

U.S. Department of Labor

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



BRB No. 19-0560

LORA A. OUTLAW)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: 03/03/2020
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Order Awarding Attorney’s Fees and Costs of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz, Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Order Awarding Attorney’s Fees and Costs (2017-LHC-01645) of Administrative Law Judge Paul C. Johnson, Jr., 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 Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

Claimant injured her left knee on April 7, 2010. Employer terminated its compensation payments on September 14, 2017, and the case was referred to the Office of Administrative Law Judges for a hearing. The administrative law judge awarded claimant continuing compensation for permanent total disability from August 26, 2017, and \$2,568.91 in medical expenses. Decision and Order Awarding Benefits at 6-7 (May 20, 2019). Claimant's counsel filed a fee petition on June 3, 2019, to which employer filed objections and claimant filed a reply. He sought a fee of \$44,170, representing 126.20 hours at \$350 per hour, plus \$2,847.54 in costs.

In his Order Awarding Attorney's Fees and Costs (Order), the administrative law judge found the requested \$350 hourly rate reasonable in view of recent fee awards in the geographic area and "counsel's extensive experience, strong credentials, and excellent reputation in the local Longshore bar." Order at 3. He disallowed 1.64 of the hours claimed and sustained employer's objections to \$618.74 of the claimed costs. *Id.* at 4-6. The administrative law judge awarded claimant's counsel an attorney's fee and costs of \$45,824.80, payable by employer.

Employer appeals the fee award, challenging the hourly rate and number of hours awarded. Claimant filed a response brief urging affirmance in all respects.

Employer first contends the administrative law judge erred in awarding an hourly rate of \$350, averring the market rate for the Hampton Roads area is no higher than \$300 per hour. The United States Supreme Court has held 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 *Perdue v. Kenny A.*, 559 U.S. 542 (2010). It is claimant's counsel's burden to submit satisfactory evidence of the prevailing market rate for the relevant community. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010); *Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010). Evidence of fee awards in comparable cases provides inferential evidence of the prevailing market rate in the relevant community and may be relied on by the fact-finder to set the rate in a given case. *Gosnell*, 724 F.3d at 572; *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 251, 38 BRBS 37, 41(CRT) (4th Cir. 2004).

In support of his claim to a \$350 hourly rate, counsel relied on the administrative law judge's award of that rate to him in *Speller v. Ports America/P & O Ports Virginia, Inc.*, Case No. 2016-LHC-00067 (Apr. 18, 2017), and his years of experience and qualifications.¹ In its objections, employer relied on 2008 awards of a \$250 hourly rate

¹ Counsel has been practicing law since 1960. He appeared before the Supreme Court in *Nacirema Operating Co. v. Johnson*, 396 U.S. 347 (1969) and the United States

and a 2012 study by the economics department at Old Dominion University, which concluded that legal rates stagnated in the Hampton Roads area after the 2008 recession.

The administrative law judge rejected employer's reliance on outdated evidence, referring to three 2019 fee awards to other counsel in the Hampton Roads area ranging from \$350 to \$390.90 per hour. Order at 3. He thus awarded counsel the requested rate of \$350 in view of these other awards, counsel's extensive experience, strong credentials and excellent reputation. *Id.*

We affirm the administrative law judge's finding that a rate of \$350 per hour is reasonable for counsel. The administrative law judge has broad discretion in assessing the factors relevant to awarding a fee, and he permissibly found employer's evidence outdated and the market rate better-reflected by more recent fee awards. *See Cox*, 602 F.3d at 288; *Gosnell*, 724 F.3d at 572. Moreover, employer's contention that the case's lack of complexity does not warrant the rate awarded is misplaced; complexity goes to the number of hours billed and not to the hourly rate. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). As there is evidence to support his decision and employer has not shown he abused his discretion, we affirm the administrative law judge's award of an hourly rate of \$350. *Gosnell*, 724 F.3d at 573-575; 20 C.F.R. §702.132.

Employer next reiterates the objections it made below to itemized entries in counsel's fee petition. The administrative law judge stated he reviewed each objection, and other than the reduction of 1.64 hours, found employer's contentions without merit. Order at 3 n.1. The administrative law judge is afforded "substantial deference in deciding whether hours represented in a fee petition are excessive" as he is in a better position to determine the reasonableness of the time expended on a particular task. *Gosnell*, 724 F.3d at 577; *see also Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Employer has not established the administrative law judge abused his discretion in awarding the full fee requested for the challenged entries, with one exception. *Gosnell*, 724 F.3d at 577.

Court of Appeals for the Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell]*, 592 F.2d 762 (4th Cir. 1979).

We agree with employer that the administrative law judge erred in awarding claimant's counsel 15 hours for the preparation of his fee petition.² Employer relied on counsel's acknowledgement that he does not keep contemporaneous records of time expended on a case and contended it should not be liable for any excessive time counsel required to retrospectively determine the amount of time he expended representing claimant.

An attorney is entitled to a "reasonable" fee for time spent for preparing and defending fee applications. *See, e.g., Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Bogden v. Consolidation Coal Co.*, 44 BRBS 121 (2011) (en banc). Counsel's request for a fee for 15 hours for the preparation of his fee petition is significantly greater than usual, and includes time for the admitted reconstruction of the time counsel expended on this case. It is not reasonable to hold employer liable for a fee for work incurred by counsel's failure to keep contemporaneous records.³ Thus, we modify the award to allow claimant's counsel 7.5 hours for preparing his fee petition.⁴ This results in a fee of \$43,199.80, representing 117.06 hours at \$350 per hour, plus \$2,847.54 in costs.

² The fee petition states counsel expended 15 hours for its preparation as follows: 7.5 hours on May 29, 2019; 2.25 hours on May 31, 2019; and 5.25 hours on June 3, 2019.

³ While we agree employer should not be liable for the time counsel spent reconstructing his billable hours, we reject employer's assertion that all of counsel's time entries are inherently suspect. Employer has not shown the administrative law judge abused his discretion in finding the time claimed for each task to be reasonable. *Gosnell*, 724 F.3d at 577.

⁴ We modify rather than remand because the Supreme Court has cautioned that "[D]etermination of fees 'should not result in a second major litigation.'" *Fox v. Vice*, 563 U.S. 826, 838 (2011) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). "The essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection." *Id.*

Accordingly, we modify the administrative law judge's Order Awarding Attorney's Fees and Costs as stated herein and affirm in all other respects.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge