

BRB Nos. 11-0400
and 11-0655

SAM CASTILLO)
)
 Claimant-Petitioner)
)
 v.)
)
 SUNDIAL MARINE TUG & BARGE) DATE ISSUED: 02/23/2012
 WORKS, INCORPORATED)
)
 and)
)
 SAIF CORPORATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeals of the Order on Attorney's Fees of R. Todd Bruininks, District Director, United States Department of Labor, and the Attorney Award Order and the Order Denying Motion for Reconsideration of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Jill Gragg (SAIF Corporation), Salem, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order on Attorney's Fees (No. 14-14550) of District Director R. Todd Bruininks and the Attorney Award Order and the Order Denying Motion for Reconsideration (2010-LHC-00341) 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, an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant sought compensation under the Act for allergic contact dermatitis resulting from exposure to epoxy paint in the course of his employment as a painter-sandblaster with employer. The parties disputed issues related to the calculation of claimant's average weekly wage and his residual wage-earning capacity and, thus, the claim was referred to the Office of Administrative Law Judges for a hearing. Subsequent to the hearing held on March 29, 2010, and the filing of the parties' closing arguments, the parties reached a settlement of all issues except attorney's fees, and this settlement was approved by the administrative law judge pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), on December 29, 2010.

Claimant's counsel requested an attorney's fee of \$12,143.04, representing 28 hours at \$400 per hour for attorney services, six hours of legal assistant time at \$150 per hour, and \$43.04 in costs, for services performed before the district director. In an Order on Attorney's Fees, the district director awarded claimant's counsel a fee of \$11,126.64.¹

Claimant's counsel also filed a fee petition for work performed before the administrative law judge. He requested a fee of \$20,006.96, representing 49.25 hours of attorney services at the hourly rate of \$400, .5 hour of legal assistant services at the hourly rate of \$150, and \$231.96 in costs. Employer filed objections to the fee petition, and claimant filed a reply to employer's objections, and requested an additional fee of \$200, representing .5 hour of attorney time at \$400 per hour, for the preparation of his reply. In her Attorney Award Order, the administrative law judge reduced the \$400 hourly rate sought for attorney services to \$316.42 for the services performed in 2009 and to \$322.87 for the services performed in 2010. The administrative law judge reduced the hourly rate sought for legal assistant services to \$110 for the work performed in 2009 and to \$112.24 for the work performed in 2010. The administrative law judge further disallowed two hours of attorney time itemized for the preparation of claimant's reply to employer's closing argument and for his response to the Order to Show Cause. The administrative law judge approved the \$231.96 requested for costs. Consequently, the administrative law judge awarded a fee in the amount of \$15,252.38, representing .5 hour of attorney services at the hourly rate of \$316.42 (\$158.21), 46.75 hours of attorney services at the hourly rate of \$322.87 (\$15,094.17), .25 hour of legal assistant work at the hourly rate of \$110 (\$27.50), .25 hour of legal assistant work at the hourly rate of \$112.24 (\$28.06), and \$231.96 in costs. The administrative law judge summarily denied claimant's motion for reconsideration.

Claimant appeals the district director's fee award, alleging that the district director erred by failing to take into account the delay in claimant's counsel's receipt of the fee.

¹This fee award represents attorney services performed from 2006 to 2010 at hourly rates of \$349, \$357.50, \$370, \$384 and \$392, and rates for legal assistant services at the rates of \$136.89, \$139.83, \$144.83 and \$150.28.

BRB No. 11-0400. Claimant also appeals the administrative law judge's fee award, challenging the administrative law judge's hourly rate determinations and her disallowance of specific entries itemized in counsel's fee petition. BRB No. 11-0655. Employer responds, urging affirmance of the fee awards of the district director and the administrative law judge. Claimant filed reply briefs in each of his appeals.

District Director's Fee Award

In challenging the district director's fee award, claimant argues only that the district director erred by awarding a fee for services performed from 2006 to 2009 based on the market rates in effect in those years without compensating counsel for the delay in the receipt of his fees. We decline to address counsel's contentions regarding his entitlement to compensation for the delay in payment of his fees. Although consideration of enhancement for delay in the payment of an attorney's fee is appropriate for fee awards under Section 28 of the Act, 33 U.S.C. §928, *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995), counsel must timely raise his entitlement to an augmented fee. *Allen v. Blutworth Bond Shipyard*, 31 BRBS 95 (1997). If the issue is timely raised, the fact-finder may adjust the fee based on historical rates to reflect its present value, apply current market rates, or employ any other reasonable means to compensate claimant for the delay. *Id.*

The record reflects that claimant's counsel did not raise before the district director the issue of his entitlement to compensation for the delay in receiving a fee for services performed from 2006 to 2009. Although counsel requested his current market rate of \$400 per hour for all services performed before the district director, that request, in and of itself, did not sufficiently raise the delay issue before the district director. Rather, it is clear from counsel's fee petition and the district director's order that the issue under consideration was not delay but whether claimant's counsel's \$400 per hour request represented the current prevailing market rate. Thus, because counsel did not raise the prospect of delay below, we decline to reach the issue on appeal. *See Van Skike v. Director, OWCP*, 557 F.3d 1041, 1048-49, 43 BRBS 11, 15(CRT) (9th Cir. 2009); *Johnson v. Director, OWCP*, 183 F.3d 1169, 1171, 33 BRBS 112, 113(CRT) (9th Cir. 1999). As counsel raises no further challenge to the amount of the district director's award of an attorney's fee for legal services rendered, we affirm the award of \$11,126.64 in attorney and legal assistant fees and costs.

Administrative Law Judge's Fee Award

We first address claimant's challenge to the awarded hourly rate for attorney services. In *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), involving an appeal of fees awarded by the Board, the

United States Court of Appeals for the Ninth Circuit held that the Board erred in limiting the hourly rates to those awarded in longshore cases in a geographic region. The court stated that the Board “must define the relevant community more broadly than simply [as] fee awards under the [Act.]” *Id.*, 557 F.3d at 1055, 43 BRBS at 8-9(CRT). Thus, a “reasonable” hourly rate must reflect the rate: (1) that prevails in the “community” (2) for “similar” services (3) by an attorney of “reasonably comparable skill, experience, and reputation.” See *Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39 (2010), *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). This analysis applies as well to attorney’s fee awards issued by administrative law judges and district directors. *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT).

Consistent with the Board’s decisions following the Ninth Circuit’s remand in *Christensen*, the administrative law judge in this case specifically found that the “relevant community” for claimant’s counsel is the city of Portland, Oregon. Attorney Award Order at 3; *Christensen*, 43 BRBS at 146. The administrative law judge further found, in accordance with the Board’s decision on reconsideration in *Christensen*, 44 BRBS 39, that rates for workers’ compensation attorneys should not be included in the hourly rate calculation for claimant’s counsel. Attorney Award Order at 4.

The administrative law judge next addressed the evidence submitted by claimant’s counsel in support of his requested hourly rate of \$400,² and found that none of the evidence submitted by counsel provides an adequate basis for his requested hourly rate. Attorney Award Order at 4-10. Having determined that claimant’s attorney failed to meet his burden of establishing the market rate for his services, the administrative law judge found that she must estimate the value of counsel’s services in the Portland, Oregon, market. *Id.* at 10. In making this determination, the administrative law judge relied on a fee award by Administrative Law Judge Etchingham in another case, *DiBartolomeo v. Fred Wahl Marine Constr.*, 2008-LHC-01249 (Oct. 22, 2009) (Attorney Fee Order), *recon. denied* (Dec. 1, 2009), *aff’d*, BRB No. 10-0257 (Aug. 30, 2010)

²Counsel submitted several documents: his own affidavit; the 2008 Morones Survey of commercial litigation rates in the Portland area; affidavits from William B. Crow, Phil Goldsmith and David Markowitz; the March 2008 State Bar Litigation Section Fee Survey; data from the 2009 *Small Law Firm Economic Survey*; data from the Oregon State Bar 2007 Economic Survey; an email from Jim Jacobsen; the declaration of Daniel Skerritt; and excerpts from Mr. Skerritt’s deposition.

(unpub.), in which Judge Etchingham awarded counsel an hourly rate of \$316.42 for services performed in 2008 and 2009.³ *Id.* at 10-11. The administrative law judge additionally determined that counsel's requested hourly rate of \$400 is not warranted based upon the simplicity of this case and on the unsatisfactory quality of the representation provided by counsel. *Id.* at 11. She concluded that counsel is entitled to hourly rates of \$316.42 for services performed in 2009 and \$322.87 for services performed in 2010. *Id.* at 11-12.

We agree with claimant that the administrative law judge's hourly rate determinations for the attorney services performed in this case cannot be affirmed. Claimant first challenges the administrative law judge's rejection of the documentation submitted by counsel in support of his requested hourly rate of \$400. While we uphold the administrative law judge's rejection of certain documents submitted by counsel,⁴ we

³In *DiBartolomeo*, Judge Etchingham addressed many of the same documents that were submitted by counsel to the administrative law judge in this case and determined that these documents did not satisfy counsel's burden of establishing the market rate in the relevant community. Judge Etchingham therefore relied on data from the 2007 edition of *The Survey of Law Firm Economics* to establish a proxy market rate which, in his estimation, was based on skills similar to those used in longshore claims as well as factors specific to counsel, such as his years of experience, geographic location, and overall ability. Judge Etchingham averaged the hourly rates provided in the survey for attorneys who practice in the areas of employment, maritime, personal injury, and workers' compensation law, and the hourly rate charged by lawyers, like counsel, who have more than thirty-one years of experience. He then adjusted the average rate derived from this data to the upper quartile rate to account for counsel's expertise, and further adjusted the 2007 rate upward based on 2008 increases in attorney salaries. On reconsideration, Judge Etchingham rejected counsel's contention that his location in the city of Portland warranted a higher market rate than the proxy rate found by the administrative law judge, which was based on Oregon statewide rates.

⁴We do not agree with claimant that the administrative law judge erred by finding that the Morones Survey; the Crow, Goldsmith and Markowitz affidavits; and the Skerritt declaration and deposition do not provide a basis for counsel's requested hourly rate. *See Christensen*, 43 BRBS at 146 ("The Board has considered the parties' documentation and is persuaded that rates paid to commercial/business litigators in Portland do not provide an appropriate basis for setting a market rate").

find merit in claimant's assignment of error to the administrative law judge's findings regarding the Oregon State Bar 2007 Economic Survey (Bar Survey).⁵ The administrative law judge found the Bar Survey insufficient to establish a market rate for counsel on the basis that "the survey is not based on a representative sample." Attorney Award Order at 6. Specifically, the administrative law judge focused her inquiry on the subset of Portland attorneys who have been admitted to practice law for over 30 years, the experience bracket to which claimant's counsel belongs, and within that subset, the still smaller groups of attorneys who comprise the 95th and 75th percentiles in the billing rate tables.⁶ Attorney Award Order at 6; Bar Survey at 8, 28. The administrative law judge posited that the sample size consisting of the 5 attorneys in the 95th percentile, or even the 26 attorneys in the 75th percentile, of the Portland attorneys with over 30 years of experience "is not large enough to be considered a proper statistical sample" on which she could base a market hourly rate for claimant's counsel. Attorney Award Order at 6; *see* Bar Survey at 28.

⁵As noted by the administrative law judge, Attorney Award Order at 3, the Board utilized the Oregon State Bar 2007 Economic Survey in determining the appropriate hourly rate for counsel's services performed before the Board. In relying on data from the Bar Survey, the Board noted that the survey is used by the United States Federal District Court for the District of Oregon as its baseline for attorney's fee rates. *See Christensen*, 43 BRBS at 146 and n.3. The Board held in *Christensen* that counsel's hourly rate would be set by reference to an average of the rates for Portland attorneys listed in the Bar Survey for plaintiff general civil litigation and plaintiff personal injury litigation cases, and that rates for workers' compensation cases should not be included in the hourly rate calculation. 43 BRBS at 146-147, *as modified by* 44 BRBS at 40. After the administrative law judge issued her decision in this case, the Ninth Circuit affirmed the Board's methodology in *Christensen*, stating that "[e]ach factor the Board relied on was corroborated by evidence in the record in the form of affidavits and surveys." *Stevedoring Services of America v. Director, OWCP*, 445 F. App'x 912, 914 (9th Cir. 2011). The administrative law judge is not bound by the Board's evaluation of the market rate. *Christensen*, 44 BRBS at 76. However, the administrative law judge's reasons for rejecting the evidence submitted by counsel in support of his requested hourly rate must be rational. *See generally Van Skike*, 557 F.3d at 1047, 43 BRBS at 14(CRT).

⁶Although claimant's counsel expressed his opinion that his expertise placed him in the 95th percentile for Oregon attorneys with over 30 years of experience, *see* Affidavit of Attorney Fees and Costs at 7, his requested rate of \$400 is based on the 75th percentile for Portland attorneys, as adjusted for 2011 rates, *see id.* at 12. *See also* Attorney Award Order at 4 and n.2.

Contrary to claimant's contention, the administrative law judge did not find the entire Bar Survey statistically invalid. Nonetheless, the administrative law judge did not address the introduction to the Bar Survey, which explains: that the Survey was administered by an independent survey firm; the survey design/process; the data analysis; and the validity of the sample.⁷ *See* Bar Survey at 1-4. The Bar Survey states:

Given the proportional sampling method by region, the large number of respondents, and the similarity of respondents and non-respondents regarding gender, age, and years admitted to practice in Oregon, the data in this report can be viewed as representative of attorneys in Oregon.

Id. at 3. Moreover, the administrative law judge did not address other portions of the survey which could provide a basis for an appropriate market rate. *See, e.g.,* n. 5, *supra*; Bar Survey at 29-31. We therefore remand the case for the administrative law judge to give further consideration to whether the Bar Survey provides sufficient evidence from which the administrative law judge can establish the prevailing market rate for counsel's services in this case. *See Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT).

Although we have vacated the administrative law judge's hourly rate determination and remanded the case for further consideration of the Bar Survey, in the interest of judicial economy we shall address claimant's attorney's additional arguments regarding the proxy rate established by the administrative law judge for counsel's services in this case. Attorney Award Order at 10-12. Claimant contends in this regard that the administrative law judge erroneously relied on the proxy rate set by Judge Etchingham for the services performed by counsel in the *DiBartolomeo* case. As correctly noted by claimant, Judge Etchingham's proxy rate was based on the average of hourly rates from areas of practice he found similar to longshore practice, including workers' compensation rates, and was based on Oregon statewide rates. *See* n.3 *supra*. In this case, however, the administrative law judge explicitly found that counsel's market rate should be based on Portland, rather than statewide, rates and should not be based on workers' compensation rates. Attorney Award Order at 3-4. As Judge Etchingham's proxy rate was based, in part, on rates which the administrative law judge here expressly

⁷The Bar Survey is based on a proportional random sample comprising one-third of the members of the Oregon State Bar in each of seven geographic regions of the state. *See* Bar Survey at 1, 4. The validity of the sample was ascertained by comparing the respondents with the total sample, including non-respondents. *See id.* at 2-3. The overall return rate was 58.3 percent, which was "considered acceptable for a survey of this type." *Id.* at 4. The "Downtown Portland" geographic region, which represents counsel's "relevant community," has a total bar membership of 3,446, of whom 1,148 were sent surveys; 684 surveys were returned, representing a 59.6 percent response rate. *See id.*

found should not be included in the market rate determination, the administrative law judge's reliance on Judge Etchingham's proxy rate in *DiBartolomeo* cannot be affirmed.⁸

We agree with claimant's further contention that the administrative law judge improperly reduced the rate requested for attorney services on the basis of the lack of complexity of the legal issues in this case. Attorney Award Order at 11. Any reduction in the fee due to a lack of complexity in the case must be reflected in the hours approved and not in the hourly rate awarded. *Perdue v Kenny A.*, 130 S.Ct. 1662, 1673 (2010); *Blum v. Stenson*, 465 U.S. 886, 898-99 (1984); *Van Skike*, 557 F.3d at 1048, 43 BRBS at 15(CRT); *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009).

Claimant also contends that the administrative law judge erred by reducing the requested hourly rate for counsel's services on the basis of the unsatisfactory quality of his representation and by disallowing two hours for services related to the preparation of claimant's reply brief and his response to the administrative law judge's Order to Show Cause. The administrative law judge's criticism of the quality of claimant's attorney's representation in this case was premised on counsel's filing of a reply brief to employer's closing argument without requesting leave to file such brief and on counsel's response to the administrative law judge's Order to Show Cause why the reply brief should not be stricken, which the administrative law judge characterized as "inadequate." Attorney Award Order at 11. In addition to finding that these actions warranted a reduction in counsel's hourly rate, the administrative law judge disallowed two hours itemized for preparation of counsel's reply brief and his response to the Order to Show Cause. *Id.* at 12. The administrative law judge engaged in impermissible "double-counting" of the same consideration to justify reducing counsel's hourly rate and to also disallow the time itemized for these tasks. *See Moreno v. Sacramento*, 534 F.3d 1106, 1115-16 (9th Cir. 2008). We affirm the administrative law judge's disallowance of the two hours itemized for the services related to the preparation of counsel's reply brief and his response to the administrative law judge's Order to Show Cause, as claimant has not shown that the administrative law judge abused her discretion in this regard. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 955-56, 41 BRBS 53, 57(CRT) (9th Cir. 2007). However, the administrative law judge's additional reliance on these activities by claimant's

⁸As noted by claimant, the administrative law judge refused to credit the 2008 Oregon State Bar Litigation Section Survey submitted by claimant in part because it included workers' compensation case rates. Attorney Award Order at 8. The administrative law judge's rejection of the survey on this basis is inconsistent with the administrative law judge's reliance on the proxy rate determination by Judge Etchingham in *DiBartolomeo*.

attorney to justify reducing the hourly rate for all of counsel's services in this case constitutes an abuse of discretion.⁹ *See Moreno*, 534 F.3d at 1115-16.

We therefore vacate the administrative law judge's hourly rate determinations for the attorney services performed in this case, and remand the case for further consideration of the hourly rate issue consistent with applicable law. With respect to the issue of the appropriate hourly rate for the .5 hour of legal assistant work itemized in this case, the administrative law judge rejected claimant's documentation in support of an hourly rate of \$150, and found that hourly rates of \$110 for work performed in 2009 and \$112.24 for work performed in 2010 are appropriate in this case. Attorney Award Order at 12-13. We affirm this determination as claimant's attorney has not shown that the administrative law judge abused her discretion in this regard.

Accordingly, the district director's Order on Attorney's Fees is affirmed. The administrative law judge's fee award is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁹If, in fact, the administrative law judge reduced counsel's hourly rate because she deemed the amount of time claimed for preparation of closing argument excessive and the supplement to his closing argument unnecessary, *see* Attorney Award Order at 11, the administrative law judge should have reduced the hours approved for those tasks rather than the hourly rate. *See generally Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT).