

BRB Nos. 08-0811  
and 09-0261

D.C. )  
)  
Claimant-Petitioner )  
)  
v. )  
)  
STEVEDORING SERVICES OF AMERICA ) DATE ISSUED: 04/28/2009  
)  
and )  
)  
HOMEPORIT INSURANCE COMPANY )  
)  
Employer/Carrier- )  
Respondents ) DECISION and ORDER

Appeals of the Compensation Order on Attorney's Fees of Karen P. Staats, District Director, United States Department of Labor, and the Attorney Fee Order of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order on Attorney's Fees (No. 14-146189) of District Director Karen P. Staats and the Attorney Fee Order (2007-LHC-00540) of Administrative Law Judge Jennifer Gee 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 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his right knee during the course of his employment. Employer controverted the claim. The parties subsequently agreed to a settlement, which was approved by the administrative law judge. The parties, however, were unable to agree on the amount of an attorney's fee.

For work performed before the district director, claimant's attorney requested a fee for 5.25 hours at \$375 per hour for attorney services and one hour of legal assistant time at \$120 per hour, for a total of \$2,088.75. Employer responded, challenging the hourly rate of \$375 and the allowance of any time for the legal assistant as "duplicative" of the attorney services on the same date. Claimant's counsel replied, and requested a supplemental fee of \$468.75 for 1.25 hours at an hourly rate of \$375 for preparation of his reply. Employer responded to counsel's reply and claimant's attorney responded and requested an additional fee of \$93.75 for .25 hours at \$375 per hour.

For work performed before the administrative law judge between January 11, 2007 and May 6, 2008, claimant's counsel submitted a fee petition requesting \$11,718.75 for 31.25 hours of attorney services at a rate of \$375 per hour, plus 6.25 hours of legal assistant services at a rate of \$120 per hour, for a total fee of \$12,468.75, plus \$1,516.45 for costs. Employer challenged the hourly rate for attorney services and objected to specific itemized entries for both attorney and legal assistant services. Counsel replied, and requested an additional 1.5 hours of attorney services at an hourly rate of \$375 for preparation of the reply.

With both fee petitions, counsel submitted his résumé, a copy of the Morones Survey, and a copy of an affidavit of William B. Crow, an expert on attorney's fees, in support of his hourly rate request. Employer submitted testimony from Mr. Crow's deposition to rebut his opinion and establish his unfamiliarity with longshore work. Employer also submitted an affidavit of Mr. Skeritt, its attorney fee expert, to refute the contention that \$375 per hour is a reasonable rate for attorney services in this case. Claimant replied, attaching a deposition of Mr. Skeritt.

The district director found that the Board and the Office of Administrative Law Judges have consistently rejected use of the Morones Survey as evidence of the market rate under the Longshore Act.<sup>1</sup> The district director stated that the Board has held that

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<sup>1</sup> The Morones Survey is a 2004 survey of commercial litigation fees in the Portland, Oregon, area taken by Serena Morones, a CPA. The district director stated that claimant's counsel appeared to submit a "2006 update" of that survey.

administrative law judges and district directors may set the hourly rate based on their familiarity with awards made to attorneys in other longshore cases in the relevant geographic community. The district director stated that “for experienced longshore practitioners in the major cities of the western United States, the rate currently hovers around \$225 to a high of \$300.” Moreover, the district director stated that the hourly rate should incorporate the factors listed in 20 C.F.R. §702.132. The district director concluded:

The work billed on this fee affidavit consists of telephone conferences with claimant, an office conference, exchanges of email to claimant, two letters and completion of Form LS-18 (Pre-Hearing Statement). This does not constitute novel, complicated or difficult legal activity. An hourly rate of \$235 is deemed to be appropriate.

Order at 2. As to the amount requested for legal assistant services, the district director did not reject the time as duplicative of the attorney’s services, but instead reduced the hourly rate to \$115, because “an hourly rate of \$120 for such services seems excessive.” *Id.*

Claimant appeals the district director’s fee award, contending the district director erred in disregarding the evidence submitted to establish the market hourly rate for his services and those of his legal assistant, and therefore avers that the district director’s reduction of the requested hourly rates was arbitrary. Employer responds, urging affirmance. Claimant replied, reiterating his contentions. BRB No. 08-0811.

The administrative law judge awarded counsel a fee based on an hourly rate of \$275. The administrative law judge rejected the Morones Survey and the Crow affidavit as being insufficient to establish a proxy rate for longshore work. She found that the survey compiled hourly rates of 22 law firms, with a minimum of five attorneys, specializing in commercial litigation. The administrative law judge found that counsel is a sole practitioner and that his longshore practice is not comparable to commercial litigation. She also rejected Mr. Crow’s affidavit as evidence of proxy longshore rates because she found that, contrary to his opinion, longshore work and commercial litigation are not comparable areas of practice. Citing the Board’s decisions in *D.V. v. Cenex Harvest States Cooperative*, 41 BRBS 84 (2007) and *B.C. v. Stevedoring Services of America*, 41 BRBS 107 (2007), the administrative law judge relied on prior fee awards in longshore cases in the Portland area and on her own experience in setting the hourly rate at \$275. Absent any evidence supporting the request for \$120 per hour for the legal assistant’s work, the administrative law judge awarded an hourly rate of \$110 for these services. The administrative law judge disallowed 1.25 hours of attorney services and .25

hour of legal assistant services. The administrative law judge awarded counsel a fee of \$11,182.70, including costs of \$1,516.45.

Claimant's counsel appeals, contending the administrative law judge erred in disregarding the evidence he submitted to show market hourly rates and in arbitrarily determining an hourly rate for attorney and legal assistant work. Counsel also appeals the disallowance of itemized services related to counsel's communication with Kaiser regarding claimant's medical benefits. Employer responds, urging affirmance. Claimant has filed a reply brief. BRB No. 09-0261.

For the reasons set forth in *Van Skike v. Director, OWCP*, 557 F.3d 1041 (9<sup>th</sup> Cir. 2009) and *Christensen v. Stevedoring Services of America*, 557 F.3d 1049 (9<sup>th</sup> Cir. 2009), we vacate both the district director's and the administrative law judge's fee awards. The cases are remanded for determinations of reasonable hourly rates for the services of counsel and his legal assistant consistent with these decisions. *H.S. v. Dept. of Army/NAF*, \_\_\_ BRBS \_\_\_, BRB Nos. 08-0533, 08-0596 (Apr. 10, 2009); *see also Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942 (9<sup>th</sup> Cir. 2007).

Claimant also contends the administrative law judge erred in disallowing .5 hour of attorney time and .25 hour of legal assistant time for correspondence with and telephone calls to Kaiser regarding its potential claim for reimbursement of medical expenses. We reject this contention. The administrative law judge reasonably found that as counsel did not represent Kaiser in its reimbursement claim against employer, employer does not have to bear the expense of counsel's correspondence with Kaiser. As claimant has not established an abuse of the administrative law judge's discretion in this regard, we affirm the administrative law judge's disallowance of a fee for the services in question.<sup>2</sup> *Tahara v. Matson Terminals, Inc.*, 511 F.3d 95, 41 BRBS 53(CRT) (9<sup>th</sup> Cir. 2007).

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<sup>2</sup> As the fee awarded by the district director for itemized entries and by the administrative law judge for the remaining itemized entries are not challenged on appeal, they are affirmed.

Accordingly, the number of hours found compensable by the district director and the administrative law judge are affirmed. The hourly rates awarded by the district director and administrative law judge for attorney and legal assistant services are vacated, and the case is remanded for reconsideration consistent with this decision.

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge