U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 22-0152
and 22-0152A

PETER T. BLOHM	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
TIDEWATER TERMINAL COMPANY	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	DATE ISSUED: 4/28/2023
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Order Approving Attorney Fee of Marco A. Adame II, District Director, Western Compensation District, United States Department of Labor.

Charles Robinowitz and M. Elizabeth Duncan (Law Office of Charles Robinowitz), Portland, Oregon, for Claimant.

James R. Babcock (Babcock Holloway Caldwell & Stires, PC), Lake Oswego, Oregon, for Employer/Carrier.

Mark A. Reinhalter (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and Employer cross-appeals, the Order Approving Attorney Fee (OWCP Nos. LS-14149947 and LS-14157581) of District Director Marco A. Adame II (district director) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act).[1] 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, based on an abuse of discretion, or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

On July 19, 2017, District Director R. Todd Bruininks issued an Order approving a settlement between the parties in accordance with 33 U.S.C. §908(i). Order Approving Attorney Fee (Order) at 1. Shortly thereafter, on August 1, 2017, Claimant's counsel, Charles Robinowitz, filed a Declaration of Attorney Fees and Costs with the district director requesting a fee totaling $79,261.17 for 152.87 hours of attorney time at an hourly rate of $466.00; 26.30 hours of associate attorney time at an hourly rate of $225; 0.25 hours of associate attorney time at an hourly rate of $165; and 11.80 hours of legal assistant time at an hourly rate of $175; plus $29,600.60 in costs, of which $25,150 was the expert fee of vocational rehabilitation counselor Scott Stipe. *Id*. at 2. Employer filed objections to counsel's fee petition. Counsel filed a reply along with a Supplemental Declaration of Attorney Fees and Costs for time spent preparing the reply, totaling an additional

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the Claimant's injury occurred in the State of Washington. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

$4,696.50, representing 5.25 hours of attorney time at an hourly rate of $466 and 10 hours of associate attorney time at an hourly rate of $225. *Id*. at 2-3.

On March 22, 2018, Mr. Robinowitz submitted an Amended Declaration of Attorney Fees and Costs, due to the release of the 2017 Oregon State Bar (OSB) Economic Survey (which counsel argued affected his hourly rate) and to Mr. Stipe's agreement to reduce his bill for vocational services by $600. First Amended Declaration of Attorney Fees and Costs at 19. Mr. Robinowitz requested an increased hourly rate for himself, from $466 per hour to $500 per hour, and for an associate attorney from $225 per hour to $285 per hour. Order at 3. The number of hours worked remained the same as in the original Declaration of Attorney Fees and Costs, resulting in an increased fee request of $86,036.75. *Id*. However, the amount of the requested costs decreased by $600, to $29,000.60, due to Mr. Stipe's reduction of his costs. *Id*. These changes resulted in an increased application for fees and costs totaling $115,037.35. *Id*.

More than three years later, on September 23, 2021, Mr. Robinowitz submitted a Second Amended Declaration of Attorney Fees and Costs, as well as a Motion for Interest on Costs. Order at 3. He did not alter the amount of costs requested, the number of hours worked by associate attorneys, or the amount of fees requested for work performed by legal assistants. *Id*. at 3-4. However, he increased his time by one hour and increased the requested hourly rates for himself and three associate attorneys. *Id*. at 3. As a result, the second amended fee request totaled $113,867.25, representing 153.87 hours of attorney time at an hourly rate of $675, 26.30 hours of associate attorney time at an hourly rate of $300, 0.25 hours of associate attorney time at an hourly rate of $200, and 11.8 hours of legal assistant time at an hourly rate of $175. *Id*. at 3. These adjustments increased the total request of fees and costs to $142,867.85. *Id*. at 4.

In an Order issued on December 6, 2021, the district director determined the "relevant community" for purposes of establishing a market hourly rate was the Portland, Oregon metropolitan area. Order at 6. He awarded Claimant's counsel the hourly rate requested in the original Declaration, $466, relying on the 2017 OSB Economic Survey, which showed workers' compensation attorneys within the 95th percentile in Portland, Oregon billed at an hourly rate of $450. *Id*. at 8. As parties settled the claim in 2017, the district director concluded the increase to $466 per hour was reasonable. *Id*.

For the rates requested for the associate attorneys, the district director awarded an hourly rate of $284, based upon the 2017 OSB Economic Survey, which showed a 2016 mean of $284 per hour for workers' compensation attorneys in the Portland area. Order at 8. The district director likewise awarded a rate of $175 per hour for paralegal work and

the work of one of the associate attorneys,[2] citing as support the 2014 Morones Survey of Commercial Litigation Fees in Portland, Oregon, which showed a paralegal hourly billing rate of $195 in 2014. *Id*. The district director declined to further enhance any hourly rates to compensate for a delay in payment, finding the four-year time period the district director took in resolving attorney fees after Counsel submitted his fee petition was not "extraordinary." *Id*. at 7.

The district director then reduced the number of requested hours, eliminating several time entries as unnecessary, duplicative, and/or excessive. Order at 9-11. As for costs, the district director examined the fee statement of Claimant's vocational expert, Mr. Stipe, and cut 18.5 hours of his claimed time, resulting in a monetary reduction of $3,700. *Id*. at 12-13. Finally, the district director denied counsel's motion for interest on costs, finding the four-year delay was not "exceptionally protracted" under *Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066, 1084, 55 BRBS 1, 10(CRT) (9th Cir. 2021). In all, the district director awarded Claimant's counsel a total of $76,363.87 in fees and costs. Order at 13-14.

Claimant's counsel appeals on six grounds: 1) the district director erred in failing to award his requested hourly rate of $675; 2) the district director failed to make the proper adjustment to the hourly rate to account for inflation and delay from 2017 until 2021; 3) the district director improperly reduced the itemized time entries by 37%; 4) the district director erred in refusing to award time for local travel;[3] 5) the district director improperly reduced his vocational expert's time; and 6) the district director erred in refusing to award interest on costs.[4]

Employer responds, urging affirmance of the district director's refusal to enhance the hourly rate due to delay in payment for the four-year period from 2017 to 2021,

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[2] The district director awarded Alana Iturbide a paralegal's rate because she "does appear (sic) on the Oregon State Bar directory," and Mr. Robinowitz "did not note when [she] was admitted to the Oregon State Bar." Order at 8. We assume this is a typographical error, and Ms. Iturbide's rate was reduced because she did *not* appear in the Oregon State Bar directory.

[3] More than merely disputing the district director's denial of fees for travel time, counsel urges the Board to re-examine and overrule precedent holding such time non-compensable if not in excess of overhead.

[4] Counsel further insists interest should be calculated using the rate the United States applies to tax refunds and delinquent taxes under 26 U.S.C. §6621(a), using federal mid-term rates instead of short-term rates.

elimination of time for local travel, reduction of the vocational expert's time, and refusal to award interest on costs. However, Employer agrees the district director improperly calculated the hourly rate and acknowledges his reduction of hours contained mathematical errors; therefore, Employer concurs remand is necessary. The Director, Office of Workers' Compensation Programs (Director), also responds, arguing the fee award should be vacated and remanded due to the district director's failure to adequately explain his findings with respect to the hourly rate and the reduction of time for the attorneys and the vocational expert. Claimant's counsel filed a reply, re-emphasizing the issues within his Petition for Review.

Employer cross-appeals the district director's Order. While acknowledging the district director failed to calculate the hourly rate in accordance with *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015), Employer avers he also erred in placing Mr. Robinowitz within the 95th percentile of Oregon practitioners based on his conduct throughout the claim, an argument it raised before the district director but which the district director failed to address. Employer further avers the district director failed to thoroughly address its objections to many of counsel's time entries and failed to provide a clear explanation for his reduction and/or elimination of other time. Claimant responds, urging affirmance of his inclusion in the 95th percentile of practitioners. However, he agrees the district director failed to adequately consider Employer's objections, as well as his reply, and therefore the case should be remanded for reconsideration of his fee request.

At the outset, we agree with the parties and the Director that the district director's fee award must be vacated as it contains factual, mathematical, and legal errors. The most significant of the mathematical errors involves the district director's reductions of Mr. Robinowitz's billed time. According to his written summary, the district director reduced several entries totaling 131.25 hours of claimed time[5] to 24.75 hours.[6] Order at 11. However, the 131.25 hours of time subject to reduction erroneously included 75 hours for a telephone call entry dated March 15, 2017. *Id*. at 10-11. The actual time requested for

[5] According to the district director, the total claimed hours subject to reduction represented 116 hours billed to Mr. Robinowitz, 14 hours billed to associate attorney Genavee Stokes-Avery, 0.25 hours billed to associate attorney Lee Ann Donaldson, and 1.0 hour billed to paralegal Krilyn Pilkington. This results in a total number of 131.25 claimed hours (116 + 14 + 0.25 + 1 = 131.25), not 131.35 hours as cited by the district director. Order at 11.

[6] The 24.75 allowed hours following reduction represents 18.25 hours billed to Mr. Robinowitz, 6 hours billed to Ms. Stokes-Avery, 0 hours billed to Ms. Donaldson, and 0.5 hours billed to Ms. Pilkington. Order at 11.

that entry was 0.75 hour, meaning the entries subject to reduction by the ALJ actually totaled 57.1 hours of request time, not 131.25 hours. That 75-hour error affected Mr. Robinowitz's requested hours, which should have been 41.85 hours.

Although the district director appears to have not carried this particular error forward in determining the final amount of fees to be awarded, his final calculations contain additional errors requiring remand. First, he erroneously reduced the total requested hours by the total amount of time that was subject to reductions, instead of the time he actually reduced from those entries. *Id*. at 3, 9-11, 13.[7] Second, he did not include in his final calculation the additional time requested in Mr. Robinowitz's Supplemental Declaration of Fees and Costs for time spent responding to Employer's objections. Order at 2-3. He refers to these hours in his summary of the fee requests, eliminates a portion of these hours in his reduction chart, but does not include them in his ultimate calculation of awarded fees. *Id*. at 2-3, 11, 13.

The district director's Order also fails to include a clear finding with respect to counsel's motion for interest on costs. Order at 12-13. Acknowledging that such an award is allowed for "exceptionally protracted" delays in accordance with *Seachris*, 994 F.3d at 1084, 55 BRBS at 10(CRT),[8] the district director concluded:

> Four years has lapsed which is (sic) would not be considered an exceptionally protracted period in the litigated field of Workers' Compensation therefore, interest on the cost for vocational expert services. (sic)

[7] The district director did not identify the exact amount of his reductions; rather, he provided only the total number of claimed hours subject to reductions and the ultimate number of hours he allowed. Order at 11.

[8] In *Seachris*, the United States Court of Appeals for the Ninth Circuit noted Supreme Court precedent allowing interest on costs if the attorney made "an extraordinary outlay of expenses and the litigation is exceptionally protracted." *Seachris*, 994 F.3d at 1084, 55 BRBS at 10(CRT) (quoting *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 555 (2010)). It thus remanded the claim for the Board to "determine whether an award of interest on costs is appropriate because of the 'exceptionally protracted' period that this case has been pending—having been filed in 2005—in which costs were incurred between 2007 and 2016, a period five to fourteen years ago." *Id*.

Order at 13. Because the district director stated this litigation both "is" and "would not be" considered exceptionally protracted and did not state whether he approved or denied interest on costs, we must remand the claim for a clear finding and explanation.[9]

In addition, the district director's order contains legal errors. Claimant, Employer, and the Director are all correct in stating the district director improperly relied on the hourly rates of Oregon workers' compensation practitioners in determining the relevant hourly market rate for Mr. Robinowitz and his associate attorneys. Both the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this claim arises, and the Board have rejected the use of Oregon workers' compensation practitioners' rates in determining the relevant market rate for attorney fees under the Act. *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT); *Christensen v. Stevedoring Services of America*, 44 BRBS 39 (2010). The district director, without adequate explanation, dismissed other evidence submitted by Mr. Robinowitz in support of his requested hourly rate. *Seachris*, 994 F.3d 1066, 55 BRBS 1(CRT); *Hernandez v. National Steel and Shipbuilding Co.*, 54 BRBS 13 (2020). He also failed to adequately consider and explain his rejection of Employer's objection against Mr. Robinowitz's inclusion in the 95th percentile of practitioners based on experience alone. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97, 101 (1999). Consequently, we must vacate the district director's finding as to the hourly rates of $466 for Mr. Robinowitz and $284 for his associate attorneys and remand the case for reconsideration. Upon remand, the district director should not rely on the relevant rates of Oregon workers' compensation practitioners but instead should determine a reasonable hourly rate considering (and expressly rejecting or adopting, with reasons) all evidence Claimant's counsel and Employer submitted.

Claimant's counsel further argues the district director erred in failing to enhance his hourly rate to account for a delay in payment. The Board has previously held, in light of the United States Supreme Court's decisions in *Missouri v. Jenkins*, 491 U.S. 274 (1989), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), consideration of enhancement for delay is appropriate for fee awards under Section 28 of the Act, 33 U.S.C. §928. *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). Accordingly, when the question of delay is timely raised, the tribunal awarding the fee must consider this issue. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Bellmer v. Jones Oregon Stevedoring*, 32 BRBS 245 (1988). If the factfinder awards a delay enhancement,

[9] The final amount awarded appears to *not* include interest on costs, suggesting the district director intended to deny Claimant's request. Nevertheless, the district director must make a specific finding and explain his rationale. As the district director has not rendered a clear finding on whether interest should be awarded, we decline to address counsel's arguments regarding the proper calculation of the interest rate.

he 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 the claimant's attorney for the delay. *Nelson*, 29 BRBS 90*; see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).

Here, the district director declined to enhance counsel's hourly rate, finding a four-year delay in resolving fees was not extraordinary. Order at 7 (citing *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) (two-year delay is not extraordinary)). He failed to provide any reasoning or explanation for this conclusory finding. Consequently, the district director's denial of Mr. Robinowitz's request for fee enhancement due to delay is vacated, and the matter is remanded for his reconsideration. Upon remand, the district director should thoroughly explain his reasons for either granting or denying the enhancement.

With respect to the reduction of hours, when a district director substantially reduces a fee request, he must explain the reasons for his reductions with specificity. *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 48 BRBS 21(CRT) (9th Cir. 2014); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 665 (1982). In the Ninth Circuit, a "substantial reduction" requiring clear and specific explanation is any reduction greater than 10%. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). Here, the district director's reduction of the total requested time by approximately 37%[10] is unequivocally "substantial." *Id.* As a result, he was obligated to explain each reduction clearly and specifically. *Moreno*, 534 F.3d at 1111. He indicated only in general that the time in question should be reduced as "redundant, excessive, or otherwise unnecessary" without articulating which entries were reduced for which reasons. Order at 9-11.

Likewise, the district director reduced a significant portion of Mr. Stipe's expert fee without adequate explanation.[11] While it is within the district director's discretion to determine the reasonableness and necessity of an expert's fee, a substantial reduction must

[10] Combining the 192.22 total hours identified in counsel's Second Amended Declaration of Attorney Fees and Costs (Order at 3) with the 15.25 total hours in his Supplemental Declaration of Attorney Fees and Costs (*Id*. at 2), Claimant's counsel requested fees for a total of 207.47 hours for work performed by him and his staff. The district director awarded fees for 131.62 total hours (*Id*. at 13), a total reduction of 75.85 hours or approximately 37%.

[11] The First Amended Declaration of Attorney Fees and Costs includes Mr. Stipe's charge of $24,550; the district director ultimately allowed $15,350, approximately a 38% reduction. Order at 2-4, 11-13.

be accompanied by a sufficient explanation. *Cutaia v. Northeast Stevedoring Co., Inc.*, 12 BRBS 942, 945 (1980); *Lozupone v. Lozupone and Sons*, 12 BRBS 148, 151 (1979). A "sufficient explanation" is one that allows the Board to "properly perform our function of review of the fee award." *Id*. at 152. The disparity between the district director's written explanation and the time actually reduced, without additional clarification, creates an ambiguity that prevents the Board from performing a review of the Order.

Finally, the district director did not adequately address several of Employer's objections to individual entries, including time that was allegedly unnecessary and/or unrelated to the claim, time related to unsuccessful motions, and excessive time. He summarily noted these objections but did not address any arguments or weigh any evidence, and he rejected some of Employer's objections and adopted others, all without adequate explanation. Order at 7-11; *Jensen*, 33 BRBS at 101.

Accordingly, we vacate the district director's Order Approving Attorney Fee and remand the case for further consideration consistent with this opinion.[12]

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[12] In light of our decision to vacate the order and remand the case, we decline to address counsel's specific arguments related to local travel time. On remand, the district director must reconsider the issue and provide a more thorough explanation of his findings in accordance with the following line of cases: *Griffin v. Virginia International Terminals*, 29 BRBS 133 (1995); *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); *Harrod v. Newport News Shipbuilding and Dry Dock Co.*, 14 BRBS 592 (1981); *Lopes v. New Bedford Stevedoring Corp.*, 12 BRBS 170 (1979).