

BRB No. 11-0519

TIMMIE JORDAN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LAKE UNION DRYDOCK COMPANY)	
)	
and)	
)	
AMERICAN HOME ASSURANCE)	DATE ISSUED: 02/14/2012
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Order on Lay Representative Fees of R. Todd Bruininks, District Director, United States Department of Labor.

Bradley R. Marshall (Chartmans, Inc.), Charleston, South Carolina, for claimant.

Jonathan P. Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order on Lay Representative Fees of District Director R. Todd Bruininks 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).

Claimant injured his left wrist while working for employer. Employer voluntarily paid claimant benefits, and the parties subsequently settled the claim for an additional \$120,000, of which \$90,180 was paid to claimant, \$6,000 was set aside for future medical benefits, and \$29,820 was set aside for claimant's attorney's fee and/or for benefits to claimant depending on the amount of a fee approved by the district director. Of the \$29,820, claimant's representative received \$17,500 in advance of his filing a fee petition, and the remaining \$12,320 was held in escrow. Claimant's representative then filed two applications for a fee with the district director in order to receive the remaining funds. The district director disapproved various entries, ultimately approving 81.9 hours of the requested 118.4 hours of services and an hourly rate of \$150 instead of the requested \$300, as he determined that claimant's representative is a "lay representative."¹ Thus, the district director awarded claimant's representative a total fee of \$12,229.02, representing 81.9 hours at an hourly rate of \$150, plus \$6.02 in costs. As this amount was less than that which claimant's representative had already received under the settlement, the district director denied him the remaining amount being held in escrow and ordered that no party was to pay him any additional fee. The district director ordered the remaining amount to be paid to claimant as compensation.² Claimant's representative appeals the fee award. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the district director's fee award. Employer has not responded.

Claimant's representative contends he is entitled to the fee remaining in escrow, as he is an "attorney at law" under Section 28(a) of the Act, 33 U.S.C. §928(a). He argues that the State of Washington's disbarment of him is void *ab initio*, as the disbarment was in violation of bankruptcy law. The Director responds that the district director properly found claimant's representative to be a disbarred attorney without a state license to

¹The settlement agreement consistently identified claimant's representative as claimant's "designated representative."

²As claimant's representative filed an appeal of the district director's order, the \$12,320 remains in escrow until the case is resolved. Order at 4.

practice law during the entire period he represented claimant, citing *Todd Shipyards Corp. v. Director, OWCP [Hilton]*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976). Thus, she asserts, the district director properly found claimant's representative to be a lay representative who is not entitled to an attorney's hourly rate. In reply, claimant's representative asserts that he was authorized to practice before courts other than those in Washington while representing claimant.³ We reject the contentions of error and affirm the district director's Order.

Section 28(a) of the Act provides that an employer may be held liable for an attorney's fee if a claimant successfully prosecutes his claim after "utiliz[ing] the services of an attorney at law[.]" The United States Court of Appeals for the Ninth Circuit held in *Hilton* that "only licensed members of the practicing bar can fit within [the] definition" of "attorney at law" in Section 28(a), (b), 33 U.S.C. §928(a), (b). *Hilton*, 545 F.2d at 1181, 5 BRBS at 28. Contrary to claimant's representative's arguments, he is not an "attorney at law" within the meaning of the Act. The State of Washington granted claimant's representative a license to practice law, and the state disbarred him as of October 1, 2009. *In the Matter of the Disciplinary Proceeding against Marshall*, 167 Wash.2d 51, 217 P.3d 291 (Wash. 2009), *cert. denied*, 130 S.Ct. 3480 (2010). Moreover, the Ninth Circuit rejected his contention that the disbarment proceedings violated the bankruptcy law. *Marshall v. Washington State Bar Ass'n*, No. 10-35684 (9th Cir. Aug. 17, 2011).

Although claimant's representative argues that he should be considered an "attorney at law" because he was admitted to practice law before federal courts in Michigan and Colorado during the time he represented claimant, his argument fails. Claimant's representative obtained admission to appear before those courts based on his license in good standing in the State of Washington. Absent that license, he has no authority to appear before any court, as evidenced by the Order of Revocation issued by the United States District Court for the Eastern District of Michigan and the lack of evidence of a law license in good standing from any other United States locality. That

³With his reply brief, claimant's representative submitted a copy of a certificate permitting him to practice in the United States District Court for the District of Colorado, dated January 2001. Also attached, by supplemental motion, is a copy of an Order of Revocation, dated January 11, 2012, which references the State of Washington's 2009 disbarment and revokes claimant's representative's name from the list of attorneys permitted to practice law in either the United States District Court or the United States Bankruptcy Court for the Eastern District of Michigan. Although the Board does not accept new evidence, 20 C.F.R. §802.301, the attachments are relevant official court documents, and we take judicial notice of them. *See Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

the United States District Court for the District of Colorado has yet to revoke claimant's representative's permission to practice before it is mere happenstance and does not support his position.⁴ As an attorney at law under the Act must be licensed to practice law, and claimant's representative has not provided any evidence that he has a valid license to practice law, he cannot be considered an "attorney at law" under the Act.⁵ *Hilton*, 545 F.2d at 1181, 5 BRBS at 28. The district director, therefore, properly identified claimant's representative as a "lay representative."

In light of claimant's representative's legal experience, it was within the district director's discretion to award him a lay representative's fee based on an hourly rate equivalent to that paid to an experienced paralegal. *Hilton*, 545 F.2d 1176, 5 BRBS 23; *see generally Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001). As claimant's representative has not established an abuse of discretion, we affirm the district director's award of a lay representative fee based on an hourly rate of \$150.⁶ As the calculated fee was less than the amount claimant's representative already received under the settlement, the district director committed no error in denying claimant's representative the amount remaining in escrow or any other fee payable by the parties.

⁴The rule for practicing before the United States District Court for the District of Colorado states: "An applicant for admission to the bar of this court must be a person licensed by the highest court of a state, federal territory, or the District of Columbia, be on active status in a state, federal territory or the District of Columbia, and be a member of the bar in good standing in all courts and jurisdictions where he or she has been admitted." D.C.COLO.LCivR 83.3. Thus, "[t]he only requirement for maintaining bar membership is to remain on active status in at least one state or federal licensing jurisdiction and be in good standing in all courts and licensing jurisdictions where you are admitted." <http://www.cod.uscourts.gov/AttorneyServices/AttorneyServices.aspx>.

⁵Claimant's representative's reliance on 29 C.F.R. §18.34(g) and 20 C.F.R. §802.202(d) is misplaced. Both sections provide that an attorney at law is someone who "is admitted to practice before the Federal courts or before the highest court of any State," and, therefore, may practice before the Board or the Office of Administrative Law Judges. However, the attorney must be in good standing with those courts, and under normal circumstances the attorney's own representation of such will suffice. Claimant's representative here cannot make such a representation.

⁶As the Director notes, the hourly rate actually received by claimant's representative exceeded \$150, as the fee paid by virtue of the settlement agreement, \$17,500, divided by the number of hours approved by the district director, 81.9, results in an hourly rate of \$213.68.

Accordingly, the district director's Order on Lay Representative Fees is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge