



BRB No. 15-0437

LINWOOD ROBBINS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: <u>Apr. 28, 2016</u>
HUNTINGTON INGALLS,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney Fees of Dana Rosen, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Attorney Fees (2015-LHC-00450) of Administrative Law Judge Dana Rosen 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. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a work-related injury on May 27, 2014 while employed by employer. After claimant's claim was transferred to the Office of Administrative Law Judges, the parties reached an agreement. Consequently, in an Order issued on February

9, 2015, the administrative law judge remanded the case to the district director for appropriate action.

Claimant's counsel subsequently filed a petition seeking an attorney's fee of \$1,486, representing 3.04 hours of attorney work at an hourly rate of \$400 and 2.25 hours of paralegal work at an hourly rate of \$120, for work before the administrative law judge. The administrative law judge reduced the hourly rates and number of hours requested for both attorney and paralegal work and approved an attorney's fee, payable by employer, totaling \$855, representing 2.55 hours of attorney work at \$300 per hour and 1 hour of paralegal work at \$90 per hour.

On appeal, claimant's counsel challenges the administrative law judge's reduction of his requested hourly rates and the disallowance of 1.25 hours of paralegal time for lack of specificity.¹ Employer responds, urging affirmance of the administrative law judge's decision. Claimant's counsel filed a reply brief.

We agree with claimant's counsel that the administrative law judge's reduction in the hourly rates and disallowance of itemized entries for lack of specificity cannot be affirmed. For the reasons that follow, we remand the case for further consideration.

The Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the 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); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). The Court has also held that 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 is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation. *Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010);

¹ Counsel does not specifically challenge the administrative law judge's finding that the quarter-hour charges for attorney time spent on January 13 and 15, 2015, to "receive & review LS-208," and "[draft] letter to employer," respectively, were excessive and should be reduced to .13 hour, or that the quarter-hour charge for attorney time on February 9, 2015, for "[receive and review] letter from employer" was duplicative of charges on February 5, 2015. We, therefore, affirm the administrative law judge's reduction in attorney time by .49 hour as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

see also Blum, 465 U.S. at 896 n.11; *Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010).

In support of his request for hourly rates of \$400 for attorney work and \$120 for paralegal work, claimant's counsel submitted evidence of rates he and his paralegals received in prior longshore cases, along with evidence to support an upward adjustment to those figures to reflect current rates. Specifically, counsel submitted the Board Order in *Green v. Ceres Marine Terminals, Inc.*, BRB Nos. 09-0294/A (Mar. 30, 2010) (unpub. Order), awarding counsel's firm an hourly rate of \$350 for attorney work and an hourly rate of \$150 for paralegal work; the Board's Order in *Smith v. Huntington Ingalls Industries, Inc.*, BRB No. 13-0331 (July 18, 2014) (unpub. Order), awarding counsel's firm an hourly rate of \$400 for attorney work and an hourly rate of \$120 for paralegal work; and charts of the Laffey Matrix (2003-2013). Counsel additionally cited and submitted supporting links to the Legal Services Component of the Consumer Price Index (CPI) -- Lawyer (2009-2013); Legal Services Component of CPI -- Paralegal (2009-2013); the Federal Locality Rate Adjusted CPI -- Lawyer (2009-2013); and the Laffey Matrix (2003-2013). Employer filed objections to counsel's fee petition.

In addressing counsel's requested hourly rates, the administrative law judge did not address the fee award in *Smith*, BRB No. 13-0331, submitted by claimant's counsel in support of his fee request; rather, the administrative law judge noted only that claimant's counsel cited *Green*, BRB Nos. 09-0294/A, in which the Board approved a rate of \$350 per hour, and that counsel relied on the Laffey Matrix and increases in the federal locality pay rate and CPI to upwardly adjust that rate. *See* Decision and Order at 4. The administrative law judge found, however, that this evidence did not correlate to a change in the market for legal services in claimant's counsel's locale, and that, moreover, counsel did not introduce any affidavits from other counsel in the area or other evidence that would support his requested hourly rate of \$400. *Id.* The administrative law judge, relying on "experience and the administrative record," found that hourly rates of \$300 for attorney work and \$90 for paralegal work are "the prevailing rate[s]" in claimant's counsel's locale. *Id.* at 5.

The administrative law judge, however, did not identify what, in her "experience or the administrative record," led her to conclude that these hourly rates are the prevailing rates in the relevant area. *Id.* In particular, the administrative law judge was not presented with any evidence awarding those rates, nor did she cite any other cases awarding those rates.² Thus, we are unable to assess the basis for the administrative law

² The administrative law judge appears to have found employer's citation to "The State of the Region" Economics report, issued in 2012, to be persuasive. Decision and Order at 3-4; <https://www.odu.edu/content/dam/odu/offices/economic-forecasting-project/docs/2012-sor-attorneys.pdf>. This report states that there is an oversupply of

judge's findings. Consequently, we conclude that, at present, the fee award cannot be affirmed. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); see *Finnegan v. Director, OWCP*, 69 F.3d 1039, 1041, 29 BRBS 121, 122-123(CRT) (9th Cir. 1995).

Moreover, the administrative law judge did not provide a sufficient basis for rejecting counsel's evidence. Prior fee awards may constitute "inferential evidence" of a prevailing market rate in cases arising under the Act. *Eastern Associated Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561 (4th Cir. 2013); *Cox*, 602 F.3d at 290; *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Newport News Shipbuilding & Dry Dock v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004); *Stanhope*, 44 BRBS 107. Additionally, contrary to the administrative law judge's suggestion, affidavits of other attorneys are not "required" to set the prevailing market rate. *Cox*, 602 F.3d at 289-290.³ Furthermore, the rate should be based on current, rather than historical, market conditions. See generally *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *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). Thus, counsel's evidence of rates he previously received for work in the Hampton Roads area, which was not considered by the administrative law judge, may constitute sufficient evidence of a prevailing market rate.⁴ *Gosnell*, 724 F.3d at 572-574.

attorneys in the Hampton Roads area, in which there are "plausibly" 17 broad legal specialties, but the fields most affected by oversupply are litigation, family law, personal injury, real estate and general practice. State of the Region at 80. The report goes on to state that 28 local attorneys were polled in the spring of 2012, and half of them reported that their billing rates had fallen. *Id.* at 90-91. As the administrative law judge stated, however, the average hourly billing rate for attorneys is not indicated in the report. Decision and Order at 4. Moreover, the administrative law judge did not explain her implicit finding that the decrease in billing rates existed in the relevant practice areas.

³ In *Cox*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, "recognized a range of sources" that could provide evidence to support an hourly rate determination, including: 1) evidence of fees the attorney received in the past; 2) affidavits of other local attorneys who are familiar with the applicant's skills and the type of work in the relevant community; and/or 3) evidence of rates awarded in other administrative proceedings of similar complexity. 602 F.3d at 289-290.

⁴ We reject, however, counsel's use of the Board's Order in *Green v. Ceres Marine Terminals, Inc.*, BRB Nos. 09-0294/A (Mar. 30, 2010) (unpub. Order), as evidence of his market rate because the claimant's award of benefits in that case was reversed on appeal. *Green v. Ceres Marine Terminals, Inc.*, 656 F.3d 235, 45 BRBS

In view of the absence of evidence to support the administrative law judge's rate determinations, and her erroneous rejection of counsel's evidence for lack of supporting affidavits, we vacate the hourly rate determinations and remand the case for further consideration of this issue. On remand, the administrative law judge must reconsider counsel's evidence of fee awards in other cases and provide the specific basis for her conclusions regarding the market rate for the services of counsel and paralegals. *Gosnell*, 724 F.3d 561; *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Brown*, 376 F.3d 245, 38 BRBS 37(CRT).

Counsel also challenges the administrative law judge's finding that his fee petition lacks specificity and is vague, and her consequent reduction or disallowance of 1.25 hours of paralegal time. The administrative law judge found that counsel's fee petition lacks the specificity to allow her to determine whether the activity was "reasonably necessary to the success of the claim." *See* Decision and Order at 6. Stating that the usual remedy for an incomplete or non-specific fee request is to withhold a fee until a complete statement is received, the administrative law judge nonetheless disallowed in their entirety four entries, on January 9, 19, 20, and 26, 2015, which documented three "telephone call[s] from client" to counsel's paralegal and "review [of] file," stating that the three entries for phone calls "lacked specificity" and "there was no indication as to the basis for the phone call." *Id.* at 7.

It was within the discretionary authority of the administrative law judge to find that claimant's counsel's fee petition lacked specificity. *See generally Sullivan v. St. John's Shipping Co.*, 36 BRBS 127 (2002); *Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994). As acknowledged by the administrative law judge, however, the usual remedy for a fee petition that is incomplete, lacks specificity, or fails to meet the standards of the regulation at 20 C.F.R. §702.132, is to withhold a fee award until a complete, adequate statement is provided. *Nat'l Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 5 BRBS 317 (5th Cir. 1977); *Carter v. General Elevator Co.*, 14 BRBS 90 (1981). If counsel fails to correct the deficiency, the administrative law judge may disallow the entries at issue. *Hudson*, 28 BRBS 334.

In this case, there is no evidence that counsel's paralegal did not receive telephone calls from claimant or review the file. Thus, it was unreasonable for the administrative law judge to completely deny the time requested without giving claimant's counsel an opportunity to address the administrative law judge's concerns regarding the deficient entries. Accordingly, we vacate the administrative law judge's denial of these 1.25 hours of paralegal time. On remand, the administrative law judge must allow claimant's

67(CRT) (4th Cir. 2011). Thus, counsel never received an attorney's fee in that case, and the Board's fee award cannot serve as a basis for setting a market rate.

counsel an opportunity to address her concerns regarding the lack of specificity of these entries.

Accordingly, the administrative law judge's Decision and Order Awarding Attorney Fees is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge