BRB No. 11-0791

BILLY J. NICHOLS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	DATE ISSUED: 08/08/2012
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Order Denying Employer's Motion to Take Discovery and Granting Claimant's Motion to Quash Discovery and the Order Awarding Attorney Fees of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Michael J. Perticone (Hardwich & Harris, L.L.P.), Baltimore, Maryland, for claimant.

Lawrence P. Postol (Seyfarth Shaw, L.L.P.), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Order Denying Employer's Motion to Take Discovery and Granting Claimant's Motion to Quash Discovery and the Order Awarding Attorney Fees (2009-LHC-00002) of Administrative Law Judge Daniel F. Solomon 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. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

In this case, the administrative law judge awarded claimant two periods of temporary total disability benefits as well as on-going medical benefits for his work injury. Employer appealed the award (BRB No. 11-0220), and the Steamship Trade Association – International Longshoremen's Association Benefit Fund appealed the administrative law judge's denial of its motion to intervene to protect its lien against benefits awarded to claimant (BRB No. 11-0385). The Board affirmed the award of temporary total disability benefits to claimant but vacated the award of future medical benefits, remanding the case to the administrative law judge for further consideration of the issue. Additionally, the Board vacated the denial of the motion to intervene and remanded the case for the administrative law judge to reconsider the motion and, if necessary, determine the Fund's entitlement to an enforceable lien. *Nichols v. Ceres Marine Terminals, Inc.*, BRB Nos. 11-0220, 11-0385 (Nov. 30, 2011).

Claimant's counsel filed a petition for an attorney's fee with the administrative law judge, requesting a fee of $14,877 (52.2 hours x $285 per hour) and $1,027.28 in costs. In response to the fee petition, employer filed objections as well as a "Motion to Take Discovery as to Claimant's Counsel's Billing Rate." Employer sought to depose counsel and those attorneys from whom he obtained letters regarding hourly rates. Counsel filed a response to the objections and a motion to quash the discovery request. The administrative law judge denied employer's motion and granted claimant's motion to quash. The administrative law judge stated that both parties already had submitted hourly rate evidence such that additional discovery was unnecessary and that employer would not be prejudiced by the denial of its motion. Order Denying Motion at 2-3.

Subsequently, the administrative law judge addressed counsel's fee petition and employer's objections. He acknowledged employer's assertion that counsel's request of an hourly rate of $285 is too high and employer's evidence from two other cases wherein the attorneys requested $200 and $225 per hour. The administrative law judge also noted employer's argument that counsel failed to provide evidence of his "normal rates" or what his "paying clients pay" and that, absent this information, counsel's petition is defective and should be denied. After summarizing counsel's evidence and background, the administrative law judge found the requested hourly rate of $285 to be appropriate and reasonable. Order at 4-5. He reasoned that a "certain degree of expertise" was needed as the case included "several complex issues," and that the rate is comparable to the rates of the Baltimore-area attorneys who perform similar work and provided letters concerning their rates. The administrative law judge rejected employer's assertion that counsel's failure to provide evidence of the rate he charges "paying clients" defeats the claimed rate, relying on the decision of the United States Court of Appeals for the Fourth Circuit in *Cox*, 602 F.3d 276, 24 BLR 2-269, that a "variety of sources" may establish the "market rate," including fees received in the past, fees of other attorneys, and fees awarded in other administrative proceedings. Order at 5. Considering the factors in the

regulation and the Act, 33 U.S.C. §928; 20 C.F.R. §702.132, and the evidence submitted, the administrative law judge concluded that $285 per hour "is warranted[.]" The administrative law judge denied all of employer's specific objections, approved the number of hours requested, and awarded the requested fee of $14,877, plus the requested costs of $1,027.28, for a total of $15,904.28. Order at 9. Employer appeals the administrative law judge's denial of its motion for discovery and his fee award.[1]

Employer contends the administrative law judge erred in refusing its request for discovery, thereby violating its due process rights, and in ignoring its rate evidence. Employer also argues that a proper fee application includes an attorney's "normal rate," 20 C.F.R. §702.132(a), and that the administrative law judge erred in failing to require counsel to provide his normal rate or the rate his paying clients pay. Moreover, it argues, the administrative law judge merely accepted the rate counsel wished to obtain and did not actually find that such a rate was the "prevailing rate" in the community.

The relevant community in this case is Baltimore, Maryland. The Fourth Circuit stated in *Cox* that the applicant for a fee has the burden of establishing a reasonable rate and that the administrative law judge has broad discretion in awarding the fee but may not abuse his discretion by awarding a fee absent any evidence to support the awarded hourly rate. The court stated that the fee applicant must "produce satisfactory specific evidence of the prevailing market rates in the relevant community for the type of work for which he seeks an award" and "the market rate should be determined by evidence of what attorneys earn from paying clients for similar services in similar circumstances, which, of course, may include evidence of what the plaintiff's attorney actually charged his client." *Cox*, 602 F.3d at 289 (quoting *Depaoli v. Vacation Sales Assocs., L.L.C.*, 489 F.3d 615, 622 (4th Cir. 2007), and *Plyler v. Evatt*, 902 F.2d 273, 277 (4th Cir. 1990)). The Fourth Circuit "recognized a range of sources" that could provide evidence to support an hourly rate finding: 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 3) evidence of rates awarded in other administrative proceedings of similar complexity. *Cox*, 602 F.3d at 289-290 (citing *Robinson v. Equifax Information Services, L.L.C.*, 560 F.3d 235, 245 (4th Cir. 2009)); *see also Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010).

[1]With regard to the fee awarded, employer's arguments are limited to the hourly rate issue; it does not appeal the administrative law judge's findings as to the hours approved. Therefore, the number of hours for which a fee was awarded is affirmed. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

We reject employer's contention that the administrative law judge erred in denying its motion for discovery. The administrative law judge properly relied on the Supreme Court's admonition that fee requests should not result in second major litigations. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); Order Denying Motion at 2. Moreover, he correctly stated that, when a fee request is submitted, due process requires only that the employer be served with the fee request and be granted a reasonable time to respond to it. *Todd Shipyards Corp. v. Director, OWCP [Hilton]*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); 20 C.F.R. §702.132. As both parties submitted evidence of market rates that complied with the evidence the Fourth Circuit has deemed sufficient, employer has not established error or an abuse of discretion in the denial of its request to depose counsel's affiants. *See generally Carter v. General Elevator Co.*, 14 BRBS 90 (1981).

Employer also contends that counsel's fee petition was incomplete and should have been denied in its entirety because counsel did not identify his "normal billing rate" pursuant to 20 C.F.R. §702.132(a). We reject the contention that this omission defeats counsel's fee petition in this case. Counsel provided to the administrative law judge sufficient evidence of a prevailing market rate. *Cox*, 602 F.3d 276, 24 BLR 2-269; *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004). In this regard, we also reject employer's assertions that the administrative law judge erred in failing to address its hourly rate evidence, in failing to make a specific prevailing rate finding, and in failing to find that $285 per hour exceeds the prevailing market rate.

In support of his requested hourly rate of $285, counsel submitted letters from three Baltimore attorneys in three different law firms whose practice includes longshore work, stating that their hourly rates as of July 2010 were $275 and $280, with one contemplating raising his to $285. Employer presented fee petitions in two other Baltimore longshore cases, wherein the attorneys requested $200 and $225 per hour for work performed in 2009 and 2010. The administrative law judge acknowledged employer's evidence. *See* Order at 3. Nevertheless, he found that counsel's requested hourly rate was supported by the evidence counsel submitted. The administrative law judge relied on the Fourth Circuit's statements that evidence of the prevailing rate may come from a variety of sources, and he found that the requested rate was comparable to those of other attorneys in the community. After assessing relevant factors and finding that the rate counsel receives from paying clients would not be dispositive in his assessment of an appropriate rate, the administrative law judge determined that "a $285 per hour rate is warranted in this case for [counsel's] services." Order at 5; *see also Cox*, 602 F.3d 276, 24 BLR 2-269; 20 C.F.R. §702.132.

The administrative law judge has broad discretion in assessing the factors relevant to awarding a fee. As there is evidence to support his decision, employer has shown no abuse of that discretion, and we affirm the administrative law judge's finding that an hourly rate of $285 is reasonable for counsel in this case. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); 20 C.F.R. §702.132. Therefore we affirm the administrative law judge's award of an attorney's fee of $14,877, representing 52.2 hours of work at an hourly rate of $285, plus $1,027.28 in expenses, for a total of $15,904.28.

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board between February 1 and March 11, 2011, in the case on the merits. BRB No. 11-0220. He requests a fee of $5,486.25, representing 19.25 hours of work at an hourly rate of $285. Counsel has submitted to the Board the same hourly rate evidence as he did to the administrative law judge. Employer has filed objections to the hourly rate as well as to the hours requested. We find that counsel's evidence is sufficient to support his request for an hourly rate of $285, as that rate is comparable to the rates requested by colleagues in Baltimore. We reject employer's assertions that we should permit discovery of the normal billing rate and that its hourly rate evidence should be given greater weight than the letters submitted by counsel.[2] *Hensley*, 461 U.S. 424. Accordingly, we find that an hourly rate of $285 is reasonable for counsel in this case. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); 20 C.F.R. §802.203(d)(4).

Employer also objects to the number of hours requested, arguing that they are excessive and should be reduced. As that objection pertains to the time spent on claimant's response brief, we agree. Counsel requested 17.3 hours for the preparation of claimant's response brief. This time includes 4.5 hours for preparing and drafting the brief, 3.75 hours for re-drafting the argument portion, 3.5 hours for drafting the brief, 3.8 hours for researching relevant case law, and 1.75 hours for reviewing the brief to be submitted. A comparison of claimant's post-hearing brief to the administrative law judge and his brief to the Board on appeal reveals that only five of the thirteen pages to the Board are "new," with only one different case citation. Consequently, we conclude that the 17.3 hours claimed for preparing claimant's brief is excessive in this case. We reduce the time to 8.7 hours, as we conclude that is a reasonable time commensurate with the

[2]However, counsel is reminded that the regulations require that a complete fee petition include "the normal billing rate" for all individuals providing the claimant's legal services. 20 C.F.R. §802.203(d)(4); *see also Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010) (failure to identify normal billing rate and to submit sufficient evidence of market rate required remand to correct defect); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010); *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010).

work performed. *See generally Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982). We reject the remainder of employer's arguments and approve an attorney's fee for 10.65 hours of work performed before the Board.[3]

Accordingly, the administrative law judge's Order Denying Employer's Motion to Take Discovery and Granting Claimant's Motion to Quash Discovery and Order Awarding Attorney Fees fee award are affirmed. BRB No. 11-0791. Claimant's counsel is awarded an attorney's fee for work performed in BRB No. 11-0220 in the amount of $3,035.25, representing 10.65 hours of work at an hourly rate of $285, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[3]We acknowledge the discrepancy employer raised regarding the entry on March 11, 2011. The fee approved herein is based on the petition received by the Board which included a request for .2 hour on that date as opposed to the conflicting versions received by employer, one of which requested .25 hour on that date.