm the administrative law judge's reduction in the requested fee.[16]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[16] Claimant's counsel's contention that the disallowance amounted to a double reduction is meritless. The administrative law judge noted that, in order to prevent a double reduction, she only reduced by half the hours she had previously allowed after addressing the line item objections by SEII and Fluor. Order at 80 n.76.