

SCOTT O. RAMSEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CASCADE GENERAL, INCORPORATED /	)	DATE ISSUED: 08/29/2012
VIGOR INDUSTRIAL, L.L.C.	)	
	)	
and	)	
	)	
AIG CLAIM SERVICES / CHARTIS	)	
INSURANCE	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

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

Meagan A. Flynn (Preston Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

Stephen E. Verotsky (Sather, Byerly & Holloway LLP), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2009-LHC-01819) 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. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5<sup>th</sup> Cir. 1999).

Claimant sought compensation under the Act for a right ankle injury that he suffered on September 5, 2007, while working for employer. The parties stipulated that claimant is temporarily totally disabled. The only issues before the administrative law judge were average weekly wage and the recoupment of any overpayment of benefits. The administrative law judge rejected both parties' theories as to how to calculate claimant's average weekly wage and awarded benefits based on an alternative method which she deemed to be the most fair and accurate. She also found there had been an overpayment of benefits and determined that an incremental recovery of the overpayment was appropriate. Decision and Order at 13, 17.

Thereafter, claimant's counsel filed an application for attorney fees and costs for work performed before the administrative law judge between August 25, 2009, and May 26, 2011. Counsel requested a fee of \$10,770.25, representing 17 hours of work at \$392 per hour (\$6,664.00) for services rendered by Mr. Preston, 10.5 hours of work at \$375 per hour (\$3,937.50) for services rendered by Ms. Flynn, and 1.125 hours of legal assistant work at \$150 per hour (\$168.75). Counsel also asked to be reimbursed for \$223.18 in costs. Employer filed objections to the fee petition, disputing only the hourly rates requested. Counsel filed a reply and sought an additional \$490, representing 1.25 hours of Mr. Preston's time at \$392 per hour, for filing the reply. The administrative law judge reduced the requested hourly rates to \$331.20 for work performed by Mr. Preston and to \$310.50 for work performed by Ms. Flynn; however, she awarded all the hours requested as well as the requested \$150 per hour for legal assistant services and \$223.18 in costs. The administrative law judge awarded counsel a total fee of \$9,696.28.

On appeal, claimant contends the administrative law judge erred in calculating the hourly rates by including workers' compensation rates and factoring in the simplicity of the case and the limited success of counsel's arguments. Employer responds, urging affirmance. Claimant filed a reply brief.

The administrative law judge found that the "relevant community" in this case is the city of Portland, Oregon. Order at 3; *see Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9<sup>th</sup> Cir. 2009). She also found, in accordance with the Board's decision on reconsideration in *Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39 (2010), *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F. App'x 912 (9<sup>th</sup> Cir. 2011), that rates for workers' compensation attorneys practicing in Oregon should not be included in the hourly rate calculation because fees in many categories of Oregon workers' compensation disputes are capped by statute. Order at 5. The administrative law judge next addressed the evidence submitted by counsel in support of the requested hourly rates of \$392 for Mr. Preston and \$375 for Ms. Flynn. Rejecting the evidence submitted by

counsel because it included contingency fees and incomparable areas of practice, the administrative law judge determined that counsel failed to establish their market rates and that she must estimate the value of their services in the Portland, Oregon, market. Order at 3, 8. The administrative law judge relied on a fee award by Administrative Law Judge Etchingham in another case, *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.), in which Judge Etchingham relied on data from the 2007 edition of *The Survey of Law Firm Economics* (Altman Weil Survey) to establish a proxy market rate, which was based on skills similar to those used in longshore claims as well as factors specific to the attorney, such as his years of experience, geographic location, and overall ability.<sup>1</sup> Order at 8. The administrative law judge found these categories to be appropriate for calculating a market rate in this case.<sup>2</sup> *Id.*

Further, the administrative law judge found that fees at the 95<sup>th</sup> percentile were not warranted given that she rejected counsel's theories for calculating claimant's average weekly wage in this case. *Id.* at 11. She stated she would place counsel at about the 75<sup>th</sup> percentile and she arrived at an hourly rate of \$320 for Mr. Preston's services based on averages of the rates in the Altman Weil Survey, the Oregon Bar Survey and the average hourly rate for all Portland attorneys with 21-30 years of experience, regardless of practice area. The administrative law judge observed that this rate is about the same rate as the 75<sup>th</sup> percentile rate reported by the Altman Weil Survey for attorneys with the same experience and similar practice but is \$17 higher than the rate reported for Portland attorneys. *Id.* at 11. Using much the same analysis, the administrative law judge determined that an hourly rate of \$300 is appropriate for Ms. Flynn. Because the hourly rates reported by the surveys were based on 2007 data, the administrative law judge used Bureau of Labor Statistics figures to adjust the base rates upward. Thus, the administrative law judge found that Mr. Preston's hourly rate for work performed in

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<sup>1</sup>In *DiBartolomeo*, Judge Etchingham averaged the hourly rates provided in the Altman Weil Survey for attorneys who practice in the areas of employment, maritime, personal injury, and workers' compensation law, and the hourly rate charged by lawyers with similar years of experience. He then adjusted the average rate derived from this data to the upper quartile rate to account for counsel's expertise, and further adjusted the 2007 rate upward based on 2008 increases in attorney salaries.

<sup>2</sup>The administrative law judge found that nationwide workers' compensation rates should be included despite her finding that the cap placed on fees in Oregon workers' compensation cases precludes consideration of those attorney fee rates since Longshore attorney fees are not capped. The administrative law judge explained that there is no indication that workers' compensation rates are capped across the country. Order at 8.

2009-2010 should be \$331.20, and Ms. Flynn's hourly rate for work in the same time period should be \$310.50. Order at 13.

Counsel asserts that the administrative law judge erred in including nationwide workers' compensation rates in the calculation of the market rates for Mr. Preston and Ms. Flynn. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that a "reasonable" hourly rate must reflect the rate: (1) that prevails in the "community" (2) for "similar" services (3) by an attorney of "reasonably comparable skill, experience, and reputation." *Christensen*, 43 BRBS at 146. This applies to attorney's fee awards issued by administrative law judges and district directors as well as the Board. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9<sup>th</sup> Cir. 2009). Moreover, the administrative law judge is afforded considerable discretion in determining factors relevant to a market rate in a given case. *See generally Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4<sup>th</sup> Cir. 2009); *B&G Mining, Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6<sup>th</sup> Cir. 2008).

In this case, the administrative law judge very thoroughly analyzed the issue and determined that work under the Act is similar to practicing general workers' compensation law. As she found, there is no indication in the record that nationwide workers' compensation rates cannot fairly be deemed "market rates."<sup>3</sup> Contrary to counsel's assertion, the fact that rates received by workers' compensation attorneys may not themselves be market rates does not prevent them from being included in a market rate calculation under the Act. The administrative law judge explained that she agreed with Judge Etchingham's finding in *DiBartolomeo* that workers' compensation rates are relevant to the calculation of counsel's market rate because this category of work requires skills similar to those employed in longshore claims. As the rate counsel could receive for his skills in a similar practice area such as workers' compensation, even if not itself a market rate, could affect the rate counsel commands for those skills in an open market, the administrative law judge did not abuse her discretion in factoring such rates into her market rate calculation.

Counsel additionally asserts that the administrative law judge improperly reduced the rate requested for attorney services on the basis of the lack of complexity and limited success. Specifically, counsel asserts the administrative law judge erroneously calculated Mr. Preston's market rate using average rates earned by attorneys in the 75<sup>th</sup> percentile,

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<sup>3</sup>Counsel attached to his brief on appeal a survey of laws on fees in workers' compensation cases from 40 states. This survey was not before the administrative law judge and may not be considered by the Board. 20 C.F.R. §802.301(b).

rather than the average rates earned in the 95<sup>th</sup> percentile. In finding that counsel was entitled to a market rate based on average rates at the 75<sup>th</sup> percentile, the administrative law judge stated:

In determining the appropriate market rate for Mr. Preston, I must also consider the other factors mandated by the regulations including the complexity of the case, the quality of the representation, and the benefits that were obtained. This case was a simple one. The major issue was how to compute the [c]laimant's average weekly wage at the time of his injury. I have already mentioned that I rejected both of Mr. Preston's theories for calculating the [c]laimant's average weekly wage. After weighing all these factors, I would place Mr. Preston at about the 75<sup>th</sup> percentile, but not certainly at the 90<sup>th</sup> or 95<sup>th</sup> percentile for fee rates.

Order at 11. In determining which data to use in her market rate calculation, the administrative law judge concluded that the quality of counsel's work in this case did not warrant a fee based on a rate equivalent to the uppermost tier of attorneys given that the case was a simple average weekly wage calculation issue yet she rejected both methods of calculation offered by counsel. Consequently, the administrative law judge, as within her discretion, used the upper quartile rate because she assessed the quality of counsel's representation in this case and found it did not meet her expectations of an attorney in the top five percent of the profession. *Blum v. Stenson*, 465 U.S. 886, 898-899 (1984) (holding that counsel's skill should be reflected in the reasonableness of the hourly rates); 20 C.F.R. §702.132. As counsel has not shown that the administrative law judge abused her discretion, in awarding an attorney's fee based on rates of \$331.20 and \$310.50, we affirm the award. *See generally Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011).

Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge