

A.P.)
)
 Claimant-Petitioner)
)
 v.)
)
 STEVEDORING SERVICES OF)
 AMERICA)
)
 and)
)
 EAGLE PACIFIC INSURANCE) DATE ISSUED: 04/28/2009
 COMPANY)
)
 and)
)
 HOMEPORT INSURANCE COMPANY)
)
 Employer/Carriers-)
 Respondents) DECISION and ORDER

Appeal of the Supplemental Decision and Order on Attorney Fees of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/Eagle Pacific Insurance Company.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for employer/Homeport Insurance Company.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order on Attorney Fees (1992-LHC-2469, 1999-LHC-1653) of Chief Administrative Law Judge John M. Vittone rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 115 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case, which has been before the Board several times previously, has a lengthy procedural history which need not be related here. Relevant to this appeal, claimant sought benefits for two separate injuries sustained in the course of his employment with employer, one sustained on October 2, 1991, at which time employer's longshore carrier was Eagle Pacific Insurance Company (Eagle Pacific), and the other on July 3, 1998, at which time employer was insured by Homeport Insurance Company (Homeport). This attorney fee appeal relates to both claims, the merits of which have been resolved. *Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), and No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), *cert. denied*, 544 U.S. 960 (2005); *A.P. v. Stevedoring Services of America*, BRB No. 07-0567 (Feb. 21, 2008) (unpub.), appeal pending, No. 08-71719 (9th Cir.).

On March 21, 2007, claimant's attorney submitted a fee petition to the administrative law judge requesting a fee of \$52,833.80, representing 135 hours of attorney services at an hourly rate of \$375, 11.75 hours of legal assistant services at an hourly rate of \$110, and \$678.80 in costs.¹ With his fee petition, counsel submitted his resume, the affidavit of William B. Crow, an attorney and expert on attorney fees, the Morones Survey,² and the *Laffey* Matrix,³ all in support of his requested hourly rate.

¹ Counsel's March 21, 2007 fee petition superseded several earlier fee petitions filed with the administrative law judge between 2000 and 2005.

² The Morones Survey is a 2004 survey of commercial litigation fees in the Portland, Oregon, area taken by Serena Morones, a CPA. According to counsel, Ms. Morones received 281 responses from attorneys in 16 firms.

³ The matrix is a chart derived from hourly rates allowed by the district court in *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983). The matrix is prepared annually by the Civil Division of the United States Attorney's Office for the District of Columbia for use in "fee-shifting" statutes where the prevailing party is entitled to a "reasonable" attorney's fee. See www.usdoj.gov/usao/dc/divisions/Civil_Division/laffey_matrix_6.html. Claimant's attorney additionally submitted supporting

Homeport responded, challenging the requested hourly rate and making objections to specific entries.⁴ Eagle Pacific also responded, joining in Homeport's objections as well as making additional objections to specific entries and asserting that the fee should be reduced based on claimant's limited success against Eagle Pacific. In conjunction with his reply to the objections made by Homeport and Eagle Pacific, claimant filed a supplemental fee petition on September 27, 2007, requesting an additional fee of \$5,614.25, representing 14.625 hours of attorney services at an hourly rate of \$350, 1.5 hours of legal assistant services at an hourly rate of \$120, and \$315.50 in costs. On February 5, 2008, claimant replied to two additional filings by Homeport, and submitted a second supplemental fee petition requesting a fee of \$700 for two hours of attorney time plus an additional \$400 in costs for the deposition of Mr. Crow.

In his Supplemental Decision and Order on Attorney Fees, the administrative law judge first reduced counsel's requested hourly rate from \$375 to \$250. Next, having considered the carriers' objections to specific entries in the March 21, 2007 fee petition, the administrative law judge disallowed various entries and made reductions in other entries. With respect to the September 27, 2007, supplemental fee petition, the administrative law judge approved only four of the 14.625 hours requested for attorney services based on counsel's limited success in defending his original fee request, and approved the requested \$315.50 in costs.⁵ The administrative law judge denied the February 5, 2008 fee request in its entirety. Consequently, the administrative law judge awarded counsel a fee of \$30,063, representing 114.15 hours of attorney services at an hourly rate of \$250, 11 hours of legal assistant services at an hourly rate of \$110, and \$315.50 in costs.

documentation for purposes of converting the Washington, D.C. area hourly rate to a Portland, Oregon area hourly rate. According to counsel's calculations, his hourly rate would be about two dollars less than the rate for a Washington, D.C. area attorney.

⁴ Among the numerous documents submitted by Homeport in support of its objections were fee awards to counsel by other administrative law judges and a fee award by the United States Court of Appeals for the Ninth Circuit in this case, portions of a deposition of Mr. Crow, and the declaration of Daniel M. Skerritt, an attorney and attorney fee expert.

⁵ The administrative law judge did not address the time itemized for legal assistant work in the September 27, 2007 fee request.

On appeal, claimant challenges the administrative law judge's reduction in his counsel's requested fee.⁶ Both Eagle Pacific and Homeport have responded, urging affirmance of the administrative law judge's fee award.

We first consider claimant's challenge to the administrative law judge's reduction in the hourly rate requested for attorney services. Claimant argues that the administrative law judge committed legal error by rejecting counsel's evidence of the market rates of comparable attorneys in similar, but not identical, cases and relying instead on hourly rate determinations made by the Board and administrative law judges in this and other longshore cases. We are unable to uphold the administrative law judge's rationale for reducing counsel's requested hourly rate in light of the intervening opinions of the United States Court of Appeals for the Ninth Circuit in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049 (9th Cir. 2009),⁷ and *Van Skike v. Director, OWCP*, 557 F.3d 1041 (9th Cir. 2009), as well as the Board's recent decision in *H.S. v. Dept. of Army/NAF*, ___ BRBS ___, BRB Nos. 08-0533, 08-0596 (Apr. 10, 2009), which addressed the precise issue regarding hourly rates raised in this case. For the reasons set forth by the Ninth Circuit in *Christensen* and *Van Skike*, and by the Board in *H.S.*, we vacate the administrative law judge's hourly rate determination and remand the case for the administrative law judge to determine a reasonable hourly rate, consistent with these decisions.

⁶ We reject claimant's request that the case be assigned to a different administrative law judge on remand as the statement relied upon by claimant as an indication of the administrative law judge's personal animus, *see* Cl. Br. at 8-9; Supplemental Decision and Order at 6, is insufficient to show bias. *See Raimier v. Willamette Iron & Steel Co.*, 21 BRBS 98, 100 (1988).

⁷ The Ninth Circuit's decision in *Christensen* involved a consolidated appeal of Board fee awards entered in an earlier phase of the proceedings in the instant case and in a case involving another claimant. With respect to *A.P.*, the claimant in this case, the Board had reduced counsel's requested \$350 hourly rate to \$250, stating that a rate of \$250 was appropriate in the geographic region and adequately compensated counsel for the delay in payment of his fee. 557 F.3d at 1052. The Ninth Circuit held that the Board had not adequately justified its hourly rate determination, observing that the Board must define the relevant community for purposes of determining the prevailing market rate more broadly than simply fee awards made in longshore cases and that its fee awards must be based on current, rather than merely historical, market rates. *Id.* at 1055.

We next consider claimant's contentions regarding the administrative law judge's disallowance or reduction of various services itemized in counsel's fee petitions.⁸ Claimant makes three related arguments regarding the administrative law judge's disallowance of, or reductions in, entries itemized for work in pursuit of an attorney's fee. Specifically, claimant first contends that the administrative law judge erred in disallowing as "superfluous" the 1.5 hours claimed against Homeport on December 18, 2000, for the preparation of counsel's response to Homeport's objections to counsel's initial fee petition, and 1.75 hours requested in two supplemental fee petitions.⁹ Supp. Decision and Order at 6-7. Secondly, claimant argues that the administrative law judge erred, with respect to the fee claimed against Eagle Pacific, in reducing the time spent on various fee petitions from 16.85 hours to four hours on the basis of counsel's limited success in pursuit of his fee.¹⁰ *Id.* at 8. Thirdly, claimant contends that the administrative law judge erred in reducing the amount of the fee requested in counsel's September 27, 2007 supplemental fee petition based on counsel's limited success in defending his fee request and in denying as unreasonable the February 5, 2008 fee request in its entirety. *Id.* at 8-9. As we have remanded this case for reconsideration of counsel's reasonable hourly rate, we vacate the reductions and disallowances made by the administrative law judge

⁸ Although the administrative law judge purported to separately analyze the hours itemized against Eagle Pacific alone, Homeport alone, and both Eagle Pacific and Homeport combined, he did not accurately apportion the reductions made in the fee to the appropriate categories. Although Homeport acknowledges this error, it notes that it is not contested on appeal by any party. *See* Homeport Br. at 14.

⁹ We are unable to ascertain to which specific entries the administrative law judge was referring in his disallowance of these 1.75 hours. *See* Cl. Br. at 9-10. Therefore, we will not reach claimant's and Homeport's arguments with respect to Homeport's liability for a fee for counsel's work related to the administrative law judge's January 24, 2001 Order to Show Cause as it remains unclear whether the entries for this work were, in fact, disallowed by the administrative law judge. If, on remand, the administrative law judge again disallows these 1.75 hours, he must identify the specific entries and provide a reasoned explanation of their disallowance.

¹⁰ Claimant correctly contends that the administrative law judge miscalculated the number of hours itemized for this work, *see* Cl. Br. at 13-14; the administrative law judge apparently relied on the inaccurate calculations contained in Eagle Pacific's objections to counsel's fee petition. As further noted by claimant, *see id.*, it appears that the administrative law judge, in addressing the fee claimed against Homeport, had already disallowed some of these same entries, *see* Decision and Order at 7; thus, the administrative law judge may have erroneously double-counted the hours to be disallowed.

with respect to the entries itemized for work performed in pursuit of counsel's fee. On remand, the administrative law judge must reconsider counsel's request for a fee for this work in light of his ultimate success in pursuit of his fee. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Thompson v. Gomez*, 45 F.3d 1365, 1367-68 (9th Cir. 1995).

Claimant next assigns error to the administrative law judge's 25 percent across-the-board reduction in the 14.25 hours itemized for conferences with claimant and his wife in preparation for and after the depositions and hearings held in this case.¹¹ Supp. Decision and Order at 7-8. As claimant's assertions on appeal are insufficient to meet his burden of showing that the administrative law judge abused his discretion in finding that the amount of time claimed for this purpose was excessive, we affirm the administrative law judge's decision to reduce the time sought by counsel to 10.75 hours. *See, e.g., Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194, 197 (1986). Next, we agree with claimant that the administrative law judge abused his discretion in deciding to compensate counsel for 1.75 hours of itemized attorney services at the lower legal assistant rate based on his determination that these services could have been performed by a legal assistant. Supp. Decision and Order at 8. The services itemized in these entries, which included letters written and telephone calls conducted by counsel, constitute professional services traditionally performed by attorneys, and, thus, are compensable at counsel's reasonable hourly rate. *See generally Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003). On remand, therefore, the administrative law judge must award a fee for these 1.75 hours at counsel's reasonable hourly rate. We further agree with claimant that the administrative law judge erroneously disallowed 1.5 hours itemized for file review on the basis that counsel did not adequately explain the necessity of the charges. Supp. Decision and Order at 8. Our review of counsel's fee petition reveals that the periodic file reviews conducted by counsel, usually in connection with other tasks performed on the same day or shortly afterward, were reasonable and necessary and were sufficiently explained in the fee petition. *See generally 20 C.F.R. §702.132(a); Forlong v. Am. Sec. & Trust Co.*, 21 BRBS 155, 163 (1988). Thus, as the administrative law judge did not have a rational basis for disallowing this work, on remand, he must award a fee for the 1.5 hours claimed for these entries.

¹¹ Contrary to claimant's assertion on appeal, *see* Cl. Br. at 12-13, we are able to discern, based on our review of the administrative law judge's discussion and counsel's fee petition, the basis for the administrative law judge's calculation of these hours. Counsel itemized a total of 14.25 hours for these conferences on the following dates: March 4-5, 1993, April 6, 1993, September 27, 1999, and November 16-18, 1999.

Accordingly, the administrative law judge's hourly rate determination and reduction in the fee requested for counsel's pursuit of a fee are vacated, and the case is remanded for reconsideration of these issues consistent with this decision. The administrative law judge's reduction in the number of hours itemized for counsel's conferences with claimant and his wife is affirmed. The administrative law judge's disallowance of 1.75 hours of counsel's services on the basis that the work could have been performed by a legal assistant and 1.5 hours itemized for file review is reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge