BRB No. 14-0066

JAMES P. BRAUTIGAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Aug. 15, 2014
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Robert J. Quigley, Jr. (McKenney, Quigley, Izzo & Clarkin, LLP), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (2013-LHC-01658) of Administrative Law Judge Daniel F. Sutton 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Following the issuance of a decision granting claimant's unopposed motion for summary decision and awarding claimant medical benefits for lung cancer and

pulmonary fibrosis,[1] claimant's counsel filed a petition with the administrative law judge for an attorney's fee for work performed before the Office of Administrative Law Judges from June 17 to September 27, 2013. Specifically, counsel sought a fee of $4,506.25, representing 9 hours of attorney services by Stephen C. Embry; .75 of an hour of attorney services by David N. Neusner; .25 of an hour of attorney services by Melissa Riley; and .25 of an hour of attorney services by Amity L. Arscott, all at an hourly rate of $395; .75 of an hour of paralegal services at an hourly rate of $110; and 3.75 hours of paralegal services at an hourly rate of $100. Employer filed objections to the hourly rates requested in the fee petition.

In his fee order, the administrative law judge awarded the requested hourly rate of $395 for Mr. Embry and Mr. Neusner. He reduced the hourly for Ms. Riley to $350 and for Ms. Arscott to $260. He awarded an hourly rate of $100 for all paralegal services. Thus, the administrative law judge awarded claimant's counsel a fee of $4,453.75, payable by employer.

On appeal, employer challenges the administrative law judge's finding that $395 is the "current maximum prevailing market rate" in Connecticut for attorney services provided under the Act. Employer contends that the evidence submitted by claimant's counsel is insufficient to establish an increase in the previously established maximum prevailing market rate of $325 per hour. Claimant responds, urging affirmance.

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.[2] *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

[1] Claimant worked for employer until 1979 when he became disabled due to work-related back injuries, for which he was awarded compensation for permanent total disability. *See* 33 U.S.C. §908(a).

[2] A "reasonable attorney's fee" is calculated in the same manner in all federal fee-shifting statutes, including the Longshore Act. *See City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 227 n.8, 43 BRBS 67, 70 n.8(CRT) (4th Cir. 2009); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1054, 43 BRBS 6, 8-9(CRT) (9th Cir. 2009); *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657, 662 (6th Cir. 2008); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 159 (2009).

"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 falls 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); *see also Blum*, 465 U.S. at 896 n.11; *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1053, 43 BRBS 6, 8(CRT) (9th Cir. 2009); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010).

In his supplemental decision, the administrative law judge addressed the fee award in *Davis v. Electric Boat Corp.*, 2009-LHC-01268 (Jan. 3, 2011), wherein Administrative Law Judge Calianos determined that the highest market rate for longshore litigation in Connecticut was $325 per hour, and claimant's contention that the *Davis* maximum rate is no longer valid due to the passage of time. Supplemental Decision and Order at 3. The administrative law judge stated that counsel submitted much of the same evidence that was submitted in *Davis*, and he found that resubmission of this evidence three years later does not provide a basis for a different result. *Id*. at 3-4. The administrative law judge found that the decision in *Serricchio v. Wachovia Securities, LLC*, 706 F.Supp. 2d 237 (D.Conn. 2010) "provides helpful, though not dispositive, guidance in determining the prevailing market rate"[3] *Id*. at 5. The administrative law judge found, however, that an employment discrimination case is not fully comparable to a workers' compensation case, such that the rates awarded in *Serricchio* are not directly applicable to the current case. Relying on the Board's fee award in *Kelly v. Electric Boat Corp.*, BRB Nos. 12-0518/A (Jul. 30, 2013) (unpub. Order), the administrative law judge found that $395 is the current maximum prevailing market rate for an attorney and $100 is the current reasonable rate for paralegal services in Connecticut. The administrative law judge found that Mr. Embry and Mr. Neusner are entitled to a fee based on this rate as they are both recognized as highly successful and experienced experts in longshore litigation. The administrative law judge found that Ms. Riley is entitled to a fee based on an hourly rate

[3] In *Serricchio*, the district court awarded attorney's fees based on an hourly rate of $465 for the plaintiff's lead attorney, $410 for a junior partner, $300 for a senior associate, and $130 for a paralegal in a case arising under the Uniformed Services Employment and Reemployment Act. The district court noted that the United States Court of Appeals for the Second Circuit has rejected a historical approach to fee determinations because recycling rates awarded in prior cases may not reflect the current prevailing market rate. *Serricchio*, 706 F.Supp. 2d at 253 (*citing Farbotko v. Clinton County of New York*, 433 F.3d 204, 208-209 (2d Cir. 2005)).

of $350 due to her 18 years of experience and level of competence and success and that Ms. Arscott is entitled to a fee based on an hourly rate of $260.[4]

The services in the *Davis* case were performed in 2009; in this case, they were performed before the administrative law judge in 2013. Given this four years' passage of time, the administrative law judge's rationally found that mere recycling of previously awarded rates may fail to reflect market conditions. *Serricchio*, 706 F.Supp. 2d at 253; *see also Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT) (hourly rates should be periodically updated to reflect current market conditions).

However, the administrative law judge's reliance on the Board's Order in *Kelly* to find that counsel established their entitlement to an hourly rate of $395 cannot be affirmed. In *Kelly*, the Board noted that counsel requested an hourly rate of $395, but the Board did not address whether such a rate is a prevailing market rate in Connecticut. As the liable carrier did not respond to counsel's fee petition, the Board merely found that the overall fee of $2,051.25 that counsel sought for 4.75 hours of attorney services and 1.75 hours of paralegal services was "reasonably commensurate with the necessary work done in these appeals." *Kelly*, slip op. at 1. The Board's granting of an unopposed fee petition does not constitute evidence of the prevailing market rate in Connecticut. Therefore, we vacate the administrative law judge's finding that $395 is the prevailing maximum market rate for attorney services in Connecticut, and we remand the case for the administrative law judge to determine the appropriate hourly rates for claimant's counsel.

It is claimant's counsel's burden to submit satisfactory specific evidence of the prevailing market rates in the relevant community. *See Eastern Associated Coal Corp. v. Director, OWCP*, 724 F.3d 561 (4th Cir. 2013); *Stanhope*, 44 BRBS 107. In this case, the administrative law judge did not abuse his discretion in finding that exhibits that counsel had also submitted in *Davis* do not support an increase in the prevailing rate. Supplemental Decision and Order at 4; *see Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). However, counsel's exhibits include more recent affidavits from Mr. Embry and Mr. Neusner attesting to their qualifications and stating that their hourly rate is $395. *See Jeffboat, LLC v. Director, OWCP* [*Furrow*], 553 F.3d 487, 42 BRBS 65(CRT) (7th Cir. 2009); *see also Christensen*, 557 F.3d at 1053-1054, 43 BRBS at 8(CRT); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009). On remand, the administrative law judge should address this evidence. In addition, the administrative law judge may, within his

[4] The administrative law judge derived these hourly rates by taking the percentage reduction from the ceiling rate of $465 in *Serricchio* allowed for a junior partner and associate of 88 percent and 65 percent respectively and applying these percentages to Ms. Riley and Ms. Arscott.

discretion, allow counsel an opportunity to submit additional market evidence supporting the requested hourly rate of $395, or apply a standardized adjustment to the *Davis* rate of $325 to account for increases in the cost of living. *See Stanhope*, 44 BRBS 107; *Christensen v. Stevedoring Services of America, Inc.*, 44 BRBS 39 (2010), *modifying in part on recon.* 43 BRBS 145 (2009), *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).

Accordingly, we vacate the hourly rates awarded by the administrative law judge and remand the case for further proceedings in accordance with this opinion. In all other respects, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge