



BRB No. 16-0519

MARTIN V. NELSON)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: <u>Aug. 10, 2017</u>
)	
ICTSI OREGON, INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
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.

Richard A. Nielsen (Nielsen Shields, PLLC), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2014-LHC-00748, 00749) of Administrative Law Judge Richard M. Clark rendered on claims 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 issuance of a Decision and Order awarding claimant compensation benefits under the Act based on the parties' stipulations, claimant's counsel filed a petition for an attorney's fee for work performed before the administrative law judge. Counsel requested a fee totaling \$21,449.42, representing 46.6 hours of attorney time at an hourly rate of \$425, 1.5 hours of attorney time at an hourly rate of \$225, 2.5 hours of attorney time and 1.7 hours of paralegal time both at an hourly rate of \$165, 1 hour of legal assistant time at an hourly rate of \$110, and \$503.92 in costs. Employer filed objections to the hourly rates claimed. Counsel filed a reply to employer's objections, along with a request for an additional attorney's fee.

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 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 adjusted this 2011 market proxy 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 a proxy market rate of \$195.67 per hour for 2011 for counsel's more experienced associate, which he adjusted to \$210.10 in 2014. For counsel's second associate, the administrative law judge determined that a rate of \$150 per hour "for a newly minted attorney with no particular achievements or specialization appears appropriate based on the 2012 [OBS]," Attorney Fee Order at 6, which he adjusted to \$161.06 for 2014. The administrative law judge awarded a rate of \$150 for the paralegal's work and \$100 for the legal assistant's work. The administrative law judge awarded the claimed costs of \$503.92. The administrative law judge awarded counsel a fee and costs totaling \$18,228.76, payable by employer.

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

Counsel's hourly rate contentions are the same as those raised and addressed by the Board in its initial decision and order denying reconsideration in *Ayers v. Jones Stevedoring Co.*, BRB No. 16-0520 (Apr. 24, 2017), *recon. denied* (Aug. 4, 2017) (unpub.). In *Ayers*, the Board affirmed the administrative law judge's proxy hourly rates

based on the 2012 OBS,¹ 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*, 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.

Counsel further contends the administrative law judge erred by awarding only one of the two hours he sought for preparing his reply to employer's objections. *See Attorney Fee Order* at 6 n.6 (awarding a fee for one hour for counsel's reply brief). We reject counsel's contention. His reply brief to the administrative law judge requests "1.00 hour at \$425 per hour to reply to the carrier's objections." Reply to Objections to Attorney Fees at 3. Counsel's fee petition itemizes two hours, but states that as the fee objections to the administrative law judge and the district director were identical, "I am requesting one hour before the ALJ for an additional \$425." Declaration of Attorney Fees (June 15, 2015) at 1. As counsel requested a fee for only one hour and received what he requested, his claim to a fee for an additional hour is without merit.

¹ The Board stated in its initial decision 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*, 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 Attorney Fee Order is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge