BRB No. 13-0197

STEVE KENISTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CROWLEY MARINE SERVICES	)	DATE ISSUED: Jan. 31, 2014
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Attorney Fee Order and the Order Denying Petition for Reconsideration of Attorney Fee Order of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Daniel P. Thompson (Thompson & Delay), Seattle, Washington, for claimant.

Raymond H. Warns, Jr. (Holmes, Weddle & Barcott), Seattle, Washington, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order and the Order Denying Petition for Reconsideration of Attorney Fee Order (2009-LHC-02013) 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 272 (1980).

Following an agreement on the merits between the parties in this case, claimant's counsel filed a fee petition with the administrative law judge for work performed before the Office of Workers' Compensation (OWCP) and the Office of Administrative Law Judges (OALJ) from December 3, 2008, to November 15, 2011.[1] Specifically, counsel sought a fee of $74,064.69, representing 229.6 hours of attorney services at an hourly rate of $300, and costs of $5,861.69. Employer filed objections to the fee petition.

In her fee order, the administrative law judge reduced the hourly rate to $240 and, after making reductions in the requested hours,[2] awarded claimant's counsel a fee of $51,240 for 213.5 hours at $240 an hour, plus the requested costs of $5,861.69. Claimant's motion for reconsideration was denied.

On appeal, claimant challenges the hourly rate allowed for attorney services and the denial of the time expended in relation to employer's motion to compel claimant's attendance at an examination by employer's physician. Employer responds in support of the administrative law judge's fee award. Claimant has filed a reply brief.

The United States Supreme Court has held that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see also Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that 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." *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 1055, 43 BRBS 6, 8-9(CRT) (9th Cir. 2009); *see also 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).[3] This analysis applies to attorney's fee awards issued by

[1] On February 24, 2011, the administrative law judge issued a compensation order in which she awarded claimant, based on the parties' stipulations, medical benefits, periods of temporary total and permanent total disability benefits, as well as continuing permanent partial disability benefits from September 15, 2008, as compensation for his work-related shoulder injury. 33 U.S.C. §§907, 908(a), (b), (c).

[2] The administrative law judge disallowed as unnecessary 15.9 hours expended responding to employer's motion to compel and for filing a motion to strike and .2 hour for research.

[3] We reject claimant's request for an advisory opinion that sets specific guidelines for consideration of an attorney's fee petition as such action is outside the Board's scope

administrative law judges and district directors. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). The administrative law judge is afforded considerable discretion in determining factors relevant in a given case. *See generally Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657 (6th Cir. 2008).

Claimant's counsel contends the administrative law judge erred by not using the evidence he submitted of fees he received in five areas of law to determine his market hourly rate for Seattle.[4] Once the administrative law judge determined that Seattle is the relevant community for determining counsel's hourly rates,[5] the burden fell on claimant's counsel 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." *Blum,* 465 U.S. at 896 n.11; *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT); *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010); *Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010).

In this case, the administrative law judge properly rejected claimant's evidence in the practice areas of personal injury, state workers' compensation, Jones Act/maritime litigation and employment discrimination, since the exhibits offered stated only the lump sum fee counsel received for this work and did not specify the number of hours being compensated or an hourly rate for the services rendered. Accordingly, the administrative law judge properly stated she had no basis to determine counsel's average hourly rate in these practice areas. The administrative law judge also acted within her discretion in rejecting the $300 per hour rate counsel received at three levels for a single ERISA case on the basis that a single case is not a sufficient basis for determining counsel's usual hourly rate for ERISA cases.

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of review. *See generally Sample v. Johnson*, 771 F.2d 1335, 18 BRBS 1(CRT) (9th Cir. 1985); *Andrews v. Petroleum Helicopters, Inc.*, 15 BRBS 160 (1982).

[4] Counsel also argues the administrative law judge erred by rejecting evidence of a fee received by a San Diego attorney on the basis that it is more expensive to live in San Diego than Seattle. However, the administrative law judge acted within her discretion in rejecting counsel's evidence from legal markets in California as this evidence is not relevant to the Seattle market. *See Blum*, 465 U.S. 886; *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT).

[5] Counsel does not challenge the administrative law judge's finding that Seattle is the relevant legal market.

Claimant's counsel also challenges the administrative law judge's methodology for determining that $240 is an appropriate hourly rate for his services. Review of the administrative law judge's decision reflects that she thoroughly considered and discussed counsel's arguments and evidence in terms of the applicable law. *See* Order at 2-13. In view of counsel's failure to establish a market rate, the administrative law judge was constrained to consider other evidence. In reaching her conclusion that $240 is an appropriate rate for counsel's services, the administrative law judge rationally relied on her knowledge of fees awarded in longshore cases and reluctantly utilized, in part, a rate she awarded counsel in a 2008 pre-*Christensen* case, i.e., *Martinez v. Eagle Marine Services*, which the administrative law judge acknowledged did not consider the broader criteria now required by the Ninth Circuit. Order at 12. In addition, the administrative law judge relied on some hourly rates awarded in longshore cases to Mr. Sweeting, an attorney in Tacoma, Washington.[6] Specifically, the administrative law judge found that the $225 hourly rate awarded claimant's counsel in 2008 in *Martinez* "must be somewhat increased since [counsel's] services in this case were performed primarily in 2010." *Id.* at 13. Additionally, the administrative law judge found that the $285 and $310 hourly rates Mr. Sweeting was awarded in longshore cases between 2010-2012 "must be reduced somewhat, given that he has more experience than [claimant's counsel] and because his higher fees were awarded for work performed after 2010." *Id.* She thus concluded, after considering these rates, as well as her "judgment of [counsel's] level of skill based on the quality of his advocacy in this case, which was somewhat lacking," that the appropriate hourly rate for services rendered in this case is $240. *Id.*

Contrary to claimant's contentions, the administrative law judge did not abuse her discretion in her assessment of counsel's supporting evidence. The administrative law judge adequately addressed counsel's standing in the legal community, and rationally determined counsel's hourly rate based on fee awards to counsel and to Mr. Sweeting by administrative law judges in other cases.[7] Moreover, contrary to claimant's contention, the administrative law judge's statement that Tacoma and Seattle have hourly rates for attorneys that "are reasonably comparable," is not inappropriate, as that statement is supported by claimant's own evidence, i.e., Mr. Sweeting's declaration links the two

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[6] In this regard, we note that claimant's counsel submitted the evidence on which the administrative law judge relied in part, i.e., the *Martinez* case and Mr. Sweeting's declaration. The administrative law judge was not required to accept at face value Mr. Sweeting's declaration. *See* n. 8, *infra*.

[7] Contrary to counsel's contention regarding the complexity of the issues in relation to the hourly rate, we note that the Ninth Circuit has stated that complexity is not a relevant factor in determining the hourly rate. *Van Skike*, 557 F.3d at 1048, 43 BRBS at 15(CRT).

cities for purposes of setting the "prevailing market rate" in this case.[8] Consequently, the administrative law judge's determination that counsel's hourly rate in this case is $240 has a rational basis in the existing record and reflects consideration of counsel's submission of Mr. Sweeting's statements. *See generally Van Skike*, 557 F.3d at 1046-1047, 43 BRBS at 14-15(CRT) (a fee award should reflect consideration of the evidence that both parties submitted in support of their hourly rate calculations). Counsel has thus failed to establish that the administrative law judge abused her discretion in reaching this result. *See generally Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011). Consequently, we affirm the administrative law judge's hourly rate determination.

Counsel next asserts the administrative law judge erred in failing to address additional evidence of his market rate that he submitted with his motion for reconsideration. On reconsideration, the administrative law judge stated that "she carefully considered the Petition for Reconsideration with its supporting documents," before concluding that there was no reason to grant claimant's petition. Upon review, much of the evidence, though from different sources, supports a fee within the same range of rates as the evidence counsel previously submitted. Further, as the Supreme Court stated, "[t]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection." *Fox*, 131 S. Ct. at 2216. "[D]etermination of fees 'should not result in a second major litigation.'" *Id.*; *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Thus, we reject claimant's contention that the administrative law judge erred by not fully discussing the evidence submitted on reconsideration.

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[8] Mr. Sweeting, whose office is located in Tacoma, Washington, stated "[i]t is my opinion that the community relevant rate at this time in the Seattle/Tacoma [area] is $450.00/per hour." Sweeting Declaration at 4. Mr. Sweeting also expressed concern that the $300 per hour rate requested by claimant's counsel in this case was "clearly below the relevant community hourly rate," leading him to conclude that "Mr. Thompson's request for $300.00/per hour or the findings by this court" should not "reflect or evidence what is the true community prevailing market hourly rate in the Seattle/Tacoma area." *Id.* The administrative law judge found that the $450 hourly rate assessment by Mr. Sweeting lacks a credible basis because the cases upon which Mr. Sweeting relied "absolutely do not" support that figure "as the going rate for longshore work in Seattle," and moreover, because "Mr. Sweeting is not even credible about his own rates," which reflect hourly rates for work performed in longshore cases between 2010-2012 ranging from $285 to $310. Order at 9 n. 7.

Claimant's counsel also challenges the administrative law judge's denial of time expended responding to employer's motion to compel a medical examination. Counsel contends that under the Federal Rules of Civil Procedure Rule 35 he was required to file a response to employer's motion, and that he is entitled to all time expended since claimant was fully successful on all issues. We reject counsel's assertions of error. The administrative law judge denied counsel's request for time spent responding to employer's motion to compel because those efforts were, in light of the overall circumstances of this case, unnecessary. The administrative law judge found that counsel's lack of cooperation "forced" employer to file a motion to compel claimant's attendance at a medical examination to which employer was clearly entitled. Acknowledging that counsel has a responsibility to advocate forcefully for his client, the administrative law judge found that this duty "does not extend to escalating routine discovery disputes with unnecessary filings that waste the time of both parties and the court." Order at 16. Only necessary attorney work is compensable and fees for services reasonably found to be "excessive, redundant or otherwise unnecessary" may be properly reduced or disallowed. *Tahara v. Matson Terminals, Inc.,* 511 F.3d 950, 955, 41 BRBS 53, 57(CRT) (9th Cir. 2007). Given the administrative law judge's superior understanding of the underlying litigation, she is in the best position to determine the necessity of time expended by counsel. *Id*. As counsel has failed to demonstrate an abuse of the administrative law judge's discretion, we affirm the administrative law judge's reduction of these hours as unnecessary. We therefore affirm the administrative law judge's award of a fee for 213.5 hours.

Accordingly, the administrative law judge's Attorney Fee Order and the Order Denying Petition for Reconsideration of Attorney Fee Order are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge