BRB No. 08-0416

MORRIS BECKWITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HORIZON LINES, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: 11/25/2009
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	ORDER

By Order dated June 25, 2008, the Board granted employer's motion to withdraw its appeal of the district director's approval of a rehabilitation plan. Claimant's attorney has filed an application for an attorney's fee for work performed before the Board, seeking a fee of $7,360, representing 16 hours of attorney services at $460 per hour, which, he avers, is his normal billing rate based on his years of experience and comparable rates for litigation attorneys in Washington, D.C., where he maintains his law practice.

Employer has filed objections to the fee petition. Employer first objects to claimant's attorney below, Mr. Sweeting, bringing in co-counsel for the appellate stage in a case that required no special expertise. Employer cites *Esselstein v. Director, OWCP*, 676 F.2d 228 (6th Cir. 1982), for the proposition that co-counsel's fee may be denied when the claim is straightforward, claimant's original counsel is experienced, and association with co-counsel is not based on the difficulty of the case or on any other

rational basis. Employer also objects to its liability for any fee because claimant did not "successfully *prosecute*" the claim before the Board. Employer further objects to the claimed hourly rate of $460, and avers that a reasonable rate for the Seattle area is $225-$250. Employer objects to 1.8 hours for preparation of the fee petition, stating that no more than .5 hour should be allowed.

Counsel replies, *inter alia*, that this is not a co-counsel case, as Mr. Sweeting did not represent claimant before the Board. Counsel states that it is well established that the successful defense of an award supports a fee payable by employer, averring that the fact that employer does not pay for a vocational rehabilitation plan is irrelevant if employer has filed an appeal objecting to the plan. Counsel replies that his hourly rate request is reasonable for Washington, D.C., as that is the relevant market for services performed before the Board. Counsel requests an additional fee for 13.3 hours at $460 per hour for replying to employer's objections. Counsel also filed a separate motion to strike some of employer's objections, and seeks a fee for an additional 3 hours for replying to employer's response to the motion to strike. Counsel's total fee request is now $14,858, for 32.3 hours at an hourly rate of $460. Employer observes that counsel has now claimed more time on the issue of his entitlement to an attorney's fee than on claimant's response to the appeal (18.1 hours to 14.2 hours).

We reject employer's contention that counsel is not entitled to any attorney's fee because he did not successfully prosecute the case. Section 28(c) of the Act states, "If any proceedings are had before the Board or any court for review of any action, award, order, or decision, the Board or court may approve an attorney's fee for the work done before it by the attorney for the claimant." 33 U.S.C. §928(c). The regulation at 20 C.F.R. §802.203(b) states that claimant's counsel is entitled to a fee for work performed before the Board in conjunction with the successful defense of an award. Thus, it is well settled that claimant's counsel is entitled to an attorney's fee for defending an award on appeal. *See, e.g., Lewis v. Todd Pacific Shipyards Corp*., 30 BRBS 154, 159 (1996). Contrary to employer's contention, claimant did not obtain a mere procedural victory without monetary consequences. *See, e.g., Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997) (no fee where Board affirmed administrative law judge's allowing claimant to withdraw his claim). The effect of the withdrawal of employer's appeal was to keep the vocational rehabilitation plan in place. It is of no consequence that employer does not pay the cost of the vocational rehabilitation. *See generally Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995) (employer liable for challenge even though Special Fund liable for benefits). Thus, employer is liable for claimant's attorney's fee as the vocational award was successfully defended before the Board.

We also reject employer's contention that the fee request should be disallowed because claimant has not established the need for co-counsel. Contrary to employer's argument, this is not a co-counsel case. Only one attorney appeared before the Board on claimant's behalf and only one has filed a fee petition.

Employer objects to 1.3 of the 1.8 hours claimed for preparation of the initial fee application, and for the additional 16.3 hours claimed for responding to employer's objections. We reject employer's objection to the amount claimed for the initial fee petition, as 1.8 hours is not an unreasonable expenditure of time for this work. *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). We disallow the .1 hour claimed on July 16, 2008, for review of the settlement application, as this work was performed after the appeal was dismissed and is not related to the proceedings before the Board.

The larger issue here concerns the 16.3 hours claimed by claimant's counsel for filing responses to employer's objections. Both sides here have failed to heed the Supreme Court's admonition that, "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). We disallow 5 hours of the time claimed by claimant's counsel in his supplemental fee application for responding to employer's objections, and all 3 hours claimed in the second supplemental fee application. Counsel is entitled to reply to employer's objections, but must exercise discretion in doing so. *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT) (counsel entitled to a *reasonable* fee for preparing fee petition). It was completely unnecessary for counsel to escalate the fee issues by filing both a reply to employer's objections and a separate motion to strike some of the objections.[1] It was inevitable that employer would respond to a separate motion to strike and that counsel would feel compelled to reply thereto. The attorney fee requests generated by needless pleadings are not reasonably commensurate with the necessary work performed in conjunction with the appeal. Therefore, we award counsel an attorney's fee for 24.2 hours of necessary work, representing 14.1 hours of time on the merits of claimant's appeal and 10.1 hours for the fee application and the defense thereof.

We next address the parties' contentions concerning counsel's requested hourly rate of $460. As this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, *see* 33 U.S.C. §921(c), our determination as to an appropriate hourly rate is guided by the court's recent decision in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009). *See also Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009),

[1] Claimant's motion to strike is denied.

vacating in pert. part D.V. [Van Skike] v. Cenex Harvest States Cooperative, 41 BRBS 84 (2007); *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942 (9th Cir. 2007). The hourly rate should be calculated with reference to the "prevailing market rates in the relevant community." The Ninth Circuit stated that it is improper to define the market as consisting of only longshore cases in any geographic area, as that merely "recasts" awards made in previous decisions and calls it a "market." The court stated that the Board must justify the rates it awards and cannot merely reference the regulations at 20 C.F.R. §802.203, or state that the rate is appropriate for the geographic region. The court declined to specifically address what the appropriate market is and on what evidence the Board should rely in arriving at a "market" rate. The court continued, however, by noting that there is no private market under the Longshore Act, and that, therefore, it is necessary that counsel be awarded a fee "commensurate with those which [he] could obtain by taking other types of cases." *Christensen*, 557 F.3d at 1053-1054, 43 BRBS at 8(CRT), citing *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973 (9th Cir. 2008).

Claimant's counsel asserts that his hourly rate should be based on the "prevailing market rate" in Washington, D.C., where counsel maintains his office, and that the rate should be set by reference to the *Laffey* Matrix, which is used in other Federal fee-shifting statutes. In this regard, counsel asserts that the Board erred in its decision in *Van Skike*, 41 BRBS at 87, in stating that the *Laffey* Matrix is inapplicable to cases arising in the Ninth Circuit.

We first conclude that counsel is entitled to the prevailing market rate in Washington, D.C. Counsel maintains his office in this city and thus bears the overhead costs associated with this market. In addition, counsel participated in this case only at the Board appellate level and thus did not have any contacts with the local area where claimant resides. This result is not precluded by the court's decision in *Christensen,* as the court specifically declined to determine the appropriate geographic region, stating only that "generally" the geographic area is where the district court sits. *Christensen*, 557 F.3d at 1053, 43 BRBS at 8-9(CRT). In addition, this result comports with the applicable regulation, 20 C.F.R. §802.203(d)(4), which states, "The rate awarded by the Board shall be based on what is reasonable and customary in the *area where the services were rendered* for a person of that particular professional status." (emphasis added). *See generally Jeffboat, LLC v. Director, OWCP*, 553 F.3d 487, 42 BRBS 65(CRT) (7th Cir. 2009) (permitting rate where out-of-town counsel practices).

We next address what is the appropriate hourly rate for counsel's services. The Ninth Circuit stated that this rate should not be set with reference only to other longshore cases in a given geographic region unless the fee applicant fails to produce evidence of the relevant market and the rate charged in that market. *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT). Thus, as counsel has offered evidence of the relevant market and a

rate appropriate for that market, we reject employer's contention that counsel's rate should be set only with reference to rates awarded in other longshore cases in the Seattle area. In this case, counsel has provided evidence that his market rate should be set with reference to the *Laffey* Matrix. *See Welch*, 480 F.3d 942. Counsel contends in this regard that the Board erroneously stated in *Van Skike,* 41 BRBS at 87, that the *Laffey* Matrix is inapplicable in the Ninth Circuit pursuant to *Maldonado v. Lehman*, 811 F.2d 1341 (1987).

Counsel correctly avers that the Board's decision is mistaken as to the validity of the *Laffey* Matrix. The Matrix is derived from the decision of the United States District Court for the District of Columbia in *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). In *Maldonado v. Lehman*, 811 F.2d 1341 (1987), the plaintiff was entitled to a fee paid by the defendant. Counsel requested an hourly rate of $110. The agency awarded $95 per hour for hearing work and $75 for non-hearing work, noting that counsel's "customary billing rate" was $80. Counsel appealed to the federal district court and submitted affidavits from attorneys in San Francisco to show that similarly situated attorneys charged $90 to $135 per hour. The court awarded $110, and the agency appealed, seeking to limit counsel to his customary rate, rather than awarding a "prevailing market rate." The agency cited *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984), as support for its decision.

In this *Laffey* decision, the circuit court did not address the validity of the Matrix devised by the district court in *Laffey*, but rather, whether the prevailing community rate applied where counsel's usual rate was lower than that rate. The *Laffey* court stated that the use of prevailing market rates applies only where, as in the case of the public interest nonprofit law firm, the attorneys have no billing histories, and a "proxy for the market must be found in order to set a reasonable hourly rate." *Laffey*, 746 F.2d at 16 n. 74. It was this aspect of *Laffey* that was rejected in *Maldonado*, as the Ninth Circuit stated, "This Circuit does not follow the legal standard set forth in *Laffey*. While evidence of counsel's customary hourly rate may be considered by the District Court, it is not an abuse of discretion in this type of case to use the reasonable community standard that was employed here.'" *Maldonado*, 811 F.2d at 1342, *quoting White v. City of Richmond*, 713 F.2d 458, 461 (9th Cir. 1983). Indeed, the United States Court of Appeals for the District of Columbia Circuit itself subsequently overruled this portion of the circuit decision in *Laffey*. *See Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988). Thus, counsel is correct in averring that the Board misstated the non-use of the

Laffey Matrix in Ninth Circuit courts.[2] The Board's decision in *Van Skike*, 41 BRBS at 87, is thus overruled on this point.

The *Laffey* Matrix may be accessed at the Department of Justice website, http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html. This site states:

> This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks as been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia. The matrix is intended to be used in cases in which a "fee-shifting" statute permits the prevailing party to recover "reasonable" attorney's fees. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412 (b) (Equal Access to Justice Act). The matrix does not apply in cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).

[2] Indeed, at least one federal district court in California has used the *Laffey* Matrix for guidance in setting hourly rates in fee-shifting statutes. *See Martin v. FedEx Ground Package System, Inc.*, No. C 06-6883 VRW, 2008 WL 5478576 (N.D. Cal. Dec. 31, 2008) (using Matrix adjusted by federal cost-of-living table for San Francisco, Chico and Santa Ana, California); *Garnes v. Barnhardt*, No. C 02-4428 VRW, 2006 WL 249522 (N.D. Cal. Jan. 31, 2006) (adjusted for Los Angeles); *In Re HPL Technologies, Inc. Securities Litigation*, 366 F.Supp.2d 912 (N.D. Cal. 2005); *cf. Perez v. Cozen & O'Connor Group Long Term Disability Coverage*, No. 05CV0440DMSAJB, 2007 WL 2142292 (S.D. Cal. March 27, 2007) (declining to apply Matrix in California because it does not provide rates for the local community for similar work).

(emphasis added).[3] The Longshore Act is such a fee-shifting statute, *see* 33 U.S.C. §928; *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *B&G Mining , Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008), and the decision in *Christensen* is premised on the principle that a "reasonable attorney's fee" is calculated in the same manner in all federal fee-shifting statutes. *Christensen*, 557 F.3d at 1054, 43 BRBS at 8-9(CRT); *see City of Burlington v. Dague*, 505 U.S. 557 (1992). As counsel has demonstrated the appropriateness of the use of the *Laffey* Matrix in fee-shifting statutes where the relevant geographic area is the District of Columbia, we will use the Matrix as a guide for setting counsel's hourly rate in this case. The rates provided in the Matrix are applicable from June 1 to May 31 for a given year. Counsel's services in this case were performed between March and July 2008. The Matrix provides an hourly rate of $440 until June 1, 2008 for an attorney, such as counsel, with over 20 years of experience, and of $465 in the year thereafter. Counsel requests a current hourly rate of $460 for all services performed in this case. This rate is supported by the Matrix, and we award counsel a fee for 24.2 hours at an hourly rate of $460.

[3] In addition,

> Use of an updated *Laffey* Matrix was implicitly endorsed by the Court of Appeals in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc). The Court of Appeals subsequently stated that parties may rely on the updated *Laffey* Matrix prepared by the United States Attorney's Office as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. *See Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n. 14, 1109 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996). Lower federal courts in the District of Columbia have used this updated *Laffey* Matrix when determining whether fee awards under fee-shifting statutes are reasonable. *See, e.g., Blackman v. District of Columbia*, 59 F.Supp.2d 37, 43 (D.D.C. 1999); *Jefferson v. Milvets System Technology, Inc.*, 986 F.Supp. 6, 11 (D.D.C. 1997); *Ralph Hoar & Associates v. Nat'l Highway Transportation Safety Admin.*, 985 F.Supp. 1, 9-10 n.3 (D.D.C. 1997); *Martini v. Fed. Nat'l Mortgage Ass'n*, 977 F.Supp. 482, 485 n.2 (D.D.C. 1997); *Park v. Howard University*, 881 F.Supp. 653, 654 (D.D.C. 1995).

http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html.

Accordingly, we award claimant's counsel an attorney's fee of $11,132 for work performed before the Board, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge