

U.S. Department of Labor

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



BRB No. 19-0466

JEANNE JOHNSTON)
(Widow of ROY JOHNSTON))
)
 Claimant-Petitioner)

v.)

DATE ISSUED: 03/27/2020

HAYWARD BAKER)
)
 and)

KEMPER INSURANCE COMPANY AND)
LUMBERMAN'S MUTUAL CASUALTY)
COMPANY)

Employer/Carrier-)
Respondents)

DECISION and ORDER

Appeal of the Attorney Fee Order on Remand of Christopher Larsen,
Administrative Law Judge, United States Department of Labor.

Paul R. Myers (Dupree Law), Coronado, California, for claimant.

Kelly F. Walsh and Mark T. Tufts (Brown Sims), New Orleans, Louisiana,
for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and
ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order on Remand (2011-LHC-00983; 2011-
LHC-00984) of Administrative Law Judge Christopher Larsen rendered on a claim filed
pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C.

§901 *et seq.* (the 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).

The case arises out of a claim for death benefits filed by the widow of the employee. Administrative Law Judge Pulver initially denied the claim. Claimant appealed to the Board, which vacated the denial. *Johnston v. Hayward Baker*, 48 BRBS 59 (2014). On remand, Judge Larsen (the administrative law judge) awarded benefits.¹ 33 U.S.C. §909.

Claimant's counsel, Eric Dupree, filed a timely fee petition, seeking an attorney's fee of \$516,715, comprising 471.7 hours of his work at an hourly rate of \$575; 520 hours for the work of his associate, Paul Myers, at an hourly rate of \$475; 9.3 hours of paralegal work at an hourly rate of \$150; and costs of \$39,711.69. Employer filed objections. Counsel filed a reply brief and a supplemental fee petition, seeking an additional \$5,075 for preparing the reply brief and other services. The administrative law judge awarded hourly rates of \$400 for Dupree, \$275 for Myers, and \$150 for the paralegals. Attorney Fee Order at 7-8. He struck the supplemental fee petition and disallowed some of the hours billed. *Id.* at 2. He awarded a total fee of \$351,565.65.

Claimant's counsel appealed the Attorney Fee Order to the Board. The Board vacated the administrative law judge's hourly rate awards because he did not fully address the evidence counsel supplied with his fee petition. *Johnston v. Hayward Baker [Johnston II]*, BRB No. 18-0040 (Aug. 29, 2018) (unpub.). The Board remanded the case for the administrative law judge to specifically address the affidavit of attorney Ronald Burdge, who specializes in consumer law and opined that longshore law is comparable to consumer law for purposes of establishing a market rate for attorney's fees, and Burdge's Consumer Law Attorney Fee Survey Report.²

On remand, the administrative law judge rejected Burdge's declaration that consumer law practice is similar to longshore practice, noting differences between the two practice areas, including evidentiary standards, length of litigation, and the use of jury trials and class action litigation in consumer law. Attorney Fee Order on Remand at 3. He

¹ Judge Pulver retired in the interval.

² The Board also vacated the administrative law judge's striking of the Supplemental Fee Petition and remanded for him to award a fee for preparation of the reply brief. *Johnston II*, slip op. at 7. The Board affirmed the administrative law judge's Attorney Fee Order in all other respects. *Id.*, slip op. at 8.

therefore gave no weight to either Burdge's declaration or the Consumer Law Survey Report. He found counsel did not carry his burden of establishing the prevailing market rates for San Diego and looked to previous attorney's fee awards to find appropriate hourly rates are \$400 for Dupree, \$275 for Myers, and \$150 for paralegal services. *Id.* at 4. He awarded an additional 2.70 hours of Dupree's time and 5.20 hours of Myers's time for work on the reply brief. The administrative law judge therefore awarded counsel a total fee of \$334,075.86, comprising, inter alia, 406.1 hours of work at an hourly rate of \$400 for counsel, 412.1 hours at an hourly rate of \$275 for associate counsel, and 112.8 hours at an hourly rate of \$150 for paralegal work.

Claimant's counsel appeals the Attorney Fee Order on Remand, challenging the administrative law judge's hourly rate determinations. Employer filed a response brief, urging affirmance. Counsel filed a reply brief.

The lodestar method, which multiplies a reasonable hourly rate by the number of hours reasonably expended in preparing and litigating the case, is generally used to arrive at a "reasonable attorney's fee" in fee-shifting statutes, such as the Act. *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." *Id.* 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. *See Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015).

Claimant's counsel contends the administrative law judge erred by not accepting the Burdge affidavit and Consumer Law Survey Report as satisfactory market evidence in view of employer's failure to refute it. We reject this contention. The Board remanded the case for the administrative law judge to address in the first instance the sufficiency of this evidence to support counsel's market rate claim. *Johnston II*, slip op. at 6. The administrative law judge was not required to accept the evidence submitted by counsel in support of his requested hourly rates. *See Shirrod*, 809 F.3d at 1087, 49 BRBS at 95(CRT) (decision-maker has discretion to determine prevailing market rate so long as he provides adequate justification). Moreover, that other decision-makers have accepted the Burdge affidavit and Consumer Law Survey Report as satisfactory market rate evidence does not require the administrative law judge to do so in this case. *See* 33 U.S.C. §928(c) (fee is to be approved by the body before whom the work was performed); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994).

Counsel also contends the administrative law judge’s conclusion that consumer law is not comparable to longshore practice is arbitrary and unreasonable or, in the alternative, that he did not adequately explain how the differences between consumer law and longshore law justify giving Burdge’s affidavit and Consumer Law Survey Report no weight. The administrative law judge considered Burdge’s reasons for opining that longshore law and consumer law are comparable, citing the facts that both involve disputes concerning “uniquely technical and complex questions of law and disputed fact, burden-shifting presumptions, fee-shifting, and one-time clients.” Attorney Fee Order on Remand at 3. However, he rejected Burdge’s conclusion, reasoning that longshore work, unlike consumer law, does not involve mastery of the formal rules of evidence, jury trials, class action lawsuits, or lengthy litigation. *Id.* He also noted the Act permits liberal motions for modification. *Id.* at 3-4. The administrative law judge found, therefore, that consumer law is not comparable to longshore law for purposes of establishing market rates and concluded that counsel did not meet his burden of supporting his requested hourly rates. *Id.* at 4.

We reject counsel’s contention of error. The administrative law judge adequately explained his reasoning for concluding consumer law is not comparable to longshore law for the purposes of establishing reasonable market rates.³ Counsel has not established the administrative law judge abused his discretion in rejecting the Burdge affidavit and Consumer Law Survey Report. As the administrative law judge permissibly concluded claimant did not meet his burden of supporting his requested hourly rates, we affirm the finding that claimant failed to submit sufficient evidence of market rates for San Diego. *See generally Carter v. Caleb Brett, LLC*, 757 F.3d 866, 48 BRBS 21(CRT) (9th Cir. 2014) (court must give adequate reasoning for its findings).

We also reject counsel’s contention of error with regard to the administrative law judge’s reliance on other recent fee awards to determine reasonable hourly rates. Having concluded counsel did not adequately support his requested hourly rates, the administrative law judge was permitted to look to other recent fee awards in order to determine proxy market rates. *See Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT); *see Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004). The administrative law judge rationally found that recent fee awards to counsel under the

³ We reject counsel’s contention that the administrative law judge erred in considering the complexity of longshore litigation compared to other civil litigation in determining the hourly rates. While an administrative law judge is not permitted to consider the complexity of the case before him in setting the market rate, *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), he is entitled to determine if longshore work is “similar” to that of other types of cases to determine the market rate. *Christensen*, 557 F.3d at 1053, 43 BRBS at 6(CRT).

Act provide a basis for determining proxy rates for counsel's services in this case.⁴ Attorney Fee Order on Remand at 4. Counsel has failed to establish the administrative law judge's findings are arbitrary, capricious, contrary to law or based on an abuse of his discretion. We therefore affirm the administrative law judge's hourly rate determinations in this case. *See McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011).

Accordingly, we affirm the administrative law judge's Attorney Fee Order on Remand.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁴ Contrary to counsel's contention, we perceive no error in the administrative law judge's use of prior fee awards *to counsel* without prior notice that he would do so.