U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0269

HELAY SEIDQI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 01/25/2019
ACCLAIM TECHNICAL SERVICES	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Howard S. Grossman and Scott L. Thaler (Grossman Attorneys at Law), Boca Raton, Florida, for claimant.

David Utley (Samuelson, Gonzalez, Valenzuela & Brown, LLP), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2007-LHC-01749) 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), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the DBA). 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. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

On September 1, 2017, claimant's counsel filed a petition for an attorney's fee for work performed before the Office of Administrative Law Judges (OALJ) in this case in which claimant was awarded benefits. Counsel requested a fee totaling $81,884.91, representing: 132.65 hours of lead attorney time at an hourly rate of $450; 37.4 hours of associate attorney time at an hourly rate of $275; 7.05 hours of paralegal time at an hourly rate of $140; and $10,920.41 in costs. Employer filed objections to the fee petition; it did not object to the requested hourly rates, but did challenge specific entries and costs. Claimant's counsel filed a reply to employer's objections.

In his Attorney Fee Order, the administrative law judge reduced the hourly rates for lead counsel, associate counsel, and paralegal services, and reduced or disallowed certain itemized entries and costs. He awarded an attorney's fee and costs totaling $48,511.30, payable by employer.[1]

Claimant's counsel appeals the administrative law judge's award of an attorney's fee and costs. Employer responds, urging affirmance. Claimant's counsel filed a reply brief.

Claimant's counsel first challenges the administrative law judge's reduction in the hourly rates sought for attorney services.[2] Citing *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015), counsel contends that Palm Beach County, Florida, is the relevant community for determining the market rate for his services because the majority of litigation in this case occurred via pleadings and drafting motions from his office in that locale, and that the administrative law judge erred in failing to inform the parties that he would not accept employer's acceptance of counsel's requested hourly rates.

[1] The administrative law judge's award represents 89.8 hours of lead counsel time at $380 per hour, 28.9 hours of associate attorney time at $225 per hour, 7.05 hours of paralegal time at $120 per hour, and $7,038.80 in costs.

[2] We affirm the administrative law judge's award of an hourly rate of $120 for services performed by counsel's paralegals as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

For the reasons that follow, we agree with counsel that the administrative law judge's decision on this issue cannot be affirmed.

The United States 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); *Blum v. Stenson*, 465 U.S. 886 (1984). 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. As this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the determination as to an appropriate hourly rate is guided by the court's decision in *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT), which held that an administrative law judge must define the relevant community and consider market rate information tailored to that market. The Ninth Circuit stated that while it typically recognizes the forum where the district court sits as the "relevant community," such a determination in Longshore Act cases should focus on where the litigation took place. *Id.*, 809 F.3d at 1087-1089, 49 BRBS at 96-97(CRT). The burden is 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. *Id.*, 809 F.3d 1082, 49 BRBS 93(CRT); *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); *see Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010); *see also Blum*, 465 U.S. at 896 n.11.

Claimant's counsel sought an hourly rate of $450 for his services and $275 per hour for his associate counsel. In its objections to counsel's fee request, employer unequivocally stated that it did not object to the hourly rates sought. *See* Resp. Obj. at 2, 7-8. The administrative law judge acknowledged that employer did not object to counsel's requested hourly rates, *see* Attorney Fee Order at 4, 6, but addressed the issue of the relevant community for determining the market hourly rates regardless. After concluding that Long Beach, California, is the relevant community, the administrative law judge relied on three other administrative law judge fee awards as representing the market rate for that community. He then reduced the rates to $380 per hour for lead counsel and $225 for associate counsel.[3] *See id.* at 3-9.

[3] Notably, while an administrative law judge has discretion to set aside an agreed upon rate, we question the appropriateness of exercising it under these circumstances. The Supreme Court long ago admonished that "attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Therefore, "[i]deally, of course, litigants will settle the amount of a fee." *Id.* The parties, represented by competent counsel, achieved that ideal outcome here with respect to rates, and that

Employer's acceptance of the claimed hourly rates is akin to a stipulation. Thus, the administrative law judge erred in not giving the parties notice that he would not award counsel the rates claimed.[4] *See generally Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Beltran v. California Shipbuilding & Dry Dock Co.*, 17 BRBS 225 (1985); *see also* 20 C.F.R. §702.336(a). The administrative law judge denied claimant's counsel the opportunity to meet his burden of producing evidence that his requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience and reputation. *See Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT). We therefore vacate the administrative law judge's hourly rate awards for attorney services and remand the case for further consideration. On remand, the administrative law judge must allow the parties the opportunity to address the issue of the relevant community for determining the prevailing market rates and to submit evidence of market rates in Long Beach.[5] *Id.*

Claimant's counsel next contends the administrative law judge erred in disallowing 35.75 hours of travel time associated with the claim, as well as $2,911.60 in costs related to that travel. Claimant's counsel asserts he was prejudiced by the administrative law judge's failure to provide him "reasonable notice and the opportunity to respond" to his taking administrative notice that claimant could have retained local counsel to handle his claim, such that travel between Florida and California was unnecessary.

Fees for travel time and reimbursement of travel costs may be awarded where the travel is necessary, reasonable and in excess of that normally considered to be a part of

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agreement is not irrational on its face. Keeping the Supreme Court's clear directive in mind, we stress that administrative law judges should be extremely reluctant to create conflict where none exists. *See, e.g., Fox v. Vice*, 563 U.S. 826, 838 (2011) (courts "should not become green-eyeshade accountants" because the "essential goal in shifting fees . . . is to achieve rough justice, not accounting perfection.").

[4] We further note that the administrative law judge's identification of Long Beach as the relevant community was based in part on his determination, which we vacate *infra*, that local counsel was available in the Long Beach area. Attorney Fee Order at 2, 5. Although employer objected to certain costs for counsel's travel from Florida to California based on the availability of local counsel, the administrative law judge found that employer "does not object to South Florida as the relevant community for Mr. Grossman's requested $450 hourly rate." *Id*. at 4.

[5] Counsel had the opportunity to submit evidence relating to the market rates in Palm Beach County, Florida.

overhead. *See B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009); *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006); *Brinkley v. Dept. of the Army/NAF*, 35 BRBS 60 (2001) (Hall, C.J., dissenting on other grounds); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Griffin v. Virginia Int'l Terminals, Inc.,* 29 BRBS 133 (1995). The Board has held that an attorney's travel may be found to be unreasonable where the claimant retains counsel from outside the area in which he resides despite the availability of experienced counsel within the claimant's locality. *Baumler*, 40 BRBS at 7.

In responding to counsel's fee petition, employer specifically objected to various travel-related costs and expenses documented by claimant's counsel, contending that skilled and experienced local attorneys were available in claimant's locale. In support of its objections, employer named five attorneys in the Long Beach area who, it asserted, are well-versed in prosecuting claims under the DBA. *See* Resp. Obj. at 2. In replying to employer's objections, claimant's counsel asserted that, as employer failed to provide any evidence in support of its assertion that competent and experienced counsel were available to claimant in his local community, claimant's decision to retain his services was not unreasonable. *See* Cl. Resp. at 1-2.

In addressing this issue, the administrative law judge took "Administrative Notice of the availability of adequate counsel in the Long Beach area." *See* Attorney Fee Order at 2.[6] He identified three attorneys he considered to be experienced in litigating cases arising under the DBA. *Id.* at 11. The administrative law judge then reduced five of claimant's counsel's time entries by 35.75 hours, thus approving 18.25 hours of the 54 hours associated with travel between Florida and California. *See id.* at 10-12. Additionally, the administrative law judge reduced claimant's counsel's travel-related costs by $2,911.60. *See id.* at 15-16.

We reject claimant's counsel's assertion that he was not given an opportunity to respond to the issue of whether his travel expenses should be reduced based on the availability of competent, experienced counsel in claimant's community. Employer specifically raised this issue in its objections to counsel's fee petition, and claimant's counsel addressed this objection in his reply brief.

On the facts of this case, however, we cannot affirm the administrative law judge's finding that adequate counsel was available to claimant in the Long Beach area. *See*

[6] The administrative law judge however, struck from the record employer's October 31, 2017 request that he take judicial notice of the availability of experienced local counsel. *See* Attorney Fee Order at 2.

Attorney Fee Order at 2, 11. While the administrative law judge identified three attorneys in the Long Beach area who litigate cases under the DBA, *see id.* at 11, he did not cite any information regarding the extent of the attorneys' experience with the DBA, their competence to represent DBA claimants, or their availability to do so. *See generally Baumler,* 40 BRBS at 8. We therefore vacate the administrative law judge's conclusion that adequate counsel was available to claimant in the Long Beach area and the reductions in travel and expenses based on that finding. On remand, the administrative law judge must set forth the factual foundation for any determination made on this issue and reassess employer's liability for counsel's travel time and expenses.

Lastly, the administrative law judge denied claimant's counsel's request for the reimbursement of the cost to videotape claimant's deposition. The administrative law judge found that this cost, $420, was not a reasonable or necessary litigation expense. *See* Attorney Fee Order at 16.

In challenging the administrative law judge's denial of his request for reimbursement, claimant's counsel asserts only that it was "reasonable" to pay for a videographer of claimant's deposition. *See* Cl. Br. at 10. As counsel's unsupported statement fails to establish why the videotaping of claimant's deposition was in fact reasonable and necessary, counsel has failed to establish that the administrative law judge abused his discretion in denying counsel reimbursement for this cost. *See generally Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997).

Accordingly, the administrative law judge's hourly rate findings for attorney services, and his reduction in the travel-related time and expenses, are vacated, and the case remanded for further proceedings in accordance with this opinion. In all other respects, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge