

BRB No. 11-0874

CLUREN ANTHONY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WASHINGTON UNITED TERMINALS)	DATE ISSUED: 09/19/2012
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order on Attorney's Fees and the Reconsideration of Attorney's Fee Order of R. Todd Bruininks, District Director, United States Department of Labor.

Matthew S. Sweeting, Tacoma, Washington, for claimant.

Raymond H. Warns, Jr. (Holmes, Weddle & Barcott), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order on Attorney's Fees and the Reconsideration of Attorney's Fee Order (Case No. 14-147666) of District Director R. Todd Bruininks 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

This is the second time this case has come before the Board. Following a settlement between the parties, claimant's counsel filed a fee petition with District Director Karen P. Staats for work performed before her office between March 22, 2007 and January 29, 2010. Counsel sought a fee of \$3,145, representing 7.4 hours at an hourly rate of \$425, and submitted evidence in support of his requested hourly rate. Employer filed objections to the fee sought by claimant's counsel, challenging the hourly rate, the relevant market community, and some of the time requested. District Director Staats first found that Tacoma, Washington, is the relevant community for which a market rate for counsel's services should be determined. Next, she determined that counsel was entitled to an hourly rate of \$220.¹ Based on employer's objections, District Director Staats disallowed .6 hour of the requested time and awarded a fee for 6.8 hours of work. Accordingly, she awarded counsel a total fee of \$1,496.

Claimant appealed this fee award to the Board. In its decision, the Board upheld District Director Staats's determination that Tacoma, not Seattle, Washington, is the relevant market community in this case. The Board, however, vacated District Director Staats's hourly rate determination and remanded the case for further consideration of the hourly rate issue. Specifically, the Board cited intervening case law regarding reliance on the workers' compensation rates in the Oregon State Bar 2007 Economic Survey (Oregon Bar Survey). *Christensen v. Stevedoring Services of America [Christensen I]*, 43 BRBS 145 (2009), *modified on recon. [Christensen II]*, 44 BRBS 39, *recon. denied [Christensen III]*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of*

¹In determining counsel's hourly rate, District Director Staats relied on an attorney's fee awarded by Administrative Law Judge Berlin to claimant's counsel in a different case, *Estate of V.P. [Poasa] v. A.P.M. Terminals*, 2008-LHC-00842-00847 (Aug. 18, 2009). In *Poasa*, the administrative law judge addressed the relevant law and determined that the same evidence submitted by counsel in this case did not meet his burden of establishing the market rate in the relevant community. Judge Berlin therefore used the workers' compensation rates from the Oregon State Bar 2007 Economic Survey to establish the prevailing market rate. The administrative law judge used a cost-of-living calculator from an undisclosed website to adjust the Portland, Oregon, rates to rates appropriate for Seattle, Washington.

District Director Staats adopted Judge Berlin's rationale in *Poasa* to find that the Oregon Bar Survey is the appropriate starting point for determining the appropriate hourly rate for counsel's services in this case. As she determined that Tacoma, Washington, is the relevant market, she concluded that the Portland rates reflected in the Oregon Bar Survey must be adjusted downward to reflect the lower cost-of-living in Tacoma.

America, Inc. v. Director, OWCP, 445 F.App'x 912 (9th Cir. 2011).² Next, the Board agreed with claimant that since the website used by District Director Staats to adjust Portland, Oregon, rates to Tacoma, Washington, rates was not identified, the Board was unable to review the propriety of the adjustment. The Board stated in this regard that it was within District Director Staats's discretion to use a cost-of-living adjustment in calculating counsel's hourly rate on remand so long as she provided a sufficient explanation of her hourly rate determination. *Anthony v. Washington United Terminals*, BRB No. 10-0439 (Mar. 8, 2011) (unpub.).

In light of District Director Staats's retirement, the case was assigned on remand to District Director Bruininks (the district director). Claimant's counsel filed a supplement to his original fee petition, attaching additional documentation in support of his requested hourly rate.³ Employer submitted objections to counsel's supplemental fee petition. The district director first reaffirmed, in accordance with the Board's decision in this case, that Tacoma is the relevant community for determining the prevailing market rate. Fee Order at 1-2. Next, the district director considered the documents submitted by counsel in support of his requested hourly rate, and concluded that this evidence did not satisfy counsel's burden of establishing the market rate for his services. *Id.* at 2-3. The district director therefore relied on data from the Oregon Bar Survey to establish a proxy market rate for counsel's services. *Id.* at 3. The district director computed the average of the hourly rates for Portland attorneys who practice in the areas of general civil litigation and personal injury litigation. *Id.* Consistent with the Board's decision in *Christensen II*, 44 BRBS at 40, he excluded from this calculation the rates listed in the Oregon Bar Survey for workers' compensation cases. *Id.* Next, the district director adjusted this baseline average by using the top quartile rates to account for counsel's years of experience, which resulted in an hourly rate of \$297 for Portland attorneys. *Id.* He then referenced the Sperling's Best Places cost-of-living calculator, found at www.bestplaces.com.

²In *Christensen*, the Board utilized the Oregon Bar Survey in determining the appropriate hourly rate for the claimant's attorney's services performed before the Board. *Christensen I*, 43 BRBS 145. After District Director Staats issued her fee award in this case, the Board held in *Christensen II* that the hourly rate would be set by reference to an average of the rates for Portland attorneys listed in the Oregon Bar Survey for plaintiff general civil litigation and plaintiff personal injury litigation cases, and that rates for workers' compensation cases should not be included in the hourly rate calculation. 44 BRBS at 40. The Ninth Circuit affirmed the Board's methodology in *Christensen*, stating that "[e]ach factor the Board relied on was corroborated by evidence in the record in the form of affidavits and surveys." 445 F. App'x at 914.

³In his supplemental fee petition, counsel requested an hourly rate of \$450. He further stated that the documents submitted support an hourly rate of no less than \$325.

net, which reflected that as of May 12, 2011, the cost of living in Tacoma was 14 percent lower than in Portland.⁴ *Id.* at 3-4; Emp. Ex. 6. The district director therefore adjusted the \$297 Portland hourly rate to a market rate of \$255 for Tacoma. Accordingly, claimant's counsel was awarded a fee of \$1,734, representing 6.8 hours of services at an hourly rate of \$255.

Claimant's counsel filed a motion for reconsideration, urging approval of an hourly rate of \$352 for his services. Specifically, counsel cited salary data from www.salary.com for "Attorney III" positions located in Portland and Tacoma in support of his contention that the median salary for an attorney in Tacoma is 9.43 percent higher than in Portland. In addition, counsel noted that the \$297 hourly rate for the Portland market which the district director derived from the Oregon Bar Survey was based on 2007 data; counsel maintained that this rate must be adjusted to account for cost-of-living increases in Tacoma from 2007 through 2010. Employer filed an opposition to claimant's motion for reconsideration. The district director denied the motion for reconsideration, finding that the arguments and evidence submitted in support of counsel's request were not persuasive.

Claimant appeals the district director's fee award, challenging his hourly rate determination. Employer responds, urging affirmance of the fee award.

Claimant first avers that the district director erred by basing his hourly rate determination on the Oregon Bar Survey in contravention of the Board's prior decision in this case. Claimant's contention is without merit. Consistent with the Board's prior decision in this case, *Anthony*, slip op. at 3, and with *Christensen II*, 44 BRBS at 40, the district director did not err in basing the hourly rate determination on data from the Oregon Bar Survey and calculating a market rate for Portland attorneys without reference to the rates included in that survey for workers' compensation cases. Fee Order at 3. While counsel asserts that he provided sufficient evidence to establish the market rate in Tacoma, he does not present a specific argument challenging the district director's finding that the documents submitted by counsel do not provide a basis for his requested hourly rate. *See id.* at 2-3. Thus, counsel has not established that the district director abused his discretion in relying on data from the Oregon Bar Survey. *See generally Christensen I*, 43 BRBS at 146.

⁴The district director noted that the Sperling's cost-of-living calculator was used by District Director Staats in the original fee award in this case and also by Judge Berlin in the *Poasa* case. Fee Order at 3-4; *see n.1 supra*.

Claimant's counsel also has not established an abuse of discretion by the district director in his adjustment of the Portland market rate derived from the Oregon Bar Survey data to a market rate for Tacoma. The district director is afforded considerable discretion in determining factors relevant to a market rate 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, 42 BRBS 25(CRT) (6th Cir. 2008). In this case, the district director considered both parties' proposed methodology for comparing the Portland and Tacoma markets, and rationally found the Sperling's cost-of-living calculator, Emp. Ex. 6, to be the more reliable method for adjusting the Portland rate to a Tacoma rate. Fee Order at 3-4; Order Denying Reconsideration at 1.

Lastly, claimant's counsel contends that the district director erroneously failed to apply annual cost-of-living adjustments to the hourly rates for the services he performed subsequent to 2007. *See* Brief in Support of Petition for Review at 3-4. We agree that the district director erred in utilizing a single hourly rate for all of the work performed in this case without making adjustments to reflect the appropriate market rates for the years subsequent to 2007.⁵ *See 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, 1046, 43 BRBS 11, 14(CRT) (9th Cir. 2009). We therefore modify the district director's decision to reflect the hourly rates appropriate for each year in which services were performed. *See Christensen I*, 43 BRBS at 147. Based on the Oregon Bar Survey, the district director found that the applicable Portland market rate was \$297 in 2007. Fee Order at 3. For the ensuing years, we will use the percentage increases in the Federal locality pay tables for Portland to calculate the appropriate annual increases in the cost of living in Portland.⁶ *See Christensen I*, 43 BRBS at 147. The percentage increases for Portland are as follows: (1) 2008-3.45%; (2) 2009-3.76%; (3) 2010-2.04%. Thus, the Portland market rate for services performed in 2008 is \$307, in 2009 is \$319, and in 2010 is \$325. As discussed, the district director found that the cost of living in Tacoma is 14 percent lower than in Portland. This was based on May 2011 data. *See* Emp. Ex. 6. We will apply this discount to the Portland rates. Thus, the applicable hourly rate for counsel's services performed in 2007 is \$255, in 2009 is \$274, and in 2010 is \$280.⁷ We therefore modify the district director's fee award to provide that claimant's counsel is entitled to an hourly rate of \$255 for work performed in 2007, \$274 for work performed in 2009, and \$280 for work performed in 2010.

⁵Counsel's fee petition itemizes services performed in 2007, 2009 and 2010.

⁶<http://www.opm.gov/oca/10tables/index.asp>.

⁷Counsel did not itemize any services performed in 2008.

Accordingly, the district director's fee award is affirmed in part and modified in part consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge