

JOSEPH PETITT)
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 Claimant-Petitioner)
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 v.)
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 SAUSE BROTHERS) DATE ISSUED: 08/08/2012
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 and)
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 SEABRIGHT INSURANCE COMPANY)
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 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Attorney Fee Order of Richard M. Clark, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order (2008-LHC-00942) of Administrative Law Judge Richard M. Clark 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 may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant's counsel filed an attorney's fee petition with the administrative law judge for work performed before the Office of Administrative Law Judges in this case, seeking a total fee of \$30,211.60, representing 72.25 hours of attorney work at an hourly

rate of \$400 and 4.75 hours of legal assistant work at an hourly rate of \$150, plus costs of \$599.10. Employer filed objections to the fee petition. The administrative law judge reduced the requested hours and hourly rates for claimant's counsel to \$316 and for the legal assistant to \$110, and awarded counsel an attorney's fee, payable by employer, totaling \$9,209, plus \$599.10 in costs.

On appeal, claimant challenges the administrative law judge's hourly rate determinations.¹ Employer responds, urging affirmance of the administrative law judge's award of an attorney's fee. Claimant has filed a reply brief.

Claimant contends that the administrative law judge, in determining the market rate for counsel's services in this case, improperly rejected counsel's evidence in support of his requested hourly rate and incorrectly relied on the hourly rate determinations of other administrative law judges, as well as two unpublished Board decisions, in which those hourly rate calculations were affirmed. Claimant also avers that the administrative law judge, in adopting Judge Etchingham's hourly rate determination, improperly used workers' compensation insurance defense rates in his blended market rate. Moreover, claimant contends that it was arbitrary for the administrative law judge to place counsel only in the top 25 percent of all Oregon attorneys, and thus, to reduce his requested rate.

In this case, although the administrative law judge found that counsel did not establish that his documentation supported his requested hourly rate of \$400, he did not award a rate that is not supported by market data. Rather, in an extensive discussion, the administrative law judge found that the other administrative law judges, on whose decisions he relied, used the data as a framework for determining a market rate. Attorney Fee Order at 4-6. As the Ninth Circuit stated in *Christensen*, "Nor do we insist that in every fee award decision the [tribunal] must make new determinations of the relevant community and the reasonable hourly rate." *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 1055, 43 BRBS 6, 9(CRT) (9th Cir. 2009). Thus, the administrative law judge did not err in advertent to decisions of other administrative law judges. The administrative law judge evaluated recent fee awards to counsel by other administrative law judges in which they analyzed the same market data, and he

¹Claimant also argues, in the alternative, that if he were to prevail on his appeal of the merits in this case, BRB No. 11-0351, the Board would have to vacate the attorney's fee award and remand the case for further consideration. The Board's decision, affirming the administrative law judge's findings on the merits, renders claimant's alternative argument moot. *Petitt v. Sause Brothers*, BRB No. 11-0351 (Jan. 19, 2012)(unpub.).

determined that \$316 is an appropriate market rate.² See *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); see also *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT). Counsel's displeasure at the rate selected does not demonstrate error on the part of the administrative law judge.

In this regard, we reject counsel's contention that the administrative law judge erred in failing to base his hourly rate on those commanded by the top five percent of statewide litigation attorneys rather than on the upper quartile rate. 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. Based on his observation that "counsel has not demonstrated any exceptional performance" which led to the result in this case,³ as well as his assessment of counsel's performance at the trial level,⁴ the administrative law judge concluded that counsel's work does not warrant a fee based on a rate equivalent to the uppermost tier of attorneys. Order at 4. Claimant has not established an abuse of the administrative law judge's discretion in using the top quartile rates. See *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT). Moreover, as the administrative law judge is afforded discretion in determining factors relevant to a market rate analysis, we reject claimant's contention that the administrative law judge erred in selecting a rate that includes workers' compensation rates. 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.2d 657, 42 BRBS 25(CRT) (6th Cir. 2008). As the administrative law judge gave a valid explanation for his rejection of the hourly rate requested, we decline to disturb this finding. See generally *Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011); *McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011).

²In support of his requested rate, counsel submitted his own affidavit; the 2008 Morones Survey of commercial litigation rates in the Portland area; affidavits from William B. Crow, Phil Goldsmith and David Markowitz; the March 2008 State Bar Litigation Section Fee Survey; data from a portion of the 2009 *Small Firm Economic Survey*; data from the Oregon State Bar 2007 Economic Survey; an email from Jim Jacobsen; the declaration of Daniel Skerritt; and excerpts from Mr. Skerritt's deposition.

³The administrative law judge also observed that this case did not involve the sort of skills detailed by Judge Berlin which merit higher hourly rates, such as managing teams of associates or developing a complex litigation strategy.

⁴The administrative law judge found that counsel's performance at the trial level did not meet his expectations for an attorney in the top five percent of the profession.

Claimant next contends that the administrative law judge had no basis to reject his request of an hourly rate of \$150 for work performed by counsel's legal assistant. In particular, claimant argues that the administrative law judge erred by rejecting the only evidence which shows the appropriate hourly rate for legal assistant work, i.e., the affidavit of Mr. Goldsmith, and then by arbitrarily picking an hourly rate which is not supported by any evidence. In this case, the administrative law judge, citing Judge Etchingham's rationale, rejected Mr. Goldsmith's opinion that an hourly rate of \$150 should apply, as it is based on the Morones Survey. The administrative law judge found, based on the factors in Section 702.132(a) and his knowledge of longshore practice, that since counsel presented no new evidence to support a higher rate, that the hourly rate of \$110 for legal assistant services adopted by Judge Etchingham is appropriate in this case. We affirm this determination as the administrative law judge adequately addressed the relevant factors and counsel has not shown that the administrative law judge abused his discretion. Because claimant has not established that the fee award of \$9,029 based on hourly rates of \$316 for attorney work and \$110 for legal assistant services is arbitrary, capricious, not in accordance with law or based on an abuse of the administrative law judge's discretion, we affirm the award.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge