

VICTOR NASSER)	
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Claimant-Petitioner)	
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v.)	
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L-3 COMMUNICATIONS)	DATE ISSUED: 12/18/2012
)	
and)	
)	
AIG WORLDSOURCE)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order on Remand Concerning Attorney’s Fees and the Order Denying Motion for Reconsideration of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants’ National Law Center), Washington, D.C., and Eric A. Dupree and Paul R. Myers (Dupree Law, APLC), San Diego, California, for claimant.

Stephanie Seaman Brown (Laughlin, Falbo, Levy & Moresi LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order on Remand Concerning Attorney’s Fees and the Order Denying Motion for Reconsideration (2006-LDA-00150) of Administrative Law Judge Russell D. Pulver 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 Marcum v. Director, OWCP*, 12 BRBS 355 (1980).

This case has been before the Board previously. Claimant filed a claim for compensation and medical benefits under the Act, alleging he sustained a compensable back injury while working for employer in Iraq on May 10, 2005. The parties agreed to settle this claim for \$30,000, and, following the administrative law judge's issuance of an Order Approving Settlement, claimant's counsel filed a fee petition for work performed before the administrative law judge. Specifically, claimant's lead counsel requested an attorney's fee totaling \$12,525, representing 24.3 hours of work at an hourly rate of \$350, 18.4 hours of work performed by an associate attorney at an hourly rate of \$175, 8 hours of paralegal work at an hourly rate of \$100, and \$481.31 in costs. Employer responded, objecting to the fee request, and claimant's counsel replied. In a Fee Award Order dated January 30, 2008, the administrative law judge reduced the hourly rate requested by lead counsel to \$285, reduced some itemized entries, and awarded a fee totaling \$10,868.81.

Claimant's counsel then filed a supplemental petition requesting a fee for time spent defending his initial fee petition; specifically, counsel sought a fee totaling \$49,243, representing 106 hours of attorney work at an hourly rate of \$400, 1.3 hours of work performed by outside counsel at \$435 per hour, 29.4 hours of associate work at \$200 per hour, and costs of \$397.50. In his Order Awarding Supplemental Attorney's Fees dated March 24, 2008, the administrative law judge awarded counsel an additional fee of \$1,271.75, representing 2.05 hours of attorney work at an hourly rate of \$285, 2 hours of attorney work at \$175 per hour, and costs of \$337.50.

Claimant appealed the administrative law judge's Attorney Fee Order and Order Awarding Supplemental Attorney's Fees to the Board, challenging the hourly rates awarded to claimant's counsel and the number of hours the administrative law judge found compensable for defending counsel's fee petition. In a Decision and Order issued January 30, 2009, the Board affirmed both of the administrative law judge's fee awards in their entirety. *V.N. [Nasser] v. Titan Corp.*, BRB No. 08-0357 (Jan. 30, 2009) (unpub.).

Claimant appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit which, on April 26, 2010, vacated the Board's decision and remanded the case to the administrative law judge for reconsideration of counsel's fee request in light of the then recent decisions in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). *Nasser v. Director, OWCP*, 377 F.App'x 650 (9th Cir. 2010). On remand to the administrative law judge, claimant's counsel submitted additional evidence in support of his request for an hourly rate higher than that previously awarded. Counsel also submitted a second supplemental fee petition requesting an additional fee totaling \$3,852, representing 2.3 hours of services at \$450 per hour, 11 hours of services at \$250 per hour, and \$67 in costs.

In his Order on Remand, the administrative law judge found that the documentation submitted by the parties in support of their respective positions regarding claimant's counsel's hourly rate were "plagued by inaccuracies." Order on Remand at 11. The administrative law judge concluded that, taking into account the evidence before him, lead counsel is entitled to a fee based on an hourly rate of \$340. *Id.* The administrative law judge disallowed 88.55 hours sought by lead counsel in his supplemental fee request, denied the 1.3 hours sought by outside counsel, and awarded claimant's associate counsel the 29.4 hours requested at an hourly rate of \$200. *Id.* at 11-13. Lastly, with regard to the services rendered by counsel on remand, the administrative law judge awarded counsel the hours requested but reduced the hourly rates to \$340 for lead counsel and to \$200 for associate counsel. *Id.* at 13. In sum, claimant's counsel was awarded an attorney's fee totaling \$26,502.50, representing 43.75 hours of services at \$340 per hour, 40.4 hours of services at \$200 per hour, and 16.9 hours of services at \$175 per hour, 5.9 hours of paralegal services at \$100 per hour, and costs totaling \$885.81. The administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant challenges the hourly rate awarded to his lead counsel by the administrative law judge, averring that the administrative law judge failed to adequately address the documentation counsel presented in support of his requested hourly rate. Claimant additionally contends that the administrative law judge erred in reducing the number of hours requested by counsel for defending his fee petition by 83.5 percent. Employer responds, urging affirmance of the administrative law judge's fee awards. Claimant has filed a reply brief.

In support of his request for an hourly rate of \$350 for services documented in his initial fee petition, \$400 per hour for services documented in his supplemental fee petition, and \$450 per hour for services documented in his second supplemental fee petition, claimant's counsel submitted to the administrative law judge fee surveys as well as declarations from other attorneys familiar with his work. In his Order, the administrative law judge stated that San Diego is the relevant community for determining counsel's market rate, and that, based upon his years of experience and quality representation in longshore cases, claimant's lead counsel should be considered "in the average to upper quartile range" of attorneys. Order on Remand at 9. The administrative law judge extensively discussed the data submitted by the parties, but, for various reasons, found the evidence insufficient to support counsel's request for rates of \$350 to \$450. The administrative law judge concluded that "taking everything into account, . . . an hourly rate of \$340 is appropriate for work performed by Claimant's counsel." *Id.* The administrative law judge applied this hourly rate to all of the services documented in counsel's fee petitions. *Id.* at 11, 13.

In remanding the case, the Ninth Circuit stated that, pursuant to *Christensen* and *Van Skike*, the administrative law judge was to determine a prevailing market rate for counsel's services. *Nasser*, 377 F. App'x at 652. The burden is on the fee applicant to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984)). Counsel's hourly rate should be calculated with reference to the prevailing market rates in the relevant community, and counsel should be awarded a fee commensurate with that which he "could obtain by taking other types of cases." *Christensen*, 557 F.3d at 1053-1054, 43 BRBS at 8(CRT) (quoting *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973 (9th Cir. 2008)).

We reject the contention that the administrative law judge did not award claimant's counsel a "market rate." The administrative law judge thoroughly discussed the market rate evidence submitted by the parties, and he gave detailed reasons for finding the evidence flawed with respect to defining a rate in San Diego. These findings are rational and within his discretion. *See, e.g., Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F.App'x 912 (9th Cir. 2011) (Board rejected evidence submitted to establish market rate). The administrative law judge therefore was not bound to accept counsel's claim to hourly rates ranging from \$350 to \$450. Moreover, the administrative law judge found that the data submitted support an upper quartile range of \$314 to \$375 per hour and he awarded counsel a rate midway between these figures. Order on Remand at 9, 11. Counsel has failed to establish that the administrative law judge's selection of this rate is arbitrary, capricious, not in accordance with law or based on an abuse of discretion. Therefore, we affirm the hourly rate awarded. *See generally Fox v. Vice*, 131 S.Ct. 2005, 2216 (2011); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).

Claimant next challenges the administrative law judge's decision to reduce to 17.45 hours the 106 hours sought by lead counsel in his supplemental fee petition for successfully defending his fee request, a 83.5 percent reduction. Specifically, claimant contends that there is no basis in law for the administrative law judge's statement that:

These hours were of benefit not only to this one particular claimant and his attorney but rather were of a far reaching benefit to [claimant's counsel] for all of his present and future clients and of course, to himself. Therefore, they should not be the sole responsibility of one employer.

Order on Remand at 12-13. We agree that the administrative law judge's reduction in the number of hours claimed cannot be reduced on this basis.¹

It is well-established that claimant's counsel is entitled to a fee for a reasonable amount of time for preparing his fee petition and responding to employer's objections if that work results in his establishing his entitlement to an attorney's fee award. *See, e.g., Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT); *Bogden v. Consolidation Coal Co.*, 44 BRBS 121 (2011) (en banc); *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982). There is no basis in law for reducing a fee request on the ground that the work will benefit counsel in other cases, and therefore the cost of that work should be borne by more than one employer. Rather, the only tests to be applied to the compensability of the attorney's work are whether the hours claimed are "reasonable" for the "necessary work done" in the case before the administrative law judge and the fee award is commensurate with the degree of success obtained. *See* 20 C.F.R. §702.132(a); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Thus, the administrative law judge may, within his discretionary authority, disallow a fee for hours found to be duplicative, excessive, or unnecessary, *see Tahara v. Matson Terminals, Inc.*, 511 F.3d 95, 41 BRBS 53(CRT) (9th Cir. 2007), or to reduce a fee where the request is not commensurate with the success obtained.² *See generally Farrar v. Hobby*, 506 U.S. 103 (1992); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001). Consequently, as the administrative law judge's rationale for reducing the number of hours requested by lead counsel is not accordance with law, we vacate the administrative law judge's disallowance of 88.55 hours. We remand the case to the administrative law judge to address the compensability of counsel's services consistent with applicable law. *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009).

¹We note that, although the administrative law judge reduced the fee request for lead counsel, he awarded associate counsel the full fee requested for his work denoted in the supplemental fee petitions.

²The administrative law judge correctly noted the Supreme Court's admonition in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), that "[a] request for attorney's fees should not result in a second major litigation." Order on Remand at 12.

Claimant additionally contends that the administrative law judge erred in disallowing the 1.3 hours of services requested by outside counsel. In this regard, the administrative law judge declined to hold employer liable for these hours on the basis that these services “inured to the mutual and rather self-serving interests of the counsel themselves.” Order on Remand at 13. We agree with claimant that the administrative law judge’s disallowance of these hours cannot be affirmed. There is nothing inherently objectionable to several attorneys participating in the litigation of a claim where the complexity of the case or other factors warrant it. *See generally Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff’d mem.*, 202 F.3d 259 (4th Cir. 1999) (table). Moreover, it is axiomatic that work performed in defense of a fee request is “self-serving” to the counsel performing that work; nevertheless, as discussed above, employer is liable for a reasonable fee for necessary work on issues relating to attorney’s fee petitions. We therefore vacate the administrative law judge’s disallowance of this time; on remand, the administrative law judge must address whether the services performed by outside counsel on May 15 and 16, 2007, were reasonable and necessary to counsel’s request for an attorney’s fee. *See generally O’Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000).

Accordingly, the administrative law judge’s disallowance of 88.55 hours of the hours sought by lead counsel in his supplemental fee petition, and the 1.3 hours of services performed by outside counsel, is vacated, and the case is remanded for further consideration in accordance with this decision. In all other respects, the administrative law judge’s Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge