U.S. Department of Labor

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

BRB No. 20-0050

CAROLINA PRECIADO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 06/30/2020
NAVY EXCHANGE SERVICE COMMAND	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Jeffrey M. Winter and Scott MacInnes, San Diego, California, for claimant.

Arthur A. Leonard (Aleccia & Mitani), Long Beach, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2017-LHC-00377; 2017-LHC-00378) of Administrative Law Judge Richard M. Clark rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*., as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 applicable law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant filed two claims for benefits under the Act. Her first claim sought benefits for left shoulder injuries and cumulative trauma to multiple body parts occurring at work on August 19, 2012; her second claim sought benefits for cumulative trauma injuries to her cervical spine, lumbar spine, upper extremities and right knee occurring at work through September 15, 2013. On February 8, 2016, following the consolidation of these claims, Judge Dorsey approved the parties' stipulations with regard to claimant's right knee claim; the parties agreed claimant would receive temporary total disability benefits from September 15, 2013 through September 1, 2016, and medical care for her right knee condition. The stipulations further provided claimant remained able to pursue her claims for injuries allegedly sustained to her neck, back, and left shoulder.[1]

Claimant subsequently underwent arthroscopic surgery on her knee and was assigned a 10 percent permanent impairment rating. Her claims were then reassigned to Judge Gee who, in a Decision and Order issued in January 2019, found claimant did not establish work-related injuries to her left shoulder, cervical or lumbar spines. Judge Gee awarded claimant medical benefits and temporary total disability benefits from September 16, 2013 through September 8, 2016 for her right knee injury, at a compensation rate higher than that agreed to in the parties' February 2016 stipulations. She also awarded claimant permanent partial disability benefits for a 10 percent impairment to her right leg, at a weekly rate of $249.40, and stated the district director would make the necessary calculations. On January 19, 2019, the district director calculated that claimant was entitled to $2,622.19 in additional temporary total and permanent partial disability benefits and interest.

Upon Judge Gee's retirement, the case was assigned to Judge Clark (the administrative law judge). Claimant's counsel filed a petition for an attorney's fee for work performed before the Office of Administrative Law Judges requesting $67,279.29, representing 82.9 hours of attorney time at $515 per hour (Winter), 10.7 hours of attorney time at $385 per hour (Ellis), 11.6 hours of attorney time at $345 per hour (MacInnes), 37.9 hours of paralegal time at $130 per hour; and $11,537.29 in costs. Employer filed objections to counsel's fee request. Claimant's counsel filed a reply, and sought an additional $1,104, representing 3.2 hours at $345 per hour (MacInnes), for preparing the reply brief.

In his Attorney Fee Order, the administrative law judge awarded a fee based on a rate of $410 per hour for Winter's time, $300 and $260 for MacInnes and Ellis, respectively, and $115 per hour for paralegal time. He reduced Winter's time to 17.86

[1] Claimant states she received 154.714 weeks of temporary total disability benefits totaling $56,522.15 as a result of the stipulation.

hours, Ellis's time to 3.92 hours, MacInnes's time to 2.14 hours, paralegal time to 11.58 hours, and costs to $1,309.27. Accordingly, the administrative law judge awarded claimant's counsel $10,386.70 in fees and $1,309.27 in costs, payable by employer.

Claimant appeals the fee award, challenging the hourly rates awarded and the reduction in the number of hours sought for services performed prior to the parties' stipulated agreement. Employer responds, urging affirmance on these issues.

Claimant avers the administrative law judge erred in rejecting all the evidence counsel offered to support the hourly rates requested. Claimant's counsel submitted: his own declaration addressing his current hourly rates and those of his associates; a declaration from Attorney Ronald Burdge with attachments stating longshore law is similar to consumer law and counsel's rate should be in the $575 to $596 range based on data from his Consumer Law Survey; a declaration from Attorney Timothy Brictson stating counsel merits a rate of $500 per hour and should receive "at least" $425 per hour, which is under-market; the Laffey and United States Attorney's Office fee matrices; the 2015 Real Rate Report for Partners and Associates for San Diego; and cases arising under the Act in which hourly rates between $460 and $500 were awarded.

The Supreme Court has held that 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). The Court has also held that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see also Perdue*, 559 U.S. at 551; *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009). Thus, in this case, once the administrative law judge determined San Diego is the relevant community for determining counsel's hourly rate, *see* Attorney Fee Order at 4, the burden was on claimant's counsel 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." *Blum*, 465 U.S. at 896 n.11; *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015). The administrative law judge has discretion to determine the prevailing market rate so long as he provides adequate justification for his conclusion. *See Shirrod*, 809 F.3d at 1087, 49 BRBS at 95(CRT).

The administrative law judge addressed each of counsel's submissions and concluded he failed to meet his burden of establishing entitlement to the hourly rates claimed. He found counsel's declarations and that of Brictson do not establish a market

rate, the two matrices are not probative of the San Diego legal market, the 2015 Real Rate Report is not probative in that its methodology was not provided, and the Board fee award on which counsel relied was unopposed. He also rejected the Burdge declaration. *See infra.* He stated counsel's evidence, as a whole, is insufficient to establish entitlement to any of the requested hourly rates. *See* Attorney Fee Order at 4-9. Thus, pursuant to *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT), the administrative law judge looked to prior awards under the Act. Finding "no reason to depart from [the] award" in *Hernandez v. Nat'l Steel & Shipbuilding Co.*, Nos. 2016-LHC-00465, 2016-LHC-00466 (Aug. 21, 2019), he awarded Winter a rate of $410 per hour. *Id*. at 10-12. He also awarded MacInnes a rate of $300 per hour and Ellis a rate of $260 per hour. *Id.* at 12-13.

We cannot affirm the administrative law judge's rejection of the Burdge declaration.[2] Attorney Ronald Burdge's statement addresses what private attorneys charge in San Diego for work alleged to be similar to that performed by counsel in this case, namely various consumer law practices. The administrative law judge found Burdge's statement not "very convincing" and his "understanding of Longshore practice and [counsel] . . . sketchy at best." Attorney Fee Order at 8. He additionally found Burdge's knowledge of the San Diego market to be "very sketchy," with only a limited understanding of the relevant legal market. *Id.*

Contrary to the administrative law judge's finding, the Burdge declaration provides the basis for his knowledge of the San Diego market.[3] Burdge further noted he

[2] Claimant has not established an abuse of the administrative law judge's discretion in rejecting: (1) counsel's own affidavit because it is based on "unspecified inquiries to unknown members of the legal community who engage in unknown practices;" (2) the Laffey and U.S. Attorney's Office matrices because they are for work in the Washington, D.C. area; and (3) the 2015 Real Rate Report because the methodology is not provided, litigation practice results are not broken down by area, and the reported rates do not support counsel's claimed rates. The administrative law judge gave valid reasons for these conclusions. *See generally Eastern Associated Coal Corp. v. Director, OWCP*, 724 F.3d 561 (4th Cir. 2013).

[3] Burdge states:

> I have experience with and knowledge of attorney fee rates in the major coastal metropolitan areas of California and in many other jurisdictions. That experience comes from having assisted attorneys who were litigating cases there on a paid and paying basis, as well as personal information gathered from local attorneys.

"specialize[s] in issues relating to attorney fees, hourly rates, court-awarded attorneys' fees, and Consumer Law." Fee Pet. Ex. 1 at 1. He states he took into consideration the results of his own 2015-2016 *United States Consumer Law Attorney Fee Survey Report*, the declarations of multiple attorneys, and information he obtained by way of his own writing and practice which resulted in a familiarity with market rates charged by attorneys for consumer law, which he analogized to longshore practice. *Id*. at 5-7. Furthermore, Burdge reviewed Winter's qualifications and experience, and opined that

> a reasonable hourly rate for a Longshore practitioner of Mr. Winter's education, training, skill, experience, and reputation would be in the range of $575 to $596 per hour in the San Diego community, and that this rate would be reasonable and in line with rates prevailing in the San Diego community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

Id. at 13.

The administrative law judge's summary conclusion that Burdge's knowledge of longshore practice and of counsel is "sketchy" is arbitrary, as we are unable to perceive a basis for that finding in view of the evidence submitted.[4] We therefore vacate the administrative law judge's decision to accord the Burdge declaration "only little weight." Attorney Fee Order at 9. On remand, the administrative law judge must reevaluate the sufficiency of the Burdge documents to support counsel's claimed rates. *See Shirrod*, 809 F.3d at 1087, 49 BRBS at 95(CRT); *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2013) (counsel can support his claimed rate with affidavits of other lawyers

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Fee Pet. Ex. 1 at 2.

[4] The administrative law judge appears to have erected an insurmountable barrier where knowledge of workers' compensation and longshore markets is necessary to establish the credibility of some affiants, but renders other affiants not credible. For example, he discredited Burdge for lacking an adequate understanding of the longshore market while simultaneously discrediting Brictson, a workers' compensation and longshore attorney, because "he works in a practice where he does not actually . . . charge paying clients actual rates." Attorney Fee Order at 5-6. Moreover, while discrediting Brictson's assessment of attorney fees under California's workers' compensation system ostensibly because they are paid by employers rather than clients, the administrative law judge discredited Burdge for not "looking to other sorts of practice to determine Longshore Act rates," including a "far more obvious candidate[]—workers' compensation[.]" *Id*. at 8.

who might practice other types of law, but who "are familiar both with the skills of the fee applicants and more generally with the type of work in the relevant community") (internal citations omitted).

Having determined counsel did not meet his burden of establishing entitlement to the hourly rates requested, the administrative law judge looked to prior fee awards under the Act in the relevant community. *See* Attorney Fee Order at 10-13. While an administrative law judge may advert to prior fee awards under the Act if a claimant fails to meet his burden of establishing a market rate, *see Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT) (citing *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 251, 38 BRBS 37, 41(CRT) (4th Cir. 2004)), the administrative law judge's reliance on the fee award in *Hernandez*, Nos. 2016-LHC-00465, 2016-LHC-00466, requires that his hourly rate awards be vacated.[5] *See* Attorney Fee Order at 11-13. As the Board recently vacated the hourly rate awarded Winter in that decision and remanded the case for further consideration, *see Hernandez v. Nat'l Steel & Shipbuilding Co.*, BRB Nos. 19-0537/A (May 22, 2020), the administrative law judge's reliance on it in this case cannot be affirmed. Like *Hernandez*, the administrative law judge in this claim appears to have reverted to the "tautological, self-referential enterprise" condemned in *Christensen*.[6] *See Christensen*, 557 F.3d at 1054, 43 BRBS at 8(CRT). Consequently, for the foregoing

[5] In *Hernandez*, the administrative law judge awarded Winter an hourly rate of $410, and Ellis an hourly rate of $260.

[6] In vacating the hourly rate awarded to Winter, the Board held that the administrative law judge set forth an inaccurate description of the Burdge declaration, failed to discuss in the proper context all of the relevant evidence presented by Winter in support of his hourly rate request, and erred in considering the case's complexity when addressing that hourly rate. *See Hernandez*, BRB Nos. 19-0537/A, slip op. at 4-6. The Board also stated,

> [t]he administrative law judge appears to have reverted to the "tautological, self-referential enterprise" condemned in *Christensen*, 557 F.3d at 1054, 43 BRBS at 8(CRT), by dismissing without adequate reasoning all of the evidence offered by claimant's attorneys and adopting rates awarded by other administrative law judges. Administrative law judges are not required to blindly accept the rates claimed by claimants' counsel, but, in view of the "inherently difficult" nature of establishing a market rate in a market in which there are no paying clients, "the rates charged in private representations may afford relevant comparisons." *Blum*, 465 U.S. at 896 at n.11.

Id., slip op. at 4. The same can be said in this case.

reasons, we vacate the hourly rates awarded and remand the case for further consideration of this issue. *See id.*

We next address the challenge to the administrative law judge's decision to reduce the time requested for services performed prior to the parties' February 2016 stipulation. Claimant's counsel asserts the administrative law judge erred in failing to consider his success, as evidenced by the $56,522.15 award in compensation benefits in addition to medical benefits for claimant's right knee injury, which resulted from the services counsel performed prior to the entry of the stipulated award.

In *Hensley v. Eckerhart*, 461 U.S. 421, 434 (1983), the Supreme Court held that, in appropriate cases, a fee award should be reduced to reflect a party's partial success. The Court stated that the focus is on the significance of the overall relief obtained in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because she failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Id.* at 435-437. This analysis applies to claims arising under the Act. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 166, 27 BRBS 14, 17(CRT) (5th Cir. 1993); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1535, 25 BRBS 161, 164(CRT) (D.C. Cir. 1983); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 325, 21 BRBS 73, 77(CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988); *see also* 20 C.F.R. §702.132(a) (amount of benefits is relevant factor in fee award).

The administrative law judge acknowledged *Hensley* stating "[t]his is an obvious partial success case." Attorney Fee Order at 17. He based this finding on the fact that only claimant's right knee claim was successful and stated claimant's counsel's requested fee does not account for the "very limited success in this case." *Id.* Then in addressing the pre-stipulation fee counsel requested, the administrative law judge accepted employer's position that counsel's time should be reduced by 80 percent, stating that such a reduction is reasonable since claimant prevailed on only one of the five injuries claimed. *Id.* He therefore reduced the 35.3 pre-stipulation attorney hours and the 23.7 paralegal hours by 80 percent.[7] *Id.* at 18.

[7] We affirm, as unchallenged on appeal, the administrative law judge's decision to use the same reduction percentage for those hours requested for services performed following the entry of the February 2016 stipulated order. Attorney Fee Order at 18; *see Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

We cannot affirm this finding. As a result of counsel's services prior to the parties' 2016 stipulation, claimant obtained temporary total disability compensation totaling $56,522.15, as well as medical benefits which resulted in her undergoing arthroscopic knee surgery. Thereafter, for this injury claimant received an additional $2,622.19 in compensation and interest thereon pursuant to Judge Gee's Decision and Order. Thus, claimant received significant success on the knee injury claim, which is not reflected in the reduction of the overall fee request. The administrative law judge erred in focusing solely on the number of successful claims, rather than on the degree of the success as required by *Hensley*. *See Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89 (1993); 20 C.F.R. §702.132; *see also Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (en banc) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in pert. part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995). We therefore vacate the administrative law judge's 80 percent reduction in the time requested for services rendered prior to the parties' stipulations. On remand, the administrative law judge should separately assess the fee requested for the pre-stipulation work in view of the success claimant obtained in the right knee claim. *See Tahara*, 511 F.3d 950, 41 BRBS 53(CRT); *see also Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Ahmed v. Washington Metro. Area Transit Auth.*, 27 BRBS 24 (1993).

Accordingly, we vacate the awarded hourly rates and the reduced fee for services performed prior to the February 2016 stipulated order. We remand the case for further consideration consistent with this opinion. In all other respects, we affirm the administrative law judge's Attorney Fee Order.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge