

BRB Nos. 13-0341  
and 13-0341A

BRIAN CONNER )

Claimant-Petitioner )

Cross-Respondent )

v. )

FRASER BOILER AND SHIP REPAIR )

Employer-Respondent )

Cross-Petitioner )

SEALIFT, INCORPORATED )

Self-Insured )

Employer-Respondent )

Cross-Petitioner )

PERENNIAL CONTRACTORS )

DATE ISSUED: Mar. 14, 2014

and )

COMMERCE AND INDUSTRY )

INSURANCE COMPANY )

Employer/Carrier- )

Respondents )

Cross-Petitioners )

GUAM INDUSTRIAL SERVICES, )

d/b/a GUAM SHIPYARD )

and )

SIGNAL MUTUAL INDEMNITY )

ASSOCIATION )

Employer/Carrier- )

Respondents )  
Cross-Petitioners ) DECISION and ORDER

Appeals of the Attorney Award Order of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Robert E. Babcock and James R. Babcock (Holmes, Weddle & Barcott, P.C.), Lake Oswego, Oregon, for employers and carriers.

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

Claimant appeals and employers cross-appeal the Attorney Award Order (2008-LDA-00034; 2009-LHC-01751; 2010-LHC-02011) 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.* (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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant first suffered a lower back injury on April 16, 2006, while working as a boiler technician on a ship in Gdansk, Poland. He suffered a second back injury on October 8, 2006, in Guam.<sup>1</sup> Claimant's last employer before he had low back surgery was Guam Shipyard. As a result of his injury and surgery, claimant could not return to his usual job as a boilermaker. He filed a claim under the Act in 2006, which went to a hearing on March 30, 2010, without Guam Shipyard as a party to the case. Following the hearing, Perennial Contractors filed a motion to join Guam Shipyard to the proceedings as a potentially responsible general contractor. The motion was granted on September 13, 2010. The parties subsequently settled the claim for \$150,000 pursuant to a Section 8(i), 33 U.S.C. §908(i), settlement. The parties did not settle the attorney fee issue.

On February 2, 2012, claimant's counsel filed with the administrative law judge a petition for an attorney's fee and costs of \$128,135, representing 288.5 hours of attorney

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<sup>1</sup> At all relevant times, claimant was employed by either Fraser Boiler or Perennial Contractors. Sealift and Guam Shipyard were potentially responsible general contractors for the injuries in Poland and Guam, respectively, but only in the event that Fraser Boiler was found to be liable as claimant's employer.

time at \$400 per hour, 32.25 hours of paralegal time at \$150 per hour, and \$7,897.50 in costs. Employers filed objections, and claimant replied and requested a \$2,000 fee for an additional five hours of attorney services for preparing the reply.

In her fee award, the administrative law judge found that claimant's counsel is entitled to a fee that accounts for the delay in payment of the fee, as more than five years had elapsed between the time counsel began providing services in 2007 and the issuance of her order in 2013. Thus, to account for the delay, the administrative law judge awarded counsel an hourly rate of \$340, the amount she found to be a reasonable market rate for 2011, for all attorney services, and an hourly rate of \$112.24 for all paralegal services. The administrative law judge reduced the time allowed for phone calls made by the attorney and paralegal, denied the time spent e-mailing a law school professor regarding an ethical question, reduced the time for sending e-mails, and awarded one hour of attorney services at the paralegal rate, as the paralegal should have performed that work. The administrative law judge thus awarded claimant's counsel a total of \$104,350.36 in fees and costs.<sup>2</sup> Claimant appeals and employers jointly cross-appeal the fee award.

On appeal, claimant contends the administrative law judge erred in: reducing the requested hourly rates; reducing and disallowing time entries; reallocating services from the attorney to the paralegal; and using 2011 and 2010 rates to compensate for delays in payment through 2013. Employers urge the Board to reject counsel's contentions. Claimant filed a reply brief. On cross-appeal, employers argue that the administrative law judge erred in enhancing counsel's fee for delays that counsel could have avoided and in failing to apply a 50 percent reduction to the fee given claimant's limited success in this case. Claimant filed a response brief urging rejection of employers' appeal.

Claimant initially contends the administrative law judge erred in failing to award the requested hourly rate of \$400 for attorney services. 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;

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<sup>2</sup> The fee was apportioned among the four employers. *See Order* at 18-19.

*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).

Claimant contends the administrative law judge erred in failing to find that the 2012 Oregon State Bar Economic Survey supports the requested \$400 hourly rate. Although counsel correctly notes the 2012 Oregon Survey stated that the top 25 percent of Portland attorneys with 30 years of experience received \$400 per hour,<sup>3</sup> the administrative law judge rationally discounted this portion of the Survey's results because it was not clear which practice areas were represented. Order at 4, 11; *see generally Christensen v. Stevedoring Services of America*, 43 BRBS 145 (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). Consequently, we reject claimant's assertion that the administrative law judge erred in failing to find the results of the 2012 Oregon State Bar Economic Survey supportive of the requested \$400 hourly rate for attorney services.

Similarly, we reject counsel's assertion that the administrative law judge erred in failing to find the Morones Survey supportive of counsel's requested hourly rates. As the rates reflected in the Morones Survey represented those for commercial litigation attorneys, the administrative law judge rationally found that the Morones Survey does not provide a basis for counsel's requested hourly rate. *See Christensen*, 43 BRBS at 146 ("The Board has considered the parties' documentation and is persuaded that rates paid to commercial/business litigators in Portland do not provide an appropriate basis for setting a market rate."). As the basis for counsel's requested rates was not limited to prevailing rates for similar services in the relevant community, the administrative law judge was not bound to accept counsel's claim to a \$400 hourly rate.<sup>4</sup> *Id.* Moreover, as the \$340 hourly

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<sup>3</sup> Neither party challenges the administrative law judge's findings that: 1) Portland is the relevant community; 2) counsel has over 30 years' experience; and 3) counsel is in the top 25th percentile of practitioners.

<sup>4</sup> We reject counsel's assertion that he should have been given notice of defects in his evidence and an opportunity to cure them before the administrative law judge rendered her decision. The Ninth Circuit stated that a fee applicant may be granted a chance to cure his failure to carry the burden of establishing his market rate if the reasons given by the court for rejecting the requested rate could not have been anticipated by the applicant. *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT); *Van Skike*, 557 F.3d at 1047, 43 BRBS at 14(CRT). Contrary to counsel's assertions before the Board, however, counsel submitted to the administrative law judge much the same evidence that had been rejected in prior cases. 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

rate awarded is within the range of rates established by the evidence that counsel submitted and that the administrative law judge found relevant, counsel has failed to establish that the administrative law judge abused her discretion in finding that \$340 per hour represents a reasonable 2011 market rate.<sup>5</sup> 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). Therefore, we affirm that finding.

On cross-appeal, employers assert that the administrative law judge erred in awarding counsel an enhanced rate because claimant's counsel is "the primary cause of the delay." We reject this contention. There is no evidence that claimant's counsel engaged in purposeful delay.<sup>6</sup> See generally *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1988). Further, contrary to employers' implication, the purpose of augmentation is not punitive in nature, but merely reflects economic realities, as fees counsel is paid years later for work done in 2007 at a 2007 hourly rate do not account for inflation. See, e.g., *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). In light of the Supreme Court's decisions in *Missouri v. Jenkins*, 491 U.S. 274 (1989), and *Dague*, 505 U.S. 557, it is clear that consideration of enhancement for delay is appropriate for fee awards under Section 28 of the Act, 33 U.S.C. §928. *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245

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to do rough justice, not to achieve auditing perfection." *Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011). "[D]etermination of fees 'should not result in a second major litigation.'" *Id.*; *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Therefore, as counsel was given 50 days following the administrative law judge's decision approving the stipulations to file a fee petition, he was provided ample opportunity to file an adequately-supported fee petition for which he bears the burden of proof. The administrative law judge did not abuse her discretion in addressing the fee petition as submitted.

<sup>5</sup> The administrative law judge found the hourly rates established by the Oregon State Bar Economic Survey results for attorneys practicing in plaintiff's civil litigation, plaintiff's personal injury, workers' compensation, and general litigation to be relevant. Order at 11. The survey showed that the top 75 percent of attorneys working in these fields earned between \$268 and \$350 per hour.

<sup>6</sup> The administrative law judge specifically noted that it was unfortunate that Guam Shipyard was not brought into the case earlier since its identity was known, but she did not know why it had not been joined earlier, because there was no hearing after Guam Shipyard's joinder. Order at 16.

(1998); *Nelson*, 29 BRBS 90. Accordingly, when the question of delay is timely raised, the body awarding the fee must consider this factor. *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997). The fact-finder may adjust the fee based on historical rates to reflect its present value, apply current market rates, or employ any other reasonable means to compensate claimant's counsel for the delay. *Id.*

In addressing the delay in payment, the administrative law judge accurately noted that most of the services were rendered between 2008 and 2011.<sup>7</sup> The administrative law judge determined that the \$340 rate should be applied to all the services provided to account for the delay in payment. Order at 14; see *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT) (Ninth Circuit affirmed the Board's determination that a two-year delay in the payment of an attorney's fee is not long enough to merit a fee enhancement); *Parks*, 32 BRBS 90 (Board held that a six-year delay in the payment of an attorney's fee merits a fee enhancement). As the administrative law judge issued her fee award in March 2013, over five years had passed between the time counsel began rendering services and when he would be paid for them. Thus, on the facts of this case the administrative law judge properly found an augmentation of the fee to account for the delay in payment is warranted, and we affirm the finding that counsel is entitled to an augmented fee. See *Anderson*, 91 F.3d at 1323, 30 BRBS at 68-69(CRT); *Nelson*, 29 BRBS at 97-98; see also *Gates v. Deukmejian*, 977 F.2d 1300 (9th Cir. 1992) (holding that the district court did not err in awarding plaintiff's counsel a fee based on current rather than historical rates for three-year delay in civil rights case).

Claimant asserts that using a market rate from 2011 does not adequately compensate counsel for the delay in this case because the administrative law judge did not issue her fee award until March 2013. The administrative law judge accurately cited the relevant case law, specifically noting that there may be some adjustment for delays that deprive successful litigants of the market rates, "but the method of adjustment is somewhat discretionary; it does not necessarily call for payment of the lawyer's current hourly rate." Order at 13. Here, after consideration of the factors at 20 C.F.R. §702.132, as well as the relevant case law, the administrative law judge based her hourly rate determination on the evidence submitted, additionally noting that the \$340 hourly rate awarded is in line with awards to claimant's counsel in other post-*Christensen* decisions.<sup>8</sup> Order at 13. Although claimant accurately notes some evidence of inflation between

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<sup>7</sup> Counsel billed a total of 325.75 hours, but only 2.25 hours of services were performed in 2007 and only nine hours of services were performed in 2012.

<sup>8</sup> Specifically, the administrative law judge observed that those decisions reflect hourly rates of \$316 for 2008 and 2009, and \$340 for 2010.

2011 and 2012,<sup>9</sup> claimant nonetheless has not established that the award of a 2011 hourly rate of \$340 for his work in 2012 is an abuse of the administrative law judge's discretion. Consequently, we affirm the administrative law judge's award of \$340 per hour for all attorney services rendered in this case.

Claimant additionally contends the administrative law judge erred in reducing the requested paralegal rates from \$150 to \$112.24 per hour because the affidavit of Mr. Goldsmith supports an hourly rate of \$150 for paralegals, and because commercial litigation paralegals and longshore paralegals have the same skill-set. We reject counsel's assertion of error. Although counsel requested \$150 per hour for paralegal time and the affidavit of Mr. Goldsmith states this rate is consistent with that prevailing in the relevant community, the administrative law judge rationally rejected Mr. Goldsmith's affidavit because he practices in the field of commercial litigation, which she found was not comparable to longshore work. Counsel did not submit any evidence demonstrating that paralegal work is comparable in the two fields. Thus, the administrative law judge found that counsel failed to adequately support the requested paralegal hourly rate. Accordingly, the administrative law judge rationally relied on her own prior fee award analysis on this issue and awarded an hourly rate of \$112.24. We thus affirm the administrative law judge's award at an hourly rate of \$112.24 for the paralegal work performed in this case.<sup>10</sup> *See Van Skike*, 557 F.3d at 1047, 43 BRBS at 14(CRT).

Claimant next asserts the administrative law judge erred in reducing the number of hours requested for certain tasks because employers did not object to any specific time entries. We disagree. Counsel is entitled to a reasonable attorney's fee and has the burden of establishing that the requested fee is reasonable. *See Blum*, 465 U.S. at 896 n.11; *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT); *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT). Whether an employer objects is irrelevant to counsel's carrying his burden, as the administrative law judge must determine the reasonableness and necessity of the services rendered. *See* 20 C.F.R. §702.132(a). Therefore, we affirm the administrative law judge's reduction in hours worked as it is rational and based on a proper exercise of her discretion.

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<sup>9</sup> In support, counsel points out that the national average weekly wage increased by 3.05 percent from 2011 to 2012.

<sup>10</sup> To the extent claimant argues on appeal that a 2010 paralegal market rate does not adequately compensate him for the delay in payment through 2013, we reject the assertion. Counsel argued before the administrative law judge that paralegal rates were the same in 2012 as they were in 2009. As counsel did not raise the issue of enhancement for delay regarding the paralegal rate before the administrative law judge, the issue is not now properly before the Board. *See Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000); *Allen v. Blutworth Bond Shipyard*, 31 BRBS 95 (1997).

Claimant additionally challenges the administrative law judge's disallowance of attorney time for activity she characterized and allowed as paralegal work. The administrative law judge addressed work for preparing letters: regarding the deposition schedule; the deposition date; and to other attorneys accompanying recent medical records, as being paralegal, not attorney, work. As these letters are routine correspondence and do not require legal judgment or advocacy on claimant's behalf, counsel has not met his burden of showing that the administrative law judge abused her discretion in characterizing these services, totaling one hour, as paralegal services. *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994). We affirm the reallocation of this time from attorney to paralegal work as it is rational and within the administrative law judge's discretion.

Counsel lastly asserts the administrative law judge erred in disallowing use of the quarter-hour billing method for phone calls and e-mails and the total disallowance of a 45-minute charge for writing an e-mail to an ethics professor. The administrative law judge may, within her discretionary authority, disallow a fee for hours found to be duplicative, excessive, or unnecessary. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); 20 C.F.R. §702.132(a). An administrative law judge is afforded "considerable deference" in determining what hours are "excessive, redundant, or otherwise unnecessary." *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT). Given the administrative law judge's superior understanding of the underlying litigation, she is in the best position to make this determination. *Id.*; *see also Fox*, 131 S.Ct. at 2216. Here, the administrative law judge rationally found that numerous telephone calls and e-mails "realistically could not have taken 15 minutes." Order at 14. Because she recognized that some of the phone calls and e-mails may have taken the full time claimed, she reduced the total time claimed by counsel for his phone calls by one-third, and his e-mails by one-half, and she reduced the total paralegal time claimed for phone calls and e-mails by one-half, so as not to overcompensate counsel for minor tasks. Similarly, she explained that the 45 minutes sought for an e-mail, regarding the "ethical" issue of resolving attorney fees before settling the case, was unnecessary as counsel had appeared before her in numerous cases, had settled "a fair number of them," and had claimed his experience warranted a higher hourly rate. The administrative law judge found that, with the experience counsel has, this was not an issue he should have had to research, and even if it was, it was of benefit to his overall practice and should have been considered part of his overhead. Order at 15. As the administrative law judge rationally explained her reasons for disallowing this time and counsel has not demonstrated an abuse of discretion, we reject claimant's assertions of error. *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); *see generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990). Consequently, we affirm the administrative law judge's reduction in hours and total award of 297.25 hours for services rendered by counsel and his paralegal.

Finally, employers argue on cross-appeal that the administrative law judge erred in failing to apply a 50 percent reduction to any fees awarded in light of claimant's counsel's disproportionately high fee request compared to his limited success,<sup>11</sup> pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983).<sup>12</sup> The administrative law judge has great discretion in compensating counsel for work performed before her. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988). This well-established rule is based on the fact that the administrative law judge is in the best position to "observe firsthand the factors affecting [the] analysis of counsel's fee award." *Barbera*, 245 F.3d at 289, 35 BRBS at 32(CRT).

In addressing employers' argument for an overall fee reduction, the administrative law judge acknowledged that counsel's fee award was high when compared to the recovery he obtained for his client. However, the administrative law judge found that the case was not a routine Longshore case because of the question of the identity of the employer liable for his benefits, it involved a lengthy litigation, and after one full hearing on the merits was completed, the parties determined that another employer had to be brought in, and the case had to start from the beginning.<sup>13</sup> Thus, the administrative law judge found that the work was reasonable and necessary and no general reduction was warranted in this case. Order at 16. As the administrative law judge is in the best position to decide what constitutes appropriate compensation for services rendered on a claimant's behalf, and she explained her basis in finding the fees, though high, to be warranted in this case, we reject employers' assertion of error, and we affirm the administrative law judge's fee award. *Barbera*, 245 F.3d at 289, 35 BRBS at 32(CRT).

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<sup>11</sup> Employers argued before the administrative law judge that claimant succeeded in acquiring only 38 percent of the amount to which he contended he was entitled. Employers aver on cross-appeal that counsel's fee award of \$104,350.36 is grossly disproportionate to the \$150,000 that counsel acquired for his client against a claim he alleged to be valued at \$393,705.05.

<sup>12</sup> The Supreme Court held in *Hensley* that an award under a fee-shifting scheme should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *Hensley*, 461 U.S. at 434; *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 997 (1988). If the plaintiff achieves only partial or limited success, the fee awarded should be an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-36.

<sup>13</sup> Settlement negotiations took approximately one year.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge