BRB No. 13-0199

RAYMOND LEFFARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EAGLE MARINE SERVICES	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
LOUIS DREYFUS CORPORATION	)	DATE ISSUED: Jan. 17, 2014
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor	)	DECISION and ORDER

Appeal of the Order Concerning Attorney's Fees and the Order Denying Petition for Reconsideration of Order Concerning Attorney's Fees of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Daniel P. Thompson (Thompson & Delay), Seattle, Washington, for claimant.

Raymond H. Warns, Jr. (Holmes, Weddle & Barcott), Seattle, Washington, for Eagle Marine Services.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Order Concerning Attorney's Fees and the Order Denying Petition for Reconsideration of Order Concerning Attorney's Fees (2010-LHC-00037; 00038; 00039) of Administrative Law Judge Russell D. Pulver 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 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant brought claims against two employers, Eagle Marine Services (EMS) and Louis Dreyfus Corporation (Dreyfus), collectively, employers, for injuries to his left bicep, left hand, and right shoulder. The parties reached a settlement regarding these claims, which the administrative law judge approved in November 2011. The settlement did not address attorney's fees. On December 8, 2011, claimant's counsel submitted an application for attorney's fees and costs, requesting $52,156.36 for work done before the Office of Administrative Law Judges, representing 160.9 hours of attorney services at an hourly rate of $300 ($48,270) and $3,886.36 in costs. EMS and Dreyfus, in separate briefs, filed objections and claimant replied to the objections, seeking an additional $7,905.60 in fees and costs. EMS responded to claimant's reply.

With respect to counsel's hourly rate, the administrative law judge found the relevant market is Seattle/Tacoma. Based on relevant evidence counsel submitted, the administrative law judge awarded an hourly rate of $250. Finding that some of claimant's time entries were duplicative, excessive, or clerical, the administrative law judge reduced the number of hours to 157.3. Accordingly, the administrative law judge awarded counsel a fee of $39,325, representing 157.3 hours of attorney services at an hourly rate of $250, and $3,886.36 in costs. The administrative law judge apportioned the fee between the two employers: 75 percent to be paid by EMS and 25 percent to be paid by Dreyfus, pursuant to the ratio of liability set forth in the settlement. Claimant filed a motion for reconsideration, which the administrative law judge summarily denied.

On appeal, claimant challenges the administrative law judge's hourly rate determination and reduction in the number of hours.[1] EMS responds, urging affirmance. Claimant filed a reply brief.

[1]In his appeal, counsel asks that the Board issue an advisory opinion that: (1) addresses what areas of law outside of Longshore are analogous to Longshore work for purposes of determining an attorney's market rate; (2) establishes evidentiary presumptions and shifting burdens of proof based on these analogous areas of law; (3)

Claimant first contends the administrative law judge erred in awarding a fee based on a reduced hourly rate of $250. Claimant argues that the administrative law judge failed to explain why the evidence submitted does not support the requested hourly rate of $300. The United States Supreme Court has held that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see also Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that a "reasonable" hourly rate must reflect the rate: (1) that prevails in the "community" (2) for "similar" services (3) by an attorney of "reasonably comparable skill, experience, and reputation." *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 1055, 43 BRBS 6, 8-9(CRT) (9th Cir. 2009); *see also Christensen v. 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). The burden falls on the fee applicant to produce satisfactory evidence of his requested hourly rate. *Blum*, 465 U.S. at 896 n.11; *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). The administrative law judge is afforded considerable discretion in determining factors relevant in a given case. *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.3d 657 (6th Cir. 2008).

Contrary to claimant's assertion, the administrative law judge explained that much of the evidence counsel relied upon did not support the requested hourly rate because it did not pertain to similar services in the Seattle/Tacoma community.[2] As the basis for

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establishes the relevancy of contingent fee recoveries in analogous law practices; and, (4) gives significant weight to the amount of benefits obtained and the efforts of claimant's counsel to resolve the case in determining counsel's fees. We reject claimant's request for an advisory opinion as it is outside the Board's scope of review. *See generally Sample v. Johnson*, 771 F.2d 1335, 18 BRBS 1(CRT) (9th Cir. 1985); *Andrews v. Petroleum Helicopters, Inc.*, 15 BRBS 160 (1982).

[2]For example, the administrative law judge found that claimant's submission of settlement awards from previous maritime litigation "to be of little assistance in establishing a reasonable market rate" because they were lump sum amounts that gave no indication of the amount of time spent such that an hourly rate could be ascertained. Order at 4. The administrative law judge also found that claimant's submission of evidence regarding hourly rates outside the Washington State metropolitan area was "of limited relevance" in establishing the market rate for Seattle/Tacoma. *Id.*

counsel's requested rate was not limited to prevailing rates for similar services in the relevant community, the administrative law judge was not bound to award counsel's request for a $300 hourly rate. *See, e.g., Christensen,* 43 BRBS 145. Further, as the $250 hourly rate awarded falls within the range of rates established by the evidence the administrative law judge deemed relevant,[3] counsel has failed to establish that the administrative law judge abused his discretion in awarding this hourly rate. *See generally Fox v. Vice,* 131 S.Ct. 2205, 2216 (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 determination.

Counsel next asserts the administrative law judge erred in failing to address additional evidence of his market rate that he submitted with his motion for reconsideration. The administrative law judge stated that counsel failed to submit any additional *relevant* evidence supporting reconsideration of the hourly rate awarded. Upon review, much of the evidence, though from different sources, supports a fee within the same range of rates as the evidence counsel previously submitted. Further, 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,* 131 S. Ct. at 2216. "[D]etermination of fees 'should not result in a second major litigation.'" *Id.*; *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983). Thus, we reject claimant's contention that the administrative law judge erred by not fully discussing the evidence submitted on reconsideration. *Fox,* 131 S.Ct. 2205.

Counsel also alleges the administrative law judge erred in reducing the time allowed for preparing claimant's pretrial statement and in reducing the time requested for replying to employers' objections to his fee petition. Counsel asserts the time should not have been reduced because he believed his work on claimant's pretrial statement was necessary when it was performed and that a single reply memorandum is not a "second major litigation." We reject counsel's assertions of error. The administrative law judge may, within his discretionary authority, disallow a fee for hours found to be duplicative, excessive, or unnecessary, and is afforded considerable deference in determining what hours are "excessive, redundant, or otherwise unnecessary. *See Tahara v. Matson Terminals, Inc.,* 511 F.3d 950, 956, 41 BRBS 53, 57(CRT) (9th Cir. 2007); 20 C.F.R.

[3]The administrative law judge found the following evidence submitted by counsel to be relevant to establishing his market rate: three previous ERISA cases in which counsel was awarded $300 per hour; two fee awards under the Act from 2007 and 2008, awarding counsel $225 per hour; the declaration of Richard Spoonmore, stating that $375 per hour is an appropriate ERISA hourly rate for someone with counsel's experience; and the declaration of Matthew Sweeting, a longshore attorney, stating that the relevant rate for Seattle/Tacoma is $450 per hour.

§702.132(a). Given the administrative law judge's superior understanding of the underlying litigation, he is in the best position to make this determination. *Id*. Thus, the administrative law judge rationally found 6.6 hours of work on claimant's pretrial statement to be duplicative because counsel indicated on January 21, 2011, that claimant's pretrial statement was nearly finished, yet he billed an additional 8.8 hours after this date for work on this document, stating that he was "Begin[ning] preparation of claimant's pre-trial statement." *See Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); Order at 7. Similarly, although counsel is entitled to reply to employer's objections, he must exercise discretion in doing so. *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). Thus, the administrative law judge rationally found a request for 12.2 hours spent on a reply brief to be excessive where the amount of time exceeded the number of hours reasonably spent preparing for the hearing. *See Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009); Order at 9. As claimant has failed to demonstrate an abuse of the administrative law judge's discretion, we affirm the administrative law judge's reduction of these hours. We therefore affirm the administrative law judge's award of a fee for 157.3 hours.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with my colleagues that the administrative law judge acted within his discretion in discounting some of the evidence counsel submitted to support his claim to a market hourly rate of $300. Counsel has not established error in the finding that such evidence was not for comparable work in the relevant labor market. *See* Order at 4.

However, the administrative law judge did not reject all of counsel's evidence. He found the following evidence submitted by counsel to be relevant to establishing his market rate: three previous ERISA cases in which counsel was awarded $300 per hour; two fee awards under the Act from 2007 and 2008, awarding counsel $225 per hour; the declaration of Richard Spoonmore, stating that $375 per hour is an appropriate ERISA hourly rate for someone with counsel's experience; and the declaration of Matthew Sweeting, a longshore attorney, stating that the relevant rate for Seattle/Tacoma is $450 per hour. *See* Order at 4-5. From this evidence, without further explanation, the administrative law judge concluded that counsel is entitled to a market hourly rate of $250.

The Administrative Procedure Act requires that the administrative law judge state his "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). In *Perdue v. Kenny A*, 559 U.S. 542, 558 (2010), the Supreme Court stated that, "It is essential that the judge provide a reasonably specific explanation for all aspects of a fee determination" so that judicial review of the determination is possible. *Cf. Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 575 n.13 (4th Cir. 2013) ("because we 'can discern what the ALJ did and why he did it, the duty of explanation is satisfied' ") (internal citations omitted). In this case, it is not readily apparent how the administrative law judge arrived at the $250 rate. Thus, I would remand the case for the administrative law judge to explain how he arrived at this figure in view of the evidence he found relevant.

In addition, I would instruct the administrative law judge to discuss whether it was appropriate for counsel to submit additional market rate evidence with his motion for reconsideration. The Ninth Circuit has stated that "if the reasons given by the [ALJ] would not have been anticipated by a reasonable fee applicant, it may be appropriate for the [ALJ] to allow an applicant to cure its failure to carry the burden." *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 1055, 43 BRBS 6, 9(CRT) (9th Cir. 2009). Thus, I would remand the case for the administrative law judge to determine the propriety of counsel's additional submissions, and, if appropriate, to address the evidence submitted in more detail.

For these reasons, I dissent from the majority's opinion. I concur in their decision to affirm the administrative law judge's disallowance of hours found to be excessive.

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JUDITH S. BOGGS
Administrative Appeals Judge