



BRB No. 17-0581

LADONNA E. SEACHRIS)	
(Widow of CLOYD E. SEACHRIS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BRADY-HAMILTON STEVEDORE)	
COMPANY)	DATE ISSUED: 5/16/2022
)	
and)	
)	
SAIF CORPORATION)	
)	
Employer/Carrier-)	
Respondents)	ORDER

Claimant’s counsel has filed an itemized petition for an attorney’s fee for work performed before the Benefits Review Board (Board or BRB) in the captioned case, *Seachris v. Brady-Hamilton Stevedore, Co.*, BRB No. 17-0581 (May 7, 2018) (unpub.) *rev’d in part, vacated and remanded*, 994 F.3d 1066 (9th Cir. 2021). 33 U.S.C. §928; 20 C.F.R. §802.203(c). Counsel, Charles Robinowitz, seeks a fee of \$50,311.50, representing \$48,822.75 for 72.33 hours of his work at an hourly rate of \$675, \$3,937.50 for 12.5 hours of work by his associate, Genevee Stokes-Avery, at an hourly rate of \$315, and \$288.75 for 1.75 hours of paralegal work at an hourly rate of \$165, “less [a] prior payment” of attorney’s fees for such work of \$2,737.50. He additionally requests the Board award interest on the costs granted by Administrative Law Judge (ALJ) Jennifer Gee. Employer has not filed objections to the fee petition.

In its decision, the Board modified the ALJ’s Attorney Fee Order to reflect lead counsel’s entitlement to an inflation-adjusted hourly rate of \$349.85, but otherwise

affirmed the ALJ's orders.¹ *Seachris*, BRB No. 17-0581. Counsel appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit. Meanwhile, he also filed with the Board an itemized petition for an attorney's fee totaling \$7,084.10.² In its Order dated March 20, 2019, the Board awarded Claimant's counsel an attorney's fee "for services relating to counsel's success before the Board on the inflation-adjustment issue" in BRB No. 17-0581 totaling \$2,737.50, representing \$2,375 for 5 hours of Mr. Robinowitz's work at an hourly rate of \$475, \$235 for 1 hour of Ms. Stokes-Avery's work at an hourly rate of \$235, and \$127.50 for .75 hour of paralegal work at an hourly rate of \$170. See *Seachris v. Brady-Hamilton Stevedore, Co.*, BRB Nos. 17-0375 and 17-0581 (Mar. 20, 2019) (unpub. Order).³

In its 2021 decision, the Ninth Circuit held "the ALJ and the BRB committed legal error in determining [counsel's] hourly rate," and the ALJ's hourly rate determinations and denial of 1.125 hours counsel expended on preparation of a supplemental brief are not supported by substantial evidence. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 1082-1084 (9th Cir. 2021). The court also held "[t]he ALJ and BRB erred by holding [the Act] does not permit an award of interest on costs to account for delay in payment." *Id.* at 1085. The court therefore vacated counsel's hourly rate determination, the denial of time spent on a supplemental brief, and the summary denial of interest on costs, and remanded the case for reconsideration of those issues.⁴ It also directed the Board "to

¹ In her Attorney Fee Order, the ALJ reduced the requested hourly rates and number of hours and awarded counsel an attorney's fee totaling \$36,560.50. The ALJ denied counsel's motion for reconsideration in a subsequent order.

² The fee request consisted of \$6,307.60 for 12.13 hours of Mr. Robinowitz's time at \$520 per hour, \$470.25 for 1.65 hours of Ms. Stokes-Avery's time at \$285 per hour, and \$306.25 for 1.75 hours of his paralegal's time at \$175 per hour. More specifically, the requested hours reflected significant reductions from the total hours of services performed to account for unrecoverable time allocated on unsuccessful issues.

³ The Board disallowed all time for services performed on BRB No. 17-0375, as that appeal was dismissed as premature; counsel filed this appeal while his own motion for reconsideration was pending before the ALJ. See 20 C.F.R. §802.206.

⁴ The court held counsel is entitled to the requested hourly rate of \$165 for paralegal work but did not explicitly state what hourly rate would be appropriate for counsel under the circumstances of this case. Instead, it pointed out the ALJ's errors and remanded the case for reconsideration of counsel's hourly rate consistent with its instructions.

reassign this matter to a different ALJ on remand to avoid the appearance of partiality.” *Id.*

Following the Ninth Circuit’s 2021 decision, and because Claimant “prevailed on all issues in the Ninth Circuit and is the prevailing party on all issues before this [B]oard,” Claimant’s counsel filed the above-noted fee petition with the Board on August 10, 2021. We first address counsel’s fee petition, and then address the court’s remand order.

Hourly Rate

Counsel seeks an hourly rate of \$675 for “all of my time” performed in this case before the Board, which covers periods from April 6, 2017, through July 28, 2018, and from July 10 to August 9, 2021.⁵ However, we rely on counsel’s originally requested hourly rate of \$520 for the work he performed in 2017-2018.⁶ Counsel submitted at that time that the rate of \$520 per hour was reasonable for the work he performed. In this regard, he explicitly referred to “my market rate of \$520 per hour” in his signed “Declaration of Attorney Fees” dated June 27, 2018, stating “if a client wants to hire me on a matter on an hourly basis, I would charge at least \$520 per hour.” 2018 Declaration at 5. At that time, he also stated he knew of other comparable attorneys “who handle similar types of claims [and] receive at least that or more per hour for their time.” *Id.* He

⁵ In support of his requested hourly rate, he submits: 1) the 2020 Morones Survey of Commercial Litigation Fees indicating, as of January 1, 2020, an hourly rate of \$623 for commercial litigators with over 30 years of experience (counsel states factoring in inflation based on the Consumer Price Index (CPI) and his “over 50 years of experience as an attorney” increases his requested hourly rate to \$675); 2) the July 2, 2021 declaration of attorney Robert E. L. Bonaparte, who, based on the 2020 Morones Survey and 2017 Oregon State Bar survey plus “personal observation of market rates,” concludes “\$750/hour is a reasonable rate for” counsel; 3) an order issued by “an experienced Oregon state court trial judge” awarding him an hourly rate of \$500 for work performed in 2018 on a discrimination case under Oregon law, *Scott v. Vigor Marine*, Oregon Circuit Court (2018); and 4) a post-*Seachris* order in a Longshore case that the Ninth Circuit issued awarding his requested hourly rate of \$550, *Aegis Defense Services, LLC v. Martin*, No. 19-70566 (9th Cir. May 7, 2021).

⁶ We hold Portland, Oregon, is counsel’s relevant community for purposes of determining his market rate.

therefore recognized the possibility that he might have justification to charge an even higher hourly rate but opted to stay with his “market rate of \$520 per hour.”⁷ *Id.*

The requested \$520 hourly rate also is consistent with evidence that counsel submitted, notably the \$500 per hour rate awarded in the state case for his work performed in 2018 and the \$550 hourly rate that the Ninth Circuit awarded for his work performed in 2019-2020,⁸ as well as the historical hourly rates counsel requested for his work performed before the Board in other cases during a similar time frame. Based on counsel’s own assertions and market evidence, we award him his initial requested “market rate” of \$520 per hour for the work he performed before the Board in 2017-2018. Adjusting this 2017-2018 hourly rate for inflation, we award counsel an hourly rate of \$637 for work he performed in 2021 (Oregon State average weekly wage increase from 2018-2021 of 22.461 percent multiplied by the 2018 hourly rate of \$520 yields \$636.80 rounded up to nearest dollar).⁹ Moreover, in accordance with our earlier fee order, we approve an hourly rate of \$235 for Ms. Stokes-Avery because counsel’s supporting documentation for her requested hourly rate of \$315 is negligible¹⁰ and otherwise flawed.¹¹

⁷ Counsel declared this “statement is true to the best of my knowledge and belief.” 2018 Declaration of Attorney Fees at 10.

⁸ Furthermore, this rate is comparable with those that Mr. Bonaparte charged, who, with his “over 30 years of practice in the Portland community,” states his own “current hourly rate ranges from \$375 - \$500 per hour.” Mr. Bonaparte indicated “I regularly charge these rates to hourly-fee paying clients.”

⁹ We grant the requested hourly rate for paralegal work of \$165 as it is consistent with the Ninth Circuit’s directive and otherwise reasonable.

¹⁰ Whereas counsel dedicates more than 3.5 pages explaining why he deserves his requested hourly rate, he devotes 1 paragraph to support Ms. Stokes-Avery’s requested rate, citing only the state court decision in *Scott*.

¹¹ In his 2021 fee petition, counsel requested an hourly rate of \$315 for Ms. Stokes-Avery, which he calculated by using the *Scott* court \$285 hourly rate enhanced for inflation from 2018 to 2021. Counsel’s fee petition, however, reflects Ms. Stokes-Avery’s work was all performed in 2017-2018.

Number of Hours

We find counsel's itemized entries reasonable with the exception of the 43.15 hours he seeks for preparing and filing his petition for review and supporting brief,¹² and the 17.85 hours he requests for his reply brief. Considering the entirety of the circumstances of this case,¹³ we reduce by 5 hours counsel's requested hours for writing his petition for review and brief.¹⁴ *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986); *see also generally Tahara v. Matson Terminals, Inc.*, 511 F.3d 950 (9th Cir. 2007). We grant counsel 2.85 hours and Ms. Stokes-Avery 11.25 hours for preparing the reply to Employer's 2017 response brief.¹⁵ Moreover, we grant the 6.68 hours he seeks for work performed in 2021. Consequently, we approve 55.58 hours (48.9 hours in 2017-2018 and 6.68 hours in 2021) to counsel and 11.25 hours (2017-2018) to Ms. Stokes-Avery, as well as 1 hour for paralegal work,¹⁶ as they are reasonably commensurate with the necessary work performed before the Board in this case. 20 C.F.R. §802.203(d). Therefore, counsel

¹² Counsel's 2021 itemized time entries reflect 46.15 hours for this work. He then presumably subtracted the 3 hours the Board already granted him for such work. It is therefore reasonable to assume counsel is now seeking 43.15 hours in time expended on his petition for review and brief.

¹³ In this regard, we have factored in counsel's success before the Board and the Ninth Circuit.

¹⁴ Evaluating counsel's brief in support of his petition for review, we view the treatment of the case history and the ALJ's order as excessive and, in part, unnecessary. *Compare* 2017 Cl's Br. at 2-16 *with* 2017 Emp Br. at 2 and *Seachris* (2018 D&O), slip op. at 2. Similarly, counsel's lengthy legal analysis section is disproportionate to the familiar and repetitive issues addressed, and further contains unsuccessful arguments regarding reductions not impacted by the Ninth Circuit's decision, and it further includes an argument for which the Board already awarded him an attorney's fee. *Id.*, at 17 -34. We therefore disallow 5 of the 43.15 hours claimed for this brief.

¹⁵ Counsel's request of 5.75 hours to revise, finalize and file the reply brief is excessive given his role was limited to a review of Ms. Stokes-Avery's 13-page brief. The .5 reduction in Ms. Stokes-Avery's requested hours reflects .25 previously awarded her by the Board and .25 for the unsuccessful argument regarding the ALJ's reduction in the number of hours.

¹⁶ This represents counsel's requested 1.75 hours for paralegal work, subtracting the .75 hour that the Board previously awarded.

is entitled to a fee of \$32,491.91, representing 43.9 hours of work that counsel performed at an hourly rate of \$520 in 2017-2018 (\$25,428) and 6.68 hours of work in 2021 at an hourly rate of \$637 (\$4,225.16), 11.25 hours of work that Ms. Stokes-Avery performed at an hourly rate of \$235 (\$2,643.75), and 1 hour of paralegal work at an hourly rate of \$165 (\$165).

Interest on Costs

Counsel contends, in compliance with the Ninth Circuit’s remand instructions in *Seachris*, the Board should consider Claimant’s entitlement to interest on costs awarded at the Office of Administrative Law Judges (OALJ) level, payable by Employer. He maintains the time span between his outlay of costs from 2005 for Claimant and Employer’s 2017 reimbursement for those costs amounts to an “exceptionally protracted” delay which warrants an award of interest. Counsel further requests the Board establish the appropriate rate of interest payable. He suggests the Board apply the same rate that the government applies to tax refunds and delinquent taxes under 26 U.S.C. §6621(a), or alternatively, “ask the Director for guidance on the appropriate rate, before setting its own rate.”

Citing *Perdue v. Kenny A.*, 559 U.S. 542, 555 (2010), the Ninth Circuit determined the ALJ and the Board erred in holding the Act does not permit an award of interest on costs.¹⁷ *Seachris*, 994 F.3d 1066. The court then ordered:

On remand, the BRB should determine whether an award of interest on costs is appropriate because of the ‘exceptionally protracted’ period that this case has been pending – having been filed in 2005 – in which costs were incurred between 2007 and 2016, a period five to fourteen years ago.

Id., 994 F.3d at 1084.

In *Perdue*, the Supreme Court held an attorney’s fee under a fee-shifting statute based on the lodestar method may be increased in “extraordinary circumstances.” *Perdue*, 559 U.S. at 554. The Court indicated such circumstances are “‘rare’ and ‘exceptional,’” they must involve factors not already considered in calculating the lodestar, “and require specific evidence....” *Id.* at 554-556. Pertinent to the issue in this case is the Court’s

¹⁷ The Ninth Circuit also held its own decision in *Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987), upon which the ALJ and Board relied, in part, “has no bearing on the question presented here” because it involved post-judgment interest and not interest on costs. *Seachris*, 994 F.3d at 1084.

discussion of a second exception when “the attorney’s performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted.” *Id.* at 555-556. With respect to this circumstance, the Court stated:

when an attorney agrees to represent a civil rights plaintiff who cannot afford to pay the attorney, the attorney presumably understands that no reimbursement is likely to be received until the successful resolution of the case, and therefore *enhancements to compensate for delay in reimbursement for expenses must be reserved for unusual cases*. In such exceptional cases, however, an enhancement may be allowed, but the amount of the enhancement must be *calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest* to the qualifying outlays of expenses.

Id., 559 U.S. at 555 (emphasis added).¹⁸

In accordance with the Ninth Circuit’s decision in this case, an attorney or claimant is entitled to an enhanced reimbursement for expenses, awarding interest on the expenses, if the circumstances satisfy the *Perdue* requirements: the attorney must have made an “extraordinary outlay of expenses” and the time between payment and reimbursement, generally the litigation period, must have been “exceptionally protracted.”¹⁹ *Perdue*, 559 U.S. at 555-556; *Seachris*, 994 F.3d at 1084. As the ALJ addressed and awarded the costs in question, we remand this case for the ALJ to determine whether there was an “extraordinary outlay of expenses” and whether the time between payment and reimbursement was “exceptionally protracted.”²⁰ *Perdue*, 559 U.S. at 555-556. If so, the

¹⁸ *Perdue* involved a civil rights claim under 42 U.S.C. §1983, with the fee-shifting provision at 42 U.S.C. §1988.

¹⁹ The Supreme Court did not establish how to calculate the enhancement on costs; however, the *Perdue* Court stated interest is likely the most reasonable and easily reviewable method. *Perdue*, 559 U.S. at 555. This differs from a delay enhancement on an attorney’s fee where delay enhancements are calculated using either current or present value hourly rates. *See generally Van Skike v. Director, OWCP*, 557 F.3d 1041 (9th Cir. 2009); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997).

²⁰ Claimant’s counsel, who apparently began representing Claimant in 2005, expended claim-related costs totaling \$5,413.95 as of August 27, 2008. Claimant reimbursed counsel on February 1, 2011. Counsel then sought reimbursement of those costs for Claimant in his fee request at the OALJ level. The ALJ, in her 2017 Attorney Fee Order, ordered Employer to pay Claimant costs in the amount of \$5,413.95. Employer

ALJ may award Claimant interest on any extraordinary outlay of expenses pursuant to 28 U.S.C. §1961. *Price v. Stevedoring Services of Am.*, 697 F.3d 820 (9th Cir. 2012) (en banc).²¹

Accordingly, pursuant to the Ninth Circuit’s instructions and mandate, we remand this case to the OALJ for re-assignment, and we modify the ALJ’s awarded paralegal hourly rate to \$165. On remand, the ALJ must address counsel’s hourly rate and requested hours for work performed before the OALJ pursuant to the court’s decision. Additionally, we instruct the ALJ to address Claimant’s entitlement to interest on costs consistent with

complied with the ALJ’s directive and reimbursed Claimant that amount on February 8, 2017.

²¹ The Ninth Circuit adopted the use of 28 U.S.C. §1961 to award interest on past-due compensation under the Act. The court rejected the use of 26 U.S.C. §6621(a), which counsel now suggests we use to calculate interest on overdue costs. The court explained, “Congress has not expressed an intent on the matter,” “the agency [through the Director, Office of Workers’ Compensation Programs (the Director)] has expressed a preference for 1961,” having consistently applied that rate for at least twenty years and incorporated “the 1961 rate into the Longshore Manual.” *Price*, 697 F.3d at 839. Additionally, although the *Price* court stated its holding would not preclude the Director from changing its position and adopting Section 6621(a) “through the formal rulemaking process or other appropriate means,” *id.*, n.12, there is no suggestion that the Director has undertaken any such action. Further, recent case law indicates the Ninth Circuit continues to use Section 1961 to calculate interest, “unless the trial judge finds, on substantial evidence, that the equities of the particular case require a different rate.” *See, e.g., Persian Broad. Serv. Glob. Inc. v. Walsh*, No. 2:21-CV00229CASGJSX, 2022 WL 375294, at *11 (C.D. Cal. Feb. 7, 2022) (citing *W. Pac. Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1984)); *Villasenor v. Cmty. Child Care Council of Santa Clara Cty., Inc.*, No. 18-CV-06628-BLF, 2021 WL 242924, at *5 (N.D. Cal. Jan. 25, 2021) (citing *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1164 (9th Cir. 2001)). For these reasons, we decline counsel’s suggestions to calculate interest pursuant to Section 6621(a) and to ask the Director for additional guidance.

this opinion. For work performed before the Board in this appeal, we order Employer to pay counsel an attorney's fee of \$32,491.91.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge