



BRB No. 18-0238

ALFRED WAKELEY)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 12/20/2018
)	
KNUTSON TOWBOAT COMPANY)	
)	
and)	
)	
SAIF CORPORATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

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

Charles Robinowitz and Genavee Stokes-Avery (Law Office of Charles Robinowitz), Portland, Oregon, for claimant.

Michael J. Godfrey (Sather, Byerly & Holloway LLP), Portland, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order (2007-LHC-01749) 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, 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).

On February 25, 2013, claimant's counsel filed a petition for an attorney's fee for work performed before the Office of Administrative Law Judges (OALJ) in this case.¹ On February 22, 2017, counsel filed a second fee request, to which employer filed objections. Counsel filed an amended fee request, to which employer replied with revised objections. Ultimately, counsel requested a fee totaling \$82,752.86, representing 151.5 hours of lead attorney time at an hourly rate of \$466, 4.5 hours of associate attorney time at an hourly rate of \$225, 11.25 hours of paralegal time at an hourly rate of \$175, and \$9,172.61 in costs.²

In her Attorney Fee Order, the administrative law judge reduced the hourly rates for lead counsel and paralegal services and disallowed or reduced certain itemized entries. She awarded the claimed costs without a delay enhancement. Thus, she approved an attorney's fee and costs totaling \$54,979.83, payable by employer.³

Claimant's counsel appeals the administrative law judge's award of an attorney's fee and costs. Employer responds, urging affirmance. Claimant's counsel filed a reply brief.

Counsel first challenges the administrative law judge's hourly rate determinations. He contends the administrative law judge erred in rejecting all of his supporting evidence

¹ On August 19, 2009, the administrative law judge issued a Decision and Order Denying Benefits. On the appeal of both parties, the Board reversed the administrative law judge's decision and remanded the case to the administrative law judge for further consideration. *Wakeley v. Knutson Towboat Co.*, 44 BRBS 47 (2010). On remand, the administrative law judge issued a Decision and Order Awarding Benefits, which was affirmed by the Board. *Wakeley v. Knutson Towboat Co.*, BRB Nos. 13-0288/A (Dec. 19, 2013), *recon. denied* (Mar. 14, 2014) (unpub.). The Board's decisions were affirmed by the United States Court of Appeals for the Ninth Circuit. *Knutson Towboat Co. v. Wakeley*, 660 F. App'x 487 (9th Cir. 2016).

² Although counsel initially sought \$7,116.62 in costs, he subsequently enhanced that figure in April 2017 to account for the delay in payment of the costs.

³ The administrative law judge's award represents 145.1 hours of lead counsel time at \$365.29 per hour, 2.25 hours of associate attorney time at \$225 per hour, and 9.8 hours of paralegal time at \$150 per hour.

and that the proxy rate determination is arbitrary. Counsel also appeals the awarded paralegal rate.

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. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Blum v. Stenson*, 465 U.S. 886 (1984). It is well-established that an attorney’s reasonable hourly rate is “to be calculated according to the prevailing market rates in the relevant community.” *Blum*, 465 U.S. at 895. The burden is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015); *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); *see Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Blum*, 465 U.S. at 896 n.11.

As this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the determination of an appropriate hourly rate is guided by the court’s decision in *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT), which held that an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Id.*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT). The Ninth Circuit found that when, as here, the relevant market is identified as Portland, the results of the Oregon Bar Survey (OBS) may provide information on attorney fees specific to Portland. *Id.*

The administrative law judge fully addressed, and permissibly rejected, the evidence submitted by counsel in support of his requested hourly rate of \$466. Attorney Fee Order at 14-33. *See Christensen v. Stevedoring Services of America, Inc.*, 43 BRBS 145, 146 (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*, 455 F. App’x 912 (9th Cir. 2011). Citing her own decision in *Seachris v. Brady-Hamilton Stevedore Co.*, Case No. 2007-LHC-01747 (Jan. 19, 2017), *recon. denied* (Mar. 7, 2017),⁴ the

⁴ On claimant’s appeal, the Board modified the administrative law judge’s fee order in *Seachris* to reflect a 2016 hourly rate to claimant’s lead counsel of \$349.85; in all other respects, the Board affirmed the administrative law judge’s fee award. *Seachris v. Brady-Hamilton Stevedore Co.*, BRB No. 17-0581 (May 5, 2018) (unpub.), *appeal pending*, No. 18-71807 (9th Cir. 2018).

administrative law judge considered the 2012 OBS, relying on the weighted average of the documented rates for plaintiff civil litigation/personal injury, plaintiff civil litigation/non-personal injury, and plaintiff general civil litigation cases, to calculate a proxy market for counsel's services in this case. The administrative law judge found that counsel's 2011 proxy hourly rate based on the OBS was \$317.92, based on the 75th percentile for these practice areas, which she then adjusted for inflation to \$365.29 by using the increase in the Consumer Price Index-Urban for Portland-Salem, Oregon (CPI-U) for the period of 2011 through 2017. Attorney Fee Order at 29-33; *see Shirrod*, 809 F.3d at 1092, 49 BRBS at 98-99(CRT); *Christensen*, 44 BRBS at 40.

We reject counsel's contentions of error. The administrative law judge provided a thorough analysis of the market rate evidence under applicable law and a rational basis for her 2011 proxy market rate determination of \$317.92 per hour. *See Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT); *Christensen*, 44 BRBS at 40. As this rate represents a reasonable weighted average of the rates established by the 2012 OBS in the three practice areas the administrative law judge rationally found to be relevant, *see Shirrod*, 809 F.3d at 1092, 49 BRBS at 98-99(CRT); *Christensen*, 44 BRBS at 40, claimant's counsel has failed to establish that the administrative law judge abused her discretion. *See generally Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011); *Anderson v. Director, OWCP*, 91 F.2d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).⁵ Moreover, the administrative law judge permissibly used the increase in the CPI-U for the Portland area to adjust counsel's 2017 rate to \$365.29, which the administrative law judge applied to all services rendered by lead counsel. *See Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Christensen*, 43 BRBS 145. Therefore, we affirm the hourly rate awarded for lead counsel's services.

Counsel also challenges the administrative law judge's reduction of the paralegal hourly rate from \$175 to \$150. The administrative law judge awarded \$150 as she did in *Seachris*, finding that counsel did not present evidence that the market rate had increased to \$175. *See* Attorney Fee Order at 33. Counsel has failed to establish that the administrative law judge abused her discretion in awarding a rate of \$150 for paralegal

⁵ *See Nelson v. ICTSI Oregon, Inc.*, 743 F. App'x 120 (9th Cir. 2018), *aff'g* BRB No. 16-0517 (Aug. 18, 2017) (unpub.), wherein the court found no abuse of discretion in the administrative law judge's use of the 2012 OBS to calculate counsel's hourly rate and the placement of counsel at the 75th percentile rate. The court stated that the administrative law judge permissibly discounted counsel's evidence of commercial litigation rates. *See also Hardman v. Marine Terminals Corp.*, No. 17-73370, 2018 WL 6040665 (9th Cir. Nov. 19, 2018), *aff'g* BRB No. 17-0097 (Oct. 18, 2017) (unpub.).

work and we affirm this award. *See generally Fox*, 131 S.Ct. at 2216; *see also Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT).⁶

Counsel next contends the administrative law judge erred in reducing or disallowing some of the time claimed for responding to employer's objections to his fee petition. We disagree.

Counsel is entitled to recover a reasonable attorney's fee for the time spent preparing and defending a fee petition. *See Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). The test to determine the compensability of the attorney's work is whether the hours claimed are "reasonable" for the "necessary work done." *See* 20 C.F.R. §702.132(a). Thus, the administrative law judge may, within her discretion, disallow a fee for hours found to be duplicative, excessive, or unnecessary. *See Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); *Anderson*, 91 F.3d at 1325, 30 BRBS at 70(CRT). The administrative law judge disallowed six of the eight hours claimed for lead counsel's work for the preparation of the fee petition and 2.25 of the 4.5 hours claimed for associate counsel's work as excessive and redundant. Attorney Fee Order at 37-38. We affirm this discretionary determination. *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT).

Counsel finally contends that the administrative law judge erred in not augmenting for delay in payment the award of costs. Counsel initially sought reimbursement for costs in the amount of \$7,116.61. Counsel amended his request to \$9,172.61, with the increase reflecting an enhancement for the delay in reimbursement. The administrative law judge awarded the reimbursement of \$7,116.61, but denied the enhancement request. Attorney Fee Order at 39-41. On appeal, counsel cites two administrative law judge decisions awarding a delay enhancement on costs,⁷ and urges the Board to award claimant a delay enhancement such in this case.

⁶ *See also Nelson*, 743 F. App'x at 122.

⁷ In *Pennington v. Caicos Corp*, 34 BRBS 307(ALJ) (2000), an administrative law judge found, in her "judgment," that "it would be patently unfair to not enhance the costs award." Consequently, without citing any supporting precedent, the administrative law judge awarded interest on costs "due to the delay in payment."

In *M.K. v. Holmes & Narver, Inc.*, 43 BRBS 604(ALJ) (2009), an administrative law judge, citing *Pennington*, increased the costs sought by the sum of the increases in the National Average Weekly Wage as a "means to compensate for the delay."

We affirm the administrative law judge's award of costs as counsel has failed to establish his entitlement to augmented reimbursement. Other than the two administrative law judge decisions, counsel has not cited any law supportive of his contention. Moreover, the two cited cases themselves are devoid of any legal basis for the award of interest on costs. Consequently, counsel has failed to establish that the administrative law judge erred in denying his request for an amount above the actual costs incurred in this claim. *See Seachris v. Brady-Hamilton Stevedore Co.*, BRB No. 17-0581 (May 5, 2018) (unpub.), *appeal pending*, No. 18-71807 (9th Cir. 2018).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge