

V.N.)
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 Claimant-Petitioner)
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 v.)
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 TITAN CORPORATION) DATE ISSUED: 01/30/2009
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 and)
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 AIG WORLD SOURCE)
)
 Employer/Carrier-) DECISION and ORDER
 Respondents)

Appeal of the Attorney Fee Order and Order Awarding Supplemental Attorney's Fees 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, San Diego, California, for claimant.

Michael W. Thomas, Robin A. Leonard and Stephanie Seaman (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 Attorney Fee Order and Order Awarding Supplemental Attorney's Fees (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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On April 14, 2005, prior to his deployment in Iraq, claimant received immunization shots which caused him to become ill. Claimant alleged that medication for the illness caused by the immunizations resulted in vertigo, and that as a result he fell and injured his back on May 10, 2005. The parties agreed to settle the claim for compensation and medical benefits, and the administrative law judge approved the settlement in an order issued on November 21, 2006. *See* 33 U.S.C. §908(i).

Claimant's counsel, Mr. Dupree, submitted a fee petition requesting an attorney's fee totaling \$12,525, representing 24.3 hours of attorney work at an hourly rate of \$350, 18.4 hours for work performed by an associate attorney at an hourly rate of \$175, 8 hours at an hourly rate of \$100 for work performed while the associate was a paralegal, and \$481.31 in costs. Claimant's co-counsel, Mr. Cohen, submitted a fee petition seeking \$8,250, which was calculated based on an hourly rate of \$300.¹ Employer objected to the fee requests. Mr. Dupree, having conferred with Mr. Gillelan, filed a reply to the objections.

In his Attorney Fee Order, the administrative law judge deducted time expended by Mr. Dupree and Mr. Cohen prior to referral of the claim from the district director. The administrative law judge reduced the hourly rate requested to \$285 for Mr. Dupree and to \$225 for Mr. Cohen. The administrative law judge reduced the time allowed by Mr. Dupree's associate by 1.5 hours and by 2.1 hours for paralegal work. Accordingly, Mr. Dupree was awarded a fee totaling \$10,868.81, representing 24 hours of attorney work at an hourly rate of \$285, 16.9 hours of associate work at \$175 per hour, 5.9 hours of paralegal time at \$100 per hour, and costs of \$481.31. Mr. Cohen was awarded a fee of \$2,357.50, representing 9.9 hours of attorney work at an hourly rate of \$225, and costs of \$130.

Thereafter, Mr. Dupree filed a supplemental fee petition requesting a fee for time defending his attorney fee petition totaling \$49,243, representing 106 hours of attorney work at an hourly rate of \$400, 1.3 hours for Mr. Gillelan at \$435 per hour, 29.4 hours for associate work at \$200 per hour, and costs of \$397.50.

¹ Mr. Cohen's petition states that his fee request was \$9,520, representing 31.3 hours of attorney work at an hourly rate of \$300, and \$130 in costs. He reduced his request to \$8,250 to account for time related to an unsuccessful state claim for compensation.

In his Order Awarding Supplemental Attorney's Fees, the administrative law judge found that claimant's counsel is entitled to a reduced fee for his defense of the fee petition due to the lack of success on the hourly rate issue, which he found was the major issue argued by counsel in his reply to employer's objections. The administrative law judge allowed Mr. Dupree a fee for 2.05 hours of attorney work, Mr. Dupree's associate was allowed a fee for 2 hours expended, and Mr. Gillelan was denied a fee. The requested costs were reduced by \$60 for website research on the hourly rate issue. Accordingly, Mr. Dupree was awarded 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.

On appeal, claimant challenges the hourly rates awarded to Mr. Dupree in the administrative law judge's Attorney Fee Order and Order Awarding Supplemental Attorney's Fees. Claimant also challenges the reduction in the number of hours the administrative law judge found compensable for defending Mr. Dupree's attorney's fee petition. Employer responds, urging affirmance of the administrative law judge's attorney's fee orders.² Claimant filed reply briefs.

Claimant contends the administrative law judge erred by relying on hourly rates allowed in past fee awards in cases arising under the Act rather than on comparable rates in the relevant geographic market. Claimant alternatively moves for summary affirmance of the hourly rate awarded to Mr. Dupree should the Board decline to reconsider its case law stating that an administrative law judge may set an hourly rate with reference to fee awards in comparable longshore cases. *See B.C. v. Stevedoring Services of America*, 41 BRBS 107 (2007); *D.V. v. Cenex Harvest States Cooperative*, 41 BRBS 84 (2007), *appeal pending*, No. 07-73886 (9th Cir.); *see also H.H. v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 07-0870 (Dec. 17, 2007) (unpub.), *appeal pending*, No. 08-1122 (4th Cir.).

We grant claimant's motion for summary affirmance, as the administrative law judge did not abuse his discretion in basing his fee award on hourly rates awarded to other longshore attorneys in the relevant geographic area and taking into account the regulatory criteria of 20 C.F.R. §702.132(a). *See B.C.*, 41 BRBS at 112-113; *D.V.*, 41 BRBS at 86-87; *see also Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004). In addition, we note that, in discussing the

² Employer also filed a motion to strike a portion of claimant's reply brief as outside the scope of arguments made in its brief in response to claimant's petition for review of the administrative law judge's supplemental fee award. Employer's motion is rendered moot by our disposition of claimant's appeal.

relevant “community” on which a market rate should be based, the Seventh Circuit recently stated that “community” can just as easily refer to a “community of practitioners” as to the local geographic market generally. *Jeffboat, LLC v. Director, OWCP*, ___ F.3d ___, No. 07-03834, 2009 WL 66961 (7th Cir. Jan. 13, 2009). The administrative law judge also noted that claimant’s counsel presented no evidence of what he could charge non-contingency clients. The administrative law judge concluded, after considering the complexity of the case, the quality of the work, the expertise of claimant’s counsel, employer’s contentions, and the results obtained, that the requested hourly rates of \$350 for Mr. Dupree and \$300 for Mr. Cohen are excessive. 20 C.F.R. §702.132(a). Therefore, he found appropriate an hourly rate of \$285 for Mr. Dupree and \$225 for Mr. Cohen.³ Attorney Fee Order at 4; Order Awarding Supplemental Attorney’s Fees at 2-3. The hourly rates awarded are affirmed as counsel has not established an abuse of the administrative law judge’s discretion in this regard.

Claimant next challenges the administrative law judge’s reduction in the number of hours sought for replying to employer’s objections to counsel’s fee petition. In his Order Awarding Supplemental Attorney’s Fees, the administrative law judge reduced from 106 to 2.05 the number of compensable hours for Mr. Dupree and from 29.4 to 2 the hours for his associate counsel. The administrative law judge denied a fee to Mr. Gillelan, for whom Mr. Dupree requested a fee for 1.3 hours of attorney time. Claimant contends that the administrative law judge applied an erroneous legal standard by excluding all the hours devoted to the hourly rate issue. Claimant argues that this issue is related to the issues on which claimant succeeded in the original fee litigation, namely his general entitlement to an attorney’s fee, and that claimant was partially successful because he obtained a fee based on an hourly rate of \$285, which was \$35 per hour above the rate employer contended was reasonable.

In *Hensley v. Eckerhart*, 461 U.S. 421 (1983), the Supreme Court stated that if a plaintiff has obtained “excellent” results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. The Court specifically stated that when a party “has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff’s claims were interrelated, nonfrivolous, and raised in good faith.” *Id.* at 436. The Court stated that the most critical factor is the degree of success obtained. *Hensley*, 461 U.S. at

³ The administrative law judge also found appropriate the requested hourly rates for Mr. Dupree’s associate of \$175 for attorney work and \$100 for paralegal work.

437. The courts have recognized the broad discretion of the factfinder in assessing the amount of an attorney's fee pursuant to *Hensley* principles. *Id.* at 436; *see, e.g., Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988).

In this case, the administrative law judge found that the “overwhelming majority of the 136.7 hours sought relate solely to the attempt by claimant’s counsel to obtain an award based on an hourly rate of \$350,” and that the supplemental fee petition “seeks an award of ‘supplemental’ attorney fees four times greater than the amount originally sought by claimant’s counsel in connection with the work actually performed in arriving at a settlement of claimant’s case.” Order Awarding Supplemental Attorney’s Fees at 2. The administrative law judge found that claimant’s counsel is entitled to a fee that is “severely discounted” due to the lack of success on the major issue argued -- the hourly rate sought. Accordingly, the administrative law judge allowed 2.05 hours to Mr. Dupree, and 2 hours to his associate counsel. Mr. Gillelan was denied a fee because Mr. Dupree’s consultation with him did not result in the approval of the requested higher hourly rate.⁴

We reject claimant’s contention that the administrative law judge erred in awarding a reduced fee. Initially, the administrative law judge had the discretion to not award a fee for time expended on the unsuccessful hourly rate issue, and we reject claimant’s counsel’s contention that this issue was intertwined with the fee issues on which he succeeded. *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT); *see also George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992). Claimant’s reply to employer’s objections to this fee petition is almost exclusively devoted to the hourly rate objection. Specifically, only two of the 23 pages comprising claimant’s reply brief address employer’s objections other than those relating to the hourly rate requested. Counsel’s additional submissions to the administrative law judge, three declarations from other attorneys and 22 exhibits comprising 45 pages, relate to the hourly rate issue. As the administrative law judge rationally found that the overwhelming majority of the 136.7 hours sought related solely to the attempt by claimant’s counsel to obtain an award based on an hourly rate of \$350, and claimant was wholly unsuccessful on this issue, we cannot conclude that the administrative law judge abused his discretion in awarding a fee for only 2.05 hours. Consequently, as the administrative law judge’s fee award is reasonable in view of the results obtained and counsel’s limited success, we affirm the awarded fee. *See, e.g., Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *aff’g Hill v. Avondale Industries, Inc.*,

⁴ The administrative law judge also denied \$60 requested for website research on the hourly rate issue. Claimant does not challenge the denial of this cost.

32 BRBS 186 (1998), *cert. denied*, 530 U.S. 1213 (2000); *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999).

Accordingly, the administrative law judge's Attorney Fee Order and Order Awarding Supplemental Attorney's Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge