U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0097

CHARLOTTE OCHOA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Jan. 21, 2016
JONES STEVEDORING COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Attorney Fee Order of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz (The Law Office of Charles Robinowitz), Portland, Oregon, for claimant.

James McCurdy and Gavin W. Bruce (Lindsay Hart, LLP), Portland, Oregon, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2011-LHC-00623) of Administrative Law Judge Christopher Larsen 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. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant and employer reached a Section 8(i), 33 U.S.C. §908(i), settlement in February 1992 for injuries she allegedly suffered on April 7, 1990, to her face and low back while working for employer. The parties specifically left claimant's entitlement to future medical benefits under Section 7, 33 U.S.C. §907, out of the agreement. In 2007, a dispute arose over the relatedness of claimant's back pain to her

1990 work injury; the parties reached a settlement for the 2007 medical treatment in December 2009. In 2010, employer refused claimant's request for authorization for an MRI, and another dispute ensued. Ultimately, on March 1, 2013, Administrative Law Judge Pulver awarded claimant the requested medical benefits as well as any reasonable follow-up treatment for her back condition. Decision and Order at 1-5, 11.

Subsequently, claimant's counsel filed a petition for an attorney's fee for work performed between May 9, 2011, and April 5, 2013, before the Office of Administrative Law Judges (OALJ) in seeking those medical benefits. Counsel requested a fee of $20,775, representing 42.75 hours of attorney time at an hourly rate of $450 and 10.25 hours of legal assistant time at an hourly rate of $150. In addition, he requested reimbursement of $2,343.70 in costs. Employer filed objections, challenging as excessive the requested amount of time and hourly rate for attorney services. On May 23, 2013, claimant's counsel filed a reply to the objections, which included a supplemental request for an additional fee of $1,462.50 for 3.25 hours of attorney time. Judge Pulver retired before addressing the fee petition, and the case was assigned to Administrative Law Judge Larsen. In light of the reassignment, on August 8, 2014, claimant's counsel filed a supplemental declaration which included a brief and copies of supporting cases. He also included a request for a second supplemental fee of $787.50, representing 1.75 hours of his time. On October 22, 2014, claimant's counsel submitted a copy of a fee decision issued on September 24, 2014, by the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, to further support his requested hourly rate.

Judge Larsen (the administrative law judge) awarded the requested hourly rate for legal assistant time, $150, but rejected counsel's evidence supporting his requested hourly rate and awarded him a rate of $360 per hour. Attorney Fee Order at 4-5. The administrative law judge approved all hours requested in counsel's original fee petition, and awarded a total fee of $19,271.20, representing $16,927.50 in fees and $2,343.70 in costs. *Id.* at 5-6. However, the administrative law judge rejected both the August and October 2014 submissions.[1] *Id.* at 3, 6. Claimant's counsel appeals the fee award, challenging the hourly rate awarded for his services and the rejection of the supplemental filings. Employer responds, urging affirmance, and counsel filed a reply brief.[2]

We shall address counsel's second argument first. Counsel contends the

[1] The administrative law judge did not mention the May 2013 supplement.

[2] As no party challenges the hours approved or the hourly rate awarded for the legal assistant, they are affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

administrative law judge erred in refusing to consider, and in not awarding a fee for, any of his supplemental filings. Specifically, counsel argues that, as the party bearing the burden of supporting his fee request, he must be permitted to respond to employer's objections and to submit recent court decisions in support of his fee petition.

The administrative law judge specifically declined to consider both the August and October 2014 submissions. With regard to the August supplement, the administrative law judge sustained employer's objection to it, stating:

> It is not fair for one party to sandbag the other with additional evidence and argument when the second party has no opportunity to respond. What is more, no Order in this case allowed for the filing of a Supplemental Declaration. The notion that '[a] request for attorney's fees should not result in a second major litigation,' *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), is particularly significant here. There is simply no reason to allow the parties to supplement their pleadings whenever they please when the only issue before the court is the attorney-fee issue. I disregard the Supplemental Declaration accordingly.

Attorney Fee Order at 6 (citations omitted).[3] With regard to the October 2014 filing, the administrative law judge sustained employer's objection in a footnote, stating that counsel's submission was untimely. He noted, however, that even if he had considered the supplemental filing, the Ninth Circuit case attached thereto did not support an hourly rate of $450.[4] *Id.* at 3 n.4.

Citing Rules 28(j) and 39.17 of the Federal Rules of Appellate Procedure (FRAP), and the Local Rule for the United States District Court for the District of Oregon, LR 54-

[3] Counsel considers this rationale as also covering the May 2013 supplement. Cl. Br. at 8.

[4] Counsel submitted the Ninth Circuit's affirmance of a fee award in *Petitt v. Sause Brothers*, No. 12-70740 (9th Cir. Sept. 24, 2014) (appeal of BRB No. 11-0351), as support for his requested hourly rate of $450. He submitted it shortly after its issuance by the court. In any event, the administrative law judge recognized that the work in that case was performed in 2012-2013, the same as here, yet the award was for a lower hourly rate than counsel seeks here. The administrative law judge also noted that the Ninth Circuit has awarded counsel an hourly rate of $400, not $450, in the last three years. Attorney Fee Order at 3 n.4.

3(b), counsel asserts he is entitled to file a reply to employer's fee objections.[5] We disagree. The FRAP apply to appellate proceedings before the United States circuit courts of appeals and do not apply to administrative proceedings before the administrative law judge. Similarly, local Oregon rules do not apply to the Longshore Act.[6] Rather, the administrative law judge is not bound by technical rules of evidence or procedure. 33 U.S.C. §923(a). As the Act and its regulations do not address either supplemental filings or responses and replies to fee petitions before the administrative law judge, it is the OALJ Rules of Practice and Procedure that fill the gap – not the FRAP. *See generally Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002); 20 C.F.R. §§702.338, 702.339; 29 C.F.R. §18.10 (2015). The OALJ Rules also incorporate the Federal Rules of Civil Procedure (FRCP) in situations not covered by applicable statutory or regulatory provisions. *See Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993) (explaining the interaction among the Act, the OALJ Rules, and the FRCP).

Section 702.132 of the Act's regulations, which applies to district directors and administrative law judges, addresses only the filing of an application for an attorney's fee and its contents. 20 C.F.R. §702.132. Specifically, Section 702.132(a) provides that a fee application is to be "complete." 20 C.F.R. §702.132(a). It does not address response or reply briefs.[7] Thus, this gap may be filled by the OALJ Rules.

The OALJ Rules do not address petitions for attorneys' fees specifically; they do

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[5] Rule 28(j) permits the filing of supplemental authorities with a statement limited to 350 words if the authority was brought to a party's attention after the briefs had been filed or oral argument had been held. The opposing party is permitted a similarly prompt but limited response. Fed. R. App. P. 28(j). Rule 39.17 does not exist; however, Rule 39 addresses the assessment of costs following an appeal. Rule 39(d)(2) allows objections to the requested costs to be filed within 14 days, unless the court extends the time, and there is no provision permitting a reply. Fed. R. App. P. 39(d)(2).

[6] LR 54-3(b) provides that replies to objections to fee petitions must be filed within 14 days after service of the objections. Civ. LR 54-3(b). Even if this rule were to apply, counsel's reply was mailed 20 days after he received employer's objections.

[7] The Board's regulation, which addresses the filing of a fee application and permits "[a]ny party [to] respond to the application within 10 days of receipt of the application," 20 C.F.R. §802.203(g), does not address additional filings related to the fee petition. Further, the Board's regulation which permits the filing of responses to motions, makes no reference to replies to the responses. 20 C.F.R. §802.219. Any subsequent filings would be at the Board's discretion. 20 C.F.R. §802.215.

address motions, and, inherently, a fee petition is a motion to order the award of an attorney's fee. At the time of the administrative law judge's fee award, Rule 18.6 was in effect. 29 C.F.R. §18.6 (2014). That section addressed motions and requests and stated that any application for an order must be made by a motion. Subsection (b) permitted answers to motions within 10 days; however, "[u]nless the administrative law judge provide[d] otherwise, no reply to an answer, response to a reply, or any further responsive document shall be filed." 29 C.F.R. §18.6(b) (2014); *see also* 29 C.F.R. §18.33(c)(4), (d) (2015).[8]

In this case, Judge Pulver granted counsel 30 days within which to file a fee petition, and he allowed employer 15 days thereafter in which to respond with objections. He did not provide time for counsel to reply to the objections. Decision and Order at 11. As it is undisputed that counsel did not request or obtain leave from either administrative law judge prior to filing any of his supplemental briefs/documents, it was within the administrative law judge's discretion to refuse to consider those documents in this case.[9] We reject counsel's contention of error, as he has not shown an abuse of the administrative law judge's discretion, and we affirm the administrative law judge's rejection of the May 2013, August 2014, and October 2014 supplemental filings.[10] *See Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009).

Counsel also challenges the administrative law judge's awarded hourly rate, asserting that he erred in rejecting counsel's evidence. Counsel contends the administrative law judge did not explain why $360 per hour is a reasonable market rate and failed to recognize that counsel's evidence supports a rate of $450 per hour, or, at least, something greater than $360 per hour. Counsel contends the administrative law judge erred in finding that commercial and anti-trust litigation work is not comparable to

[8] New Rule 18.33(c)(4), (d), also provides for the filing of responses to motions and states that no further filings will be permitted unless the administrative law judge directs otherwise.

[9] This is especially appropriate in situations involving attorney's fees where, as the administrative law judge noted, the Supreme Court of the United States has admonished attorneys from turning the fee request into a major litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

[10] Although the administrative law judge denied the October 2014 filing for being "untimely," we acknowledge that counsel's attempt to apprise the administrative law judge of a recent Ninth Circuit opinion was made within a reasonable time after the court issued its decision. Nevertheless, the administrative law judge reviewed the case and found it did not support counsel's hourly rate request. *See* n.4, *supra*.

longshore work. He also asserts that the administrative law judge must address the Oregon Bar Survey, he challenges the administrative law judge's reliance on the absence of complex issues as support for a reduced hourly rate, and he contends it was erroneous for the administrative law judge to deny his request for a delay enhancement.

The 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); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). The Court has also held 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; *see also Kenny A.*, 559 U.S. at 551. The burden falls 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*, ___ F.3d ___, 2015 WL 9583573, No. 13-70613 (9th Cir. Dec. 31, 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).

In this case, the administrative law judge found that claimant's counsel did not satisfy his burden of showing entitlement to an hourly rate of $450, as he did not submit evidence, other than his own statements which the administrative law judge found insufficient alone,[11] directly supportive of an hourly rate of $450.[12] Attorney Fee Order at 4-5. The administrative law judge rejected the Goldsmith declaration because it does not expressly support the request for $450 per hour, *id.* at 3 n.2, and he rejected the Markowitz declaration and the Morones survey because he found that commercial litigation is not analogous to longshore work. *Id.* at 4. The rejection of this evidence is rational and within the administrative law judge's discretion, and thus we reject counsel's

[11] *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984) (emphasis added) ("The burden is on the fee applicant to produce satisfactory evidence – *in addition to* the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.").

[12] The administrative law judge found that counsel "approache[d] his task here as if he were conducting a negotiation, demanding an hourly rate higher than the evidence will directly support, and arguing the evidence instead establishes a minimum rate the court must exceed." Attorney Fee Order at 4.

assertions of error. *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).

Upon finding that counsel did not satisfy his burden of showing entitlement to an hourly rate of $450, the administrative law judge identified two prior longshore cases which appear to have influenced his hourly rate award. Attorney Fee Order at 5; *Modar v. Maritime Services Corp.*, BRB No. 13-0319 (Jan. 17, 2014), *vacated and remanded*, __ F.App'x __, 2015 WL 8058298, No. 14-70667 (9th Cir. Oct. 16, 2015); *Conner v. Sealift, Inc.*, 2010-LHC-02011 (Dec. 27, 2011), *aff'd*, BRB Nos. 13-0341/A (Mar. 14, 2014).[13] The administrative law judge cited *Modar*, in which the Board affirmed a district director's order granting counsel a rate of $391.83 per hour for work in 2011, and *Conner*, in which the Board affirmed an administrative law judge's award of a rate of $340 per hour for counsel's work in 2009-2011. While the administrative law judge's reliance on prior longshore cases is not, *per se*, improper, *see Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT), a recent decision by the Ninth Circuit makes it impossible for us to affirm the administrative law judge's fee award in this case.

The Ninth Circuit recently reiterated that, in awarding a fee under the Act, an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Shirrod*, 2015 WL 9583573 at *4, slip op. at 10-13. Consequently, in *Shirrod*, the court vacated the Board's affirmance of an administrative law judge's fee award, concluding it was erroneous because, even after finding the relevant community to be Portland, Oregon, the administrative law judge awarded an hourly rate based on state-wide rate information rather than on rate information tailored to the Portland community. The Ninth Circuit held that, when the relevant market is identified as Portland, the results of the Oregon Bar Survey must be addressed when setting a proxy hourly rate because it provides "attorney's fee information specific to . . . Portland." *Id.* at *4, slip op. at 12-13. Additionally, relying on the Board's precedent in *Christensen*, the Ninth Circuit held in *Shirrod* that, unless proven otherwise, reported rates for state workers' compensation attorneys are not representative of a market rate and cannot be used to determine a proxy market rate for attorneys under the Longshore Act because state workers' compensation rates are generally capped by state law and, thus, are artificially low. *Id*. at *5-7, slip op. at 16-20; *Christensen*, 44 BRBS at 40.

A review of Judge Gee's decision in *Conner* reveals that she incorporated state

[13] In *Conner*, the parties reached a settlement on the attorney's fee while the case was on appeal to the Ninth Circuit. *Conner v. Sealift, Inc.*, No. 14-71385 (9th Cir. Dec. 30, 2014).

workers' compensation rates into her proxy rate calculation. *Conner*, slip op. at 13. Thus, to the extent the administrative law judge relied on *Conner*, his fee award cannot stand.[14] *Shirrod*, 2015 WL 9583573 at *7, slip op. at 17. Further, in light of *Shirrod* and the fact that the relevant community for ascertaining a prevailing market rate in this case was implicitly found to be Portland, Oregon, the administrative law judge erred in not addressing fee data from the Oregon State Bar Economic Survey. *Id.* at *5, slip op. at 14. Moreover, counsel correctly asserts that the administrative law judge erred in relying on the lack of complexity of this case to reduce the hourly rate. *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT). For these reasons, we vacate the administrative law judge's fee award, and we remand the case to him for further consideration.

Finally, counsel appeals the administrative law judge's denial of his request for an enhanced fee due to the delayed payment of his fee. He asserts that most of the services were performed in 2011 and 2012 and that an enhancement for the delayed payment of the fee is necessary.[15] The administrative law judge summarily stated that entitlement to enhancement has not been established. Attorney Fee Order at 5. In light of the Ninth Circuit's recent decision in *Modar*, the administrative law judge must address counsel's request by determining whether there has been a delay in payment of the fee which warrants an award based on current rates or present value. *Modar*, 2015 WL 8058298 at *1, slip op. at 2-3; *see also Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT) (affirming Board's conclusion that two years' delay was "ordinary" and thus did not warrant enhanced fee).

[14] It is unclear the extent to which the administrative law judge relied on either *Conner* or *Modar* to render his own decision on an hourly rate as he did not fully explain his calculation. *See* Attorney Fee Order at 5. With respect to the *Modar* decision, the Ninth Circuit vacated the Board's affirmance of the district director's fee award, stating that it was erroneous to affirm an award that reflected neither current rates nor present value. *Modar v. Maritime Services Corp.*, __ F.App'x __, 2015 WL 8058298, No. 14-70667 (9th Cir. Oct. 16, 2015), *vacating* BRB No. 13-0319 (Jan. 17, 2014). Thus, to the extent the hourly rate affirmed in *Modar*, which was later deemed erroneous, influenced the administrative law judge's proxy rate here, that reliance is also misplaced.

[15] The issue of a delay enhancement concerns the lapse in time between the performance of the legal services and the award of a fee for those services. *Missouri v. Jenkins*, 491 U.S. 274 (1989).

Accordingly, we vacate the administrative law judge's award of an hourly rate of $360 for attorney services, and we remand the case for reconsideration of this issue in accordance with this decision. In all other respects, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge