



BRB No. 16-0520

MICHAEL S. AYERS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: <u>Apr. 24, 2017</u>
JONES STEVEDORING COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	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.

James McCurdy and Gavin W. Bruce (Lindsay Hart, LLP), Portland, Oregon, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2011-LHC-01875) 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.* (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).

Following the 2015 issuance of a Decision and Order awarding claimant compensation benefits under the Act, claimant's counsel filed a petition for an attorney's fee for work performed before the Office of Administrative Law Judges (OALJ) between 2011 and 2015. Counsel requested a fee totaling \$80,942.04, representing 164.15 hours of attorney time at an hourly rate of \$425, .25 hours of attorney time at an hourly rate of \$225, and 18.55 hours of legal assistant time at an hourly rate of \$165, plus

\$8,020.04 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 \$2,235, representing 3 hours of attorney work at an hourly rate of \$425 and 7 hours of paralegal work at an hourly rate of \$150. In his Attorney Fee Order dated June 1, 2016, the administrative law judge reduced the hourly rates requested, as well as the total number of hours sought by counsel, and approved an attorney's fee totaling \$59,799.46, payable by employer.¹

On appeal, claimant's counsel challenges the administrative law judge's award of an attorney's fee. Employer responds, urging affirmance. Claimant's counsel has filed a reply brief, as well as a petition for an attorney's fee for work performed before the Board in a prior appeal, BRB No. 16-0074.

Hourly Rates

Counsel contends that the administrative law judge's market rate determinations are arbitrary and not in accordance with law. Counsel maintains it was an abuse of discretion and legally incorrect for the administrative law judge, in setting the proxy market rate for his services, to not consider counsel's significant experience or award him a market rate based on the top five percent of Portland attorneys as documented by the Oregon Bar Survey (OBS).

The United States 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). It is well-established 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. The burden is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the relevant community for

¹The administrative law judge, upon disallowing 19.78 hours of work performed by counsel and 1.855 hours of work performed by his paralegal, calculated the fee award as follows: \$1,842.75 (5.67 hours x \$325/hour) for work in 2011; \$11,011.41 (33.12 hours x \$332.47/hour) for work in 2012; \$22,098.53 (64.85 hours x \$340.79) for work in 2013; \$9,265.15 (26.55 hours x \$348.97/hour) for work in 2014; \$5,006.04 (14.18 hours x \$353.16/hour) for work in 2015; \$51.29 (.25 hours x \$205.17/hour) for work by counsel's associate in 2013; \$2,504.25 (16.695 hours x \$150/hour) for work by counsel's paralegal; and \$8,020.04 in expenses.

similar services by lawyers of comparable skill, experience, and reputation. *See Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Blum*, 465 U.S. at 896 n. 11; *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015); *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).

As this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the determination as to an appropriate hourly rate is guided by the court's recent decision in *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT), which reiterated that, in awarding a fee under the Act, an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT). In *Shirrod*, the court vacated the Board's affirmance of the administrative law judge's fee award, concluding it was erroneous because, even after finding the relevant community to be Portland, Oregon, the administrative law judge awarded an hourly rate based on state-wide rate information rather than on rate information tailored to the Portland community. The Ninth Circuit held that, when the relevant market is identified as Portland, as here, the results of the OBS should be addressed in setting a proxy hourly rate because it provides information on attorney fees specific to Portland. *Id.*

The administrative law judge addressed, and rationally rejected, the evidence counsel submitted in support of his claim to an hourly rate of \$425. Attorney Fee Order at 5-10. Specifically, the administrative law judge rejected the Goldsmith declaration because it does not expressly support the request for \$425 per hour, and he rejected the Markowitz declaration and the Morones survey because he found that commercial litigation is not analogous to longshore work. *Id.*; *see Christensen v. Stevedoring Services of America, Inc.*, 43 BRBS 145, 146 (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*, 455 F. App'x 912 (9th Cir. 2011). Therefore, the administrative law judge correctly looked to the 2012 OBS to set the proxy market rate for counsel's services in this case, and he rationally relied on the general rate for Portland, as well as plaintiff personal injury civil litigation rates and plaintiff general civil litigation rates, to calculate a proxy rate for counsel's services. *Shirrod*, 809 F.3d at 1092, 49 BRBS at 98-99(CRT); *Christensen*, 44 BRBS at 40. The administrative law judge awarded counsel a fee based on the 75th percentile rate for these practice areas. Attorney Fee Order at 12.

Contrary to counsel's contention, the administrative law judge did not refuse to consider counsel's significant experience in setting the proxy market rate, as he recognized that counsel "is a skilled and capable attorney" who "has been in practice for over 40 years, and has contributed to publications and spoken at Longshore conventions."

Attorney Fee Order at 12. The administrative law judge, citing *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 5 BRBS 317 (5th Cir. 1977), found that the rates awarded counsel for appellate work are not determinative with regard to the work performed before the OALJ in this case, because the Act intends for each adjudicatory body to separately assess the worth of the claimant's representation before it. *See also* 33 U.S.C. §928(c). As counsel has not established that the administrative law judge abused his discretion in awarding a fee based on the 75th percentile rates, we reject his contention of error.

The administrative law judge performed a thorough analysis of the market rate evidence in compliance with the law, and he provided a rational basis for his findings in support of his proxy market rate determination. *Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT); *Christensen*, 44 BRBS at 40. Consequently, as the \$325 hourly rate awarded is within the range of rates established by the 2012 OBS in the three practice areas the administrative law judge rationally found relevant, claimant's counsel has failed to establish that the administrative law judge abused his discretion in finding that \$325 per hour represents a reasonable 2011 market rate. *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). We therefore affirm the administrative law judge's finding that the proxy market rate for counsel in 2011 is \$325 per hour.

Counsel next contends that the administrative law judge erred by reducing the hourly rates for work performed by his associate from \$225 to a 2011 proxy market rate of \$195.67, and for work performed by his paralegal from \$165 to \$150. Counsel avers that the administrative law judge's inclusion of the general litigation hourly rate average of \$143 in the calculation of his associate's rate improperly depressed the proxy market rate for such services. With regard to the paralegal rate, counsel asserts that the administrative law judge erred by not adjusting the awarded rate of \$150 for inflation given the delay of three to five years from the date services were provided in this case.

The administrative law judge's findings regarding the 2011 proxy market rate of \$195.67 for work performed by counsel's associate and \$150 for work performed by his paralegal in this case are rational. The administrative law judge, after finding counsel's evidence insufficient to support the requested rates for these services, used an appropriate method to determine the proxy hourly rates. Given the experience and background of counsel's associate,² the administrative law judge rationally determined that the average of the rates given in the OBS for the 25th percentile of attorneys practicing plaintiff personal injury civil litigation, plaintiff civil litigation not including personal injury, and general practice in Portland, is appropriate to calculate the proxy rate for counsel's

²The administrative law judge found that counsel's associate "had no more than four years of experience as an attorney." Attorney Fee Order at 14.

associate as of 2011 at \$195.67. Similarly, the administrative law judge found \$150 an appropriate hourly rate for counsel's legal assistant in this case.³ Counsel has failed to establish that the administrative law judge abused his discretion in finding that hourly rates of \$195.67, representing the 2011 proxy market rate for his associate, and \$150 for work performed by his paralegal are reasonable. *See generally Fox*, 131 S.Ct. at 2216; *see also Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). We therefore affirm the administrative law judge's award of these rates.

Counsel also contends the administrative law judge erred in adjusting the market rates for inflation by using the Consumer Price Index-Urban for Portland-Salem, Oregon (CPI-U), rather than the increases in the National Average Weekly Wage. Counsel states that in the absence of other wage information, wage data increases are a more reflective measure of inflation than the CPI-U, which measures the change in prices urban consumers pay for a fixed basket of consumer goods and services.

When appropriate, prior rates should be adjusted for inflation so that the rate is based on current, rather than historical, market conditions. *See Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Christensen*, 43 BRBS 145. The administrative law judge is not required to use any particular method for calculating "current" market rates. *See generally Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT).

The administrative law judge recognized that because the 2012 OBS is based on data collected during 2011, he should adjust the 2011 base rate to reflect changes in economic circumstances. The administrative law judge's use of the CPI-U, which he noted is calculated specifically for the Portland area based on the actual cost of living in Portland and is regularly updated, represents a reasonable means for adjusting the 2011 base hourly rate for attorney work for inflation. *See generally Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT). Consequently, we affirm the following hourly rates awarded by the administrative law judge, as adjusted for inflation: for work performed by counsel in 2012, \$332.47; in 2013, \$340.79; in 2014, \$348.97; and in 2015, \$353.16; and for work performed by his associate in 2013, \$205.17.

Reductions in Requested Hours

Counsel contends the Board must reverse the administrative law judge's ten percent across-the-board reduction in the approved hours because the administrative law judge had no basis to find that ten percent of the time claimed was excessive. Counsel

³Counsel sought an hourly rate of \$150 for his paralegal's work in his supplemental fee petition dated Jun 15, 2015. *See Counsel's Declaration in Reply to Objections to Attorney Fees* dated June 15, 2015, at 3.

contends the administrative law judge accounted for any duplicative work by reducing the time claimed for the preparation of the fee petition.

The tests to be applied to the compensability of the attorney's work are whether the hours claimed are "reasonable" for the "necessary work done" in the case before the administrative law judge and the fee award is commensurate with the degree of success obtained. *See* 20 C.F.R. §702.132(a); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Thus, the administrative law judge may, within his discretionary authority, disallow a fee for hours found to be duplicative, excessive, or unnecessary, *see Tahara*, 511 F.3d 95, 41 BRBS 53(CRT), or reduce a fee where the request is not commensurate with the success obtained. *See generally Farrar v. Hobby*, 506 U.S. 103 (1992); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001). An administrative law judge is afforded "considerable deference" in determining what hours are "excessive, redundant, or otherwise unnecessary." *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT).

The administrative law judge found, based on counsel's statements regarding his billing practices, that some of counsel's time entries for preparing his fee petition are likely duplicative of entries contemporaneously documented by counsel in his work file as the case progressed.⁴ Attorney Fee Order at 15-17. Thus, the administrative law judge made an across-the-board reduction of ten percent in the total number of hours documented on the fee petition. *Id.*

We cannot affirm this finding, as the administrative law judge reduced the fee twice for the same reason. The administrative law judge rejected employer's "evidence" that claimant's counsel does not keep contemporaneous time records. Attorney Fee Order at 16. Rather, the administrative law judge found that counsel's statements reflect that his records "lack in detail," and the administrative law judge found that counsel is not entitled to the full fee requested for adding detail while preparing his fee petition. *Id.* The administrative law disallowed 4 of the 9.5 hours counsel requested for preparing his

⁴The administrative law judge stated he was:

concerned by [counsel's] statements that some portion of the time he bills for even minor tasks, like making telephone calls and letters, consists of 'making notes and updates in the file,' and the time he billed when preparing his fee petition to go back and fill in the details on his time entries. Reply at 5. It would appear that, if [counsel] is already accounting for the time needed to describe his actions in the case for each line item, billing again for re-describing that work in his fee petition is redundant.

Attorney Fee Order at 16.

fee petition on the ground that “developing a fee petition with short entries should require minimal thought and planning and should primarily be a matter of transcribing entries from whatever time tracking software or process an attorney uses.” Attorney Fee Order at 15. Counsel does not appeal this finding. *See* Cl. Reply Br. at 8. The administrative law judge then disallowed a full 10 percent of the otherwise allowable hours on the ground that counsel billed to fill in details on his fee petition and cannot bill to re-describe his work, as this results in duplicative billing. Attorney Fee Order at 16. However, the administrative law judge already disallowed 4 hours of fee petition time on this ground. He did not find that the itemized contemporaneous entries themselves represented excessive or duplicative billing. Thus, this 10 percent reduction is arbitrary and cannot be affirmed.⁵ As the administrative law judge otherwise rejected employer’s objections to the number of hours billed, we must reverse the 10 percent across-the-board reduction. The administrative law judge’s fee award is modified to award counsel an attorney’s fee of \$57,527.⁶

Counsel next contends the administrative law judge erred by not awarding a fee for the preparation of his brief in reply to employer’s objections. We agree.

The administrative law judge stated that counsel “filed a permissible Reply [to employer’s objections] on June 18, 2015.” Attorney Fee Order at 1. Accompanying the reply brief was counsel’s request for an additional fee totaling \$2,235, representing 3 hours of counsel’s work at an hourly rate of \$425 and 7 hours of work by counsel’s paralegal at an hourly rate of \$150, for the preparation of that brief. *See* Reply to Objections at 7; Counsel’s Declaration in Reply to Objections to Attorney Fees dated June 15, 2015 at 2-3. The administrative law judge did not address this request for fees. Therefore, we remand this case for the administrative law judge to address counsel’s fee petition for time expended in replying to employer’s objections. *See generally Beckwith*

⁵Although not cited specifically as a reason for reducing counsel’s fee, the administrative law judge also stated that he was “concerned” about counsel’s admission that some of the time he bills for minor tasks consists of making notes as updates to the file. Attorney Fee Order at 16. However, this does not support the administrative law judge’s ten percent across-the-board reduction. Counsel’s statement was made in the specific context of explaining his billing in ¼ hour increments for phone calls and letters and the administrative law judge found that counsel’s billing in ¼ hour increments was for tasks that “generally required a full fifteen minutes.” *Id.* at 17; Cl. Reply Br. at 5.

⁶This fee is arrived at by awarding a fee for all hours documented on page 17 of the administrative law judge’s Attorney Fee Order, minus 4 hours of attorney services in 2015, at the affirmed hourly rates.

v. Horizon Lines, Inc., 43 BRBS 156, 157 (2009); *see also Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT).

Fee Petition for BRB No. 16-0074

Counsel has filed a petition for an attorney's fee for work performed before the Board in BRB No 16-0074. Counsel seeks a fee of \$4,278, representing 9.2 hours of attorney services at an hourly rate of \$465. Employer objects to the requested fee. Counsel has filed a reply in which he also seeks an additional one hour in attorney's fees for time spent in writing his reply.

The Board remanded BRB No. 16-0074 to the district director for reconsideration of the hourly rate awarded for attorney services. *Ayers v. Jones Stevedoring Co.*, BRB No. 16-0074 (Sept. 26, 2016). The Board has not been informed that the district director has acted on remand. Thus, the degree of counsel's success before the Board, if any, has yet to be determined. Therefore, we deny counsel's fee request at this time. *See generally Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997). Should counsel ultimately be successful on remand before the district director, he may refile his fee petition with the Board within 60 days of the issuance of the district director's order. 20 C.F.R. §802.203(c).

Accordingly, the administrative law judge's hourly rate determinations are affirmed. The award of an attorney's fee is modified to reflect employer's liability for a fee and costs totaling \$65,547.04. The case is remanded for the administrative law judge to address counsel's petition for an attorney's fee for the preparation of his brief in reply to employer's objections. The petition for an attorney's fee in BRB No. 16-0074 is denied at this time.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge