



BRB No. 24-0245

CHRISTOPHER J. FRANCIS

Claimant-Petitioner

v.

JONES STEVEDORING COMPANY

Self-Insured

Employer-Respondent

NOT-PUBLISHED

DATE ISSUED: 07/22/2026

DECISION and ORDER

Appeal of the Attorney Fee Order and Order Granting Employer's Motion for Reconsideration and Denying Claimant's Motion for Reconsideration of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

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

James McCurdy and Alice Newlin (Lindsay Hart, LLP), Portland, Oregon, for Employer.

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

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Christopher Larsen's Attorney Fee Order and subsequent Order Granting Employer's Motion for Reconsideration and Denying Claimant's Motion for Reconsideration (2014-LHC-00813) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). The Benefits Review Board reviews an attorney's fee award in

cases arising within the jurisdiction of the United States Court of Appeals for the Ninth Circuit “for errors of law and adherence to the substantial evidence standard.”¹ *Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066, 1076 (9th Cir. 2021); *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950 (9th Cir. 2007); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). We “must accept the ALJ’s findings unless they are contrary to law, irrational, or unsupported by substantial evidence.”² *Seachris*, 994 F.3d at 1076.

Claimant sustained a right knee injury while working for Employer as a lasher on February 28, 2011, and injuries to both shoulders while attending physical therapy for his knee injury in September 2012. Employer voluntarily paid Claimant \$12,997.36 in compensation. Att’y Fee Order at 2. On March 13, 2015, Employer made an unconditional offer in writing to settle the claim for an additional \$20,000 that Claimant rejected. *Id.* at 2-3; Employer’s Obj. Ex. 2 at 1. Employer thereafter paid Claimant an additional \$22,203.27 in compensation. Att’y Fee Order at 3. On May 2, 2017, ALJ Richard M. Clark found Employer did not dispute compensability of Claimant’s knee injury but determined Claimant failed to establish his shoulder injuries were work-related. May 2, 2017 Decision and Order at 1, 36-38. He awarded Claimant permanent partial disability compensation and medical benefits.³ *Id.* at 51-52.

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained the injuries at issue in this case in Oregon. 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); 20 C.F.R. §702.201(a).

² *But see also Horton v. Director, OWCP*, No. 24-5011, 2026 WL 311571, at *3 (9th Cir. Feb. 5, 2026) (unpublished memorandum) (court reviews Benefits Review Board fee decisions for “abuse of discretion”); *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1052 (9th Cir. 2009) (same).

³ Claimant appealed the ALJ’s finding that he failed to establish a work-related shoulder injury and that his average weekly wage (AWW) was \$94.24. The Board vacated the AWW finding and remanded the case for the ALJ to consider all relevant evidence in calculating Claimant’s AWW but affirmed his remaining findings. *Francis v. Jones Stevedoring Co.*, BRB No. 17-0465, slip op. at 1-2, 7, 11 (June 21, 2018). On November 5, 2019, the ALJ issued a Decision and Order Following Remand, again finding Claimant’s AWW was \$94.24. Nov. 5, 2019 Decision and Order. Claimant appealed, and the Board affirmed the ALJ’s findings. *Francis v. Jones Stevedoring Co.*, BRB No. 20-0086, slip op. at 4-7 (July 16, 2020). Claimant then appealed to the Ninth Circuit, which affirmed the

On May 23, 2023, Claimant's counsel (Counsel) filed an attorney's fee petition under Section 28(b), 33 U.S.C. §928(b), for work performed before the ALJ from February 18, 2014, to May 21, 2023. Amend. Fee Pet. at 1-19. Counsel requested a total fee of \$157,054.95 plus \$16,732.18 in costs.⁴ *Id.* at 18-19.

In support of his requested hourly rate, Counsel relied on his more than fifty years of experience with cases arising under the Act, his experience litigating hundreds of both longshore and commercial litigation cases, his professional accolades, the Morones Survey, Robert Bonaparte's declaration and exhibits, and the fee order in *Scott v. Vigor Marine, LLC*, No. 17CV17799 (Or. Cir. Ct. Nov. 28, 2018), awarding Counsel \$500 per hour in a discrimination claim under Oregon state law. Amend. Fee Pet.; Decl. of Robert Bonaparte Exs. A, C. Counsel also submitted portions of the Oregon State Bar Survey showing billing rates for attorneys in Portland with more than thirty years of experience and billing rates for all attorneys in Portland in private practice. Decl. of Robert Bonaparte Ex. B.

Employer objected to Counsel's entitlement to a fee under Section 28(b) and to the requested hourly rates, time entries, and costs. Employer's Obj. at 2-30. It also asserted that because ALJ Clark awarded Claimant less than the amount it had paid Claimant following its settlement offer, Counsel should not receive any fees for work performed after March 13, 2015, the date of that offer. *Id.* at 24-27. Although Employer objected to aspects of Counsel's evidence regarding market rate, it did not submit any affirmative evidence of its own to counter Claimant's market rate submissions.

In his initial Attorney Fee Order dated January 26, 2024, ALJ Larsen (the ALJ) found Counsel entitled to an attorney's fee under Section 28(b) because Claimant was successful in obtaining additional compensation in the form of Employer's liability for two

Board's decision. *Francis v. Jones Stevedoring Co.*, No. 20-72747, 2022 WL 807409, at *1 (9th Cir. Mar. 16, 2022).

⁴ Counsel requested \$151,327.50 for 201.77 hours of legal services performed by Charles Robinowitz, Esq., at an hourly rate of \$750; \$202.20 for 0.6 hours of legal services performed by Lee Ann Donaldson, Esq. at an hourly rate of \$337; \$505.50 for 1.5 hours of legal services performed by Genavee Stokes-Avery, Esq. at an hourly rate of \$337; \$87.50 for 0.35 hours of legal services performed by Alana Iturbide, Esq., at an hourly rate of \$250; \$4,700 for 23.5 hours of legal assistant services performed by Karilyn Pilkington at an hourly rate of \$200; \$107.25 for 0.65 hour of legal assistant services performed by June Glisan at an hourly rate of \$165; and \$150 for 0.75 hour of legal assistant services performed by Jamie Khan at an hourly rate of \$200. Amend. Fee Pet. at 18.

knee surgeries and future medical benefits. Att’y Fee Order at 8. The ALJ accepted the parties’ agreement that Portland, Oregon, was the relevant community for determining Counsel’s hourly rate.⁵ *Id.* at 10.

The ALJ then purported to evaluate the evidence contained in the declarations of both Counsel and Mr. Bonaparte. He first weighed Counsel’s declaration and concluded he belonged in the 75th percentile of attorneys in Portland, Oregon, for his work in this case, rather than in the 95th percentile of Portland attorneys, as Counsel claimed and as the United States Court of Appeals for the Ninth Circuit and the Benefits Review Board had placed him in past cases. While the ALJ listed some of the market evidence contained in Counsel’s declaration in making his determination, he did not discuss it and found three factors alone justified Counsel’s reduced placement: (1) Counsel “performed much of the work on this his own [sic],” which does not involve “the type of complex management required of top commercial litigators;” (2) Counsel “often requires postponements and extensions of time to complete required work;” and (3) “the appellate history here” contained “evidence of a relative lack of judgment taking on appeals.” *Id.* at 13-14.

But the ALJ did not meaningfully discuss any other aspect of Counsel’s declaration. With regard to Mr. Bonaparte’s declaration, rather than explaining how the three factors or reasons he relied on weighed heavier than Mr. Bonaparte’s expertise and thirty years practicing in the same community as Counsel, the ALJ likewise summarily concluded “I considered this evidence above and believe [Counsel] is more appropriately placed in the top quartile of his peers.” *Id.* at 16. The ALJ then used the 75th percentile as the foundation when applying the attorney fee surveys that he blended in determining Counsel’s hourly rate.

The ALJ subsequently recognized the hearing took place in July 2015, and Counsel expended most of his time on this case between 2014 and 2016. *Id.* at 19-20. He found a delay enhancement to Counsel’s and his associates’ present rates reasonable because nearly ten years had elapsed, specifically finding an enhancement to 2023 rates fairly accounted for the delay in payment. *Id.* The ALJ rejected Counsel’s requested \$750 hourly rate and instead awarded him an hourly rate of \$443 based on an average of the 2017 Oregon State Bar (OSB) Survey’s list of relevant practice areas, the hourly rates for attorneys with more than thirty years of experience, the rates for all attorneys in all practice areas in Portland, and the rates in the 2020 Morones Survey of Commercial Litigation Fees in Portland (Morones Survey). *Id.* at 18. Using the United States Department of Labor’s Bureau of

⁵ The Office of Administrative Law Judges (OALJ) reassigned the case to the ALJ when ALJ Clark left the OALJ.

Labor Statistics (BLS) inflation calculator, the ALJ adjusted the 2016 hourly rate of \$443 to the 2023 rate of \$563. *Id.* at 20.

The ALJ next considered the reasonableness and necessity of the work performed. *Id.* at 23-26. He rejected Employer's objections to particular time entries, finding those time entries reasonable and not "unrealistically inflated." *Id.* at 26. But he instituted a fifty percent across-the-board reduction of Counsel's hours worked because he found Claimant achieved "limited success" on his claims. *Id.* at 24-25. Consequently, the ALJ awarded a total fee of \$59,465.16, plus \$16,732.18 in costs, and interest.⁶ *Id.* at 25, 27.

After significantly lowering Counsel's hourly rate determination through this process, the ALJ nevertheless commented:

In my personal opinion, the Ninth Circuit's jurisprudence in the area of Longshore fee litigation has resulted in an unnecessarily complex analysis and nearly untenable process of resolving fee disputes. The framework developed in *Christensen* [*v. Stevedoring Servs. of Am.*, 557 F.3d 1049 (9th Cir. 2009)], *Van Skike* [*v. Director, OWCP*, 557 F.3d 1041 (9th Cir. 2009)], and *Seachris* has transformed what should be a straightforward and predictable adjudication into a drawn-out, convoluted process that, in practice, departs dramatically from the Supreme Court's admonition that judges need not act as green-eyeshade accountants and that fee disputes should not devolve into a second major litigation. But I am bound to follow that framework in this case, so I have considered all relevant evidence and have endeavored to develop a reasonable proxy market based on the evidence before me in keeping with the Ninth Circuit's directives.

Id. at 17, n.23.⁷

Counsel filed a motion for reconsideration, asserting the ALJ erred in decreasing his hourly rate from \$750 to \$443, contrary to the holding in *Seachris*. Claimant's Mot. for Recon. at 1-2. He also argued the ALJ should have relied on an inflationary rate of

⁶ The ALJ found the only measure of Claimant's success is Employer's liability for the cost of two knee surgeries and ALJ Clark's determination that Employer also is liable for future reasonable medical benefits for the work-related knee injury. Att'y Fee Order at 24.

⁷ Notably, the ALJ did not explain what was unclear about any of the cases he referenced.

25.8% as recommended by the OSB Survey, rather than on the BLS inflation calculator.⁸ *Id.* Employer filed a response requesting the ALJ deny Counsel’s motion. Employer’s Resp. at 2-5.

Employer also filed a motion for reconsideration of the fee award, arguing Counsel is not entitled to any fee after it offered to settle the claim on March 13, 2015, because it did not controvert Claimant’s knee injury and did not refuse to pay his medical benefits. Employer’s Mot. for Recon. at 4-6. Claimant responded, urging the ALJ to reject Employer’s motion. Claimant’s Resp. at 1-3.

On March 6, 2024, the ALJ issued his Order Granting Employer’s Motion for Reconsideration and Denying Claimant’s Motion for Reconsideration (Order). The ALJ rejected Counsel’s argument that he violated *Seachris* by improperly relying on a general category rate for attorneys in calculating his hourly rate. Order at 3-4. Rather, he stated he averaged several rates and categories to approximate a market for Longshore attorneys in Portland, Oregon, including “all practice areas.” *Id.* at 3. He stated the “all practice area rate” differs from the “general” category Counsel refers to and is therefore consistent with *Seachris* because “the former considers billing rates for attorneys in private practices regardless of employment level in Portland . . . while the latter is limited to those practitioners who choose not to specialize in any particular area of law[.]” *Id.* at 3-4. Further, he rejected Counsel’s argument that he erred in not relying on the 2022 OSB Survey when calculating the delay enhancement because the method for calculating delay enhancements is “discretionary.” *Id.* at 4 (citing *Fox v. Vice*, 563 U.S. 826, 827 (2011)).

The ALJ, however, found persuasive Employer’s argument that its offer included acceptance of liability for reasonable and necessary medical benefits under Section 7, 33 U.S.C. §907. *Id.* at 8. Because Claimant did not procure benefits greater than the settlement offer amount, he found Employer is not liable for a fee after March 16, 2015, when Claimant received the offer. 33 U.S.C. §928(b); Order at 5 n.5, 8. Consequently, he

⁸ Counsel asserted that without including the general category rate for attorneys, his hourly rate should have been \$457. Claimant’s Mot. for Recon. at 2. He argued that applying an inflationary rate of 25.8% results in an hourly rate of \$575. *Id.* Further, he argued this rate should be increased by “the annual increase in the CPI-U for west coast cities of under 2.5 million people by 8.2[%],” resulting in an hourly rate of \$622 which should then be increased by the “annual inflationary rate for 2023 of 4.2[%],” resulting in a total hourly rate of \$648. *Id.*

did not approve any itemized hours for services performed after March 16, 2015, and he modified his fee award to reflect a new total of \$31,170.90.⁹ Order at 9.

On appeal, Counsel contends compounding errors improperly influenced the ALJ's fee award. He argues the ALJ erred in determining his appropriate percentile and his hourly rate by failing to consider the market rate evidence. Claimant's Br. at 4-7. In addition, he argues the ALJ erred in finding Employer not liable for a fee for services rendered after March 16, 2015, when Counsel rejected the settlement. *Id.* at 7-8. Employer filed a response brief in support of the ALJ's findings. Counsel filed a reply, reiterating his arguments on appeal. We agree, in part, with Counsel's arguments.

In placing Counsel in the 75th percentile of his peers, the ALJ used rationales the Ninth Circuit has specifically rejected in *Seachris* and did not meaningfully consider highly relevant evidence in Counsel's declaration.

Under the Act, an ALJ must determine the prevailing market rate "for similar services by lawyers of reasonably comparable skill, experience and reputation" in the relevant community that should be commensurate with fees attorneys could obtain in other types of cases. *Seachris*, 994 F.3d at 1076-77 (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)); *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1086 (9th Cir. 2015); *Christensen*, 557 F.3d at 1053. The fee applicant bears the burden of producing "satisfactory evidence" of the relevant market 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).

The Ninth Circuit has stressed that "a reasonable attorney's fee is one that is adequate to attract competent counsel." *Seachris*, 994 F.3d at 1076 (citations omitted). It therefore is necessary "that counsel be awarded fees commensurate with those which they could obtain by taking other types of cases," and "that fees be sufficient to induce a capable attorney to undertake the representation of a meritorious case." *Id.* An ALJ thus may not simply list relevant evidence only to discount it based on unsupported assumptions or conclusory reasoning. Rather, the adjudicator must grapple with materially relevant evidence bearing on the market rate and provide a reasonable explanation for the weight

⁹ The ALJ reduced Counsel's hours to 49.6, Ms. Donaldson's hours to 0.6, Ms. Stokes-Avery's to 0.85, Ms. Iturbide's hours to 0.25, and the legal assistants' hours to 16.5. Order at 9.

assigned to it. *Id.* at 1077 (whether a fee is reasonable is a factual determination “considering both the proponent’s evidence and evidence submitted by the fee opponent challenging the accuracy and reasonableness of the facts asserted by the prevailing party.”) (citation omitted).

Such thorough engagement did not occur here. Counsel submitted substantial evidence bearing on his claimed market rate with his declaration – including evidence concerning his experience, specialization, litigation record, and prior fee awards – fulfilling his initial burden. *Seachris*, 994 F.3d at 1077 (finding similar evidence “more than sufficient to carry [Counsel’s] initial burden of production”).

In response, Employer disputed Counsel’s evidence but failed to provide any affirmative evidence of the market rate. The ALJ then merely listed portions of Counsel’s evidence but did not meaningfully analyze it when determining Counsel’s placement in the 75th percentile “of practitioners.” Att’y Fee Order at 14. Instead, the ALJ relied almost exclusively on three rationales to discredit Counsel’s declaration none of which adequately supports the ALJ’s determination under binding Ninth Circuit precedent.¹⁰

First, the ALJ stated that Counsel should not be placed in the highest percentile because he does not manage a team of attorneys in complex litigation. *Id.* at 13. But the *Seachris* court expressly rejected reliance on this consideration when evaluating this same

¹⁰ Our dissenting colleague’s statement that there “is no burden-shifting involved” in determining the market rate is incorrect. As the *Seachris* court made clear, “[t]he evidentiary burdens governing fee motions are well established:”

The applicant has an initial burden of production, under which it must ‘produce satisfactory evidence’ establishing the reasonableness of the requested fee. This evidence must include proof of market rates in the relevant community (often in the form of affidavits from practitioners), and detailed documentation of the hours worked. If the applicant discharges its legal obligation as to the burden of production, the court then proceeds to a factual determination as to whether the fee requested is reasonable. In the usual case, *that factual determination will involve considering both the proponent’s evidence and evidence submitted by the fee opponent ‘challenging the accuracy and reasonableness of the facts asserted by the prevailing party.’*

Seachris, 994 F.3d at 1077 (citations omitted). Here, Employer did not submit any evidence of its own and instead relied on arguments interpreting Counsel’s evidence. And in evaluating those arguments, the ALJ relied on rationales the Ninth Circuit has rejected.

attorney's hourly rate. The court held that management of other attorneys is not a prerequisite to placement in the upper end of the market-rate spectrum for Longshore practitioners, and that, regardless, counsel *did* manage a team of attorneys. *Seachris*, 994 F.3d at 1079-1080 (“Even assuming these distinctions were persuasive . . . they do not apply here The record plainly shows that [Counsel] *does* delegate work to less experienced attorneys and paralegals: in fact, his fee declaration sought fees not only for his own work . . . but also for an associate attorney . . . and a paralegal.”) By simply resurrecting this rationale without any meaningful distinction, the ALJ adopted reasoning that the Ninth Circuit has already specifically rejected. *See id.*

Second, the ALJ cited Counsel's history of requesting extensions of time as a basis for reducing the percentile used to determine Counsel's market rate. Att'y Fee Order at 13. But we cannot discern how this factor bears on the prevailing market rate for an attorney with Counsel's unique qualifications and vast experience. To the extent the ALJ believed that extensions reflect inefficiency in the performance of work, such complexity is ordinarily addressed by scrutinizing the hours claimed rather than through an adjustment of the attorney's market rate. *Van Skike*, 557 F.3d at 1048 (“[T]he reasonable hourly rate is generally determined based upon the prevailing rate in the relative community, rather than upon the complexity of issues, which should be reflected in the reasonable number of hours.”) (citation omitted). And the ALJ had already cut Counsel's claimed hours *by fifty percent* based on a lack of success on the merits. The ALJ's hourly rate analysis, on the other hand, focuses on the value of Counsel's services in the relevant legal market and not on case-specific concerns regarding the number of hours reasonably expended based on complexity or success. *Id.*

Third, the ALJ stated that the appellate history of this case reflected Counsel's poor judgment, and he relied on that conclusion in determining the appropriate percentile. Att'y Fee Order at 14. But the fee at issue concerns work solely performed before the ALJ. Any concerns regarding litigation strategy or results in subsequent appellate proceedings pertain to work performed before the Board or a court of appeals and do not bear on the prevailing market rate for his services at the ALJ level. Nor did the ALJ attempt to explain how they could. 33 U.S.C. §928 (“the Board or court may approve an attorney's fee for the work done before it”); 20 C.F.R. §702.132 (“Any person seeking a fee for services performed on behalf of a claimant with respect to claims filed under the Act shall make application therefor to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed.”). Like the ALJ in *Seachris*, the ALJ here thus seems to have improperly allowed his view of matters not properly before him to influence his determination. *See Seachris*, 994 F.3d at 1081. In short, none of three reasons the ALJ provided for discounting Counsel's declaration withstands much scrutiny; the majority of the reasons were previously rejected by the Ninth Circuit in prior cases addressing Counsel's services.

Regardless, even if the ALJ's reasons for reducing Counsel's hourly rate did survive, those reasons would only account for one side of the ledger: the ALJ would still have to weigh them against Counsel's market rate evidence. *Seachris*, 994 F.3d at 1077. That did not happen here. Although the ALJ listed several categories of evidence submitted by Counsel in support of his claimed rate, his decision does not meaningfully address any of it. The ALJ, for example, did not discuss the significance of prior fee determinations by both the Board and the Ninth Circuit placing Counsel in the 95th percentile of Longshore practitioners, which is discussed in binding Ninth Circuit precedent. *Id.* While *Seachris* recognizes that these prior fee awards are not automatically controlling, the court emphasized that such determinations constitute relevant evidence that must be addressed and *explained* when an adjudicator reaches a different conclusion. *Seachris*, in fact, makes this point with this same attorney in the identical context. *Id.* at 1078 ("Evidence of historical market conditions, however, is nevertheless relevant evidence of current market conditions, and particularly appropriate when it is the most current information available.").¹¹

Nor did the ALJ substantively evaluate Counsel's extensive professional experience. Counsel has litigated for more than fifty years, with over four decades of specialization in Longshore litigation, including participation in more than two hundred jury trials, more than three hundred fifty court trials, and more than one hundred fifty appellate arguments. The Ninth Circuit noted in *Seachris* that, in certain cases, such experience alone may support placement at the highest end of the market range. *Seachris*, 994 F.3d at 1080 ("[E]ven assuming arguendo that rates based on practice area are *more* probative than rates based on years of experience, the latter rates are at least relevant.") And the court explicitly pointed out that it has authorized years of experience as the dispositive factor in Longshore fee litigation: "Indeed, our case law expressly approves of using the OSB Survey's years-of-experience chart to determine reasonable hourly rates"

¹¹ Citing *Seachris*, our dissenting colleague argues the ALJ's placement of Counsel in the 75th percentile of attorneys may be reduced to a "judgment call for the ALJ to make." *Infra* at 18; see *Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066, 1080 (9th Cir. 2021). But an ALJ's discretion is not as limitless as that out-of-context quote makes it appear; the *Seachris* court rejected Counsel's placement in the 75th percentile for some of the same reasons the ALJ relied on here. So, while an ALJ is not mechanically locked into a particular hourly rate, and there may be differences between cases, in every case an ALJ's exercise of his judgment remains subject to substantial evidence review. *Seachris*, 994 F.3d at 1076. As in *Seachris*, that review does not support the ALJ's judgment here.

and thus the “Ninth Circuit Appellate Commissioner has relied on the years-of-experience chart in awarding [Counsel’s] fees” in prior cases. *Id.* at 1080 (citation omitted).¹²

Yet the ALJ did not address the weight, if any, afforded to this evidence in this case, explaining only that “the fact that an attorney has many decades of experience does not necessarily place him among the top attorneys commanding the top rates.” Att’y Fee Order at 13. While the analysis might begin there, it cannot, without more, end there (as it did with the ALJ): evidence demonstrating long-standing specialization in a narrow field is directly relevant to determining the prevailing market rate for similarly situated practitioners. *Seachris*, 994 F.3d at 1076-1080.

We therefore hold that the ALJ erred both in the three reasons he gave for discrediting Counsel’s declaration and by not adequately considering the relevant evidence it contained. Because those errors permeated his evaluation of Mr. Bonaparte’s declaration, and the ALJ’s evaluation of the attorney fee surveys, we vacate those findings as well. Att’y Fee Order at 16 (rejecting Mr. Bonaparte’s declaration for the same reasons as Counsel’s declaration). In addition, given the ALJ’s expressed disagreement with binding precedent combined with his failure to follow it, we direct the Office of Administrative Law Judges (OALJ) to reassign the case on remand to a different ALJ for further consideration consistent with the instructions below. *Seachris*, 994 F.3d at 1084 (ordering reassignment to eliminate the appearance of partiality).

Binding precedent requires reassignment

Our dissenting colleague concludes that reassignment to a new ALJ does not satisfy the three elements the Ninth Circuit has analyzed when determining whether such transfer is proper. But this conclusion conflicts with *Seachris*, which mandates reassignment in these circumstances.

The *Seachris* court ordered reassignment *sua sponte* based on a single principle: “the tone of the ALJ’s decision and the manner in which the ALJ evaluated the evidence suggest that the the ALJ may not be able to provide [Counsel] with a fair and impartial hearing on remand.” *Id.* at 1088. The court grounded the order not in demonstrated bad faith, but in the appearance of partiality. It cited no finding of subjective animus nor required any showing that the ALJ had made the same errors before. The inference that

¹² The court’s use of the simple years-of-experience chart to calculate attorney’s fees belies the ALJ’s assertion that the Ninth Circuit’s precedent is “convoluted” and “nearly untenable,” Att’y Fee Order at 17, n.23, as well as our colleague’s agreement with that contention in stating that one need only look at this decision to confirm the ALJ’s “frustration with fee petitions.” *Infra* at 22.

the ALJ “may not be able” to adjudicate fairly on remand sufficed. *Id.* And the facts here satisfy that standard more comprehensively than *Seachris* did.

The *Seachris* court identified two markers of potential partiality: the tone of the fee order and the evidentiary rulings that appeared influenced by the ALJ’s irritation with counsel. Here, we have something the *Seachris* court did not: an explicit, on-the-record statement by the ALJ that he regards the controlling legal framework as “unnecessarily complex,” “convoluted,” and “nearly untenable.” Att’y Fee Order at 17, n.23. The ALJ did not express that statement obliquely through his rulings; he wrote it down and signed it.

Our colleague counters that an ALJ who disagrees with controlling law but professes to follow it presents no basis for reassignment. That argument might be persuasive if the record showed only a footnote. It does not. The ALJ repeated the precise errors *Seachris* and *Van Skike* explicitly rejected. The ALJ’s statement that he followed the law in the cases he disagrees with cannot be reconciled with his decision itself.

And Counsel’s identity here underscores the point. The attorney whose fees are at issue in this case is the same attorney whose fee litigation produced the three decisions that the ALJ described as having created an untenable framework. When the Ninth Circuit ordered reassignment in *Seachris*, the record suggested the ALJ *might not be able* to evaluate Counsel’s fee evidence fairly. Here, the ALJ *told us why*: he believes the framework governing that evaluation is the wrong one.

Reassignment is not a sanction. *And it in no way implies the ALJ acted in bad faith or is incapable of fair adjudication generally.* Instead, it provides a structural remedy in a unique case in which the combination of expressed disagreement with binding precedent and departure from it makes it difficult to assure the case on remand will be decided on the law. The *Seachris* court ordered reassignment in similar circumstances to “avoid the appearance of partiality.” *Id.* at 1088. So too here.

Section 28(b) – Additional Compensation

Finally, we reject Counsel’s assertion that the ALJ erred in finding Employer is not liable for his attorney’s fee after March 16, 2015. Claimant’s Br. at 7-8. Specifically, he asserts the settlement offer did not resolve what medical costs Employer would pay and Claimant successfully obtained additional compensation in the form of Employer’s payment for two surgeries. Employer asserts it “accepted liability for all reasonable and necessary medical treatment for the right knee in its March 15 offer, and Claimant did not obtain greater benefits.” Employer’s Br. at 10.

In his Attorney Fee Order, the ALJ found Employer had paid Claimant \$12,997.36, made an unconditional settlement offer of an additional \$20,000, and after Claimant rejected the offer, paid him an additional \$22,203.37. Att’y Fee Order at 2-3; Employer’s Obj. Ex. 2 at 1. In the Decision and Order, ALJ Clark awarded Claimant a total of \$20,989.76. Order at 7; Att’y Fee Order at 7; Employer’s Obj. at 4 n.3. Although the ALJ originally found Claimant successfully obtained additional payment for the surgeries and awarded Counsel a fee under Section 28(b), Att’y Fee Order at 8, he concluded on reconsideration that the fact “[t]hat disputes may have later arisen about what treatments were reasonable and necessary does not mean Employer’s offer to ‘leave medicals open ...’ was not an acceptance of liability for all reasonable and necessary treatment for the right knee at the time of the offer.”¹³ Order at 8 (footnote omitted). He was persuaded the settlement offer constituted “an acceptance of liability for reasonable and necessary medical benefits under Section 7 relating to the right knee” and “Claimant did not procure benefits greater than the settlement offer.” Order at 8.

Section 28(b) of the Act may apply when, as here, an employer voluntarily pays or tenders benefits and then a dispute arises. It states in pertinent part:

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] shall set the matter for an informal conference and following such conference the [district director] shall recommend in writing a disposition of the controversy. *If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney’s fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.*

33 U.S.C. §928(b) (emphasis added).

¹³ The ALJ acknowledged: “[Counsel] suggests he understood Employer to be offering to pay medical expenses, noting that if the employer later contested the compensability of some of the medical expenses, the claimant would be entitled to attorney fees.” Order at 8. Further, at the time of the settlement offer, there was no evidence of a specific need for medical treatment or the cost of it. *Id.*

The Ninth Circuit has held that liability for a fee under Section 28(b) does not depend on a written recommendation from the district director but on the claimant obtaining additional benefits. *Matulic v. Director, OWCP*, 154 F.3d 1052, 1060-1061 (9th Cir. 1998); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45, 50 (2011); *Davis v. Eller & Co.*, 41 BRBS 58, 60 (2007). Consequently, the Ninth Circuit has held an employer is liable for an attorney's fee under Section 28(b) if it refuses to pay the amount of compensation recommended following an informal conference or if an unresolved controversy remained after the informal conference,¹⁴ even absent a written recommendation, and afterwards the claimant successfully obtained additional benefits through the services of an attorney.¹⁵ *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 610-611 (9th Cir. 1991); see also *E.P. Paup Co. v. Director, OWCP [McDougall]*, 999 F.2d 1341, 1354 (9th Cir. 1993).

In its settlement offer, Employer agreed to compensate Claimant \$20,000 “for any ratable impairment to [his] right knee, temporary total, temporary partial, and permanent partial disability payments, and all other compensation [C]laimant requests in this claim.” Employer’s Obj. Ex. 2 at 1. It also agreed to “leave medical open, pursuant to Section 7 of the Act, for the right knee.” *Id.* Claimant rejected the offer because his surgeon recommended additional testing and possibly surgery which Employer had previously refused to authorize. *Id.* at 4. In response, Employer sent \$22,203.27 to Claimant “as an accommodation” and stated it will authorize a magnetic resonance imaging (MRI) scan for diagnostic purposes but will reserve its position regarding ongoing benefits until receiving the MRI scan report. *Id.* at 6. It also restated that its offer includes payments of “temporary

¹⁴ The parties attended an informal conference on September 16, 2023. Employer’s Mot. for Recon. Ex. 1. In the recommendation, the district director wrote “[t]he employer has agreed to authorize Dr. Vallier to evaluate the right knee.” *Id.* at 3.

¹⁵ The Ninth Circuit stated:

The purpose of [Section 28(b)] is to authorize the assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the employee-claimant succeeds in establishing liability or obtaining increased compensation in *formal* proceedings in which he or she is represented by counsel.

Todd Shipyards Corp. v. Director, OWCP [Watts], 950 F.2d 607, 610 (9th Cir. 1991) (citing *Nat’l Steel & Shipbuilding Co. v. U.S. Dep’t of Labor [Holtson]*, 606 F.2d 875, 882 (9th Cir. 1979)).

disability and residual disability based on the medical evidence developed to date.” *Id.* at 7.

The ALJ observed Employer’s offer to “leave medicals open” indicated there was no dispute regarding its liability for future reasonable and necessary medical benefits related to Claimant’s knee injury. Order at 8. Although Counsel asserts Employer contested medical treatment by refusing to pay for Claimant’s last two knee surgeries, the ALJ recognized the parties’ discussions did not mention two knee surgeries as one of them had not yet been performed. *Id.* The ALJ also accurately noted Claimant understood Employer’s settlement offer to *include* compensation for reasonable medical expenses and Employer paid for all medical expenses submitted to it related to Claimant’s right knee before the ALJ awarded benefits.¹⁶ *Id.* (emphasis added); Employer’s Obj. Ex. 2 at 4.

Consequently, because the ALJ found Employer accepted liability for all reasonable and necessary medical treatment associated with Claimant’s work-related knee injury, and it paid all requested medical expenses, the ALJ rationally concluded Claimant did not procure additional compensation greater than what Employer offered and voluntarily paid. Therefore, Employer is not liable for an attorney’s fee after March 16, 2015.¹⁷ 33 U.S.C. §928(b); *see Watts*, 950 F.2d at 610-611; *see also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (the Board should not interfere in the ALJ’s decision so long as he “provide[s] a concise but clear explanation of [his] reasons for the fee award” and “make[s] clear that [he] has considered the relationship between the amount of the fee awarded and the results obtained.”); *Armor v. Md. Shipbuilding and Dry Dock Co.*, 19 BRBS 119, 122 (1986);

¹⁶ In his Attorney Fee Order, the ALJ stated “Claimant did not obtain additional disability compensation above the amount Employer voluntarily paid” as Employer voluntarily paid \$22,203.27 in addition to the \$12,997.36 it had already paid. Att’y Fee Order at 7 n.10.

¹⁷ “Additional compensation,” within the meaning of Section 28(b), is obtained where the employer pays a claimant’s medical bills either by order of the ALJ after a hearing or by agreement before the hearing. *See Morgan v. Gen. Dynamics Corp.*, 16 BRBS 336, 339 (1984); *Hernandez v. Nat’l Steel & Shipbuilding Co.*, 13 BRBS 147, 149-50 (1980); *Revoir v. Gen. Dynamics Corp.*, 12 BRBS 524, 526 (1980). Here, the ALJ did not order Employer to pay Claimant’s medical bills nor was there an agreement between the parties to pay Claimant’s medical bills. Rather, Employer voluntarily paid Claimant’s medical bills once it was requested. Thus, Counsel’s services were not “instrumental” in obtaining greater compensation than what Employer originally paid. *See Revoir*, 12 BRBS at 526; *Hernandez*, 13 BRBS at 149.

Order at 8-9. As the ALJ has acted within his discretion and explained his rationale, Counsel has not persuaded us of any error in this regard.¹⁸

On remand, the new ALJ must consider Counsel's fee petition from the start, incorporating ALJ Larsen's fifty percent reduction in fees for lack of success on the merits as Counsel expressly waived any objection to it on appeal.¹⁹ Att'y Fee Order at 24-25; Claimant's Br. at 8.

Accordingly, we affirm in part and vacate in part the ALJ's Attorney Fee Order and Order Granting Employer's Motion for Reconsideration and Denying Claimant's Motion

¹⁸ We reject Counsel's assertion that the ALJ erred in failing to mention the awarded costs of \$16,732.18 plus interest in his Order. Claimant's Br. at 9. No party raised costs as an issue for reconsideration, and the ALJ stated "[t]he Attorney Fee Order is *amended* as follows." Order at 9 (emphasis added). We hold this statement to indicate the ALJ left in place his prior finding that Employer is required to pay Counsel those costs and associated interest. Att'y Fee Order at 29.

¹⁹ We affirm, as unchallenged, the ALJ's application of Section 28(b). *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007); Att'y Fee Order at 6-9.

for Reconsideration, and we remand the case to the Office of Administrative Law Judges for reassignment to a different ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

JONES, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's decision to vacate the ALJ's determination of Counsel's hourly rate and to reassign this case to a different ALJ on remand.

To begin, as the majority notes, "The fee applicant bears the burden of producing "satisfactory evidence" of the relevant market and the rates charged in that market. *Supra* at 7; see *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049 at 1053 (9th Cir. 2009); see also *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)." There is no burden-shifting involved, so it is of little consequence that Employer "did not submit any affirmative evidence of its own to counter Claimant's market rate submissions." *Supra* at 8.

When assigning Counsel's hourly rate, the ALJ took several factors into account. The ALJ acknowledged Counsel "is a long-time Longshore practitioner with significant skill and experience" but found his "decades of experience do[] not necessarily place him among the top attorneys in his market commanding the top rates" because his time entries demonstrate "he does not manage a team of associates over years of litigation in the same way a highly-paid civil litigator would be expected to do." Att'y Fee Order at 13. With or without a team, administrative adjudication is not performed in the same way as a civil litigation; by its very nature it is not as complicated as commercial litigation. As such, and as the ALJ noted, Counsel "performed much of the work" on his own because he could, which differs from the "type of complex management required of top commercial litigators." *Id.*

Further, the ALJ noted Counsel often requires "postponements and extensions of time" to complete required work and does not demonstrate the "conscientiousness" associated with top-tier litigators. *Id.* Counsel failed to comply with requests and orders

designed to promote the resolution of the outstanding issues involved in this case including his fee. For example, the ALJ explained Counsel did not inform the Office of Administrative Law Judges (OALJ) of the conclusion of the appeals; instead, ALJ Clark issued an order for a status update. *Id.* Then, Counsel failed to meet and confer with Employer as ordered and instead sent a letter announcing he would file an amended fee petition, which he subsequently delayed several times, “extending his own self-imposed deadline and further postponing the resolution of this fee” and increasing that fee. *Id.* In addition, the ALJ observed that on Counsel’s second appeal to the Board, he argued the same issues that had previously been “fully considered and resolved.” *Id.* at 14 (quoting *Francis v. Jones Stevedoring Co.*, BRB No. 20-0086, slip op. at 6 (July 16, 2020)). He found the appellate history of this case as evidence of Counsel’s “relative lack of judgment on taking appeals.” *Id.* Such strategy serves as evidence of Counsel’s rank among civil litigators; essentially requesting reconsideration of this tribunal’s affirmance of a denial of benefits is a strategy attorneys in the 75% percentile might follow (or so the ALJ found) but likely not so of attorneys in the top 5% of civil litigators.

But the ALJ did not stop there. The ALJ also considered Robert Bonaparte’s declaration that Counsel is among the top 5% of civil litigators in Portland based on Counsel’s years of experience. *Id.* at 14-16. Mr. Bonaparte opined commercial litigation is similar to Longshore litigation because respondents in Longshore cases are commercial entities. Decl. of Robert Bonaparte at 8. He asserted Counsel has “a depth of experience in multiple areas of civil procedure” which is applicable to both Longshore and commercial litigation claims. *Id.* at 15. However, the ALJ found Mr. Bonaparte’s opinion unpersuasive because his analogy of Longshore and commercial litigation is merely a characterization of the nature of the parties. *Id.* Further, the ALJ found Mr. Bonaparte’s failure to explain the differences between commercial litigation and Longshore work or address what characteristics of Longshore work make it unique, “caution against affording his opinion great weight.” *Id.* at 16. For example, the ALJ found Mr. Bonaparte did not acknowledge “the relaxed rules of evidence and procedure or the presumptions that favor claimants that characterize Longshore litigation.” *Id.* Despite Mr. Bonaparte’s contention, the ALJ found years of experience alone does not “automatically entitle a lawyer to placement in the top 5% of attorneys in the relevant community,” and neither does “tenacity and perseverance.” *Id.* at 16. Based on Counsel’s overall experience, reputation, skill, and performance in this case, the ALJ found Counsel is “more appropriately” placed in the top 75th percentile of attorneys in his area. *Id.* at 14, 16.

Contrary to Counsel’s assertion, the ALJ’s placement of him in the 75th percentile of attorneys is a “judgment call for the ALJ to make.” *Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066, 1080 (9th Cir. 2021); Claimant’s Br. at 4-7. The ALJ was not required to accept Mr. Bonaparte’s opinion regarding Counsel’s ranking or take Counsel’s word at face value in making this determination. *See Vargas v. Howell*, 949

F.3d 1188, 1199 (9th Cir. 2020); *Vogel v. Harbor Plaza Ctr.*, 893 F.3d 1152, 1160 (9th Cir. 2018); *Morris v. Cal. Stevedore & Ballast Co.*, 10 BRBS 375, 380 (1979). He was not required to place Counsel in the top 5% solely because he has fifty years of experience. *Christensen v. Stevedoring Servs. of Am.*, 44 BRBS 75, 75-76 (2010), *aff'd sub nom.*, *Stevedoring Servs. of Am. v. Director, OWCP [Christensen]*, 445 F. App'x 912, 913-914 (9th Cir. 2011). Nor was he required to abandon comportment by calling out Counsel's deficiencies in a detailed way that could potentially damage Counsel's reputation and livelihood not to mention subject the ALJ to likely animus for performing his job duties.²⁰ As the ALJ properly considered Counsel's experience, skills, and the quality of his representation when assessing a reasonable hourly rate and because his reasons for rejecting Counsel's evidence and argument regarding his ranking are rational, the ALJ acted within his discretion in placing Counsel in the 75th percentile of all attorneys in Portland.²¹ See, e.g., *Blum*, 465 U.S. at 898-899; *Seachris*, 994 F.3d at 1080; *Carter v.*

²⁰ Counsel asserts the ALJ erred in drawing conclusions regarding his performance in this case because he was not the original hearing judge and, therefore, was not "knowledgeable" of Counsel's reputation and skills. Claimant's Br. at 7. To assert the ALJ does not know of Counsel's reputation and skills merely because he did not preside over the hearing in this case is not persuasive. Counsel is well known to the Office of Administrative Law Judges, and the ALJ is permitted 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." *Morris v. Cal. Stevedore & Ballast Co.*, 10 BRBS 375, 380 (1979). The ALJ considered relevant evidence in determining Counsel's ranking and explained his rationale, as is within his discretion. See *Berkstresser v. Wash. Metro. Area Transit Auth.*, 16 BR3S 231, 236 (1984) (the Board will affirm the ALJ's reductions if they are fully explained and reasonable); Order at 3-4; Att'y Fee Order at 10-19.

²¹ The Board has previously affirmed an ALJ's placing Counsel in the 75th percentile. See, e.g., *Horton v. Specialty Finishes, LLC*, BRB Nos. 23-0109 & 23-0443, slip op. at 13 (June 26, 2024) (unpub.) *aff'd sub. nom. Horton v. Director, OWCP*, No. 24-5011, 2026 WL 311571, at *2 (9th Cir. Feb. 5, 2026) (the Board "did not abuse its discretion in affirming the ALJ's decision to place Robinowitz in the 75th percentile" as "this is a judgment call that the ALJ could reasonably have resolved either way.") (citing *Nelson v. ICTSI Oregon, Inc.*, 743 F. App'x 120, 121 (9th Cir. 2018)); *Lee v. Pac. Stevedoring, Inc.*, BRB Nos. 24-0243 & 24-0243A, slip op. at 7 (Dec. 10 2025) (unpub.), (motion for recon on other grounds pending); *Hill v. Louis Dreyfus Corp.*, BRB No. 23-0208, slip op. at 8 (Oct. 29, 2024) (unpub.); *Miller v. Lynden, Inc.*, BRB No. 22-0126, slip op. at 5 (Mar. 22, 2023) (unpub.). Therefore, the ALJ is not precluded from placing

Caleb Brett, LLC, 757 F.3d 866, 869 (9th Cir. 2014); 20 C.F.R. §702.132(a); Order at 3-4; Att’y Fee Order at 10-23.

Regarding Counsel’s arguments on the ALJ’s use of his market rate evidence, Counsel relied on Mr. Bonaparte’s opinion, who in turn stated he “relied primarily” upon the OSB Survey rates based on years of experience and on commercial litigation rates set forth in the Morones Survey. Decl. of Robert Bonaparte at 5; Claimant’s Br. at 5-7. With his declaration, Mr. Bonaparte included a portion of the OSB Survey that showed a 2016 median hourly rate of \$495 for attorneys in all private practice areas with more than thirty years of experience. Decl. of Robert Bonaparte Ex. B at 2. That portion of the OSB Survey also showed a 2016 median hourly rate of \$400 for attorneys in all private practice areas regardless of years of experience. *Id.* The Morones Survey demonstrated a median hourly rate ranging between \$525 and \$620 for attorneys in commercial litigation with more than thirty years of experience in the years of 2016, 2018, and 2020. Decl. of Robert Bonaparte Ex. C at 2.

While the ALJ ascribed “some value” to Mr. Bonaparte’s comparison of Longshore Act litigation and commercial litigation, he found Mr. Bonaparte did not address the differences between Longshore Act litigation and commercial litigation. Att’y Fee Order at 15-16. He specifically rejected as “illogical and unpersuasive” Mr. Bonaparte’s conclusion that these practice areas are the same because the defendants in both are commercial entities. *Id.* at 15. In addition, the ALJ found the Morones Survey, which Mr. Bonaparte relied upon and contended was due “careful consideration,” to be relevant “but not controlling or entitled to substantial weight” because it did not contain information regarding how each surveyed firm defined “commercial litigation.” *Id.* at 15-16.

The ALJ gave “some weight” to the Morones Survey but relied primarily on the OSB Survey to determine the prevailing market rate. *Id.* at 17. He determined commercial litigation rates were “relevant, but not controlling” because the “question is not whether [Counsel] qualifies as a commercial litigator; it is whether the rates charged by commercial litigators are relevant comparators.” *Id.* (citing *Seachris*, 994 F.3d at 1078). In addition to commercial litigation rates from the Morones Survey, the ALJ found rates for plaintiff civil litigation, both personal-injury and non-personal injury, were “relevant” and “reflect[ed]” what Counsel described of his practice.²² *Id.* at 18. He then averaged the rates for attorneys

Counsel in the 75th percentile merely because Counsel had been placed in the 95th percentile in other cases.

²² Counsel has been an attorney in private practice in Portland, Oregon, since 1969. Amend. Fee Pet. at 20. He stated his practice “emphasizes serious tort and wrongful death claims, maritime tort claims, and workers’ compensation claims under the Longshore and

in the 75th percentile of the general private practice market and specific practice areas in Portland, Oregon: \$495 (OSB Survey: hourly billing rate of attorneys in private practice with more than thirty years of experience); \$350 (OSB Survey: personal injury and non-personal injury plaintiff civil litigation); \$400 (OSB Survey: all private practice areas); and \$525 (Morones Survey: median rate for commercial litigation attorneys with thirty or more years of experience), to arrive at an hourly rate of \$443 in 2016, which he then adjusted to a 2023 hourly rate of \$563.²³ *Id.* at 18.

While I dissent from the majority's decision requiring the ALJ to reconsider his assessment of Counsel's rate overall, I concur with the majority that the ALJ did not adequately explain his reliance on the OSB Survey rate for all private practice attorneys regardless of their years of experience, *supra* at 9, the remaining rates the ALJ used are "tailored to the 'relevant community'" and taken together, appropriately account for Counsel's practice area, skill, and experience.²⁴ *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1089 (9th Cir. 2015); *see Blum*, 465 U.S. at 895 n.11; *Seachris*, 994 F.3d at 1080 (rates based on years of experience, regardless of practice area, "are at least relevant"); *Christensen*, 557 F.3d at 1053-1054; *Christensen v. Stevedoring Servs. of Am.*, 43 BRBS 145, 146 (2009) (plaintiff personal injury civil litigation and plaintiff general civil litigation are "similar" markets for Counsel's services), *and modified on other grounds on recons.*, 44 BRBS 39, 40 (2010) (Oregon's workers' compensation rates are not based on market rate), *aff'd sub. nom.*, *Christensen*, 445 F. App'x at 914 (no abuse of discretion in the Benefits Review Board using average rates of general civil litigation attorneys from OSB

Harbors Workers' Compensation Act" and he "handle[s] almost all cases on a contingency basis." *Id.* at 20-21. He estimated he has tried more than 200 jury trials, tried more than 350 court trials, and argued more than 150 appeals over the last fifty years. *Id.* at 21. He stated he has "represented clients and tried cases involving insurance claims, wrongful discharge, discrimination cases and commercial fraud claims" and has "considerable experience with commercial litigation." *Id.* at 21.

²³ Because the parties submitted only portions of the OSB Survey, the ALJ took official notice of the entire OSB Survey to review all practice areas he deemed relevant. Att'y Fee Order at 18.

²⁴ The ALJ noted Counsel submitted a case called *Scott*, No. 17CV17799, in which the court awarded Counsel \$500 per hour in a discrimination claim under Oregon state law. Order at 16. The ALJ found Counsel failed to show this case involved litigation similar to Longshore work and gave it little weight. *Id.*

Survey). Therefore, I would modify the ALJ's Attorney Fee Order to reflect only the elimination of the non-comparable category of rates from the calculation.

Regarding reassignment, the majority points out that the ALJ stated he thinks the United States Court of Appeals for the Ninth Circuit's jurisprudence in Longshore fee cases has resulted in "an unnecessarily complex analysis." Based on this statement, the majority seeks to reassign the case to a different ALJ. *Supra* at 11.

The Ninth Circuit has formulated a three-part test to determine whether judicial reassignment on remand is appropriate absent proof of bias: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty disregarding previously expressed views or findings the appellate court determined were erroneous; (2) whether reassignment is advisable to preserve appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving appearance of fairness. *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1041 (9th Cir. 2008); *see also Maldonado Santiago v. Velazquez Garcia*, 821 F.2d 822, 832 (1st Cir. 1987); *U.S. v. Robin*, 553 F.2d 8, 10 (2d Cir.1977); *U.S. ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 532-33 (6th Cir.2012); *Mitchell v. Maynard*, 80 F.3d 1433, 1448 (10th Cir. 1996); *U.S. v. White*, 846 F.2d 678, 696 (11th Cir. 1988).

Here, the ALJ made a general comment that he thinks this area of the law is unnecessarily complex, but he accepted that he is nonetheless "bound to follow that framework . . . in keeping with the Ninth Circuit directives." Att'y Fee Order at 17 n.23. I read no tone or irritation with Counsel into the ALJ's footnote. The ALJ's footnote does not demonstrate the ALJ is explicitly or implicitly biased against Counsel; his statement demonstrates frustration with fee petitions forcing ALJs to become the green eyeshade accountants they were never intended to be, and I share that frustration. Lest anyone disagree that fee requests require "an unnecessarily complex analysis" all that need be done is read this decision. Applying the Ninth Circuit's three-part test, all three factors weigh against reassignment. First, there is no indication that the ALJ would have difficulty disregarding his previous findings. Second, reassignment compromises the appearance of justice and could inadvertently appear to signal the Board favors a particular outcome.

Lastly, reassignment would be wasteful and duplicative as I do not believe it would result in preserving even the appearance of fairness.

For these reasons, I would not reassign this case to another ALJ. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107-08 (1992); *Zamora v. C.F. & I. Steel Corp.*, 7 BLR 1-568, 1-572 (1984).

I otherwise concur with the majority in all other respects.

MELISSA LIN JONES
Administrative Appeals Judge