U.S. Department of Labor

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

BRB No. 23-0332

ROSALIE P. HODGE (Widow of ALEXANDER HODGE) Claimant-Petitioner v. DEE ENGINEERING COMPANY and ARGONAUT INSURANCE COMPANY Employer/Carrier-Respondents CALIFORNIA INSURANCE GUARANTEE ASSOCIATION o/b/o INDUSTRIAL INDEMNITY Carrier-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	**NOT-PUBLISHED** DATE ISSUED: 04/09/2025 DECISION and ORDER

Appeal of the Attorney Fee Order and the Order Denying Reconsideration of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Alan R. Brayton and John R. Wallace (Brayton Purcell LLP), Novato, California, for Claimant.

Merri A. Baldwin and Aaron M. Scolari (Rogers Joseph O'Donnell), San Francisco, California, for Brayton Purcell LLP.

John T. Marin (Laughlin, Falbo, Levy & Moresi, LLP), Sacramento, California, for California Insurance Guarantee Association.

Alice B. Catlin (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals, Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel, John Wallace (Counsel), appeals Administrative Law Judge (ALJ) Christopher Larsen's Attorney Fee Order and Order Denying Reconsideration (2014-LHC-01360) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (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, based on an abuse of discretion, or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950 (9th Cir. 2007).

This is the fourth time this case is before the Benefits Review Board.[1] To recap, Claimant's deceased husband, Decedent, was allegedly exposed to asbestos and other toxic

[1] By order dated January 6, 2017, the Board dismissed Claimant's appeal of the ALJ's November 15, 2016 Order Dismissing California [Insurance] Guarantee Association (CIGA) as premature, as a motion for reconsideration was pending before the ALJ. BRB No. 17-0124. On March 16, 2017, the Board dismissed Claimant's appeal of the ALJ's Order Dismissing CIGA and subsequent December 16, 2016 Order Denying Motion to Reconsider as untimely. BRB No. 17-0207. In a September 7, 2017 Order on Motion for Reconsideration, the Board dismissed Claimant's appeal as interlocutory. *Id.* On April 29, 2021, the Board vacated the ALJ's February 5, 2020 Order disqualifying Brayton Purcell (BP) from representing Claimant and remanded the case to the ALJ for reconsideration.

materials while working for Employer from 1964 to 1969 and succumbed to chronic obstructive pulmonary disease on May 10, 2012. Settlement Exhibit (SX) 1; SX 2 at 13-20; SX 5; SX 9. On November 16, 2012, Claimant filed a claim for death benefits under the Act.[2] SXs 3, 4.[3] On August 11, 2022, the ALJ issued a decision and order approving the parties' settlement agreement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). Under the terms of the settlement, California Insurance Guarantee Association (CIGA), Argonaut Insurance Company, and the Special Fund[4] collectively paid Claimant $175,000 pursuant to the settlement to resolve her claims for Decedent's disability compensation and medical benefits, her death benefits, and Decedent's funeral expenses under the Act.[5] The parties were unable to reach an agreement on the amount of Claimant's attorney's fee and costs; however, they stipulated the ALJ may award a fee for services rendered before the ALJ, as well as for those rendered before the Office of Workers' Compensation Programs (OWCP) and the Board. Settlement Agreement at 7.

BRB No. 20-0189. On July 7, 2023, the Board dismissed Claimant's original appeals of the ALJ's orders underlying the instant appeal as premature. BRB Nos. 23-0186, 23-0266.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Decedent worked and died in California. 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 (4th Cir. 2002), *cert. denied,* 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[3] BP began representing Claimant in her Longshore claim on November 12, 2012. Claimant's Order to Show Cause Exhibit (OSCX) A at 14.

[4] El Dorado Insurance Company allegedly insured Employer from 1966 to 1968. Argonaut Insurance Company provided California workers' compensation insurance coverage to Employer from 1968 to 1969 and Longshore coverage from 1970 to 1972. Employer's Longshore insurance carrier from 1964 to 1966 and 1968 to 1969 is unknown.

CIGA was joined as successor-in-interest to El Dorado Insurance Company because both Employer and El Dorado Insurance Company are insolvent. As administrator of the Special Fund, the Director, Office of Workers' Compensation Programs (Director) is a party-in-interest if Employer was uninsured from 1964 to 1969, or if CIGA does not cover El Dorado Insurance Company's liabilities under the Act. Settlement Agreement at 3-4.

[5] Claimant received $25,000 from CIGA, $60,000 from the Special Fund, and $90,000 from Argonaut Insurance Company. Settlement Agreement at 7. She also received $51,000 from Quality Assurance Engineering in resolution of her California state workers' compensation claim for death benefits. SX 22.

On October 25, 2022, Claimant's Counsel submitted a petition to the ALJ seeking an attorney's fee and costs under Section 28 of the Act, 33 U.S.C. §928, on behalf of Claimant's attorneys' law firm, Brayton Purcell (BP). BP requested a total of $193,141.93, consisting of $159,026.50 for 391.3 hours billed,[6] and $34,115.43 in costs. CIGA and the Director filed objections.[7]

In his Attorney Fee Order (Fee Order), the ALJ awarded BP $65,357.56, consisting of a fee in the amount of $57,553.75 for work performed before the Office of Administrative Law Judges (OALJ) and $7,803.81 in costs. He sustained the Director's objections, and he declined to award any fees or costs incurred while the case was before the OWCP, while the case was before the Board, or while BP addressed the conflict-of-interest issue before the OALJ. Fee Order at 3-5, 24. The ALJ then determined a reasonable rate for the timekeepers listed in the fee petition and a reasonable number of hours spent on the case. He awarded the hourly rates requested, except for Alan Brayton's requested hourly rate of $950, which he reduced to $700, and Gilbert Purcell's requested rate of $750, which he reduced to $700. The ALJ disallowed time entries for work he deemed clerical or "nothing more than routine monitoring" of BP's business. With these reductions, the ALJ arrived at a total lodestar fee of $115,107.50, which he reduced by 50% to $57,533.75 because he found BP had a conflict of interest and did not get informed written consent in accordance with the California Rules of Professional Conduct. Finally, the ALJ clarified the Special Fund is not liable for any amount of the attorneys' fees and costs awarded. Fee Order at 25.

Counsel filed a Motion to Reconsider Attorney Fee Award (M/Recon.) requesting the ALJ allocate the amount of the employer-paid attorneys' fees and costs among Employer and CIGA because the parties could not agree on an allocation. The ALJ denied the motion because he considered it a request to modify the approved Section 8(i) settlement agreement by imposing "entirely new terms which the parties themselves have

[6] The fee petition contains hours billed by twenty-three different timekeepers: four partners, one trial attorney, seven associate attorneys, eight paralegals, and four case assistants. Fee Petition Exhibit (PX) B at 37.

[7] CIGA objected to the hourly rates requested, to 704 entries, and to forty-one itemized costs. (CIGA Obj.). The Director objected to the fee petition to the extent Claimant sought payment of her attorney's fee and costs from the Special Fund, and specifically to any fees or costs for services rendered before the Board or associated with defending BP against the conflict-of-interest issue and disqualification. (Dir. Obj.).

not considered" and "have not agreed," and he left it to the parties to resolve the allocation issue. Recon. Order at 4.

On appeal, BP contends the ALJ abused his discretion in reducing Mr. Brayton's hourly rate, disallowing specific time entries for what the ALJ determined were "routine monitoring of business," not awarding fees and costs while the case was before the OWCP and the Board, reducing the overall lodestar fee by 50%, and not allocating payment of the fee award between Employer and CIGA. CIGA responds, urging affirmance of the ALJ's fee award. The Director filed a response brief seeking affirmance of the ALJ's determination that the Special Fund is not liable for an attorney's fee or costs.[8] BP replied to CIGA's and the Director's responses, reiterating its contentions.

The "Lodestar" Amount

Under the Act, a claimant who successfully prosecutes a disputed claim against an employer is entitled to a reasonable employer-paid attorney's fee. 33 U.S.C. §928(a); 20 C.F.R. §702.134(a). The Supreme Court of the United States has held the lodestar method, by which the number of hours reasonably expended in preparing and litigating a case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under federal fee-shifting statutes 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).

Reasonable Hourly Rate

Counsel first contends the ALJ erred in reducing Mr. Brayton's hourly rate. He asserts the ALJ did not adequately consider the proffered market rate evidence and instead "fixate[d]" on there being no statement concerning Mr. Brayton's normal billing rate. In addition, he argues the ALJ's decision is inconsistent with the United States Court of Appeals for the Ninth Circuit's holding in *Seachris v Brady-Hamilton Stevedore Co.*, 994 F.3d 1066 (9th Cir. 2021). Cl. Brief at 27-30.

A reasonable hourly rate is to be calculated according to the prevailing market rate "for similar services by lawyers of reasonably comparable skill, experience and reputation" in the relevant community and should be commensurate with fees attorneys could obtain in other types of cases. *Seachris*, 994 F.3d at 1076-1077 (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n.1 (1984)); *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1086 (9th Cir. 2015); *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1053 (9th Cir. 2009). The fee applicant bears the burden of producing "satisfactory evidence" of the relevant market

[8] The Director takes no position on the other issues raised in Claimant's appeal. Dir. Resp. at 1 n.1.

and the rates charged in that market. *Christensen*, 557 F.3d at 1053; *see also Blum*, 465 U.S. at 895 n.11. In awarding a reasonable attorney's fee, the adjudicator must consider all relevant rate evidence before him, *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41,44 (2009), and must explain his rationale for assessing the fee. *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 869 (9th Cir. 2014); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97, 101 (1999). When requesting a fee, the applicant must submit a complete fee petition with an hourly breakdown of time spent, professional status of the person performing the work, and the "the normal billing rate" for each person. 20 C.F.R. §702.132. A declaration regarding the normal hourly rates sought in similar cases will ordinarily satisfy the "normal billing rate" requirement. *Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010).

As the ALJ observed, Counsel's fee petition did not include any statements or declarations concerning Mr. Brayton's "normal billing rate." Fee Order at 7 (quoting 20 C.F.R. §702.132(a)). Despite the failure to include a statement or declaration regarding Mr. Brayton's normal billing rate, the ALJ considered the market rate evidence.[9] He found the market rate evidence did not answer "the question of whether comparably-qualified Bay Area attorneys would accept less" than $950 to work on Claimant's case.[10] Fee Order

[9] BP asserts Mr. Brayton does not have a "normal billing rate" because it is a "contingency fee driven firm of 'plaintiffs' attorneys.'" Cl. Brief at 27. While the majority of Mr. Brayton's cases may be contingency fee based, an attorney who has "supervised" Longshore Act and California workers' compensation cases for more than fifteen years and "actively represented hundreds of claimants," Purcell Decl. at 9, ostensibly has a "normal billing rate" in similar Longshore Act cases.

[10] Counsel maintained the relevant market is the San Francisco Bay area and $950 per hour represents a reasonable market rate in 2021 for Mr. Brayton. In support of Mr. Brayton's requested rate, BP submitted previous OALJ attorney's fee orders issued between 2012 and 2015 which awarded Mr. Brayton hourly rates ranging between $340 and $450 per hour for services performed in 2010, 2011, and 2012, PXs G-I, the United States Consumer Law Attorney Fee Survey Report 2010-2011, PX D, the ALM Survey of California Law Firm Economics, PX E, the ALM Billing Rates and Practices Survey Report, PX F, the United States Attorney's Office (USAO) Attorney's Fees Matrix 2015-2021, PX K, the Adjusted *Laffey* Matrix 2021, PX L, and the Declarations of John Wallace, Gilbert Purcell, James Nevin, and "expert Attorney John O'Connor." In the fee application, Counsel referred to the "analysis set forth" in the USAO Attorney's Fees Matrix 2015-2021, the Adjusted *Laffey* Matrix, and Mr. O'Connor's opinion. PXs K, L; O'Connor Decl. He claimed the matrices support an appropriate hourly rate between $665 and $914 for an attorney with more than thirty-one years of experience, and, given Mr.

at 8. In doing so, he specifically rejected John O'Connor's opinion that "the complexities of the instant case" and Mr. Brayton's performance of "more than 'pedestrian tasks which could have been handled by a lesser lawyer'" warranted "the upper bounds of a reasonable rate."[11] *Id.* (citing O'Connor Decl. at 7-8). The ALJ explained Mr. Brayton's "reasonable" hourly rate "should already take into account his experience, including his ability to deal with complex issues" and found the work Mr. Brayton performed in the case did not seem to be "work that only a lawyer of comparable experience could have done." *Id.* Consequently, the ALJ determined Counsel's evidence did not support the reasonableness of Mr. Brayton's requested rate of $950 or justify an award for what Mr. O'Connor suggested is the "the upper bounds" of a reasonable rate.

Beyond acknowledging that Counsel did not include a statement or declaration concerning Mr. Brayton's normal billing rate, there is no indication that the absence of Mr. Brayton's normal billing rate from the fee petition had any improper effect on the ALJ's consideration of the relevant market rate evidence. The ALJ adequately explained why the

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Brayton's forty-five years of experience, his requested rate of $950 is "completely reasonable" and falls within the parameters of the matrices. Fee Pet. at 44.

[11] Mr. O'Connor opined the skills of consumer law attorneys are "comparable and similar to those necessary to pursue Longshore Act cases." O'Connor Decl. at 11-12 (citing O'Connor EX B). He acknowledged Mr. Brayton's requested hourly rate of $950 is higher than rates ordinarily awarded under the Act and likewise exceeds the highest adjusted consumer law hourly rates ($893), California workers' compensation rates ($560), and the mean rates of litigation partners ($742). *Id.* at 8, 12-15 (citing O'Connor EXs C-G). However, in Mr. O'Connor's view, this case "was not a garden variety Longshore Act case" and Mr. Brayton "possess[es] far more skill and experience than the average litigation partner," and his "considerable experience" litigating asbestos-related cases and Longshore Act cases places him in the third quartile of litigation attorneys and "warrants a premium over the top stated rates." *Id.* at 12-15. He opined that while Mr. Brayton's requested rate "would be the upper limit of a reasonable hourly rate," awarding Mr. Brayton an hourly rate between $700 and $750, or the rate sought by Mr. Purcell, would ensure Mr. Brayton is "adequately compensate[d]" for his "superior services." O'Connor Decl. at 8, 16. Along with his declaration, Mr. O'Connor included pages from the United States Consumer Law Survey Report (2017-2018) reflecting the market rate of attorneys practicing consumer law in San Francisco, California (O'Connor EX C), the Adjusted Consumer Law Rates 2022-2023, which is based on the *Laffey* Matrix hourly rates adjusted per the Legal Service Index (LSI) of the Nationwide Consumer Price Index (NSI) (O'Connor EX D), *see* O'Connor Decl. at 13, and the Real Rate Report (RRR) showing hourly rates in San Francisco in 2022 (O' Connor EX G).

evidence did not establish Mr. Brayton's requested rate was reasonable,[12] and he provided a rational basis for rejecting Mr. O'Connor's explanation for why the "upper bounds" of a reasonable rate was appropriate in this case.[13] *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 54 BRBS 13, 14 (2020); *Obadiaru v. ITT Corp.*, 45 BRBS 17, 25 (2011); *see also Van Skike v. Director, OWCP*, 557 F.3d 1041, 1048 (9th Cir. 2009) (complexity of issues reflected in the number of hours billed and not the hourly rate).

Claimant's Counsel also contends the ALJ ignored *Seachris* and "denigrat[ed] all of the matrix evidence, all of the declarations, all of the expert's opinions." Cl. Brief at 29. He argues the ALJ paid "lip-service" to the Ninth Circuit's holding in *Seachris* and left "little doubt that an evenhanded approach is not being given" to the rate evidence. Cl. Brief at 28. Specifically, he asserts the ALJ discounted the evidence "for personal reasons" and "based upon speculation" that Employer could have produced more persuasive

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[12] Referencing BP's explanation regarding the appropriateness of Mr. Brayton's proposed rate, *see supra* note 10, the ALJ wrote:

> What is Mr. Brayton's normal billing rate? I find it nowhere in the fee petition – certainly not in the confusing salad of 294 words set forth above, which cites me to matrices suggesting an appropriate hourly rate is between $665 and $914, and ends with the conclusion $950 is the correct answer.

Fee Order at 7.

[13] The ALJ found Mr. O'Connor's opinion, *see supra* note 11, "unhelpfully coy" because:

> [Mr. O'Connor] offers a *range* of 'reasonable' hourly rates. He considers $950 a reasonable hourly rate, but admits it represents the 'upper bound of a reasonable rate' and the 'upper limit of a reasonable rate.' At the same time, he ends with the observation that a rate below $700 to $750 would *not* comprise a 'reasonable rate' – thereby essentially conceding $700 to $750 is the *lower* limit of a reasonable rate. It is one thing to conclude Mr. O'Connor's opinion suffices to meet a burden of production, but it is another thing to consider at what point on the spectrum between $700 and $950 it meets that burden of production. Stated differently, while my task is to identify an hourly rate sufficient to allow a claimant to retain an attorney of Mr. Brayton's skill and experience, the fee applicant instead advocates for the highest hourly rate which the theoretical market can possibly bear.

Fee Order at 8 (emphasis in original).

contrary evidence. Cl. Brief at 28. Counsel maintains Mr. O'Connor "did not offer unsubstantiated argument, and he did not pull numbers out of 'thin air,' but instead produced substantial evidence to support his opinions." Counsel further argues he is entitled to have his evidence, "especially when it was unrebutted and undisputed," credited and "treated evenhandedly." *Id.* at 30.

In *Seachris*, after rejecting all the claimant's prevailing market rate evidence as either outdated, irrelevant, incomplete, or not probative, the ALJ concluded the fee applicant failed to meet his initial burden of production in terms of establishing the requested hourly rate was consistent with those prevailing in the relevant community. The ALJ then determined an hourly rate based on a separate chart within the survey evidence that she had initially rejected as being incomplete.[14] The Ninth Circuit reversed the ALJ's conclusion that the fee applicant failed to carry his initial burden of production. In doing so, it explained the ALJ's "concerns … go to the weight of the evidence, not its sufficiency." *Seachris*, 994 F.3d at 1077. The court further held the ALJ erred in rejecting the fee applicant's evidence as outdated or "one dimensional," in part, because she then relied on outdated and one-dimensional evidence herself.[15] In dictum, the court commented that ALJs "must treat the parties' evidence evenhandedly." *Id.* at 1078, 1080.

Contrary to BP's contentions, nothing in *Seachris* suggests the ALJ must suspend his own judgment and discretion when determining whether a requested hourly rate is reasonable or when evaluating the evidence submitted in support of the requested rate. Nor does *Seachris* require the ALJ to adopt the requested rate and evidence at face-value. *Seachris*, 994 F.3d at 1077. To the contrary, adjudicators "have a *duty* to ensure that claims for attorneys' fees are reasonable" and do not "discharge that duty simply by taking at face value the word of the prevailing party's lawyer." *Vogel v. Harbor Plaza Center*, 893 F.3d 1152, 1160 (9th Cir. 2018) (first quoting *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C. Cir. 1993) (emphasis added); then quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1398-1399 (9th Cir. 1993)); *Fox v. Vice*, 563 U.S. 826, 838-839 (2011) (determining

[14] The claimant's attorney relied on a chart from the survey that showed hourly rates based on years of experience, and the ALJ relied on a chart from the same survey that showed hourly rates charged according to practice area.

[15] The ALJ rejected two attorney declarations from 2009 and a 2010 survey as outdated. In determining an hourly rate, she relied on a 2012 survey that reported 2011 rates and adjusted those rates for inflation. The Ninth Circuit noted the 2011 rates, upon which the employer relied and the ALJ based her hourly rate determination, were outdated and "there was no reason she should not have taken the same [inflation adjustment] approach" to the fee applicant's 2009 and 2010 evidence. *Seachris*, 994 F.3d at 1078.

a reasonable attorney's fee is "committed to the sound discretion of the trial judge" (quoting *Kenny A.*, 559 U.S. at 548)); *see also Morris v. California Stevedore and Ballast Co.*, 10 BRBS 375, 380 (1979) ("[T]he adjudicatory process permits an administrative law judge to consider his personal knowledge and experience of fee rates and the practice of law when he makes a discretionary determination of the reasonableness of an attorney's fee."). In addition, "[t]o inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 895 n.11; *see also Kenny A.*, 559 U.S. at 555 (adjudicator should adjust attorney's hourly rate "in accordance with *specific proof* linking the attorney's ability to a prevailing market rate" (emphasis added)).

In the instant matter, Mr. Brayton's requested rate of $950 exceeds the rates set forth in BP's own prevailing market rate evidence. Fee Pet. at 44; PXs K, L; *see also* O'Connor Decl. at 12 ("[T]he rates requested herein, *aside from Mr. Brayton's requested $950 per hour*, are consistent with, if not lower than, consumer law rates adjusted to 2021-2022." (citing O'Connor EX B) (emphasis added)). The ALJ appropriately considered the evidence, Counsel's explanation for why a reasonable hourly rate for Mr. Brayton should exceed the rates suggested by the market rate evidence, and Mr. O'Connor's explanation for why a reasonable rate for Mr. Brayton should exceed the prevailing market rates. He rationally rejected the explanations as unsupported by the evidence. Fee Pet. at 44; *see also* PXs K, L; O'Connor Decl. at 7-8, 12.

Unlike *Seachris*, the ALJ did not reject all of Counsel's market rate evidence; instead, he specifically relied on some of it to support his hourly rate determination, but he was not "personally [] persuaded" that Mr. Brayton's hourly rate should be as high as requested. However, because CIGA objected to the requested rate as excessive but did not submit evidence to show the rate was "out-of-line with those regularly charged" in the San Francisco Bay area,[16] the ALJ acknowledged that, pursuant to *Seachris*, his consideration of the evidence was limited to the market rate evidence BP submitted. Based on Mr. O'Connor's opinion that an hourly rate between $700 and $950 is "a fully compensable market rate for the instant matter," the ALJ determined $700 is a reasonable hourly rate for Mr. Brayton's work. Fee Order at 7-9; *see also* O'Connor Decl. at 16.

Beyond Counsel's accusations, he does not explain how the ALJ's approach was not evenhanded – especially given the rate is based on BP's own expert's opinion. As the

[16] CIGA merely contended an appropriate hourly rate for Mr. Brayton is $400. CIGA Obj. at 5.

ALJ made clear, his task is to determine what is a reasonable hourly rate for Mr. Brayton in the relevant community; specifically, an amount commensurate with what Mr. Brayton could obtain taking other types of cases and that would still encourage competent counsel to undertake Longshore Act cases such as Claimant's. Fee Order at 6, 8; *Seachris*, 994 F.3d at 1076-1077; *see also Christensen*, 557 F.3d at 1054 (citing *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 981 (9th Cir. 2008)). Moreover, the ALJ correctly acknowledged his determination must be based on evidence demonstrating the prevailing rates of attorneys within the San Francisco Bay market and should also take into account the relevant factors set forth in 20 C.F.R. §702.132(a). Fee Order at 5-6, 8; *Kenny A.*, 559 U.S. at 553; *Shirrod*, 809 3d at 1088; *Van Skike*, 557 F.3d at 1048. The ALJ's finding that $700 represents a reasonable hourly rate for Mr. Brayton clearly falls within the range of market rates set forth in the proffered market rate evidence, Fee Pet. at 44, is consistent with Mr. O'Connor's opinion, and is in accord with *Seachris*. In this regard, Counsel has not shown the ALJ abused his discretion. *See* 20 C.F.R. §702.132. Accordingly, we affirm the ALJ's awarded $700 hourly rate for Mr. Brayton. *Seachris*, 994 F.3d at 1077-1078; *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45, 51 (2011).[17]

Reasonable Number of Hours

Next, BP generally contends it should be compensated for "*all* of the services performed while the matter was venued [sic] before the OALJ," Cl. Brief at 26 (emphasis in original), and specifically challenges the ALJ's disallowance of certain time entries billed by Mr. Brayton, Cl. Brief at 31.[18] Under the Act, an attorney's work is compensable

[17] We also affirm the ALJ's awarded hourly rates for all other timekeepers in this case as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc*., 41 BRBS 57, 58 (2007).

[18] Although there is a general reference to "*all* of the services performed" before the OALJ, apart from Mr. Brayton's time entries, Counsel does not identify any other specific time entry disallowances or present any arguments relevant or responsive to other disallowances made by the ALJ. For instance, Counsel asserts: "It is anticipated the argument will be made that Claimant's attorneys should not be compensated for work somehow unrelated to Claimant's entitlement to benefits, but in addition to being factually erroneous, this is neither the controlling standard nor the applicable test." Cl. Brief at 25 (citing *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984), and *Battle v. A.J. Ellis Constr. Co.*, 16 BRBS 329 (1984)). He argues that because BP "could reasonably regard such work as necessary to enable the claimant to become the prevailing party," then BP "is entitled to be compensated for the services rendered." Cl. Brief at 24-25. However, Counsel fails to apply his assertions and cited authorities to the "work" to which he is referring or the specific ALJ determinations he is appealing. Thus, with the

if the hours claimed are "reasonable" for the "necessary work done" in the case, and the fee is commensurate with the degree of success obtained. 20 C.F.R. §702.132(a); *see Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245, 252 (1991), *aff'd on recon. en banc*, 25 BRBS 346 (1992); *Quintana v. Crescent Wharf and Warehouse Co.*, 18 BRBS 254, 257 (1986); *see also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In calculating the number of hours reasonably expended, the ALJ is to exclude hours that are "excessive, redundant, or otherwise unnecessary." *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 955 (9th Cir. 2007) (citing *Hensley*, 461 U.S. at 434). Because the ALJ is afforded "considerable discretion" in making this determination, he need only provide a "concise but clear explanation of [his] reasons" for reducing the number of hours requested. *See Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1047 (9th Cir. 2000) (quoting *Hensley*, 461 U.S. at 437). On appeal, the fee applicant bears the burden of proving the ALJ abused his discretion in reducing the number of hours requested in the fee petition. *Brown v. Marine Terminals Corp.*, 30 BRBS 29, 34 (1996) (en banc).

We reject the contentions that the ALJ mislabeled case-specific work performed by Mr. Brayton as "routine monitoring of business" and disallowed those entries "without any proffered justification." Cl. Brief at 31. The fee petition consisted of 709 itemized entries, and of the 7.9 hours requested for Mr. Brayton's work, the ALJ disallowed 1.8 hours because he found the entries appeared to involve "nothing more than routine monitoring of the business of Mr. Brayton's firm . . . for which he is not entitled to recover a fee."[19] Fee Order at 14-15. As the ALJ noted, these time entries are duplicative of and contemporaneous with associate attorney Lior Brinn's time entries and are not reasonable or necessary work for a senior partner to perform in pursuit of establishing Claimant's

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exception of the ALJ's disallowance of Mr. Brayton's time entries as "routine monitoring of the business," we decline to address any other specific disallowances, as Counsel has not adequately briefed the issue. 20 C.F.R. §802.211(b); *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51, 52 n.1 (2015) (citing *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990)); *Plappert v. Marine Corps. Exch.*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997); *see also Morris*, 10 BRBS at 380 ("Although [the] claimant may have made general reference to other fee disallowances, either the item was insufficiently identified or the arguments in regard to them were not developed enough for us to consider them as issues actually raised for our consideration.").

[19] Four of the excluded time entries, 147, 155, 160, and 162, totaling .8 hour, are for follow-up emails to BP's accounting department regarding the status of Longshore filings and outstanding documents from Claimant. The remaining time entries, 108, 154, and 161, totaling one hour, are for an interoffice communication and reviewing the case file for the status of Longshore filings and outstanding documents from Claimant. PX B at 5, 7

entitlement to benefits.[20] *Compare* PX B Time Entries 147, 155, 160-162, *with* 149, 154, 156- 159, 163, 164; Fee Order at 14-15 (comparing Time Entry 162 with 163). The only explanation Counsel offers as to why he asserts the ALJ "mislabeled" these tasks and abused his discretion in disallowing this time is that Mr. O'Connor opined Mr. Brayton's "limited work" was necessary at the time it was performed. Cl. Brief at 31. However, given the ALJ's "superior understanding" of the underlying litigation, this contention is insufficient to prove the ALJ abused his discretion in disallowing time entries for tasks he determined were "routine monitoring" of BP's business and, therefore, neither reasonably expended nor necessary for establishing Claimant's entitlement to benefits. 20 C.F.R. §702.132(a); *Van Gerwen*, 214 F.3d at 1047 (citing *Hensley*, 461 U.S. at 437). As the ALJ's explanation for disallowing these hours is "sufficiently concise and clear," we affirm his disallowance of 1.8 hours of Mr. Brayton's time billed as routine monitoring. *Tahara*, 511 F.3d at 956.

Work Performed Before the OWCP and Board

We also reject the contention that the ALJ should have awarded fees for services rendered at all levels of the administrative proceedings pursuant to the parties' agreement in their Section 8(i) settlement.[21] The ALJ sustained the Director's objection to work

[20] The ALJ further reduced Mr. Brayton's requested hours by disallowing 1.1 hours for work performed before the OWCP, .5 hour for work performed before the Board, and 1.8 hours spent on BP's conflict-of-interest issue. Fee Order at 13-14; *see also* PX B at 1, 20, 23, 29. In total, the ALJ disallowed 5.2 hours of Mr. Brayton's 7.9 hours of work, thereby awarding him a fee for 2.7 hours of work. Fee Order at 15-16.

[21] The particular provision in the settlement agreement reads:

> The issue of Claimant's attorneys' fees and costs pursuant to Section 28 of the Act for work performed on Claimant's behalf before the OWCP, the Office of Administrative Law Judges, … and the Benefits Review Board … remains in dispute. A fully documented Petition, as required by 20 C.F.R. §702.132, and Respondents' Objections thereto will be filed in accordance with the Order for Filing Settlement Documents, dated July 20, 2022. The parties stipulate that any award of attorneys' fees or costs for work performed before the OWCP, the OALJ, and/or the Board may be made by the OALJ.

Settlement Agreement at 7 (cleaned up); *see also* Fee Pet. at 1 ("By agreement, the services covered by this Petition include those performed during the pendency of the case before the Office of Workers' Compensation Programs . . . before the Office of Administrative Law Judges . . . and while on appeal to the Benefits Review Board.").

performed before the Board and found there was "no written stipulation of the parties" that would allow him to award a fee for work performed before the OWCP or the Board. Fee Order at 3; *see also* Dir. Obj. at 2-3. Consequently, he declined to award a fee for work performed before them and considered only the work performed before the OALJ.

A claimant who successfully prosecutes a disputed claim against an employer is entitled to a reasonable attorney's fee "in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be directly paid by the employer or carrier to the attorney for the claimant." 33 U.S.C. §928(a); 20 C.F.R. §702.134(a). A person seeking a fee for services must submit a fee application "to the district director, administrative law judge, Board, or court, as the case may be, *before whom the services were performed*." 20 C.F.R. §702.132(a) (emphasis added). Except where the amount of an attorney's fee is included in a settlement agreement that has been approved by the district director or ALJ, only the adjudicator before whom the services were performed is authorized to approve a fee for those services. 33 U.S.C. §928(c); 20 C.F.R. §702.132(c); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1, 8 (2001); *Brown v. General Dynamics Corp.*, 12 BRBS 528, (1980); *Revoir v. General Dynamics Corp.*, 12 BRBS 524, 527-528 (1980).

The parties' agreement for the ALJ to adjudicate the disputed issue of attorneys' fees in a manner that exceeds the scope of his authority as provided in the Act is contrary to law and not binding on the ALJ. *Rochester v. George Washington Univ.*, 30 BRBS 233, 235 (1997); *see Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 890 (9th Cir. 1993); *see also Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) ("When Congress creates a statutory right . . . it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right."). As Section 28 does not authorize the ALJ to approve an attorney's fee for work performed before the district director or the Board, the ALJ properly determined he may address only the work performed before him. 33 U.S.C. §928(a), (c); 20 C.F.R. §702.132(c); *Stratton*, 35 BRBS at 8; *Revoir*, 12 BRBS at 527-528; *Hernandez v. Sealand Service, Inc.*, 9 BRBS 1076, 1078 (1978). Accordingly, we affirm the ALJ's exclusion of any fees and costs sought for work performed before the district director or the Board.[22]

[22] Had the parties' settlement included an agreed *amount* of fees and costs to cover work performed at all levels of the proceedings, the ALJ could have approved the fee award while approving the settlement. *See Jenkins v. Puerto Rico Marine, Inc.*, 36 BRBS 1, 4-5 (2002).

Adjustment to Lodestar

Counsel contends the ALJ abused his discretion in reducing the total lodestar amount by 50% based on his findings that BP had a conflict of interest and failed to obtain informed written consent from each of its clients in accordance with the California Rules of Professional Conduct (California Rules). An ALJ has an affirmative duty to supervise attorneys who represent parties appearing before him, to enforce ethical standards, and to investigate potential violations of the applicable rules of professional responsibility. *Smiley v. Director, OWCP*, 984 F.2d 278, 282-283 (9th Cir. 1993); *see also Baroumes v. Eagle Marine Servs.*, 23 BRBS 80, 83 (1989). To carry out this duty, the ALJ necessarily has the authority to take appropriate action to rectify professional misconduct where authorized by the applicable statutes, rules, and regulations. 5 U.S.C. §§556(d), 558; 33 U.S.C. §§919(d), 923(a), 927(a), 931(2)(B); 20 C.F.R. §§702.131, 702.432; 29 C.F.R. §§18.12(b), 18.22, 18.23, 18.35, 18.87.

In both the show cause (OSC) and disqualification orders (ODC), as well as the fee award, the ALJ identified two potential conflicts between Claimant and other clients represented by BP in claims arising out of Decedent's alleged exposure to asbestos. Under California law, all heirs should be joined as plaintiffs because "a wrongful death action by only a portion of the heirs is not the action authorized by statute." *Adams v. Superior Court*, 196 Cal. App. 4th 71, 77 (2011). Claimant, as the Decedent's surviving spouse, is a necessary party in the wrongful death action and is statutorily authorized to initiate the action and recover her individual damages caused by Decedent's death.[23] Cal. Civ. Proc. Code §§377.60-377.62. At the same time, by operation of Section 33 of the Act, 33 U.S.C. §933, any benefits to which Claimant is entitled under the Longshore Act may be reduced or barred depending on her recovery in the wrongful death action and whether she complied with the notice and approval requirements under Section 33, 33 U.S.C. §933. Fee Award at 20.

Given this backdrop, the ALJ reasoned that Decedent's children, who are named in the wrongful death action and who entered into settlements "purportedly on behalf of all the heirs," and Claimant, who is not named in the wrongful death actions and disclaimed

[23] A wrongful death action in California is a "joint, single and indivisible" suit adjudicating the rights of all potential beneficiaries. *Ruttenberg v. Ruttenberg*, 53 Cal. App. 4th 801, 807 (1997). Omitted heirs "are 'necessary parties,' and plaintiff heirs have a mandatory duty to join all known omitted heirs in the 'single action' for wrongful death. If an heir refuses to participate in the suit as a plaintiff, he or she may be named as a defendant so that all heirs are before the court in the same action." *Id.* at 808; *see also Adams*, 196 Cal. App. 4th at 77.

her interests and statutory entitlement to any settlement proceeds arising out of those claims, had potentially adverse interests. Fee Order at 20; ODC at 9-10; OSC at 3. Because BP's simultaneous representation of clients with adverse interests created a potential conflict of interest for BP, the California Rules required BP to fully disclose its potential conflicts to each of the family members it represented and obtain their informed written consent before simultaneously representing them and advising Claimant to disclaim her interests in the wrongful death action. 29 C.F.R. §18.22(c) (attorney must adhere to applicable rules of conduct for jurisdiction in which the attorney is admitted to practice). The ALJ found BP did not obtain informed written consent and failed to produce evidence showing it had fully disclosed its conflicts to Claimant and Decedent's children at the time the conflict arose; therefore, he concluded BP violated the California Rules and reduced the total lodestar fee amount by 50% to account for BP's rule violation. Fee Order at 17-24.

Counsel concedes the ALJ has an affirmative duty to supervise attorneys and enforce ethical standards. However, in challenging the ALJ's lodestar fee reduction, he asserts there is no precedential or factual support for the ALJ's 50% reduction of the lodestar amount based on the "alleged" or "potential" conflict of interest. He further contends there is no record evidence showing the "potential conflict ever became an actual one,"[24] that it resulted in prejudice to Claimant,[25] or that BP willfully violated the California Rules.

While the lodestar generally represents a reasonable attorney's fee, the lodestar amount may be adjusted upwards or downwards in "rare" and "exceptional" cases where the initial lodestar calculation does not adequately reflect factors that may be properly considered in determining a reasonable fee. *Perdue v. Kenny A.*, 559 U.S. 542, 554 (2010); *Blum v. Stenson*, 464 U.S. 886, 899 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 982 (9th Cir. 2008); *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1046 (9th Cir. 2000). Under the Act, the enumerated factors to be considered are "the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded." 20 C.F.R. §702.132(a). These factors are ordinarily subsumed into the lodestar amount; however,

[24] Counsel questions the significance of the "potential conflict" given the Ninth Circuit's decision in *Hale v. BAE Sys. San Francisco Ship Repair, Inc.*, 801 F. Appx. 600 (9th Cir. 2020) (mem.). Cl. Brief at 35.

[25] Claimant stated she was "at all times aware of the facts that gave rise to any potential conflict" and "unambiguously consented to continued representation." Cl. Brief at 35.

consideration of other relevant factors, where implicated but not explicitly provided for, may also be considered. *Van Skike*, 557 F.3d at 1048; *Christiansen*, 557 F.3d at 1054 n.5; *Copeland v. Marshall*, 641 F.2d 880, 892 n.22 (D.C. Cir. 1980) (en banc). That is so because the ultimate question is whether the fee is reasonable pursuant to the Act. 33 U.S.C. §928.

In adjusting the lodestar calculation, the ALJ "appreciate[d]" BP's business model, its effective advocacy for its clients, and the skill and experience of the BP attorneys representing claimants under the Act, Fee Order at 18-19. However, he advised that if BP "is going to represent clients with potentially-conflicting interests," it needs to fully comply with the California Rules, and he admonished BP for not complying with rules in this case and multiple other cases pending before him and the OALJ.[26] Fee Order at 23-24.

There is no dispute Claimant, while represented by Counsel, prevailed in her Longshore Act claim. *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993) (settlement following a dispute constitutes successful prosecution); *Brown v. Gen. Dynamics Corp.*,

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[26] The ALJ wrote:

> … I acknowledge there are advantages to Mrs. Hodge and her family in proceeding in this case as they did, jointly represented by the fee applicant. But the choice to do so must be hers, and her children's, made only after full disclosure. No lawyer may substitute his or her own judgment – even with the best of intentions – for the client's informed written consent when the Rules of Professional Conduct require it. All lawyers, from ambulance chasers to *éminences grises*, owe a duty of undivided loyalty to all their clients. None of them should take it lightly.
>
> And, with this fee applicant, the ethical consideration extends beyond Mrs. Hodge's case. The fee applicant routinely represents claimants before the OALJ while simultaneously representing other family members before other tribunals. Potential conflicts will frequently arise in such situations. There is nothing wrong with such a business model, so long as the firm obtains the informed written consent of its several clients when the Rules of Professional Conduct or similar ethical rules require it. Yet in several cases Brayton Purcell has not complied. What is more, the firm of Brayton Purcell has trained a number of young associates who participated in this case and are no longer with the firm. It should train them in their ethical responsibilities as well as imparting professional skills.

Fee Order at 23-24 (footnote omitted).

12 BRBS 528 (1980). However, given there is specific evidence in the record and detailed findings by the ALJ that BP violated ethical rules central to its representation of Claimant and Decedent's children, this is one of those "rare" and "exceptional" cases where the "quality of representation" was not adequately reflected in the reasonable rate, thus warranting further adjustment to the lodestar amount. 20 C.F.R. §702.132(a); *Blum*, 465 U.S. at 898-899; *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986); *Copeland*, 641 F.2d at 893-894; *Rodriguez v. Disner [Rodriguez II]*, 688 F.3d 654 (9th Cir. 2013) (attorney misconduct affects value of representation); *Fair v. Bakhtiari*, 195 Cal. App. 4th 1135, 1150 (2011) (collecting cases); *Day v. Rosenthal*, 170 Cal. App. 3d 1125, 1162 (1985) (conflict of interest renders attorney services "valueless"). The ALJ relied on BP's market rate evidence in determining reasonable hourly rates for the attorneys and multiplied those rates by the number of hours billed to arrive at what would presumably be a reasonable attorney's fee in the absence of his further findings of BP's potential conflict of interest and failure to obtain informed written consent. But that market rate evidence does not reflect the value of potentially conflicted representation without informed written consent, which in some cases in California may be $0, and the hours billed while BP simultaneously represented Claimant and Decedent's children without obtaining their informed written consent and waiver do not reasonably reflect services properly performed. *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1358 (9th Cir. 1998); *Fair*, 195 Cal. App. 4th at 1150 (appropriate fee is zero "when the violation is one that pervades the whole relationship)); *Day*, 170 Cal. App. 3d at 1162 (conflict of interest rendered services "valueless" and required no finding on reasonable value of fees); *see also Copeland*, 641 F.2d at 894.[27]

We reject Counsel's assertions that the ALJ's reduction of BP's attorney's fee is improper because BP's conflict was "only" "potential" and did not materialize or prejudice

[27] In *Copeland*, the United States Court of Appeals for the District of Columbia held that "quality" adjustments to the lodestar may be made when the hourly rate used to compute the lodestar does not reflect "unusually good or bad" representation— "taking into account the level of skill normally expected of an attorney commanding" that hourly rate. *Copeland*, 641 F.2d at 893. As for downward quality adjustments, the court explained: "[I]f a high-priced attorney performs in a competent but undistinguished manner, a decrease in the 'lodestar' may be necessary under the 'quality of representation' rubric because the hourly rate used to calculate the 'lodestar' proved to be overly generous." *Copeland*, 641 F.2d at 894; *see also Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp.*, 520 F.2d 102, 117 (3d Cir. 1976) (en banc) ("Under the rubric of 'the quality of an attorney's work,' the court should appraise the manner in which counsel discharged his or her professional responsibilities.").

Claimant and because any violation was not willful. *Contra Rodriguez II*, 688 F.3d 654.[28] Under the Act, an attorney's fee is statutory, and the ALJ's authority to approve an attorney's fee is limited to what is provided for in the statute and implementing regulations. 33 U.S.C. §928(c) ("In all cases fees for attorneys representing the claimant shall be approved in the manner herein provided."). Furthermore, unlike common fund cases, an attorney's fee does not come out of the benefits to which a claimant is entitled: in most instances, as in this case, a claimant's attorney's fee is paid directly by the employer to the claimant's counsel in addition to the claimant's benefits. *Id.* Consequently, the equitable considerations from *Rodriguez II* are not entirely applicable to employer-paid attorney's fees awarded under the Act, and the ALJ is under no "special obligation" to consider those equitable principles when determining whether an ethical violation warrants reduction of an attorney's fee under the Longshore Act. *Van Skike*, 557 F.3d at 1048; *Christiansen*, 557 F.3d at 1054 n.5; *Copeland*, 641 F.2d at 892 n.22; *contra Westbrook v. F. Rodgers Insulation*, BRB No. 20-0004, slip op. (May 18, 2021) (unpub.).[29]

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[28] *Rodriguez II* involved an antitrust class action with no statutory basis for attorneys' fees; thus, the district court could award class counsel a fee from the class's total recovery (the "common fund"). The Ninth Circuit held a district court has broad discretion to *deny* fees to an attorney who commits an ethical violation, and in common fund class action cases, there is a "special obligation" to consider "the extent of the misconduct, including its gravity, timing, willfulness, and effect on the various services performed by the lawyer, and other threatened or actual harm to the client" given the district court's "fiduciary role to protect absent class members." The court applied California law to determine whether the law firm committed an ethical violation, as is appropriate under the Act, *see Baroumes*, 23 BRBS at 83, but its holding as to whether the ethical violation warranted the denial of attorneys' fees is premised on the district court's equitable powers and fiduciary duty to the class. *Rodriguez II*, 688 F.3d at 653-656.

[29] In *Westbrook v. F. Rodgers Insulation*, BRB No. 20-0004, slip op. (May 18, 2021) (unpub.), the Board considered whether the ALJ abused his discretion in reducing the total amount of BP's agreed upon attorney's fee by 50% for the same conflict of interest and California Rules violation as found in the instant case. The Board reversed the ALJ's reduction for several reasons, one of which was that the facts of the case and the equitable factors set forth in *Rodriquez II* did not support reduction of the agreed-upon attorney's fee. *Westbrook*, BRB No. 20-0004, slip op. at 8.

To the extent the Board's decision in *Westbrook* is construed as requiring consideration of the equitable factors set forth in *Rodriguez II*, we reject that interpretation and clarify that those factors, where applicable and relevant to determining what is a "reasonable fee" under the Act, may be considered along with the enumerated factors set

Finally, we reject Counsel's policy argument that reducing the attorneys' fees punishes BP and creates a windfall to Employer.[30] "Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary*." *Hensley*, 461 U.S. at 434 (quoting *Copeland*, 641 F.2d at 891). Because the ALJ found BP's conflicted representation and rule violation rendered its services less valuable to Claimant, it follows that Employer cannot be liable for more than the reasonable value of BP's services to Claimant.[31] As the ALJ permissibly exercised his discretion in reducing the lodestar

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forth in 20 C.F.R. §§702.132(a). *Van Skike*, 557 F.3d at 1048 (regulation permits consideration of factors not explicitly listed); *Christiansen*, 557 F.3d at 1054 n.5 (regulation does not forbid consideration of other factors not explicitly listed); *Copeland*, 641 F.2d at 892 n.22 (discussing factors applicable in Title VII cases and acknowledging other factors may be relevant in other fee-shifting statutes).

In addition, we reject Counsel's reliance on *Westbrook* for the proposition that the ALJ is without authority to reduce the total attorney's fee under "similar facts" and "because of the same kind of potential conflict" found in this case. Cl. Brief at 32, 36. While the conflict and California Rules violation in *Westbrook* may be the same as in this case, the Board's reversal was not premised on "similar facts." Rather, the fee amount in *Westbrook* was agreed upon as part of the parties' settlement agreement, whereas the fee amount in this case is disputed. An ALJ may not alter the terms of an approved settlement, *Losacano v. Elec. Boat Corp.*, 48 BRBS 49 (2014), so it was erroneous for the ALJ to approve the *Westbrook* settlement but then alter the fee provision therein. The ALJ in this case was under no such restriction as the parties did not settle the fee.

[30] Counsel contends that reducing the employer-paid attorney's fee for a "purported breach of the rules without a finding of harm" is contrary to "important policy objectives underlying the Act" because it punishes Claimant's attorneys and creates "an unfounded and improper windfall recovery" to Employer who is a "third-party not affected by the conflict." Cl. Brief at 31-38.

[31] In California, the general rule is that "[a]n attorney cannot recover fees for conflicting representation [without informed written consent] because 'payment is not due for services not properly performed.'" *Image Tech. Serv.*, 136 F.3d at 1358 (first quoting *Blecher & Collins v. Northwest Airlines, Inc.*, 858 F. Supp. 1442, 1457 (C.D. Cal. 1994); then quoting *Cal Pak Delivery, Inc. v. United Parcel Serv.*, 52 Cal. App. 4th 1, 14 (1997)); *see also Jeffry v. Pounds*, 67 Cal. App. 3d 6, 12 (1977) (attorney may recover reasonable fee for services rendered before violation occurred). This is so even when the non-prevailing party is to pay the prevailing party's attorney's fee under a mandatory, federal, fee-shifting statute. *See Image Tech. Serv., Inc.*, 136 F.3d at 1357-1358 (prevailing party

amount by 50% due to BP's conflict of interest and California Rules violation, we affirm his 50% reduction of the lodestar amount.

Allocation of Fee Award

Counsel requests the Board remand the case to the ALJ for a determination as to Employer's and CIGA's respective liabilities for Claimant's attorney's fee and costs. He suggests the Board instruct the ALJ to allocate the fee award among Employer and CIGA according to their respective liabilities under the terms of the approved Section 8(i) settlement agreement.[32] The allocation issue in this case arose after the ALJ issued his order awarding an attorney's fee; thus, the ALJ correctly denied Claimant's Motion for Reconsideration of the attorney fee order as an improper method for solving the issue.[33]

entitled to "a reasonable attorney's fee" paid by the defendant under the Clayton Act, 33 U.S.C. §15).

[32] Although the Special Fund was liable for a portion of Claimant's settlement recovery, Counsel acknowledges it is not liable for an attorney's fee, and he does not dispute the ALJ's finding on this issue. Cl. Brief at 39.

[33] As the ALJ observed in his Order Denying Reconsideration, the parties did not agree to the amount of an attorney's fee or allocation of an attorney's fee award in the settlement agreement. Further, Counsel did not propose an allocation in his fee petition, CIGA did not address the issue in its objections, and the Director disputed only the Special Fund's liability for any portion of an attorney's fee.

Accordingly, the ALJ's Attorney Fee Order and Order Denying Reconsideration are affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge