



BRB No. 16-0520

MICHAEL S. AYERS)	
)	
Claimant-Petitioner)	
)	DATE ISSUED: <u>Aug. 4, 2017</u>
v.)	
)	
JONES STEVEDORING COMPANY)	
)	
Self-Insured)	ORDER on MOTION for
Employer-Respondent)	RECONSIDERATION

Claimant’s counsel has filed a timely motion for reconsideration of the Board’s April 24, 2017 Decision and Order in the captioned case, *Ayers v. Jones Stevedoring Company*, BRB No. 16-0520 (Apr. 24, 2017) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer responds, urging rejection of counsel’s motion. Counsel has filed a reply brief. We deny the motion for reconsideration and affirm the Board’s decision.¹

In his motion for reconsideration, counsel asserts that the Board erred by rejecting his specific contentions and in affirming the hourly rates awarded by the administrative law judge. We reject counsel’s assertions of error. First, contrary to counsel’s contentions, the administrative law judge did not refuse to consider counsel’s significant experience in setting the proxy market rate, *Ayers*, slip op. at 3; *see also* Attorney Fee

¹Counsel has filed a motion that the Board take judicial notice of the hourly rates awarded in two recent administrative law judge decisions. Employer opposes this motion. Counsel’s motion is disingenuous for two reasons. First, counsel has appealed both decisions and specifically challenges the hourly rate awarded in *Ochoa* (the brief has not yet been filed in *Seachris*). Second, in the *Ochoa* appeal, claimant moved to strike employer’s appending the administrative law judges’ decisions in *Seachris* and this case, *Ayers*, as support for employer’s contention. *See Ochoa v. Jones Stevedoring Co.*, BRB No. 17-0085 (July 28, 2017). The parties cannot have it both ways. Moreover, it is inappropriate to offer these decisions as factual, i.e., “evidentiary,” support for the contention that the administrative law judge erred. Thus, we deny counsel’s motion.

Order at 12, nor did he commit any error in rejecting the rates awarded counsel for appellate work as evidence supporting counsel's requested hourly rate for work before the Office of Administrative Law Judges. *Ayers*, slip op. at 3-4; *see also* Attorney Fee Order at 8. Second, since counsel did not, on appeal, challenge the practice areas chosen by the administrative law judge to set counsel's hourly rate, we will not address that contention on reconsideration. *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002) (issues not raised on appeal cannot be raised for the first time in a motion for reconsideration). Third, the administrative law judge sufficiently explained his rationale for awarding counsel a fee based on the 75th percentile rates as documented by the Oregon Bar Survey, *see* Attorney Fee Order at 11-12, and counsel did not establish that the administrative law judge abused his discretion in this regard. *Ayers*, slip op. at 4. Moreover, counsel's contentions regarding the hourly rates awarded to his associate and paralegal by the administrative law judge have already been addressed and rejected. *Id.* at 4-5. Lastly, counsel has not shown that the administrative law judge's use of the Consumer Price Index-Urban for Portland-Salem, Oregon (CPI-U) to adjust the base hourly rate for attorney work in 2011 for inflation is unreasonable.² *See* Attorney Fee Order at 13; *Ayers*, slip op. at 5.

²Counsel, himself, has previously advocated using either the National Average Weekly Wage or the CPI-U to adjust his hourly rates for inflation. *See Petitt v. Sause Bros.*, BRB No. 13-0330 (Feb. 26, 2014) (unpub.). Furthermore, there was no reason for the administrative law judge to "update the fees to June 1, 2016," M/R Brief at 7, as no work was performed by counsel or his associate in 2016, nor did counsel request before the administrative law judge an enhancement of the hourly rate due to delay in payment of the fee. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).

Accordingly, counsel's motion for reconsideration is denied. 20 C.F.R. §802.409.
The Board's Decision and Order is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge