

BRB No. 13-0356

SAM CASTILLO)
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 Claimant-Petitioner)
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 v.)
)
 SUNDIAL MARINE TUG AND BARGE)
 WORKS, INCORPORATED) DATE ISSUED: Apr. 24, 2014
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 and)
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 SAIF CORPORATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Attorney Fee Order of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Jill Gragg (SAIF Corporation), Salem, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2010-LHC-00341) 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This is the second time this case is before the Board. To recapitulate, claimant sought compensation under the Act for allergic contact dermatitis resulting from exposure to epoxy paint in the course of his employment as a painter-sandblaster with

employer. The parties disputed issues related to the calculation of claimant's average weekly wage and his residual wage-earning capacity, and the claim was referred to the Office of Administrative Law Judges for a hearing. Subsequent to the hearing held on March 29, 2010, and the filing of the parties' closing arguments, the parties reached a settlement on all issues, except an attorney's fee, and this settlement was approved by the administrative law judge pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), on December 29, 2010.

Claimant's counsel filed a fee petition for work performed before the administrative law judge. He requested a fee of \$20,006.96, representing 49.25 hours of attorney services at the hourly rate of \$400, .5 hour of legal assistant services at the hourly rate of \$150, and \$231.96 in costs. Employer filed objections. In her initial Attorney Award Order, the administrative law judge reduced the hourly rates requested and the number of hours allowed, but approved the requested costs. Consequently, the administrative law judge awarded claimant's counsel a fee in the amount of \$15,252.38, representing .5 hour of attorney services at the hourly rate of \$316.42 (\$158.21) for work performed in 2009, 46.75 hours of attorney services at the hourly rate of \$322.87 (\$15,094.17) for work performed in 2010, .25 hour of legal assistant work at the hourly rate of \$110 (\$27.50) for work performed in 2009, .25 hour of legal assistant work at the hourly rate of \$112.24 (\$28.06) for work performed in 2010, and \$231.96 in costs. The administrative law judge summarily denied claimant's motion for reconsideration.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's hourly rate determinations for the attorney services. Specifically, although the Board upheld the administrative law judge's rejection of most of the evidence submitted by claimant's counsel, it vacated her finding that the Oregon State Bar 2007 Economic Survey (2007 Bar Survey) could not support a market rate determination. The Board remanded the case for the administrative law judge to further consider the 2007 Bar Survey with respect to counsel's hourly rate. Further, in the interest of judicial economy, the Board addressed claimant's additional arguments regarding the proxy rate established for counsel's services. In so doing, the Board found merit in claimant's assertion that the administrative law judge's reliance on the proxy rate used by Judge Etchingham in *DiBartolomeo v. Fred Wahl Marine Constr.*, 2008-LHC-01249 (Oct. 22, 2009) (Attorney Fee Order), *recon. denied* (Dec. 1, 2009), *aff'd*, BRB No. 10-0257 (Aug. 30, 2010) (unpub.), was inconsistent with her finding that counsel's market rate should be based on rates in Portland and should not be based on workers' compensation rates because the proxy rate in *DiBartolomeo* was based on statewide rates, including workers' compensation rates. The Board additionally found merit in claimant's assertion that the administrative law judge erred in reducing the hourly rate requested on the basis of the lack of complexity of the legal issues and the quality of representation. *Castillo v.*

Sundial Marine Tug & Barge Works, Inc., BRB Nos. 11-0400, 11-0655, slip op. at 7-9 (Feb. 23, 2012).¹

On remand, the administrative law judge observed that, in the period after the Board issued its decision, the Oregon State Bar issued a more recent survey of attorney earnings, the Oregon State Bar 2012 Economic Survey (2012 Bar Survey), which is based on survey data from 2011. Based on the 2012 Bar Survey data she found to be relevant, the administrative law judge determined \$340 per hour to be a reasonable market rate for counsel's services in 2011.² Further finding that the 2007 and 2012 Bar Surveys indicated hourly rates increased 17 percent between 2006 and 2011, or 4.25 percentage points per year, the administrative law judge determined that counsel is entitled to an hourly rate of \$325 for work performed in 2010 and \$315 for work performed in 2009. Claimant challenges these hourly rate determinations on appeal. Employer responds, urging affirmance.

The Supreme Court of the United States has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating a case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a federal fee-shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Blum v. Stenson*, 465 U.S. 886 (1984). An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895; *see also Kenny A.*, 559 U.S. at 551. The burden falls on the fee applicant 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; *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).

Claimant contends the administrative law judge erred in failing to find that the 2012 Bar Survey supports the requested \$400 hourly rate. Although he correctly notes

¹ The Board affirmed the district director's fee award.

² In so finding, the administrative law judge found that: 1) Portland is the relevant community; 2) counsel has over 30 years' experience; 3) counsel is in the top 25th percentile of practitioners; and 4) it is more appropriate to use the data in the 2012 Bar Survey because they are more current and closer in time to the time claimant's counsel provided services in this case. Neither party challenges these findings. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

the 2012 Bar Survey stated that the top 25 percent of Portland attorneys with 30 years of experience received \$400 per hour, the administrative law judge rationally discounted this portion of the 2012 Bar Survey's results because it was not clear which practice areas were represented, how long the attorneys polled had been in practice, or the size of their respective law firms.³ Order at 7; *see generally Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F.App'x 912 (9th Cir. 2011). Consequently, we reject claimant's assertion that the administrative law judge erred in failing to find the results of the 2012 Bar Survey supportive of the requested \$400 hourly rate for attorney services.

Claimant additionally contends the administrative law judge erred in calculating counsel's baseline proxy rate because she did not consider his more than 30 years' experience. Contrary to claimant's assertion, however, the administrative law judge specifically noted that, although the \$340 baseline figure for work performed in 2011 was substantially higher than the \$307.75 average for Portland civil litigation practitioners in the top 25th percentile, she "felt the difference would take into consideration the \$400 hourly rate charged by all Portland attorneys in the top 25th percentile of those who had practiced for over 30 years." Order at 9. As the administrative law judge accounted for claimant's counsel's years of experience, we reject claimant's assertion of error. Moreover, as the \$340 hourly rate awarded is within the range of rates established by the 2012 Bar Survey in the practice areas the administrative law judge found relevant, claimant has failed to establish that the administrative law judge abused her discretion in finding that \$340 per hour represents a reasonable 2011 market rate.⁴ *See generally Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Therefore, we affirm that finding.

³ The administrative law judge compared the hours worked and billed by Portland attorneys in private practice, without regard to the size of the practice, with those hours for sole practitioners, like claimant's counsel. She found that, while attorneys in private practice and sole practitioners both worked about the same number of hours, attorneys in private practice who are sole practitioners billed fewer hours. Order at 4. Moreover, she determined that average and median income for Oregon attorneys generally increased as the size of practice increased. Order at 5.

⁴ The administrative law judge found the hourly rates established by the 2012 Bar Survey results for attorneys practicing in plaintiff's civil litigation, plaintiff's personal injury, workers' compensation, and general litigation to be relevant. Order at 7. The survey showed that the top 75 percent of attorneys working in these fields earned between \$268 and \$350 per hour.

Claimant further contends the administrative law judge erred in reducing the 2011 baseline rate by 4.5 percent per year. We agree. The administrative law judge found that, based on the 2007 and 2012 Bar Surveys, the average hourly rates for civil practitioners and private practitioners in Portland increased by 17 percent between 2006 and 2011. The administrative law judge determined that this averaged to 4.25 percentage points per year, and she reduced the 2011 base rate of \$340 by 4.25 percentage points per year to yield a \$325 rate for work in 2010 and a \$315 rate for work in 2009. Contrary to the administrative law judge's finding, however, the 17 percent difference over the five years between 2006 and 2011 averages to 3.4 percentage points per year.⁵ Reducing the 2011 base rate of \$340 by 3.4 percentage points per year yields a 2010 rate of \$328.44⁶ and a 2009 rate of \$316.88.⁷ Based on the foregoing, we modify the administrative law judge's award to reflect this corrected calculation and to award an additional fee of \$163.48.⁸

Claimant also contends the administrative law judge erred in awarding an attorney's fee without accounting for the delay in counsel's receipt of the fee. Although the administrative law judge issued her first attorney fee order in 2011, which employer paid promptly, counsel contends he is entitled to an enhanced fee to account for the delay in the issuance of the additional fee award on remand. We reject this contention. The record reflects that claimant's counsel did not request an enhancement for delay before the administrative law judge and thus the issue cannot be raised before the Board on appeal. *See Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT); *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999). Moreover, counsel is not entitled to an enhancement for the delay due to the appeal of the attorney's fee award. *Anderson*, 91 F.3d at 1325 n.3, 30 BRBS at 69 n.3(CRT). As claimant raises no further challenges to the administrative law judge's fee award, counsel is entitled to a total fee, as herein modified, of \$15,964.75 for his work before the administrative law judge.

⁵ There is a difference of five years between 2011 and 2006. Thus, $17\% \div 5 = 3.4\%$.

⁶ $\$340 \times (1 - 0.034) = \328.44

⁷ $\$340 \times (1 - 0.068) = \316.88

⁸ On remand, the administrative law judge awarded a total fee of \$15,801.27, representing .5 hour of attorney services in 2009, 47.25 hours of attorney services in 2010, \$55.56 for legal assistant fees, and \$231.96 in costs. Modifying this calculation to reflect the corrected rates for 2009 and 2010 ($\$316.88 \times .5 \text{ hours}_{2009}$) + ($\$328.44 \times 47.25 \text{ hours}_{2010}$) + \$55.56 + \$231.96 = \$15,964.75.

Lastly, claimant's counsel has filed a petition for an attorney's fee for work performed before the Board in the prior appeal in BRB No 11-0655. Counsel seeks a fee of \$11,332.50, representing 25 hours of attorney services at an hourly rate of \$450 and .5 hour of legal assistant time at an hourly rate of \$165.⁹ Employer objects to the requested fee, arguing that it is excessive in light of claimant's very limited success on appeal, and it asks that the fee be reduced pursuant to *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), and *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).¹⁰ Counsel replied and sought an additional .75 hour of attorney work at an hourly rate of \$450 (\$337.50) for the preparation of the reply brief. Thus, counsel seeks a total fee of \$11,670 for work performed before the Board in the prior appeal.

Although the Board rejected several of claimant's arguments regarding the administrative law judge's original fee award, claimant nonetheless succeeded in obtaining an increased attorney fee as a result of his appeal and, thus, his counsel is entitled to a fee for work performed before the Board. 20 C.F.R. §802.203(c), (e). The increased fee, however, was only \$712.37, resulting in a fee award of \$15,964, whereas counsel had sought a fee of over \$20,000.¹¹ We agree with employer that the requested fee is disproportionate to counsel's success in this case. In light of the limited success with respect to the arguments presented to the Board and the relatively small increase in his fee as the result of his appeal, we find that the hours itemized by claimant's counsel, when multiplied by a reasonable hourly rate, results in an excessive award. *See Hensley*, 461 U.S. at 435-436; 20 C.F.R. §802.203(e). We, therefore, award counsel a total fee of \$1,960 for work performed before the Board in the prior appeal. This fee represents five hours of attorney services at the reasonable market hourly rate of \$392,¹² and takes into

⁹ Counsel, however, concedes to an overall seven percent reduction in his fees, stating that he spent approximately seven percent of his time on an unsuccessful argument.

¹⁰ Employer requests that counsel's rate be reduced 90 percent pursuant to *Ezell*. Employer argues, in the alternative, that the requested hourly rates should be reduced as they do not represent market rates.

¹¹ In her original fee award, the administrative law judge awarded counsel a total fee of \$15,252.38. Thus, $\$15,964.75 - \$15,252.38 = \$712.37$.

¹² We arrive at five compensable hours of attorney services based on the briefing related to the successful issues as a percentage of the entire brief, which was 18.5 percent of 27 pages.

account claimant's limited success. *See Christensen*, 44 BRBS 39. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Attorney Fee Order is modified to reflect hourly rates of \$328.44 and \$316.88 for work performed in 2010 and 2009, respectively, resulting in an additional fee of \$163.48. In all other respects, the Attorney Fee Order is affirmed. Claimant's attorney is awarded a fee of \$1,960 for work performed before the Board in BRB No. 11-0655, to be paid directly to counsel by employer. 33 U.S.C. §928.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge