



BRB No. 16-0518

MICHAEL E. LESH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ADVANTAGE FEDERAL RESOURCING)	
)	DATE ISSUED: <u>Apr. 25, 2017</u>
and)	
)	
ALLIED WORLD NATIONAL)	
ASSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Attorney Fee Order of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz (Law Offices of Charles Robinowitz), Portland, Oregon, for claimant.

Michael Marmer (Samuelson, Gonzalez, Valenzuela & Brown, LLP), San Pedro, California, for employer/carrier.

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order (2014-LDA-00715) of Administrative Law Judge Richard M. Clark 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

After issuance of the administrative law judge's 2015 decision approving the parties' Section 8(i) settlement agreement,¹ 33 U.S.C. §908(i), claimant's counsel requested an attorney's fee totaling \$37,064.38, representing 78.95 hours of attorney time at an hourly rate of \$437.50, 5.9 hours of attorney time at an hourly rate of \$225, and 7.75 hours of paralegal time at an hourly rate of \$165. Claimant's counsel also sought \$2,910.18 in costs. Employer filed objections to counsel's fee petition. Counsel filed a reply to employer's objections, along with a request for an additional attorney's fee totaling \$2,734.38, representing 6.25 hours of attorney work at an hourly rate of \$437.50 for reviewing employer's objections, conferring with a mediator on the fee issue and preparing his reply.

The administrative law judge found that as the hourly rate determinations he made in *Ayers v. Jones Stevedoring Co.*, ALJ No. 2011-LHC-01875 (June 1, 2016), are "consistent with the holding" in *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015), and as counsel "offers the same evidence and arguments" in this case as he did in *Ayers*, "it is not necessary to re-determine those rates." Attorney Fee Order at 5. The administrative law judge thus adopted and incorporated by reference his hourly rate findings from *Ayers*. The administrative law judge, therefore, awarded counsel a proxy market rate of \$325 per hour for 2011, based on the 2012 Oregon Bar Survey (OBS). The administrative law judge upwardly adjusted this 2011 rate, based on the Consumer Price Index for Urban Consumers for the Portland-Salem region (CPI-U), to reflect hourly rates of \$348.97 for counsel's work in 2014 and \$353.16 for counsel's work in 2015. Similarly, the administrative law judge awarded counsel's associate a proxy market rate of \$195.67 per hour for 2011, which he adjusted to \$210.10 in 2014 and \$212.62 in 2015. The administrative law judge also awarded counsel's paralegal an hourly rate of \$150. The administrative law judge disallowed some of the requested hours and reduced the request for costs. He awarded counsel a fee and costs totaling \$31,384.57, payable by employer.

On appeal, claimant's counsel challenges the administrative law judge's hourly rate determinations and his failure to award a fee for the work on counsel's reply to employer's objections. Employer responds, urging affirmance.² Claimant has filed a reply brief.

¹Under the agreement, claimant received \$155,000 in settlement of his claim under the Act relating to his April 17, 2012 work-related left hand injury.

²We decline to address employer's contentions regarding the administrative law judge's allowance of certain time entries in counsel's fee petition, over employer's objections thereto. Employer should have filed a cross-appeal if it wished to raise these issues. See *Farrell v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 283 (1998), *vacating in part on recon.* 32 BRBS 118 (1998); *Garcia v. National Steel &*

Counsel's hourly rate contentions are the same as those raised and addressed by the Board in *Ayers*.³ In *Ayers*, the Board affirmed the administrative law judge's proxy hourly rates based on the 2012 OBS,⁴ stating that they are rational and in accordance with law, i.e., *Shirrod*, 49 BRBS 93(CRT); *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). The Board also affirmed the administrative law judge's use of the CPI-U as a reasonable means for adjusting the 2011 base hourly rates for inflation. See generally *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT). Consequently, the Board affirmed the adjusted hourly rates awarded by the administrative law judge. *Ayers v. Jones Stevedoring Co.*, BRB No. 16-0520 (Apr. 24, 2017) (unpub.), slip op. at 5. Thus, for the reasons stated in *Ayers*, slip op. at 2-5, we reject counsel's contentions and affirm the administrative law judge's hourly rate determinations, including his use of the CPI-U to adjust the 2011 proxy market rates for inflation.

However, we agree with counsel that the case must be remanded for the administrative law judge to address counsel's supplemental fee petition. The administrative law judge stated that counsel "filed a Reply" to employer's objections on April 25, 2016. Attorney Fee Order at 1. Accompanying the reply brief was counsel's petition for an additional fee totaling \$2,734.38, representing 6.25 hours of his time at an hourly rate of \$437.50, for reviewing employer's objections, conferring with a mediator, and preparing a reply to employer's objections. The administrative law judge did not address this fee petition and, therefore, we remand this case for him to do so. See *Ayers*, slip op. at 7-8; see generally *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009); see also *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).

Shipbuilding Co., 21 BRBS 314 (1988); see also *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364 (4th Cir. 1994).

³By Order dated August 31, 2016, the Board granted counsel's motion to file a consolidated pleading in *Ayers v. Jones Stevedoring Co.*, BRB No. 16-0520, *Nelson v. ICTSI Oregon, Inc.*, BRB No. 16-0519, and *Lesh v. Advantage Federal Resourcing*, BRB No. 16-0518.

⁴The Board stated that, having rejecting counsel's evidence in support of the requested hourly rates, the administrative law judge correctly looked to the 2012 OBS to set the proxy market rate for the services provided by counsel and his associate. *Ayers v. Jones Stevedoring Co.*, BRB No. 16-0520 (Apr. 24, 2017) (unpub.), slip op. at 3 (citing *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015)).

Accordingly, the administrative law judge's award of an attorney's fee payable by employer totaling \$31,384.57 is affirmed. The case is remanded for the administrative law judge to address counsel's supplemental fee petition.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge