

BRB No. 10-0232 BLA

HASSIE SHORT)	
(Widow of SAMUEL SHORT))	
)	
Claimant-Respondent)	
)	
v.)	
)	
SHORT TRUCKING COMPANY)	
)	
and)	
)	DATE ISSUED: 12/23/2010
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (2003-BLA-06370) of Administrative Law Judge Edward Terhune Miller regarding a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).¹ Claimant's counsel submitted a fee petition to the administrative law judge for 55.45 hours of professional services, in the amount of \$14,142.50, performed from May 20, 2003 to April 18, 2008, and reimbursement of costs totaling \$1,886.00 for the physician's fee and the transcript of Dr. Perper's deposition.² After considering employer's objections, counsel's response, and the evidence presented, the administrative law judge reduced the number of approved hours from 55.45 to 52.7, including a reduction of 2.5 hours, from 22.7 hours to 20.2 hours, for services performed by Joseph E. Wolfe. The administrative law judge stated that he excluded the .25 hours of services performed by Bobby Belcher prior to August 1, 2003, while the case was before the district director.³ The administrative law judge also reduced the hourly rate from \$400.00 to \$285.00, for services performed by Mr. Wolfe, and he reduced the hourly rate from \$100.00 to \$65.00, for services performed by the legal assistants. Accordingly, the administrative law judge awarded claimant's counsel \$10,232.00 in attorney's fees for 52.7 hours, and \$1,886.00 for reimbursement of costs, for a total award of \$12,118.00.

¹ On October 14, 2010, the Board issued an order granting the parties the opportunity to submit briefs regarding the potential effects of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010. *Short v. Short Trucking Co.*, BRB No. 10-0232 BLA (Oct. 14, 2010)(unpub. Order). The Director, Office of Workers' Compensation Programs (the Director), filed a response, asserting that, because this case does not involve the entitlement criteria for a miner's or survivor's claim, but rather a dispute over the amount of attorney's fees awarded, the amendments do not apply. Upon consideration of this issue, we agree with the Director that the recent amendments do not apply to the present case.

² Claimant's counsel requested an award of fees for time billed by himself, Joseph E. Wolfe; two other attorneys, W. Andrew Delph and Bobby S. Belcher; and legal assistants. The requested hourly rate for Joseph E. Wolfe was \$400.00 per hour for 22.7 hours. In addition, the requested hourly rate for Mr. Delph was \$200.00 per hour for 17.5 hours and for Mr. Belcher was \$250.00 per hour for .25 hours. Further, the requested hourly rate for the legal assistants was \$100.00 per hour for 15 hours.

³ The fees requested for Bobby S. Belcher were for work performed while the case was before the district director. Therefore, the administrative law judge properly excluded them from his award. 20 C.F.R. §725.366(a).

On appeal, employer argues that the administrative law judge's fee award should be vacated because claimant's counsel failed to support his fee petition with "market evidence." Employer's Brief at 5-6. In addition, employer asserts that the administrative law judge did not explain how he exercised his discretion in awarding fees and that it was error for the administrative law judge to rely on the Altman Weil survey to determine the market rate. Employer further asserts that the administrative law judge improperly rejected its proffered market evidence, failed to explain his decision to award almost all of the time charged, erred in concluding that billing in quarter-hour increments is permitted by law, and impermissibly allowed for the reimbursement of fees for Dr. Perper's deposition.

Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, addressing some of employer's arguments. The Director disagrees with employer's assertion, that it is not liable for fees relating to Dr. Perper, as responsible operators are liable for such fees even if the authoring doctor did not personally appear at the hearing. The Director also disagrees with employer's contention that fees generated by defense and/or insurance attorneys have particular relevance in determining market rate, since opposing parties have different responsibilities and are not necessarily similarly situated. Further, the Director asserts that employer incorrectly interpreted the holding in *B & G Mining, Inc., v. Director, OWCP [Bentley]*, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008), concerning quarter-hour billing.

In its reply brief, employer notes that the Director's brief was not timely filed. In addition, employer asserts that, because the Director addressed specific issues, but does not contend that the administrative law judge's determination of the hourly rates or number of hours is appropriate, the Director's response "provides no reason to affirm this particular decision." Employer's Reply Brief at 2. Employer also argues that the market rate cases cited by the Director are not relevant because they were issued by the United States Court of Appeals for the Seventh Circuit, rather than the Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises.⁴

As a threshold matter, we reject employer's assertion that the Director's brief was untimely filed. Employer alleged that it served its brief on February 3, 2010. Therefore, employer indicates that "[a]llowing three days for mailing, any response should have been filed on or before March 8, 2010." Employer's Reply Brief at 1 n.1. Employer

⁴ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

maintains that the Director's brief was untimely, as it was served on March 18, 2010. Employer, however, has offered no proof as to when the Director received its petition for review and brief, and the Board did not receive employer's filings until February 16, 2010. Assuming the Director received employer's brief on the same day as the Board, the Director had until March 18, 2010 to timely file a response brief. See 20 C.F.R. §802.212(a). Therefore, employer's argument is without merit.

The amount of an attorney's fee award by an administrative law judge is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. See *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); see also *Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*). The regulations provide that an approved fee shall take into account "the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of the fee requested." 20 C.F.R. §725.366(b).

In determining the amount of attorney's fees to award under a fee-shifting statute, the United States Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case and then multiply those hours by a reasonable hourly rate. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). This sum constitutes the "lodestar" amount, which is the appropriate starting point for calculating fee awards under the Act. *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (6th Cir. 2008). 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). The prevailing market rate is "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004). The fee applicant has the burden to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

In awarding an hourly rate of \$285.00 for claimant's counsel, \$200.00 for an additional counsel's work, and \$65.00 for legal assistants, the administrative law judge stated that he considered the 2006 Altman Weil survey for attorneys, which provided a range of fees from \$285.00 to \$525.00 per hour, with an average of \$372.00 and a median of \$370.00, for attorneys with thirty-one years of experience, as indicated by claimant's counsel. Attorney Fee Order at 2. In addition, the administrative law judge relied upon the attorney fee statement submitted by claimant's counsel, a copy of a previous attorney

fee order that claimant's counsel attached to his petition, and information provided by claimant's counsel regarding his firm's representation of claimant. *Id.*

With respect to employer's objections to the hourly rates sought by counsel, the administrative law judge stated, "[e]mployer argued at length that \$400 per hour for lead counsel and rates requested for other counsel were excessive and unjustified and this tribunal has agreed to a certain extent, and made appropriate adjustments." *Id.* Regarding employer's allegation that counsel expended an excessive number of hours on the case, the administrative law judge indicated, "[t]he hours charged by various personnel to perform various tasks necessary to the prosecution of this claim are not deemed to be excessive, unreasonable or outside the scope of allowable discretion of counsel in the management of the case." *Id.* In setting forth his finding as to the final award of fees, the administrative law judge stated:

Considering the range of factors and the circumstances of this case, this tribunal finds that some of the [p]etitioner's charges for representing this claim are somewhat excessive, though certain of his justifications of the hourly rates are considered valid. The hourly rates of the [p]etitioner and those who assisted him have been adjusted accordingly, to be more reasonably commensurate with the services performed, the quality of representation, and the issues involved in the successful prosecution of this claim. The sources and information cited by the parties are deemed to be sufficient to make these adjustments.

Id. at 2-3.

Employer initially argues that the administrative law judge erred in awarding the requested fees because he "did not require [claimant's counsel] to meet his burden" or "base his decision on credible market evidence." Employer's Brief at 6. Employer also contends that the administrative law judge "failed to consider or explain why he rejected the market evidence [employer] provided." *Id.* at 7. Regarding the number of hours of services for which counsel seeks payment, employer alleges that the administrative law judge did not explain his decision to approve virtually all of the time claimed and made inconsistent findings. Employer maintains, therefore, that the administrative law judge's award of attorney's fees is inadequately explained, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), and fee-shifting jurisprudence. We agree.

Contrary to the requirements of the APA, the administrative law judge did not identify which charges were "excessive," and which of claimant's "justifications" were valid, nor did he provide any rationale for his selection of hourly rates. *Parks v. Eastern*

Assoc. Coal Corp., BLR , BRB No. 09-0627 BLA (May 25, 2010); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1988). Consequently, we vacate the administrative law judge's award of attorney fees and remand this case to the administrative law judge for reconsideration. On remand, the administrative law judge must consider all relevant evidence, set forth the rationale underlying his determinations of reasonable hourly rates and reasonable expenditures of time, and identify the evidence supportive of his rationale.

However, we reject employer's argument that the administrative law judge erred by approving claimant's counsel's use of quarter-hour billing. Employer maintains that the Sixth Circuit in *Bentley* only approved the use of a quarter-hour billing method because "the adjudicators [had already] reduced the fee petitions so that the charges were reasonable." Employer's Brief at 10. The Director contends that "such a statement, however, incorrectly implies that something – like a reduction of the fee petition – always has to be done when quarter-hour billing is used." Director's Brief at 2. We agree with the Director. In *Bentley*, the Sixth Circuit clarified that the use of quarter-hour billing was no more suspect than billing by tenth-hour increments, and that "[a]s long as the total number of billable hours is reasonable in relation to the work performed, the work should be affirmed." *Bentley*, 552 F.3d at 666-67, 24 BLR at 2-127. Therefore, we affirm the administrative law judge's determination that counsel's use of the quarter-hour billing method was reasonable. *Abbott*, 13 BLR at 1-16.

In addition, we reject employer's assertion that claimant is not entitled to recover expert witness fees that were not incurred at the formal hearing. See *Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1, 1-4 (1994). Section 28(d) of the Longshore Act, 33 U.S.C. §928(d), as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), permits the recovery of fees for medical experts who do not attend the hearing. *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894 (7th Cir. 2003), *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR 1-177 (2001). In this case, the administrative law judge specifically considered employer's objections and determined, as was within his discretion, that the services provided by Dr. Perper were necessary to establish entitlement to benefits, and that the fee charged was reasonable in light of the services he performed. See 20 C.F.R. §725.366(c); *Branham*, 19 BLR at 1-4; Attorney Fee Order at 2. Employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused his discretion, in finding that the requested charges were reasonable. See 20 C.F.R. §725.366; *Jones*, 21 BLR at 1-108; *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984). Therefore, we hold that the administrative law judge did not abuse his discretion in finding that reimbursement for these fees was reasonable. *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is affirmed, vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge