BRB No. 12-0512

ROSS K. FUROYAMA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HORIZON LINES, LLC	)	DATE ISSUED: 05/29/2013
	)	
	)	
and	)	
	)	
SIGNAL MUTAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fee and the Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Steven M. Birnbaum, San Rafael, California, for claimant.

James P. Aleccia (Aleccia & Mitani), Long Beach, California, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney's Fee and the Order Denying Motion for Reconsideration (2010-LHC-01076) of Administrative Law Judge Lee J. Romero, Jr., 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, e.g., Roach v. New York Protective Covering Co.,* 16 BRBS 114 (1984).

Claimant filed a claim under the Act seeking temporary total disability and medical benefits for cumulative trauma injuries he sustained to both knees in the course of his employment as a container yard operator with employer. In his Decision and Order, the administrative law judge found a causal relationship between claimant's knee condition and his employment with employer and awarded claimant medical benefits for that condition. 33 U.S.C. §907(a). The administrative law judge, however, found that claimant is not entitled to temporary total disability benefits. 33 U.S.C. §908(b).

Claimant's counsel subsequently filed a petition with the administrative law judge seeking a fee of $68,891.97, representing 123.3 hours of attorney services at an hourly rate of $475, 30.7 hours of paralegal services at an hourly rate of $150, and $5,719.47 in costs. Employer filed objections to the fee petition, and claimant filed a response to employer's objections.

In his Supplemental Decision and Order Awarding Attorney's Fee (Supplemental Decision and Order), the administrative law judge reduced the $475 hourly rate sought for attorney services to $375. He further addressed employer's objections to specific entries and disallowed 9.8 hours of attorney services and 6.3 hours of paralegal services as unnecessary, excessive or clerical.[1] Citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the administrative law judge further reduced the remaining 113.5 hours of attorney time and 24.4 hours of paralegal time by 50 percent to reflect the degree of success achieved by claimant. The administrative law judge accordingly awarded counsel a fee of $28,805.97, representing 56.75 hours of attorney services at a rate of $375 per hour, 12.2 hours of paralegal services at a rate of $150 per hour, and $5,694.72 in costs. The administrative law judge denied claimant's motion for reconsideration of his attorney's fee award.

On appeal, claimant challenges the administrative law judge's hourly rate determination for the attorney services performed in this case and the 50 percent across-the-board reduction in the number of compensable hours. Employer responds, urging affirmance of the fee award. Claimant has filed a reply brief.

[1]On appeal, claimant does not challenge the administrative law judge's disallowance of these hours. Moreover, claimant agreed with employer that $24.75 should be deducted from the amount he requested for costs, and the administrative law judge accordingly reduced the award of costs by that amount.

We first address claimant's contention that the administrative law judge erred in reducing counsel's requested hourly rate for attorney services from $475 to $375. We agree with claimant that the administrative law judge's hourly rate determination cannot be affirmed. The United States 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, 130 S.Ct. 1662 (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.,* 130 S.Ct. at 1672. 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).

In this case, claimant's counsel submitted extensive evidence in support of his requested hourly rate of $475.[2] In responding to counsel's fee petition, employer set forth specific objections to counsel's hourly rate evidence and attached four administrative law judge decisions awarding fees to attorneys located in San Diego, Seattle, Florida, and Portland, Oregon. In his Supplemental Decision and Order, the administrative law judge enumerated the evidence counsel submitted as well as employer's specific objections to that evidence. *See* Supplemental Decision and Order at 3-4. The administrative law judge, however, made no findings regarding this evidence.[3]

[2]Counsel submitted a ten-page memorandum, an itemization of counsel's services and the following documents: counsel's curriculum vitae and state bar certification of his workers' compensation law specialty; Helder Associates *Attorney Billing Rate Survey-National Edition, 2006*; *Laffey* Matrix and list of Ninth Circuit *Laffey* Matrix decisions; table of California fee awards in federal fee-shifting cases; Metropolitan Area Report for San Francisco-Oakland-Fremont from the Altman Weil *Survey of Law Firm Economics, 2008 Edition*; declarations of attorneys Eric Dupree and Edward Bull; and tabulations of California U.S. District Court decisions awarding attorney's fees (Dupree Matrix), copies of those decisions, and biographical information about the attorneys in those cases.

[3]In the Supplemental Decision and Order at 4 and the Order Denying Reconsideration at 3, the administrative law judge cited the Board's decision in *McDonald v. Aecom Technology Corp.,* 45 BRBS 45 (2011), in which the Board affirmed an administrative law judge's award of an hourly rate of $375 to claimant's counsel. As claimant correctly notes, however, claimant's counsel did not appeal the administrative law judge's reduction of his hourly rate in *McDonald;* rather, the Board affirmed the rate

Although the administrative law judge noted the holdings of the Supreme Court in *Blum* and of the United States Court of Appeals for the Ninth Circuit in *Christensen*, *see id.* at 5, he did not identify the relevant community in this case nor did he analyze the parties' evidence regarding the prevailing market rates in the relevant community. Instead, the administrative law judge stated that, in determining the applicable hourly rate to be awarded in this case, he considered the difficulty of the legal issues, the quality of the work performed, the benefits obtained for claimant, and counsel's understanding of the factual, legal and procedural issues involved in the claim.[4] *See id.* at 3. The administrative law judge provided only a summary explanation of his hourly rate determination, stating:

> Having considered the surveys presented by Counsel and the objections made by Employer/Carrier, I find a $475.00 hourly rate charged for work performed by Counsel to be excessive. Counsel has over 30 years of experience. However, the legal issues involved were neither difficult nor novel. Accordingly, I find a $375.00 hourly rate for work performed by Counsel is reasonably commensurate with his experience, the necessary work performed and the benefits obtained on Claimant's behalf. Counsel's $375.00 hourly rate will be applied to the entirety of compensable fee petition entries.

Supplemental Decision and Order at 5.

For the reasons stated in *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT), and *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT), we vacate the hourly rate determination of the administrative law judge, and we remand the case for the administrative law judge to determine a reasonable hourly rate in the "relevant community" consistent with those decisions, taking into account the evidence and arguments offered by the parties. *See*

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against employer's contention on appeal that the administrative law judge should have reduced the rate still further.

[4]The factors considered by the administrative law judge in his hourly rate determination roughly correlate to those listed in the regulation governing attorney fee awards under the Act, 20 C.F.R. §702.132(a). As correctly argued by claimant, not all of the factors listed in Section 702.132(a) are properly considered under the reasonable hourly rate prong of the lodestar analysis. Instead, as discussed *infra*, some of the regulatory factors should be considered under the number of hours prong of the lodestar analysis and others are relevant to the determination of a reasonable fee in a case in which the claimant has attained only partial or limited success.

Christensen v. Stevedoring Services of America, Inc., 43 BRBS 145 (2009), *modified on recon.*, 44 BRBS 39 (2010), *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); *H.S. [Sherman] v. Dept. of Army/NAF*, 43 BRBS 41 (2009). Specifically, the administrative law judge must first identify the relevant community. *See Christensen*, 557 F.3d at 1053-55, 43 BRBS at 8-9(CRT). The administrative law judge then must consider whether claimant's counsel carried his initial burden to produce satisfactory evidence that the requested rate is in line with the prevailing market rates in the relevant community. *Blum*, 465 U.S. at 896 n.11; *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT); *Van Skike*, 557 F.3d at 1046, 43 BRBS at 14(CRT); *see also Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 980 (9th Cir. 2008)("affidavits of the plaintiffs' attorney[s] and other attorneys regarding prevailing fees in the community, and rate determinations in other cases. . . are satisfactory evidence of the prevailing market rate"). If the administrative law judge believes that claimant's counsel has failed to carry his burden, he must identify any deficiency he finds in counsel's evidence.[5] *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT). If the administrative law judge finds that claimant's counsel has met his initial burden, the administrative law judge must then consider whether employer has produced competent rebuttal evidence regarding prevailing market rates in the relevant community.[6] *See Camacho*, 523 F.3d at 980; *United Steelworkers of America v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990).

Furthermore, on remand, the administrative law judge must confine his hourly rate analysis to consideration of the appropriate factors. The absence of complex issues in the case is not relevant to a determination of counsel's hourly rate; it is relevant only to a determination of whether the number of hours spent by counsel is reasonable. *Kenny A.*, 130 S.Ct. at 1673; *Blum*, 465 U.S. at 898-99; *Van Skike*, 557 F.3d at 1048, 43 BRBS at 15(CRT); *Sherman*, 43 BRBS at 44. In addition, as the administrative law judge separately considered the amount of benefits obtained for claimant in his reduction in the number of hours in light of claimant's partial success, he should not consider this factor in determining counsel's hourly rate. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1115-16 (9th Cir. 2008)(the body awarding a fee should not double-count the same consideration to justify reducing the hourly rate and to also reduce the number of hours).

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[5]The hourly rates awarded in recent longshore cases in the relevant community may provide guidance when the fee applicant fails to produce relevant market evidence. *See Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT).

[6]In this regard, the administrative law judge should address claimant's contention that employer's evidence of administrative law judge fee awards in geographic areas other than the San Francisco area cannot be considered competent rebuttal evidence.

Claimant also contends that the administrative law judge misapplied *Hensley* in applying an across-the-board 50 percent reduction in the hours reasonably expended by counsel and his paralegal based on claimant's limited success. We disagree. The Supreme Court held in *Hensley* that a fee 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. 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 claimant achieves only partial or limited success, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-36. The courts have recognized the broad discretion of the adjudicator in assessing the amount of an attorney's fee pursuant to the principles espoused in *Hensley*. *See, e.g., Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT). Where the adjudicator has determined that the claimant has achieved only limited success, he may make an across-the-board reduction in claimant's counsel's fee. *See B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129, 134 (2009); *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91, 94 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 30-31 (1999); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186, 192-93 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 794, 33 BRBS 184, 186-87(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

In this case, the administrative law judge correctly noted that of the three primary issues litigated in this claim, claimant successfully established a causal relationship between his knee condition and his employment with employer and his entitlement to medical benefits but was unsuccessful in establishing entitlement to temporary total disability benefits. *See* Supplemental Decision and Order at 6-7. With respect to the first prong of the *Hensley* test, the administrative law judge properly found that the successful and unsuccessful claims were interrelated. *See id.* at 7. Proceeding to the second step of the *Hensley* analysis, the administrative law judge determined that claimant's success was limited relative to the scope of the litigation as a whole, and he therefore reduced the number of necessary attorney and paralegal hours by 50 percent. *See id.* at 7-8. The administrative law judge explained the 50 percent reduction as follows:

> This percent reduction is based upon my analysis of the weight of Claimant's success in establishing a compensable knee condition and medical benefits related to his knee condition, in comparison to his failure to establish entitlement to temporary total disability benefits related to his knee condition, and the limited recovery obtained.

Supplemental Decision and Order at 8-9.

In support of his request for reconsideration, claimant's counsel submitted to the administrative law judge evidence which attempted to separate the time spent on the unsuccessful temporary total disability issue from the time spent on the successful issues. Claimant asserted that a minimum of time was spent on the temporary total disability issue, and that the majority of evidence presented by both parties related to the issue of the causal relationship between claimant's knee condition and his employment with employer. In his Order Denying Reconsideration, the administrative law judge reaffirmed his finding that the three primary issues in the claim were interrelated and that the relief obtained by claimant was not proportional to the efforts expended by his counsel. *See* Order Denying Reconsideration at 4. The administrative law judge found that the exhibits submitted by claimant on reconsideration "do little to shed light on a different proportional reduction," *id.,* and noted that he was not required to make reductions based strictly on the amount of time spent on particular issues. *Id.* at 5. Noting claimant's high average weekly wage, the administrative law judge stated that had claimant been successful in establishing entitlement to temporary total disability benefits, the value of those benefits would have greatly exceeded the value of the medical benefits that were awarded to claimant. *Id.* at 4-5.

Contrary to claimant's arguments on appeal, the administrative law judge's application of the principles set forth in *Hensley* is legally sound. Under the second step of the *Hensley* analysis, "the most critical factor is the degree of success obtained," *Hensley,* 461 U.S. at 436, and the relevant inquiry is whether the relief obtained justified the hours reasonably expended on the litigation as a whole. *Id.* at 435-36 and n. 11. Consistent with *Hensley,* the administrative law judge in this case considered whether the success obtained by claimant was proportional to the efforts expended by counsel. Order Denying Reconsideration at 4. Having determined that the results obtained did not justify the hours reasonably expended by counsel on the litigation as a whole, the administrative law judge concluded that the lodestar fee must be reduced to account for claimant's limited success. *Id.; see Hensley,* 461 U.S. at 435-37, 440. Thus, contrary to claimant's contention, the administrative law judge provided a detailed explanation of his reduction of the award that comports with *Hensley's* requirement for a concise but clear explanation of the reasons for the fee award. *Hensley,* 461 U.S. at 437. The administrative law judge is in the best position to observe the factors affecting the fee determination and the Board is not free to substitute its judgment concerning the amount of an appropriate fee in light of claimant's degree of success. *Barbera*, 245 F.3d at 289-90, 35 BRBS at 32(CRT); *Horrigan,* 848 F.2d at 326, 21 BRBS at 82-83(CRT).

Moreover, we disagree with claimant that the administrative law judge impermissibly engaged in mere "claim counting" in violation of *Hensley*'s rejection of "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon." *Hensley,* 461 U.S. at 435 n.11. To the contrary, the

administrative law judge explicitly stated that he weighed the relative significance of the successful and unsuccessful issues, and viewed the medical benefits which claimant obtained to represent a less significant result. Order Denying Reconsideration at 5. Thus, as claimant has not established that the administrative law judge's reduction of the fee request is contrary to law or an abuse of discretion in view of claimant's success, we reject claimant's contentions of error in this regard.

Accordingly, we vacate the administrative law judge's hourly rate determination and remand the case for further consideration of a reasonable hourly rate consistent with this opinion. In all other respects, the Supplemental Decision and Order Awarding Attorney's Fee and the Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge