



BRB Nos. 15-0415, 16-0023, and 24-0002

CHARLES SCHUBERT
(on behalf of ESTATE OF KAREN
FULTON, widow of JESSE FULTON,
deceased employee)

Claimant-Petitioner

v.

COLBERG, INCORPORATED, and
INDUSTRIAL INDEMNITY COMPANY (in
liquidation)

and

CALIFORNIA INSURANCE GUARANTEE
ASSOCIATION (CIGA) for INDUSTRIAL
INDEMNITY (in liquidation)

Employer/Carrier-
Respondents

NOT-PUBLISHED

DATE ISSUED: 05/12/2025

DECISION and ORDER

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

Alan R. Brayton and John R. Wallace (Brayton Purcell LLP), Novato,
California, for Claimant.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS, and
JONES, Administrative Appeals Judges

PER CURIAM:

Claimant's Counsel appeals Administrative Law Judge (ALJ) Richard M. Clark's Attorney Fee Order (2015-LHC-00538 and 2019-LHC-00386) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (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. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 955-956 (9th Cir. 2007).

Karen Fulton filed a claim for death benefits on December 1, 2008, due to the death of her husband, Jesse Fulton (Decedent). Decedent died on December 11, 2007, allegedly from pulmonary insufficiency and bronchopneumonia caused by his workplace exposure to asbestos at Employer's facility during his employment in 1965, 1972, and 1973.¹ 33 U.S.C. §909. On May 13, 2019, Claimant Charles Schubert, the son of Mrs. Fulton, moved to substitute himself as the party to represent his mother's claim on behalf of her estate due to her death on April 19, 2017. On May 15, 2019, the ALJ granted the unopposed motion and substituted him as Claimant.

On February 23, 2022, Claimant and Employer informed the ALJ that they had reached a settlement and requested remand. On February 25, 2022, the ALJ remanded the claim to the Office of Workers' Compensation Programs (OWCP) to approve the settlement agreement but retained jurisdiction over attorney fees and costs for work performed before the Office of Administrative Law Judges (OALJ). On June 8, 2022, the district director issued an "Order Approving Stipulations" and an "Order Award and Special Fund Payment" approving the parties' settlement and allocating the liability.² However, the settlement agreement did not resolve the issues of an attorney's fee and costs.

¹ On December 2, 2014, Employer filed a "Motion to Dismiss CIGA as a Party Defendant" under California Insurance Code ("CIC") §1063.1. ALJ William J. King granted its motion in an interlocutory order issued on September 16, 2015. Employer appealed but soon after moved to withdraw its appeal and the Benefits Review Board granted the motion. *Fulton v. Colberg, Inc.*, BRB No. 15-0415 (Oct. 7, 2015); 20 C.F.R. §802.401. On October 7, 2015, Ms. Fulton appealed the ALJ's Order, and on November 16, 2015, based on *McCue v. Colberg, Inc.*, BRB. No 15-0037 (Jul. 23, 2015), *recon. denied* (Oct. 22, 2015), the Board dismissed Mrs. Fulton's appeal as interlocutory, holding the ALJ's dismissal is fully reviewable upon review of a decision on the merits. 33 U.S.C. §921(b); *Fulton v. Colberg, Inc.*, BRB No. 16-0023 (Nov. 16, 2015).

² Pursuant to the approved agreement, Employer and CIGA were ordered to pay Charles Schubert on behalf of the Estate of Karen Fulton, widow of Jesse Fulton, \$70,000, and the Special Fund was ordered to pay \$80,000. Order at 2.

On November 18, 2022, Claimant's Counsel, John Wallace, filed an itemized fee petition with the ALJ on behalf of the firm, Brayton Purcell, seeking an attorney's fee totaling \$241,393.33, representing \$6,935 for 7.3 hours of attorney Alan Brayon's services at \$950 per hour, \$825 for 1.1 hours of attorney Gil Purcell's services at \$750 per hour, \$3,445 for 5.3 hours of attorney James Nevin's services at \$650 per hour, \$165,050 for 330.1 hours of attorney John Wallace's services at \$500 per hour,³ \$12,909.50 for 40.1 hours of other attorneys' services at rates between \$315 and \$325 per hour,⁴ \$16,792 for 148.8 hours of paralegal and legal assistant services at rates between \$70 and \$150 per hour,⁵ and \$35,434.83 in costs. Claimant's Exhibits (CXs) B, C. On January 5, 2023, the

³ As support for the requested attorney hourly rates, Counsel submitted Exhibits A through M and declarations from Attorneys Gil Purcell, John Wallace, and John O'Connor, with O'Connor's declaration including Exhibits A through G. Claimant's exhibits A through C include the filing history for this case, a fee schedule, and an itemized list of expenses. *See* CXs A, B, C. Claimant's exhibits D through M include excerpts of Ronald L. Burges's 2010-2011 U.S. Consumer Law Attorney Fee Survey Report, 2011 ALM Survey of California Law Firm Economics Standard Hourly Billing Rates as of January 2011, a 2011 Study of the Billing Rates and Billing Practices of Attorneys in Small and Midsize Firms, past longshore fee orders from 2012 to 2015, the USAO Attorney's Fee Matrix from 2015 to 2021, and the *Laffey* Matrix. Evidence also included the resumes of paralegals and legal assistants. *See* Fee Pet., CXs D - M.

⁴ The fees requested for other attorneys' services consist of \$2,405 for 7.4 hours of Frank Ander's services at \$325 per hour, \$6,630 for 20.4 hours of Rene Casili's services at \$325 per hour, and \$3874.50 for 12.3 hours of James Ghilotti's services at \$315 per hour. Fee Pet., CX B at 37. Counsel billed zero hours for Attorneys Emerald Law and Geoff Sloniker; therefore, the ALJ did not make any determination regarding their rates. Fee Order at 8 n.4; *see* Fee Pet., CX B at 37.

⁵ The paralegal and legal assistant fees consist of \$8,895 for 59.3 hours of Rikki Bambauer's services at \$150 per hour, \$1,530 for 15.3 hours of Grant Bonham's services at \$100 per hour, \$1,400 for 14.0 hours of Asia Kowalski's services at \$100 per hour, \$2,120 for 21.2 hours of Douglas Norman's services at \$100 per hour, \$1,300 for 13 hours of Luke Stoddard's services at \$100 per hour, \$90 for 0.9 hour of Erin Sullivan's services at \$100 per hour, \$180 for 1.8 hours of Shauna Vermeulen's services at \$100 per hour, \$20 for 0.4 hour of Pamela Biagio's services at \$50 per hour, \$165 for 3.3 hours of James Gunn's services at \$50 per hour, \$315 for 4.5 hours of Monica Lepe's services at \$70 per hour, \$49 for 0.7 hour of Angela Porterfield's services at \$70 per hour, \$700 for 14.0 hours of Daryl Reese's services at \$50 per hour, and \$28 for 0.4 hour of Amy Slinkard's services at \$70 per hour. Fee Pet. CX B at 37.

Director, OWCP, objected to holding the Special Fund liable for any attorney's fee or costs. On January 26, 2026, Employer objected to portions of Counsel's fee petition and list of costs. On February 9, 2023, Counsel filed a reply brief to Employer's objections.

In his Attorney Fee Order dated September 7, 2023 (Fee Order), the ALJ found the Special Fund cannot be liable for an attorney's fee or costs as a matter of law. Fee Order at 5-6 (citing 33 U.S.C. §§918(b), 928). He also determined San Francisco, California, is the relevant community for determining the market hourly rates and Counsel met his initial burden by presenting evidence of hourly rates. Fee Order at 7. Further, he allotted some weight to Attorney John D. O'Connor's declaration and its attached exhibits containing surveys and reports in support of the requested hourly rates.⁶ Fee Order at 21-28; *see* O'Connor Decl. However, he assigned the remaining hourly rate evidence little to no weight. Fee Order at 13-21. Consequently, the ALJ awarded Attorneys Brayton and Purcell each a rate of \$600 per hour, as he found it is reasonable and "serves 'rough justice.'" *Id.* at 32-33. For the same reasons and using the same evidence, he awarded Attorney Nevin an hourly rate of \$580. *Id.* at 34. Per Counsel's petition, the ALJ awarded Attorney Wallace an hourly rate of \$500. *Id.*

The ALJ reduced the hours billed by 324.8 hours, 208.9 of which were excluded because the work was not performed before the OALJ,⁷ and rejected the remaining 115.9 hours as excessive, clerical, or unduly vague.⁸ Fee Order at 38. Further, the ALJ sustained Employer's objections to several entries he found were "interoffice communications"⁹ *Id.*

⁶ Brayton Purcell hired Mr. O'Connor as a fee expert.

⁷ The ALJ excluded 188 hours for work performed before the OWCP and 14.7 hours for work performed before the Board. Fee Order at 39; *see* Fee Pet., CX B, Billing Entries 1 to 264, 339 to 350.

⁸ The ALJ sustained 181 of Employer's objections to billing entries he found are clerical, but he overruled Employer's remaining clerical objections as he found those entries reflected substantive work requiring independent legal judgment. D&O at 41. He also sustained Employer's objections to billing entries where Claimant failed to sufficiently describe the task, thereby rendering him unable to assess whether the work was necessary. *Id.* at 42. Additionally, he sustained Employer's objections, and disallowed the time, for entries he found were excessive, duplicative, or vague, but he overruled the objections when he could discern the task performed was necessary and the time expended seemed reasonable. *Id.* at 43.

⁹ The ALJ disallowed 8.3 hours for the following billing entries he found represented unnecessary work, as they addressed routine status reports for internal management purposes rather than specific activity on this claim: 365, 367, 398, 485, 486,

at 44. The ALJ overruled Employer's objections to sixty-one entries billed between June 5, 2020, and October 29, 2020, for work performed in response to the ALJ's Order to Show Cause (OSC) regarding an alleged attorney conflict of interest and Attorney Purcell's potential disqualification.¹⁰ *Id.* at 45-46. He also disapproved some of the requested costs based on sustained objections.¹¹ *Id.* at 47-51. Ultimately, the ALJ awarded Counsel a total of \$108,206.04, representing an attorney's fee of \$94,054.50, plus \$14,151.54 in costs.¹² *Id.* at 51-54.

Counsel appeals the Fee Order, contending the ALJ erred in assigning little to no weight to most of the proffered rate evidence and in rejecting the requested hourly rates for Attorneys Brayton, Purcell, and Nevin. He also asserts the ALJ abused his discretion by denying various billing entries and reducing the number of hours billed for being ambiguous, duplicative, excessive, vague, or clerical in nature. Moreover, he argues the ALJ erred in denying reimbursement of the costs for expert O'Connor's services and in denying reimbursement of the fee paid for outside counsel's work on the OSC.¹³ Neither Employer nor the Director has responded.

638-40, 645, 648, 664-65,681, 795-96, 801, 804, and 857. Fee Order at 44 n.26; *see* CX B.

¹⁰ The ALJ nevertheless reduced some of the OSC entries for being clerical, duplicative, excessive, or vague. Fee Order at 45.

¹¹ The ALJ sustained Employer's objections for the following costs: \$2,193.50 bill for Attorney O'Connor's fee expert services; \$19,032.50 for outside counsel costs; \$52.03 for travel costs; and \$5.26 for copying costs for a total reduction of \$21,283.29. Fee Order at 48-50.

¹² The total fee represents the following: \$2,820 (4.7 hours x \$600 rate) + \$660 (1.1 hours x \$600 rate) + \$2,668 (4.6 hours x \$580 rate) + \$79,250 (158.5 hours x \$500 rate) + \$2,551.50 (8.1 hours x \$315 rate) + \$4,065 (27.1 hours x \$150 rate) + \$1,060 (10.6 hours x \$100 rate) + \$970 (9.7 hours x \$100 rate) + \$10 (0.1 x \$100 rate) + \$14,151.54 in costs. Fee Order at 51-53.

¹³ We affirm as unchallenged on appeal the ALJ's finding that the San Francisco Bay area is the relevant community for determining the market rates and the ALJ's awarded hourly rates for Attorneys Wallace and Ghilotti, the paralegals, legal assistants, and support staff members, as well as the remaining costs. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

Hourly Rates

Counsel first asserts the ALJ erred in rejecting the rate evidence, particularly the O'Connor declaration, and in reducing the requested hourly rates for Attorneys Brayton, Purcell, and Nevin. An ALJ must consider all relevant rate evidence before him, *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009), and must explain his rationale for assessing an attorney's fee. *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 869 (9th Cir. 2014); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1053 (9th Cir. 2009); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97, 101 (1999). It is within the ALJ's discretion to determine the hourly rates using locality charts, provided he fully considers all relevant evidence, gives specific explanations for his findings, and does not rely on improper factors. *Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066, 1080 (9th Cir. 2021); *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1089 (9th Cir. 2015); *Carter*, 757 F.3d at 869 (discussing the appropriateness of different rates for attorneys with different levels of experience). The burden is on Counsel to produce satisfactory evidence showing 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. *Christensen*, 557 F.3d at 1055; *Van Skike v. Director, OWCP*, 557 F.3d 1041, 1048 (9th Cir. 2009); see *Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010).

We first consider Counsel's argument that the ALJ erred in rejecting the declaration of attorney fee expert O'Connor as support for the requested hourly rates of \$950 for Attorney Brayton, \$750 for Attorney Purcell, and \$650 for Attorney Nevin. Cl. Brief at 10, 25, 35-38. In making his assessment, the ALJ considered both the declaration and its exhibits. The ALJ found O'Connor concluded the following: 1) cases under the Longshore Act "are not easy or routine;" 2) attorneys who specialize in a practice area garner higher rates than those who do not; 3) the primary consideration is years of practice; 4) consumer law hourly rates and rates of practitioners before the California's Workers' Compensation Appeals Board (WCAB) are comparable to Longshore hourly rates; 5) an attorney with ten years of experience should "command...at least \$650" per hour; and 6) senior partners' hourly rates would likely exceed \$700 per hour and perhaps "approach premium rates of \$800 to \$1,000 per hour." Fee Order at 22-23. Based on this information, O'Connor opined \$650 per hour is reasonable for Attorney Nevin, \$750 per hour is reasonable for Attorney Purcell, and \$950 per hour is reasonable for Attorney Brayton.¹⁴ *Id.* at 23. The

¹⁴ The ALJ acknowledged O'Connor "admitted" \$950 per hour "was at the upper bounds of a reasonable rate, but opined a top of the market rate was reasonable given the complexities of the case." Fee Order at 23.

ALJ concluded the surveys and reports O'Connor relied on do not support portions of the declaration or the requested rates for those three attorneys.¹⁵ This conclusion is rational.

Specifically, the ALJ found the Consumer Law Survey from 2017 to 2018, even when adjusted to 2022 dollars, did not support rates as high as Counsel requested, and this discrepancy undercut O'Connor's statements. Rather, the ALJ found the survey established San Francisco attorneys practicing consumer law for more than forty-one years could charge, on average, a rate of \$525.16 in 2022 dollars, and an attorney with thirty-six to forty years of experience could charge \$843.57 in 2022 dollars. Fee Order at 30 (citing O'Connor Decl., EX C).¹⁶ Similarly, the ALJ rejected O'Connor's opinion that the WCAB memorandum supports a premium rate.¹⁷ Fee Order at 27-28; O'Connor Decl., Ex. E.

¹⁵ We affirm the ALJ's rejection of the *Laffey* Matrix, *see* O'Connor Decl., EXs D, F; *see also* Fee Pet., CX L. The ALJ permissibly found it provided no source, the hourly rates are based on attorneys' time out of law school, and the included explanatory statement provided no description as to who independently updates the matrix. *Seachris*, 994 F.3d at 1080; *Shirrod*, 809 F.3d at 1089; *Carter*, 757 F.3d at 869; Fee Order at 15-16, 25-28. More importantly, it reflects rates in Washington, D.C., and not in the San Francisco Bay area. Fee Order at 15-16, 31-32; *see Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454 (9th Cir. 2010) (stating that "just because the *Laffey* Matrix has been accepted in the District of Columbia does not mean that it is a sound basis for determining rates elsewhere, let alone in a legal market [San Francisco Bay Area] 3,000 miles away."); *see also Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 229 (4th Cir. 2009); *Grissom v. The Mills Corp.*, 549 F.3d 313, 322-323 (4th Cir. 2008).

¹⁶ The ALJ determined the survey considered practice area, location, and years of experience, but it did not specify whether the location surveyed was limited to San Francisco proper or whether it included the greater Bay Area region, as the firm is in Novato, California, and there is a difference in overhead and costs between the areas. Fee Order at 25, 27. He also observed the report provided no information regarding the number of attorneys surveyed, and the data for rates based on years of experience is given in averages and may be skewed. *Id.* at 25.

¹⁷ Using the WCAB memorandum, O'Connor concluded, "if a ten-year junior partner was billing at \$475, [he] would expect a senior partner of counsels' experience to exceed \$700 hour, and approach premium rates of \$800 to \$1,000 reserved for the top of the market litigating the most complex matters." O'Connor Decl. at 59-61. The ALJ rejected this conclusion because O'Connor did not explain why he reached that conclusion, whether the memorandum covered the Bay area, or why he used the 2010 WCAB

Finally, the ALJ rejected O'Connor's interpretation of the Real Rate Report for litigation firms in San Francisco. He found the report established litigation partner rates in San Francisco ranged from \$423 per hour to \$995 per hour in 2022 dollars, with a median hourly rate of \$675. Fee Order at 28, 33-34; *see* O'Connor Decl., EX G. But he found the report flawed because it did not specify the type of practice other than "litigation," or the years of experience, and it is for firms located in the city of San Francisco, not in the Bay Area more generally where Counsel's office is located. Thus, he assigned no weight to O'Connor's conclusion that it supports the premium rates. Fee Order at 28.

Overall, the ALJ gave O'Connor's declaration "some weight" but, with respect to awarding "premium" rates, he found it "unsupported and its shortcomings made [O'Connor's] opinion less compelling and, ultimately, not convincing." Fee Order at 28-29. Additionally, he questioned O'Connor's use of average rates due to the possibility of skewing, and he was not persuaded O'Connor knew the Brayton Purcell attorneys well enough to "slot them in the market." Fee Order at 28, 33. The ALJ has fully explained his rationale and conclusion for rejecting O'Connor's declaration and finding it not supportive of awarding premium hourly rates.¹⁸

The ALJ has discretion to determine whether to award an attorney's requested hourly rates, including whether to base the rates on an average, a median, or a particular percentile from the survey. *Seachris*, 994 F.3d at 1080; *Shirrod*, 809 F.3d at 1089; *Carter*, 757 F.3d at 869; *see generally Eastern Associated Coal Corp. v. Dir.*, *OWCP [Gosnell]*, 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 288 (4th Cir. 2010). In weighing the O'Connor declaration as a whole, the ALJ considered how O'Connor's recommended rates analyzed the attorneys' experience, as well as the firm's location, size, and area of legal practice. Fee Order at 28. He found O'Connor's analysis relied heavily on the attorney's years of experience, but his statements regarding the attorneys were vague and lacked depth. *Id.* Specifically, the ALJ indicated O'Connor did not offer knowledge of Attorney Brayton's skills or expertise but instead reiterated the importance of his years of experience and made only vague laudatory references to his skills.¹⁹ Further, he determined O'Connor's declaration failed to explain the cost-of-living

memorandum, ignored the 2013 WCAB memorandum, and adjusted the rates from 2010 to 2018 dollars. Fee Order at 26-27.

¹⁸ Further undercutting O'Connor's opinion, the ALJ correctly explained the complexity of a case is *not* considered in the hourly rate but, instead, in the hours awarded. Fee Order at 32; *see Seachris*, 994 F.3d at 1080; *Van Skike*, 557 F.3d at 1048.

¹⁹ While the ALJ recognized O'Connor's opinion that Attorney Brayton is one of the "top plaintiff-side lawyers in the country handling multi-factorial causation issues," and "perhaps the best claimant-side trial lawyer in the Bay Area," and his supervision of the

calculations and relied on data that does not reflect regional rates in the relevant community. Fee Order at 28-29, 32-34. As the burden is on 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,” the ALJ rationally found O’Connor’s declaration failed to persuade him. *Christensen*, 557 F.3d at 1055; see *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994).

Having addressed O’Connor’s declaration, the ALJ next considered the exhibits attached to the declaration as evidence in their own right – without the taint of O’Connor’s interpretation. He gave the Consumer Law Survey some weight, and he found the WCAB information “persuasive evidence of compensation levels for similar work, especially given that Longshore attorneys sometimes also qualify as WCAB attorneys.” Fee Order at 25, 27; see *Seachris*, 994 F.3d at 1080; *Shirrod*, 809 F.3d at 1089; *Carter*, 757 F.3d at 869. In addition, he found the rates contained within the Real Rate Report “are generally informative for determinations based on litigation.” *Id.* at 33.

After considering the O’Connor exhibits, the ALJ considered the exhibits attached to the fee petition itself. The ALJ fully explained his rationale for accepting or rejecting various pieces of evidence, and he clearly stated he gave the most weight to the Burdge Survey (because consumer law is generally comparable to Longshore work) and the WCAB memorandum (because it is persuasive rate evidence for similar work). He gave limited weight to the other reports. Fee Order at 28-33. Contrary to Counsel’s assertion, the ALJ is not required to accept all the fee applicant’s rate evidence, even if uncontradicted by opposing counsel. *Shirrod*, 809 F.3d at 1087 (decision-maker has discretion to determine prevailing market rate so long as he provides adequate justification). Instead, the ALJ is required to arrive at a reasonable fee based on the statutory framework. *Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010); *Blum v. Stenson*, 465 U.S. 886, 895 (1984). We reject Counsel’s assertion that the ALJ “improperly” rejected or “degraded” all his rate evidence.²⁰

case “meaningfully contributed” to its settlement, Fee Order at 32 (citing O’Connor Decl. at 34), he found O’Connor provided no explanation or basis for these statements, and there was no evidence that O’Connor had any familiarity with the attorneys’ work prior to being retained as their fee expert. Fee Order at 32.

²⁰ We reject Counsel’s contention that the ALJ ignored evidence of past fee awards in determining the hourly rates. Cl.’s Brief at 28-29, 37, 39. Rather, the ALJ considered and rejected them as being “too dated.” Fee Order at 30. While this reasoning, alone, is contrary to the Ninth Circuit’s reasoning in *Seachris*, 994 F.3d at 1077-1078, and

Upon deciding which evidence he would consider for rates in Counsel's market, the ALJ looked to the median rates in the surveys and adjusted them for inflation and cost-of-living increases to 2022 dollar amounts.²¹ He found they generally ranged from \$493 to \$843.57 for an attorney with more than twenty years of experience (\$493 WCAB, \$525 Consumer Law; \$600.55 Burdge; \$678.04 Burdge for 26 years of experience; \$617.34 ALM; \$675 Real Rate). The Consumer Law median rate for attorneys with thirty-six to forty years of experience is \$843.57. Fee Order at 29-33; *see* Fee Pet., CXs D, E; O'Connor Decl., EXs C, E, G. He observed that the higher rates were for firms in San Francisco proper or San Francisco City, not the Bay area, were averages rather than median rates and might be skewed, did not specify the attorney's practice area, or both. *Id.* Based on his calculations, he concluded the surveys do not support Counsel's requested premium rates. Of the surveys the ALJ considered, he found the evidence overall did not support awarding Counsel's requested rates, and he awarded Attorney Brayton an hourly rate of \$600, deeming it is reasonable and "serves 'rough justice.'"²² Fee Order at 33; *see Fox v. Vice*, 563 U.S. 826, 838 (2011).

Based on their declarations, the ALJ determined Attorneys Brayton and Purcell do comparable work with similar experience. Fee Order at 33. He noted they are both named partners with approximately forty years of experience and possess similar accolades. *Id.*;

Christensen, 557 F.3d at 1055, he clearly stated if he adjusted them for inflation, they would not support the requested premium rates. Fee Order at 14, 30.

²¹ The ALJ used the increase in the national average weekly wage between various fiscal years, which he found was nearly identical to using the Department of Labor's (DOL's) Bureau of Labor Statistics Consumer Price Index (CPI) calculator, to arrive at the value in 2022 dollars. Fee Order at 11 n.6, 28, 31.

²² The ALJ reasonably stated:

Despite the shortcomings of CIGA's arguments, however, I must "strike a balance between granting sufficient fees to attract qualified counsel and avoiding a windfall to counsel," by "compensate[ing] counsel at the prevailing rate in the community for similar work; no more, no less." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008) (cleaned up). Based on the evidence before me from Petitioner, the hourly rates for Attorneys Brayton, Purcell, and Nevin exceed the relevant community rates, and should be reduced accordingly.

Fee Order at 30.

see Brayton and Purcell Decl. Therefore, he found it reasonable to apply the same rate analysis he did for Attorney Brayton to Attorney Purcell, and he awarded Attorney Purcell the same hourly rate of \$600. As his conclusions are rational, we affirm the awarded hourly rates. *Id.*; see *Seachris*, 994 F.3d at 1080; *Shirrod*, 809 F.3d at 1089; *Carter*, 757 F.3d at 869. As he found Counsel did not submit sufficient background, experience, or accolades for Attorney Nevin, the ALJ used only the surveys of record to assess \$580 as a reasonable rate for him as an attorney with twenty-one years of experience.²³ Fee Order at 34. The ALJ's findings are reasonable, supported by the evidence, and within his discretion. *Seachris*, 994 F.3d at 1080 (assessing a rate is “a judgment call that the ALJ could reasonably have resolved either way”); *Shirrod*, 809 F.3d at 1089; *Carter*, 757 F.3d at 869.

As the ALJ is in the best position to assess the attorney's work in litigation before him, he fully considered the rate evidence before him, the reasons he gave are not improper, and those reasons support his conclusion, we affirm his hourly rate findings. *Seachris*, 994 F.3d at 1080; *Carter*, 757 F.3d at 869; *Jensen*, 33 BRBS at 101.

Reduction of Hours

An attorney's work is compensable if the hours claimed are “reasonable” for the “necessary work done” in the case and the fee is commensurate with the degree of success obtained. 20 C.F.R. §702.132(a); see *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The factfinder may, within his discretion, disallow a fee for hours found to be duplicative, excessive, or unnecessary, and he is afforded “considerable deference” in making those discretionary determinations. See *Hensley*, 461 U.S. at 437; *Tahara*, 511 F.3d at 956; *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1047 (9th Cir. 2000). Further, given the factfinder's superior understanding of the underlying litigation, he is in the best position to make this determination, and his decision will not be disturbed unless it constitutes an abuse of discretion. *Id.*; see also *Fox*, 563 U.S. at 838. On appeal, the fee applicant bears the burden of proving the ALJ abused his discretion in reducing the number of hours and awarding less than what was requested in the fee petition. *Brown v. Marine Terminals Corp.*, 30 BRBS 29, 34 (1996) (en banc).

Counsel asserts the ALJ provided no guidance for his clerical work findings and erred in not explaining every individual reduction. We are not persuaded, and we reject

²³ Based on the surveys, for attorneys with twenty-one years of experience, the ALJ found the following median rates in the reports - adjusted to 2022 dollars: \$607.01 Burdge Report; \$548.89 ALM); \$663.36 Consumer Law Survey; \$493 WCAB). Fee Order at 34; see Fee Pet., CXs D, E; O'Connor Decl., EXs C, E, G. The ALJ determined a rate between \$550 and \$660 is reasonable for a partner with twenty-one years of experience. Fee Order at 34.

any contention that the ALJ erred in grouping the disallowed entries by their common objections.²⁴

The ALJ considered the entries to determine whether any attorneys billed for clerical work, along with Employer's objections²⁵ to many of those entries. Fee Order at 40-41. Specifically, he reviewed the billed time spent requesting records; receiving, scanning, and forwarding filings or emails; formatting documents; organizing exhibits; drafting cover letters; drafting spreadsheets or indices of attorneys who had worked on the case; sending billing inquiries; reviewing invoices; checking or updating contact information; scheduling calls, conferences, and mediations; and issuing records and insurance card requests. *Id.* at 41. He accurately determined none of those clerical tasks required independent legal judgment, and they should have been absorbed into overhead costs. *Id.* at 41; see *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254, *modified on recon.*, 19 BRBS 52 (1986) (counsel may not bill for purely clerical services, as such services are considered part of overhead, even if completed by an attorney or paralegal); *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979) (same); *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980). For example, he denied some billing entries as clerical because, though stating the staff person indicated they "researched" something, the action instead involved finding a document, a filing, or a calendar item to send to an attorney and did not require independent legal judgment. *Id.* Therefore, the

²⁴ We also reject Counsel's assertion that it was erroneous for the ALJ to reduce, rather than disallow, the time in an entry as clerical. First, it does not appear the ALJ partially reduced entries, and second, to the extent he did so, many entries included more than one task – block billing – so it would be reasonable for the ALJ to find some of the tasks are clerical while others are not. Even so, considering the fee petition included more than 800 entries, there are bound to be some minor math errors. The goal is "rough justice" not green-eyeshade accounting. See *Fox v. Vice*, 563 U.S. 826, 838 (2011).

²⁵ We reject Counsel's argument that the ALJ erred in accepting Employer's objections which Counsel described as "grossly untimely". Cl.'s Brief at 29-31. The ALJ acknowledged the objections were late but permissibly accepted and considered them, as well as Counsel's reply brief, determining the fifty-six-day delay in receiving Employer's objections did not result in any harm or prejudice to Counsel. Indeed, the ALJ noted Counsel himself requested three filing extensions. Fee Order at 2; *Collins v. Electric Boat Corp.*, 45 BRBS 79, 82 (2011) (ALJ has wide discretion in admitting evidence into the record); *McCurley v. Kiewest Co.*, 22 BRBS 115, 118 (1989) (same); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153, 155 n.1 (1985) (same).

ALJ permissibly sustained Employer's objections to billing entries that were clerical and overruled its objections for substantive work requiring independent legal judgement.²⁶

We also reject Counsel's argument that the ALJ abused his discretion by denying some billing entries for being "duplicative, excessive, vague or ambiguous." Cl.'s Brief at 3-4, 9, 50. The ALJ considered Employer's objections to hundreds of entries because they were "excessive, vague, and ambiguous, duplicative and ... not stated with sufficient particularity to determine the nature of the activity, the number of pages reviewed, and whether [the billing entry] is reasonable and reimbursable...." Fee Order at 42 (citing Obj. Billing Entry No. 316). He sustained Employer's objections to entries and disallowed hours when Counsel failed to sufficiently describe the task, as he could not assess whether the work was necessary, duplicative, clerical, or excessive. Fee Order at 42 (citing CX B-Billing Entry 271). In addition, he found some employees provided vague descriptions of the work performed that made it impossible to discern whether the work was reasonably necessary, and he disallowed hours if duplicative tasks or review were evident. Fee Order at 42 (citing CX B-Billing Entry 356), 43 (citing CX B-Billing Entry 298). Therefore, as the ALJ explained his rationale, Counsel has not established the ALJ abused his discretion in reducing these hours. *Brown*, 30 BRBS at 34; *Welch v. Pennzoil Co.*, 23 BRBS 395, 402 (1990); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 236 (1984).

We further reject Counsel's specific challenges to the ALJ's disallowance of hours as excessive for billing entries 316-338, 580, 582-583, 593, 595, 596, 597, and 601 for work performed by Attorney Wallace. Cl.'s Brief at 15, 18-19. Contrary to Counsel's argument that the ALJ provided "no explanation" for why these disallowances are "unreasonable," the ALJ provided sufficient explanation. Cl.'s Brief at 15. The ALJ first

²⁶ The ALJ disallowed time for the following billing entry numbers he deemed are clerical: 267, 286, 293, 301-02, 323, 324, 366, 369, 379-80, 395, 397, 400, 417-20, 423-27, 434, 438, 442, 444, 455, 462-63, 466-67, 470, 472-73, 489-507, 510-11, 513-518, 520-21, 523-31, 534, 536-37, 539, 541-42, 544-46, 549-50, 555, 558-60, 564, 568-69, 571, 577, 578, 585, 589, 591, 594, 598, 617, 619, 621, 633, 636, 647, 650, 653, 663, 669, 674, 676, 678, 679, 682-83, 686, 688, 689-98, 699, 706, 707, 712-14, 716-17, 718-21, 724, 728-30, 735-36, 738, 742-44, 748-49, 755, 761, 766, 768-69, 776, 778, 780, 783-87, 789-90, 794, 810, 812, 817-24, 826-27, 860-61, 868-70, 872, and 874-75. Fee Order at 41 n.23; *see* CX B. He then reduced the hours billed that he found are clerical for each staff member as follows: 5.9 hours for John Wallace, 6.7 hours for Douglas Norman, 0.6 hour for James Ghilotti, 0.5 hour for Shauna Vermeulen, 2.2 hours for Grant Bonham, 0.4 hour for Pamela Biago, 27.7 hours for Rikki Bambauer, 3.3 hours for James Gunn, 0.2 hour for Erin Sullivan, and 0.4 hour for Amy Slinkard. *Id.* at 41.

noted that between July 27, 2015, and September 2, 2015, Attorney Wallace billed 18.6 hours for work on tasks related to the motion to dismiss. Fee Order at 43 (citing CX B-Billing Entry No. 316 through 338). But the ALJ indicated Attorney Wallace drafted motions to dismiss in past cases with similar facts and found one of the billing entries implied he “could pull legal research from prior work.” Fee Order at 43. Considering Attorney Wallace’s experience and familiarity with the case, the ALJ permissibly found Counsel billed excessive hours and reduced the entries to allow fifteen hours of Attorney Wallace’s time on opposing the motion to dismiss. *Id.* He also observed that Attorney Wallace billed 33.6 hours for his work on responding to an Order to Show Cause. *Id.*; see CX B- Billing Entries 580-612. Determining these entries “vaguely described the task completed,” the ALJ found that time excessive based on the facts of the case and Attorney Wallace’s experience with similar orders. Fee Order at 43. Consequently, he sustained Employer’s objections to these entries and reduced the time billed for this work by 6.7 hours. *Id.* The ALJ also reduced as excessive Attorney Wallace’s billing collectively on initial disclosures by 1.4 hours because there was insufficient explanation for the higher length of time. Fee Order at 43; See Billing Entry Nos. 307 and 684. After considering these entries, the ALJ reasonably found Attorney Wallace and others billed excessive time on certain tasks. Fee Order at 43. As the ALJ adequately explained his reductions of hours with examples for billing entries he found were ambiguous, duplicative, or excessive, we affirm his findings.²⁷ *Hensley*, 461 U.S. at 433; *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194, 197 (1986).

We reject Counsel’s argument that the ALJ did not provide adequate information sufficient to assess the scope, extent, and applicable basis for the billing entry requests that he reduced or entirely disallowed. Cl.’s Brief at 40-41. The ALJ explained he would sustain an objection if he was unable to tell from the entry whether the work was necessary. He gave an example of an entry – typical of many entries – which he deemed

²⁷ The ALJ disallowed time, in whole or in part, for the following billing entry numbers he determined are duplicative, excessive or vague: 268, 271, 277, 298, 307-08, 312, 316-18, 321, 326-30, 335, 338, 356, 365, 371, 375, 382, 396, 401, 430, 435, 457-59, 474, 477, 498, 519, 522, 533, 535, 563, 567, 575, 580, 582-83, 593, 595-97, 601-03, 605-10, 612-16, 622-23, 634-35, 637, 643-44, 651-52, 654, 658, 660-62, 671, 673, 677, 684, 702, 723, 751, 752, 756-60, 781, 797, 799-800, 808-09, 813-15, 830, 842-44, 846, 848, 850-51, 854, and 862-63. Fee Order at 43 n.24, n.25; see Fee Pet. CX B. He also reduced the hours billed that he found are excessive, vague, ambiguous, or duplicative for each staff member as follows: 40.5 hours for John Wallace, 2.1 hours for Douglas Norman, 1.6 hours for James Ghilotti, 1.2 hours for Grant Bonham, 3.2 hours for Rikki Bambauer, 0.2 hour for Alan Brayton, and 0.7 hour for Angela Porterfield. Fee Order at 43-44.

“unintelligible.”²⁸ Fee Order at 42. That the ALJ did not address each item individually for hundreds of entries does not render his explanation for the reductions or disallowances any less understandable or reviewable. His findings that entries are clerical, duplicative, excessive, vague or ambiguous are valid reasons for reducing or disallowing the time Counsel claimed – and any one of the objections is sufficient. Further individualized explanation for every entry is not required, especially when the ALJ uses multiple examples to explain his reasoning.²⁹ The Board will affirm the ALJ’s reduction in the number of hours requested if it is adequately explained and reasonable. As the ALJ here provided adequate reasoning for the disallowances, he did not abuse his discretion, and we therefore affirm his reduction of hours, calculations, and findings.³⁰ *Fox*, 563 U.S. at 838; *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev’d on other grounds sub nom.*

²⁸ The ALJ explained one entry stated: “For example, on May 20, 2015, Attorney Wallace billed 0.20 hours for ‘E-mails [2x] To / From Para D Norman re Status of Case with CIGA Mtn Pending at BRB to communicate end result update to client.’ Billing Entry No. 271.” A second example he gave was entry number 356 which stated only “review status of case; request update.” He found neither communicated sufficient information for him to determine the necessity of the tasks. Fee Order at 42.

²⁹ Counsel’s assertion that the ALJ’s fee order runs afoul of *Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008), is not persuasive. In *Moreno*, a civil rights case, the court declined to affirm a district court’s reduction of a requested fee by 50% when that court did not provide a clear explanation for the reduction. The court stated, however, that the district director could make a blanket 10% reduction. Unlike *Moreno*, the ALJ in this case identified the entries he found to be problematic and discussed relevant examples, thereby providing clear reasoning for the deductions.

³⁰ We decline to address any other specific disallowances or reduction of hours as Counsel has made only general and sweeping challenges and has not adequately briefed the issues or identified purportedly problematic specific findings. Cl.’s Brief at 11-25; 20 C.F.R. §802.211(b); *see Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51, 52 n.1 (2015) (citing *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990)); *Plappert v. Marine Corps. Exch.*, 31 BRBS 109, *aff’g on recon. en banc* 31 BRBS 13 (1997); *see also Morris*, 10 BRBS at 380 (“Although [the] claimant may have made general reference to other fee disallowances, either the item was insufficiently identified or the arguments in regard to them were not developed enough for us to consider them as issues actually raised for our consideration.”).

Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Brown*, 30 BRBS at 34; *Welch*, 23 BRBS at 402; *Berkstresser*, 16 BRBS at 236.

Reduction of Costs

Finally, Counsel contends the ALJ erred in not allowing two significant aspects of the requested costs: the \$19,032.50 cost incurred for services rendered by outside counsel to address the OSC on an attorney conflict of interest issue and the \$2,193.50 cost for hiring fee expert O'Connor to provide an hourly rate assessment and declaration. Counsel asserts both are reimbursable pursuant to 33 U.S.C. §928. We reject Counsel's assertions.

As the ALJ correctly stated, Counsel chose to retain an outside attorney to address the issues raised in the OSC. Fee Order at 50. Following the retainer, Counsel structured a fee agreement with the outside counsel. The ALJ concluded this fee agreement foreclosed the possibility of including outside counsel's services in the fee petition under Section 28(a). *Id.* Additionally, it is not clear whether Section 28(a) could apply to counsel's hiring of an outside attorney to defend its own actions.³¹ See Cl. Brief at 44-45. The ALJ further concluded the cost is not reimbursable under Section 28(d) because Counsel did not establish it was necessary to secure benefits for Claimant.³² 33 U.S.C. §928(d); D&O at 50. As outside counsel's fee is neither for mileage nor for being a witness at the hearing, it does not meet the Section 28(d) criteria. Therefore, we affirm the ALJ's denial of the \$19,032.50 fee for outside counsel.

³¹ Section 28 of the Act allows for the assessment of a reasonable attorney's fee against an employer if "the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim...." Specifically, it states a *claimant* may have the employer pay his attorney's fee if four conditions are met: (1) the claimant files a claim for compensation under the Act; (2) the employer receives written notice of the claim from the OWCP; (3) the employer "declines to pay compensation" or does not respond within thirty days of receiving notice of the claim; and (4) the claimant thereafter utilizes the services of an attorney to successfully prosecute his claim. 33 U.S.C. §928(a) (emphasis added); *Dyer v. Cenex Harvest States Co-op*, 563 F.3d 1044, 1048 (9th Cir. 2009). It says nothing of an employer paying the fees of an outside attorney for purposes that benefit the claimant's attorney.

³² Section 28(d) states in part: "In cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such employer or carrier as costs, *fees and mileage for necessary witnesses attending the hearing at the instance of claimant*. Both the necessity for the witness and the reasonableness of the fees of expert witnesses must be approved by the hearing officer...." 33 U.S.C. §928(d) (emphasis added).

Counsel also argues the ALJ should have ordered reimbursement of the cost for hiring attorney fee expert O'Connor. Cl.'s Brief at 46-49. We disagree. Employer should not be held liable for Counsel's attempt to establish the hourly rates he asserts Employer should pay. No part of Section 28 allows a claimant's attorney to recover this type of cost. 33 U.S.C. §928(d); *Stevedoring Servs. of Am. v. Price*, 432 F.3d 1112, 1114 n.1 (9th Cir. 2006). Indeed, it is more akin to overhead than anything related specifically to a task Counsel performed for this claimant in this case. In addition, Counsel has not identified any law in support of his argument.³³ The ALJ properly determined the cost of the fee expert is not compensable and should have been considered as overhead. *See Cutaia v. Northeast Stevedoring Co., Inc.*, 12 BRBS 942, 945 (1980) (ALJ has discretion to determine the reasonableness and necessity of an expert's fee, and a substantial reduction must be accompanied by a sufficient explanation); *Lozupone v. Lozupone and Sons*, 12 BRBS 148, 151 (1979) (same); *see also Hensley*, 461 U.S. at 434 (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) ("[h]ours that are not properly billed to one's *client* also are not properly billed to one's *adversary*."). Therefore, we affirm the ALJ's denial of \$2,193.50 for the cost of Attorney O'Connor's expert services.³⁴ Fee Order at 48.

³³ We reject Claimant's argument that the ALJ ignored the Board's ruling in *Bradshaw v. J. A. McCarthy Inc.*, 3 BRBS 195, 201-202 (1976). Cl.'s Brief at 44-45. In *Bradshaw*, the Director appealed the ALJ's denial of a claimant's request for reimbursement of the cost of a hearing transcript, as there was no showing that it was "reasonably required" and there was no statutory support for the charging of such a reimbursement to the employer. *Bradshaw*, 3 BRBS at 201. The Board acknowledged Section 28 of the Act does not expressly allow for reimbursement of an attorney's costs but interpreted the 1972 Amendment to mean Congress intended litigation expenses to be borne by the employer. *Id.* Therefore, the Board held in cases where an attorney's fee is awarded, reasonable and necessary costs and expenses incurred during a proceeding by a claimant may also be assessed against the employer. *Id.* at 202. Accordingly, the Board modified the ALJ's decision and order to allow the transcript cost because it was reasonable and necessary for preparing the claimant's post-hearing brief. *Id.* In this case, the ALJ rationally found the fee expert cost and outside counsel cost for responding to the OSC are neither reasonable nor necessary as contemplated by 33 U.S.C. § 928(d). D&O at 48, 50.

³⁴ We affirm as unchallenged on appeal the ALJ's findings regarding the costs for medical experts, travel time, and other miscellaneous costs. *Scalio*, 41 BRBS at 58; Fee Order at 48, 50-51.

Counsel's Motion for Leave to File Fee Petition for Work Before the Board

On July 19, 2024, Counsel filed a motion for leave to file a petition with the Board. 20 C.F.R. §802.203. Accompanying the motion for leave is an unopposed itemized fee petition for work before the Board between October 5, 2015, and November 25, 2015. BRB Nos. 15-0415 and 16-0023; *see* 20 C.F.R. §802.203. Counsel requests a total fee of \$5,170, representing \$720 for 1.2 hours of legal services performed by Attorney Brayton at an hourly rate of \$600, and \$4,450 for 9.8 hours of legal services performed by Brad Austin at an hourly rate of \$500. BRB Fee Pet. at 9, 16.

The Board dismissed Employer's appeal, BRB 15-0415, on October 7, 2015, following its request to withdraw the appeal. Thereafter, on November 16, 2015, the Board dismissed Claimant's appeal, BRB 16-0023, as interlocutory and remanded the case to the ALJ. This was not successful work before the Board. However, on February 23, 2022, the parties informed the ALJ they had settled the claim and requested the case be remanded to the district director for settlement proceedings. On February 25, 2022, the ALJ remanded the case, and on June 8, 2022, the district director approved the parties' Section 8(i) settlement, 33 U.S.C. §908(i).

When the Board remands a case and the claimant prevails before the ALJ or the district director, the Board's regulation requires the claimant's attorney file a fee application with the Board within sixty days of the decision on remand. 20 C.F.R. §802.203(c). The Board has the discretion to accept or reject an untimely filed petition. 20 C.F.R. §802.217. As Counsel's motion for leave and fee petition come more than two years after the decision establishing Claimant's success (the district director's settlement approval), Counsel's petition for a Board fee is untimely. While Counsel asserts this was a "prolonged and robust litigation," and emphasizes that the fee appeal, which we have now addressed, is still pending and not final, these are not good reasons for excusing Counsel's untimely fee petition filing. The appeal of the ALJ's fee award has nothing to do with the finality of Claimant's settlement and entitlement to benefits. Therefore, we deny the motion for leave to file out of time, decline to consider Counsel's petition, and deny Counsel's request for a fee for work performed before the Board in 2015 and 2016 for BRB Nos. 15-0415 and 16-0023.³⁵ 20 C.F.R. §802.217.

³⁵ As we have affirmed the ALJ's fee award, Counsel was not successful in this appeal and is not entitled to an employer-paid fee for work before the Board in this appeal. 33 U.S.C. §928(a); 20 C.F.R. §802.203.

Accordingly, we affirm the ALJ's Fee Order and deny a fee for services performed before the Board.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge