

U.S. Department of Labor

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



BRB No. 20-0137

JERRY P. BURNETTE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
FRED WAHL MARINE CONSTRUCTION)	
)	
and)	DATE ISSUED: 08/12/2020
)	
NATIONAL UNION FIRE INSURANCE)	
COMPANY OF PITTSBURGH c/o)	
CHARTIS CLAIMS, INCORPORATED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Attorney Fee Order of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz (Law Office of Charles Robinowitz), Portland, Oregon, for Claimant.

Michael J. Godfrey (Sather, Byerly & Holloway, LLP), Portland, Oregon, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Richard M. Clark’s Attorney Fee Order (2012-LHC-00182) rendered on a claim filed pursuant to the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (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, 41 BRBS 53(CRT) (9th Cir. 2007).

Following the December 2018 issuance of a decision on remand from the Benefits Review Board, Claimant's counsel filed a petition for an attorney's fee in March 2019 for work performed before the Office of Administrative Law Judges (OALJ) between 2011 and 2019.¹ Counsel, Charles Robinowitz, requested a fee totaling \$117,569.70, representing 224.22 hours of attorney time at an hourly rate of \$500, 4.95 hours of associate attorney time by Lee Ann Donaldson at an hourly rate of \$285, 13.85 hours of legal assistant time at an hourly rate of \$175, 6.1 hours of legal assistant time at an hourly rate of \$150, and 9.85 hours of legal assistant time at an hourly rate of \$125,² plus \$8,089.49 in costs. Employer filed objections to counsel's fee petition. Counsel filed a reply to employer's objections, along with a request for an additional attorney's fee totaling \$3,850.70 for preparing the reply, representing 7.7 hours of attorney work at an hourly rate of \$500, plus an additional \$784.68 for the delay in the payment of costs.

In his Attorney Fee Order, the administrative law judge reduced the hourly rates for counsel and associate counsel and for the paralegal services for which an hourly rate of \$175 was requested, and disallowed or reduced some itemized entries.³ He awarded

¹ The initial decision and decision on remand were issued by Administrative Law Judge Jennifer Gee who, upon her retirement, transferred the attorney's fee petition to Administrative Law Judge Clark in January 2019.

² Counsel sought a legal assistant hourly rate of \$175 for Beverly Harmon and Karen Pilkington, who each have over 20 years of experience; \$150 for Robin Westwood, who has 10 years of experience; \$150 for Elena Zoniadis, a lawyer performing paralegal work; and \$125 for Phillip Duechle, whose qualifications are not listed in the fee petition. Attorney Fee Order at 2, 9-10.

³ The administrative law judge disallowed 5.7 hours of work counsel performed, .30 of an hour associate counsel performed, 6.75 hours of work paralegals performed at an hourly rate of \$150 and .65 of an hour performed at an hourly rate of \$125. The administrative law judge further reduced the individual time allowed by 10 percent because he determined the total number of hours allowed reflected counsel's use of quarter-hour billing, which he found overinflated the time expended. Attorney Fee Order at 19.

counsel's costs without a delay enhancement. Thus, he approved an attorney's fee and costs totaling \$88,511.42, payable by Employer.⁴

On appeal, counsel challenges the hourly rates awarded for him, Ms. Donaldson, and Ms. Pilkington, the reduction in the number of hours requested, and the denial of interest for the delay in reimbursement of costs. Employer responds, urging affirmance in all respects. Counsel filed a reply brief.

HOURLY RATES

The administrative law judge based counsel's hourly rate on prior fee awards to counsel under the Act, including some of his own.⁵ He found these decisions provide a reliable and thorough analysis of counsel's current market rate and therefore he need not engage in a repeat analysis of counsel's market rate evidence, which is similar to the evidence he and other judges have examined and considered in prior decisions.⁶ Attorney Fee Order at 8.

⁴ The administrative law judge calculated the fee award as follows: \$76,485.18 for counsel (218.52 hours allowed reduced by 10 percent to 196.62 hours at \$389 per hour); \$1,141.25 for associate counsel (4.65 hours reduced by 10 percent to 4.15 hours at \$275 per hour); \$1,170 for Ms. Westwood and Ms. Pilkington (13 hours reduced by 10 percent to 11.7 hours at \$150 per hour); \$30 for Ms. Zoniadis (.2 of an hour at \$150 per hour); \$1,037.50 for Mr. Duechle (9.2 hours reduced by 10 percent to 8.30 hours at \$125 per hour); and \$8,020.04 for expenses.

⁵ The administrative law judge relied on *Ayers v. Jones-Stevedoring Co.*, 2011-LHC-01875 (June 1, 2016), *aff'd in part, part, BRB No. 16-0520* (Apr. 24, 2017), *recon. denied*, (Aug. 5, 2017), *aff'd after remand*, BRB No. 19-0110 (Dec. 30, 2019), *appeals pending*, Nos. 20-70542, 20-70550 (9th Cir.); *Harper v. Temco, LLC*, 2015-LHC-01365 (June 20, 2019), *recon. denied*, July 22, 2019, *rev'd and remanded*, 54 BRBS 1 (2020) (Board reversed finding motion for reconsideration was untimely filed); *Serbinovich v. Gunderson, Inc.*, 2013-LHC-01372 (Aug. 2, 2018), *aff'd*, BRB No. 18-0596 (June 12, 2019), *appeal pending*, No. 19-72006 (9th Cir.); and *Seachris v. Brady-Hamilton Stevedore Co.*, 2007-LHC-01747 (Jan. 19, 2017), *aff'd in part, part, BRB No. 17-0581* (May 7, 2018), *appeal pending*, No. 18-71807 (9th Cir.).

⁶ Counsel submitted pertinent pages from the 2017 Oregon State Bar Economic Survey, the 2016 update of the Morones Survey of Commercial Litigation Fees, and an Oregon Circuit Court fee award he received in *Scott v. Vigor Marine, LLC*, Case No. 17CV17799 (Or. Cir. Ct. Nov. 28, 2018). In *Scott*, the court found counsel did not meet the burden of showing he was entitled to \$640 per hour and awarded him an hourly rate of

On appeal, counsel contends the administrative law judge erred by rejecting his market rate evidence and instead relying on prior fee awards. Counsel also avers the administrative law judge erred by reducing the requested hourly rates for Ms. Donaldson and Ms. Pilkington because Employer did not object to the rates claimed for their services.

The lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a “reasonable attorney’s fee” under a federal fee-shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). An attorney’s reasonable hourly rate is “to be calculated according to the prevailing market rates in the relevant community.” *Blum*, 465 U.S. at 895. The burden is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience and reputation. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).

As this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the determination as to an appropriate hourly rate is guided by that court’s decision in *Shirrod*, which reiterated that in awarding a fee under the Act, an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT). *Shirrod* holds that when the market is Portland and a proxy rate is required, the adjudicator must consider Oregon State Bar Survey (OSBS) data. *Id.*

The administrative law judge addressed and rationally rejected evidence counsel submitted in support of his requested hourly rate of \$500, and counsel has not established the administrative law judge abused his discretion in this regard. Order at 7-9; *see Christensen v. Stevedoring Services of America*, 44 BRBS 39 (2010), *modifying in part on recon.* 43 BRBS 145 (2009), *recon. denied*, 44 BRBS 75 (2010), *aff’d mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F. App’x 912 (9th Cir. 2011). Moreover, the administrative law judge permissibly looked to sufficiently recent fee awards to counsel, three of which relied on bar survey evidence, to formulate counsel’s

\$500. We note the court stated it used the 2017 Oregon Bar Survey for civil litigators at the 75th percentile, but the 75th percentile rate for Portland civil litigation is \$350 for both injury and non-injury cases.

proxy market rate.⁷ *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT) (tribunals need not revisit the market rate in every case; must do so “periodically” to ensure the rate reflects market conditions); *see generally Fox v. Vice*, 563 U.S. 826, 45 BRBS 41(CRT) (2011); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Thus, as the award is consistent with *Shirrod*, we affirm the administrative law judge’s proxy market rate award of \$389 for counsel’s services.

We agree with counsel, however, that in the absence of Employer’s objecting to the hourly rates requested for Ms. Donaldson (\$285) and Ms. Pilkington (\$175), the administrative law judge erred in reducing these rates to \$275 and \$150. The administrative law judge has the authority to review an unopposed fee petition. *Sullivan v. St. John’s Shipping Co., Inc.*, 36 BRBS 127 (2002). But Employer’s lack of objection to these claimed rates, in view of its objection to other rates, is conclusive evidence of the market rate for their services in this case.⁸ We, therefore, reverse the administrative law judge’s reduction of these hourly rates.

ITEMIZED ENTRIES

Counsel challenges the administrative law judge’s reduction of 1.75 hours from the 4.75 hours itemized on the fee petition for his meeting with Claimant on September 23, 2014, to prepare for the hearing scheduled for the next day.⁹ The administrative law judge determined the time requested was excessive in light of the 6 hours counsel met with Claimant to prepare for the hearing on September 18, 2014. Attorney Fee Order at 13.

The tests applied to the compensability of the attorney’s work are whether the hours claimed are “reasonable” for the “necessary work done” in the case and the fee award is

⁷ The hourly rate determination in *Seachris* relied on the 2012 OSBS, as well as circuit court, Benefits Review Board, and administrative law judge fee awards. *Ayers* relied solely on the 2012 OSBS and *Serbinovich* relied on the 2017 OSBS. In *Harper*, the administrative law judge relied on the fee awards in these cases and other administrative law judge fee awards to Claimant’s counsel.

⁸ We reject counsel’s contention the administrative law judge erred by not adjusting the paralegal rates for inflation, as he did not request an inflation adjustment in his fee petition. *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT); *see* Attorney Fee Petition at 22-23 (65-66).

⁹ Counsel also conferenced with Claimant for a half-hour on the day of the hearing. Cl. Fee Pet. at 16.

commensurate with the degree of success obtained. *See* 20 C.F.R. §702.132(a); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Thus, the administrative law judge may, within his discretion, disallow a fee for hours found to be duplicative, excessive, or unnecessary. *See Tahara*, 511 F.3d 950, 41 BRBS 53(CRT). An administrative law judge is afforded “considerable deference” in determining what hours are “excessive, redundant, or otherwise unnecessary.” *Id.*, 511 F.3d at 956, 41 BRBS at 57(CRT). In this case, however, we agree the administrative law judge arbitrarily reduced as excessive 1.75 hours of the 4.75 hours counsel requested for meeting with Claimant the day before the hearing. He did not preside at the hearing and, therefore, had no basis for determining the time counsel spent preparing Claimant for the hearing was excessive, and the time spent is not unreasonable on its face. Accordingly, we reverse this 1.75 hours reduction in counsel’s compensable time.

Counsel also challenges the administrative law judge’s disallowance of entries for tasks he characterized as clerical; specifically, communications with Claimant, his wife, opposing counsel and opposing counsel’s office regarding the scheduling of depositions and defense medical examinations. In his Attorney Fee Order, the administrative law judge’s disallowed as clerical 1.40 hours of counsel’s time, .30 hour of Ms. Donaldson’s time, 1.65 hours of Ms. Westwood’s time, 4.95 hours of Ms. Pilkington’s time, .65 hour of Mr. Duechle’s time, and .15 hour of Ms. Harmon’s time. Attorney Fee Order at 12-19.

Tasks such as calendaring of deadlines, case file organization, and drafting routine correspondence are clerical unless they require independent legal judgment. *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986). Moreover, an attorney’s time spent on traditional clerical duties is not compensable, *Staffile v. Int’l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980), as clerical services are part of an attorney’s overhead. While the administrative law judge is entitled to review the fee petition for compensability of itemized entries, we disagree with his characterization that communicating with opposing counsel and his office staff, and with Claimant or his wife on claim-related matters are within the scope of clerical tasks. *Quintana*, 18 BRBS 254. Moreover, much of this work was appropriately delegated to paralegal staff. Accordingly, we reverse the administrative law judge’s disallowance of the above-delineated hours as clerical.¹⁰

Counsel further challenges the administrative law judge’s additional 10 percent reduction of the compensable hours he otherwise allowed. The administrative law judge determined the vast majority of the hours billed were in quarter-hour increments, which he

¹⁰ However, we affirm the disallowance of .15 of an hour by Ms. Harmon on March 5, 2019, for preparing a form letter to the administrative law judge. *Quintana*, 18 BRBS 254.

found “overinflated the time” billed. He therefore imposed an across-the-board “10 percent reduction in the total remaining hours billed that were not previously reduced.” Attorney Fee Order at 19. He relied on *Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008) as authority for this action to impose the additional 10 percent reduction in the number of allowable hours. In *Moreno*, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, vacated a 25 percent reduction in the total hours allowed, which the district court had stated was for duplicative work. *Moreno*, 534 F.3d at 1112. The court held the lower court has the discretion to impose, without further explanation, only a 10 percent reduction for duplicative work. *Id.* In this case, unlike *Moreno*, the 10 percent reduction in compensable hours was not for duplicative work, but because some of the entries were billed in quarter-hour increments. The administrative law judge acknowledged the Board’s regulations allow for quarter-hour billing, but the OALJ regulation is silent on this subject. Attorney Fee Order at 19; see *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 346 (1991) (en banc); compare 20 C.F.R. §802.203(d)(3) with 20 C.F.R. §702.132.

We reject the administrative law judge’s reliance on *Moreno* to impose a 10 percent reduction in the number of hours allowed due to Counsel’s quarter-hour billing, as such a determination is contrary to the guidance of the Ninth Circuit that fee awards not be rendered on an arbitrary or capricious basis. *Tahara*, 511 F.3d at 952, 41 BRBS at 54(CRT); see generally *Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 576 (4th Cir. 2013). We fail to perceive a permissible rationale for reducing all of the allowable itemized entries merely because counsel used quarter-hour billing. Accordingly, we reverse the administrative law judge’s 10 percent reduction in the number of hours allowed.¹¹

COSTS

Counsel finally contends the administrative law judge erred in not augmenting the award of costs for the delay in payment. Counsel initially sought reimbursement for costs in the amount of \$8,089.49. Cl. Fee Pet. at 20. Counsel amended his request to \$8,874.17,

¹¹ Accordingly, based on our reversal of the hourly rates of Ms. Donaldson and Ms. Pilkington, the entries mischaracterized as clerical, the 1.75 hours expended by counsel preparing Claimant for the hearing, and the additional 10 percent reduction in compensable time, counsel is entitled to a fee for: 221.67 hours x \$389 for his services; 4.95 hours x \$285 for Ms. Donaldson’s services; 5.9 hours x \$150 for Ms. Westwood’s services; 13.7 hours x \$175 for Ms. Pilkington’s services; 9.85 hours x \$125 for Mr. Duechle’s services; and .20 of an hour for Ms. Zoniadis’s services at \$150 per hour. Thus, counsel’s total fee is \$92,184.13.

with the increase reflecting an enhancement for the delay in reimbursement. Cl. Reply Br. at 7-8. The administrative law judge awarded the original requested reimbursement of \$8,089.49, but denied the enhancement request. Attorney Fee Order at 20.

We reject counsel's contention that he is to be recompensed for the delay in Employer's payment of the awarded costs. Counsel has not cited any law supportive of his contention. Consequently, counsel has failed to establish the administrative law judge erred in denying his request for an enhancement on the award of costs.¹²

Accordingly, we modify the administrative law judge's Attorney Fee Order to allow a fee for Ms. Donaldson's services based on an hourly rate of \$285 and for Ms. Pilkington's services based on an hourly rate of \$175. We reverse the administrative law judge's denial of 1.75 hours of counsel's time preparing Claimant for the hearing, the time expended on tasks he mischaracterized as clerical, and the additional 10 percent reduction in compensable hours. In all other respects, we affirm the administrative law judge's Attorney Fee Order. As modified, counsel is entitled to a fee of \$92,184.13, plus \$8,089.49 in costs, payable by Employer.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

¹² See *Seachris v. Brady-Hamilton Stevedore Co.*, BRB No. 17-0581, slip op. at 6-7 (May 7, 2018), *appeal pending*, No. 18-71807 (9th Cir.); *Wakeley v. Knutson Towboat Co.*, BRB No. 18-0238, slip op. at 5-6 (Dec. 20, 2018), *appeal pending*, No. 19-70399 (9th Cir.).