U.S. Department of Labor

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

BRB Nos. 15-0121
and 15-0121A

GEORGE BAKER	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL STEEL & SHIPBUILDING, COMPANY	)	DATE ISSUED: Jan. 21, 2016
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

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

Eric A. Dupree and Paul R. Myers (Dupree Law, APLC), Coronado, California, for claimant.

Barry W. Ponticello and Renee C. St. Clair (England Ponticello & St. Clair), San Diego, California, for self-insured employer.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Attorney Fee Order (2011-LHC-00177) 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 may be set aside only if shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See, e.g., Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained injuries to his right lower extremity and psyche while working as a rigger for employer on June 26, 2006. Employer voluntarily paid temporary total disability benefits until September 3, 2010, when it controverted claimant's entitlement to permanent total disability benefits. Employer, however, continued to pay permanent partial disability benefits pursuant to the schedule for claimant's right lower extremity impairment. Claimant, thereafter, sought additional benefits under the Act. The parties settled the claim pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i),[1] while the case was pending before the Office of Administrative Law Judges (OALJ).

The settlement provided that employer would pay claimant $185,000 to resolve "any and all issues" relating to disability compensation for the right lower extremity and psychiatric injuries.[2] However, future medical care for those work injuries was left open, and the question of attorney's fees and costs was left unresolved. Administrative Law Judge Russell D. Pulver approved the settlement agreement in an order issued on May 14, 2012; he found the settlement petition complied with the regulations, and that the settlement amount was adequate and was not procured by duress. 33 U.S.C. §908(i); 20 C.F.R. §§702.242-243.

Claimant's counsel, thereafter, filed a petition seeking an attorney's fee of $141,460, representing 152.3 hours at an hourly rate of $500 (Mr. Dupree), 201.5 hours at an hourly rate of $300 (Mr. Myers), and 32.4 hours of paralegal work at an hourly rate of $150, plus $27,581.47 in costs, for work before the OALJ between September 11, 2008 and April 30, 2012. Pursuant to a July 19, 2012 Order issued by Judge Pulver, employer filed timely objections to the fee petition on August 13, 2012, and counsel filed a timely reply to those objections on September 13, 2012. Counsel subsequently filed a supplemental fee petition dated September 24, 2012, seeking an additional attorney's fee of $14,050, representing 2.9 hours of attorney work at an hourly rate of $500, and 42 hours of attorney work at an hourly rate of $300. Administrative Law Judge Christopher Larsen (the administrative law judge)[3] reduced the hourly rates requested for attorney

[1]Claimant, in addition to the right lower extremity and psychological injuries, alleged that his work for employer aggravated his pre-existing diabetic condition. Employer voluntarily paid benefits for claimant's diabetic condition up through the time of the settlement.

[2]The parties stipulated that only claimant's injuries to his right lower extremity and psyche are work-related, and, moreover, that any need for future diabetes care is non-industrial.

[3]The case was re-assigned to Judge Larsen following Judge Pulver's retirement.

work and the total number of hours sought by counsel, and approved an attorney's fee totaling $96,467.50, payable by employer.[4]

On appeal, employer challenges the administrative law judge's award of an attorney's fee for work performed by counsel relating to claimant's unsuccessful, non-industrial diabetic condition, and contends that the administrative law judge also erred by not making a substantial across-the-board reduction in light of claimant's limited success in this case. BRB No. 15-0121. Claimant's counsel responds, urging rejection of employer's arguments. In his cross-appeal, claimant's counsel challenges the administrative law judge's hourly rate determinations, the striking of counsel's supplemental fee petition, the exclusion of exhibits, the denial of time spent on the fee petition and on pre-retention work, and the reduction of copying costs by sixty percent. BRB No. 15-0121A. Employer responds, urging rejection of the arguments raised in claimant's counsel's cross-appeal. Claimant's counsel and employer each filed a reply brief in support of their respective appeals. Employer also filed supplemental case support countering claimant's appeal. As counsel's cross-appeal raises several procedural issues, his contentions shall be addressed first.

Counsel's Procedural Contentions

Counsel contends the administrative law judge erred by rejecting his reply brief exhibits 27, 28 and 30-36, because, contrary to the administrative law judge's findings, those exhibits directly address matters raised in employer's objections. Counsel also asserts the administrative law judge's rejection of his supplemental fee petition, filed September 24, 2012, on the ground that it was not authorized by order from the administrative law judge and/or because it was not timely filed in conjunction with his reply brief as authorized by Judge Pulver, is arbitrary and not in accordance with law.

Section 18.6(b) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules) was applicable to proceedings under the Longshore Act unless it was "inconsistent with a rule of special application as provided by statute, executive order, or regulation."[5] 29 C.F.R. §18.1(a)

[4]The fee award is for 140 hours of attorney work at $368 per hour (Mr. Dupree), 180.1 hours of attorney work at $225 per hour (Mr. Myers), and 29.5 hours of paralegal work at $150 per hour, plus $26,196.87 in costs.

[5]Section 18.6(b) (2014) (emphasis added) states:

> *Answers to motions.* Within ten (10) days after a motion is served, or within such other period as the administrative law judge may fix, any party to the proceeding may file an answer in support or in opposition to the

(2014) (now 29 C.F.R. §18.10(a)). As the applicable regulation governing attorney's fee awards, 20 C.F.R. §702.132, is silent as to the procedure for filing reply briefs, the administrative law judge acted within his discretion in applying Section 18.6(b) to this case. *See generally Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993). Because neither Section 18.6(b), nor any Order of the court, authorized either party to file any additional pleadings beyond those articulated by Judge Pulver in his July 19, 2012 Order,[6] the administrative law judge struck, and thus refused to consider, all pleadings filed by both parties after counsel's September 13, 2012 reply to employer's objections. The administrative law judge additionally noted, correctly, that the Supreme Court has stated that, "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); s*ee generally Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009); *Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997). As claimant's counsel has not established an abuse of discretion in the administrative law judge's exclusion of all pleadings filed by the parties after counsel's September 13, 2012 reply to employer's objections, that finding is affirmed. *See generally Collins v. Electric Boat Corp.*, 45 BRBS 79 (2011).

Furthermore, counsel has not established an abuse of discretion with respect to the administrative law judge's rejection of counsel's reply brief exhibits 27, 28 and 30-36. The administrative law judge struck these exhibits on the ground that they were unresponsive to employer's objections. Attorney Fee Order at 4. Exhibits 27 and 28 are copies of fee petitions submitted by Mr. Easley in which he sought an hourly rate of $430 in two separate Longshore cases. These exhibits are duplicative of the information

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> motion, accompanied by such affidavits or other evidence as he or she desires to rely upon. *Unless the administrative law judge provides otherwise, no reply to an answer, response to a reply, or any further responsive document shall be filed.*

The OALJ Rules of Practice and Procedure were recently revised, with the revised final regulations becoming effective on June 18, 2015. Section 18.6 is now 29 C.F.R. §18.33, entitled "Motions and Other Papers."

[6]Judge Pulver provided employer an additional 30 days to file its objections to the original fee petition, which employer timely submitted on August 13, 2012. Judge Pulver also granted claimant's counsel 30 days thereafter in which to file a reply. Counsel's reply, filed on September 13, 2012, complied with the time limitations imposed by Judge Pulver. It is not disputed that counsel submitted his supplemental fee petition beyond the 30-day time period afforded by Judge Pulver's Order for filing replies to employer's objections. Moreover, as the administrative law judge stated, counsel did not file a motion to submit or accept his supplemental fee petition.

contained in Mr. Easley's declaration, Cl. Fee Pet. Exh. 26,[7] which was accepted by the administrative law judge. With respect to Exhibits 30–36, assuming, arguendo, the exhibits are responsive to employer's objections, counsel has not established how the administrative law judge's exclusion of the exhibits is prejudicial error. *See* Cl. Pet. for Review at 24-25. Consequently, we reject counsel's contention that the administrative law judge erred in striking counsel's supplemental exhibits 27, 28 and 30-36. *See generally Carter v. General Elevator Co.*, 14 BRBS 90 (1981).

Counsel's Hourly Rate Contentions

Counsel contends the administrative law judge erred by disregarding applicable law when he rejected, as unpersuasive, hourly rate evidence of a kind the Ninth Circuit has declared is "satisfactory" in terms of setting a market rate. Counsel contends that his market rate evidence is sufficient to establish entitlement to the requested hourly rates of $500 and $300.

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).

The administrative law judge correctly identified San Diego as the relevant market. *Shirrod*, 2015 WL 9583573 at *4. The administrative law judge fully discussed the evidence counsel offered as support for his claimed rates. *See* Attorney Fee Order at 6-7. He noted the lack of any direct support for the claimed rates of $500 for Mr. Dupree

[7]Counsel's exhibit 26 is a May 17, 2012 Declaration of Preston Easley, wherein Mr. Easley stated that in the post-*Christensen* era he, at that point, had filed only one fee petition, in which he sought an hourly rate of $430. Mr. Easley also stated that when he settles cases with this particular employer he will "use an hourly rate of $350.00 in order to avoid any controversy over my hourly rate which could delay the settlement."

and $300 for Mr. Myers, as counsel identified only two actual awards of $450 per hour and the declarations of other attorneys stated only that counsel should receive at least $450 per hour as such is consistent with the market rate in San Diego for attorneys of counsel's stature.[8] *See* Cl. Fee Pet. Exh. 8, 10, 13, 14, 16. The administrative law judge observed that employer produced relevant evidence showing that, in the post-*Christensen* era, other longshore attorneys in San Diego sought and obtained hourly rates considerably lower than those sought by counsel.[9] *See* Attorney Fee Order at 5-10. Considering both parties' evidence, the administrative law judge concluded that counsel did not establish that hourly rates of $500 and $300 are market rates for counsel's services. The administrative law judge stated that he was more persuaded by rates longshore attorneys in San Diego actually sought, as evidenced by the rates charged by counsel's competitors, than what "applicant's most passionate enthusiasts – Mr. Gillelan, Mr. Dysart, and Mr. Hillsman," believe he should obtain. Attorney Fee Order at 10. Accordingly, relying on rates awarded to counsel in other longshore cases and requested by other competent counsel in San Diego, the administrative law judge concluded that $368 and $225 are reasonable hourly rates for work performed in this case by Mr. Dupree and Mr. Myers, respectively. *Id.*

We reject claimant's contention that the administrative law judge erred in rejecting the evidence offered to support a rate of $500 per hour, as the contention is contrary to law. *See Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973 (9th Cir. 2008). Moreover, the purpose of the market rate analysis is "to calculate a reasonable fee sufficient to attract competent counsel," *Christensen*, 557 F.3d at 1054, 43 BRBS at 8(CRT) (internal citations omitted), while avoiding a windfall to counsel, *see generally Blum*, 465 U.S. 886. "The way to do so is to compensate counsel at the prevailing rate in the community for similar work; no more, no less." *Moreno v. City of Sacramento*, 534 F. 3d 1106 (9th Cir. 2008). The administrative law judge's hourly rate determinations are supported by documentation offered by the parties and are in accordance with the

[8]The administrative law judge concluded that counsel was "negotiating" with him, by attempting to justify a lower figure and asking the administrative law judge to exceed it. Attorney Fee Order at 7.

[9]*See* n. 7, *supra*. The administrative law judge noted that a "market" can work in both directions and he remarked that Mr. Easley's willingness to seek a lower hourly rate in settled cases "speaks volumes about a market-based hourly rate." Attorney Fee Order at 9 n.7. Employer also offered an affidavit of Louise Holleran, its Manager of the Workers' Compensation Department, stating that between 2008 and 2011, Mr. Easley and Mr. Winter filed fee petitions seeking $350 to $365 per hour. EX J to Emp. Obj.

principles of a market rate analysis.[10] *Shirrod*, 2015 WL 9583573. The parties offered documentation that counsel was awarded hourly rates ranging from $340 to $385, and his associate rates between $200 to $225, for work performed between July 2010 and April 23, 2012. *See* Cl. Fee Pet. Exh. 23; Emp. Obj. Exh. I, N. Additionally, other competent counsel in San Diego requested and received hourly rates between $350 and $365 during the same time frame. Emp. Obj. Exh. J, K. As the administrative law judge's analysis of the hourly rate issue is in accordance with law, and his award of hourly rates for counsel and his associate respectively of $368 and $225 are supported by the parties' submissions, we affirm the awarded hourly rates. *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT) (new market rate determinations need not be made in every case).

Counsel's Remaining Contentions

Counsel contends the administrative law judge erred by denying a fee for 1.8 hours of services he performed prior to claimant's signing a retainer.[11] Counsel contends that it is erroneous for the administrative law judge to summarily deny pre-retention time without addressing whether that time was reasonably incurred prosecuting claimant's claims. In support of his position, counsel asserts that *Dyer v. Cenex Harvest States Coop.*, 563 F.3d 1044, 43 BRBS 32(CRT) (9th Cir. 2009), makes no distinction between "pre-retention" and "post-retention" work, and instead establishes that once fee liability shifts to employer, employer is liable for all reasonable attorney services regardless of when they were performed.

In *Dyer*, 563 F.3d 1044, 43 BRBS 32(CRT), the Ninth Circuit, in whose jurisdiction this case arises, addressed the contention that an employer cannot be liable under Section 28(a), 33 U.S.C. §928(a), for attorney services performed prior to its controversion of a claim, and rejected it, holding that once liability under Section 28(a) is established, the employer is liable for a reasonable attorney's fee including both pre- and post-controversion services. The court stated that Section 28(a) "imposes four conditions that must be satisfied in order for employer to be liable for claimant's attorney's fees: (1) the claimant must file a claim with the [district director]; (2) the employer must receive notice of the claim from the [district director]; (3) the employer must decline to pay compensation or not respond within 30 days; and (4) the claimant must 'thereafter' utilize the services of an attorney to successfully prosecute his claim." *Dyer*, 563 F.3d at 1048,

[10]The administrative law judge's award is not inconsistent with the Ninth Circuit's recent decision in *Shirrod*, as the administrative law judge properly identified the market as San Diego and relied on evidence that adequately represents that market.

[11]It appears this time was spent in consultation with claimant's state workers' compensation attorney.

43 BRBS at 34(CRT). In this case, counsel has not established that the administrative law judge's denial of a fee for counsel's time prior to the date claimant hired him, i.e., April 20, 2009, to provide representation for a claim arising under the Act, is contrary to *Dyer* or constitutes an abuse of the administrative law judge's discretion.[12] Consequently, we affirm the administrative law judge's denial of a fee for services performed prior to the date claimant hired counsel to represent him in pursuit of his longshore claim.

Counsel also contends the administrative law judge erred by excluding time he spent reviewing and amending his time records for purposes of drafting his fee petition. Counsel's contention is without merit. Citing *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996), the administrative law judge acknowledged that counsel is entitled to recover a reasonable fee for time spent preparing a fee petition. Nonetheless, the administrative law judge stated he is entitled to review the reasonableness of the hours requested and "may properly reduce a fee award to reflect excessive time" spent preparing a fee petition. Attorney Fee Order at 13. In this case, the administrative law judge found that the fee petition indicates that counsel's associate sought 7.5 hours "reviewing," "editing," "amending" and "finalizing" counsel's initial time records, and then an additional 8.8 hours, apparently, to get those records in order. On top of that, the administrative law judge found that counsel expended an additional .2 hours suggesting to his associate that it was time to actually file the fee petition. Noting that the fee petition "appears to me to be a computer-generated report of time records, and, assuming the timekeepers regularly entered their time as they went along," *id.*, the administrative law judge found that the initial 7.5 hours requested by Mr. Myers to review, edit, amend and finalize counsel's time records, is excessive and thus, he reduced the total number of hours requested by counsel in preparing his fee petition by that amount. Accordingly, the administrative law judge awarded counsel 9 of the total 16.5 hours he sought for preparation of his fee petition. Counsel has not established an abuse of discretion in this regard, as the administrative may disallow excessive billing. *See generally Tahara,* 511 F.3d 950, 41 BRBS 53(CRT). Thus, we affirm the administrative law judge's award of 9 hours to counsel in preparation of his fee petition.

Counsel lastly contends the administrative law judge erred by reducing, without any explanation, his requested copying costs by sixty percent. In *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989), the Board stated that an administrative law judge is not mandated either to award or to disallow photocopying costs as included in office overhead. Rather, the administrative law judge must evaluate the expenses such as those

[12]The administrative law judge was fully aware of the holding in *Dyer* and properly applied it with respect to post-retention, pre-controversion services. Attorney Fee Order at 10.

for photocopying in a given case to determine whether they are separately compensable and may award actual reasonable costs for these services. In addressing counsel's request for in-house photocopying costs, the administrative law judge reduced counsel's per page request from 25 cents to 10 cents. Counsel has not established this award is unreasonable and thus it is affirmed. *Tahara*, 511 F.3d 950, 41 BRBS 53(CRT).

Employer's Contentions

In its appeal, employer contends the administrative law judge erred by awarding claimant's counsel an attorney's fee for any work associated with claimant's unsuccessful claim that the work injuries aggravated his pre-existing diabetic condition. Employer also contends, citing *Hensley,* 461 U.S. 421, that the administrative law judge erred by not making a 75 percent across-the-board reduction in the hours reasonably expended by counsel based on claimant's limited success.

The Supreme Court held in *Hensley* that a fee award under a fee-shifting scheme should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *Hensley*, 461 U.S. at 434; *see also George Hyman Constr. Co. v. Brooks,* 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan,* 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied,* 488 U.S. 997 (1988). If the claimant achieves only partial or limited success, the fee award should be for an amount that is reasonable in relation to the results obtained.[13] *Hensley*, 461 U.S. at 435-36. The courts have recognized the broad discretion of the adjudicator in assessing the amount of an attorney's fee pursuant to the principles espoused in *Hensley*. *See, e.g., Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT).

Contrary to employer's contentions, the administrative law judge's application of the principles set forth in *Hensley* is legally sound. Under the second step of the *Hensley* analysis, "the most critical factor is the degree of success obtained," *Hensley*, 461 U.S. at 436, and the relevant inquiry is whether the relief obtained justified the hours reasonably expended on the litigation as a whole. *Id.* at 435-36 & n.11. Consistent with *Hensley*, the administrative law judge in this case considered whether the success obtained by claimant through settlement of his claim was proportional to the efforts expended by counsel. Specifically, the administrative law judge found that employer failed to show that claimant's claim for diabetes did not play a role in the parties reaching the $185,000

[13]We also note, as a general matter, that is it appropriate for the administrative law judge, in determining a reasonable attorney's fee, to compare the amount of compensation which the claimant ultimately receives to the amount initially tendered or paid by the employer. *See generally* 33 U.S.C. §928(b).

settlement, and stated that he would "not punish the claimant for failing to 'prevail' on a matter the parties settled." Attorney Fee Order at 9. The administrative law judge rejected employer's suggestion that claimant's "limited success" mandated a 75 percent across-the-board reduction in counsel's fee because employer did not provide evidence sufficient to warrant such a reduction.[14] Having determined that the results obtained generally justified the hours reasonably expended by counsel on the litigation as a whole, the administrative law judge rejected employer's position that the lodestar fee must be significantly reduced to account for claimant's limited success. *See Hensley*, 461 U.S. at 435-37, 440. In this regard, the administrative law judge provided adequate explanation for rejecting employer's contentions, Attorney Fee Order at 9, and his award comports with *Hensley's* requirement for a concise but clear explanation of the reasons for the fee award. *Hensley*, 461 U.S. at 437. The administrative law judge is in the best position to observe the factors affecting the fee determination and the Board is not free to substitute its judgment concerning the amount of an appropriate fee in light of claimant's degree of success. *Barbera*, 245 F.3d at 289-90, 35 BRBS at 32(CRT); *Horrigan*, 848 F.2d at 326, 21 BRBS at 82-83(CRT). Consequently, we affirm the administrative law judge's rejection of employer's contentions that his fee award should be significantly reduced based on a partial success theory as employer has not established that the administrative law judge abused his discretion in this regard. *See generally McDonald v. AECOM Technology Corp.*, 45 BRBS 45 (2011).

[14]Specifically, the administrative law judge found that employer did not offer any evaluation of the factors necessary to compare the "number of claims prevailed" against the "number of claims dismissed." The administrative law judge also found that it is disingenuous for employer to stipulate to a settlement of $185,000 as "a reasonable compromise" as to the disputed issues in this case, but to then suggest that the settlement "was in fact a humiliation for the claimant." Attorney Fee Order at 9.

Accordingly, 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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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge