



BRB No. 14-0400

CATHY McDONALD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NAVY EXCHANGE SERVICE)	
COMMAND)	DATE ISSUED: <u>July 27, 2015</u>
)	
and)	
)	
ABERCROMBIE, SIMMONS & GILLETTE)	
)	
Self-Insured)	
Employer/Administrator-)	
Respondents)	DECISION and ORDER

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

Matthew J. Witteman (Law Offices of Matthew J. Witteman), San Rafael, California, for claimant.

Maryann C. Shirvell (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2011-LHC-01391, 2012-LHC-01873) 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 generally Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant filed claims under the Act seeking benefits for back injuries sustained in the course of her work for employer in 2008 and 2009. The parties reached a settlement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), wherein employer agreed to pay claimant \$95,699.88 for release of her claims. The settlement agreement was approved by Administrative Law Judge Russell D. Pulver in his Order dated June 4, 2013.¹ Claimant's counsel filed fee petitions for an attorney's fee of \$161,496, representing 403.74 hours of attorney work at an hourly rate of \$400, plus \$27,805.24 in costs. Employer filed objections, to which claimant's counsel filed two reply briefs; employer filed a sur-reply brief. After making reductions in the requested hourly rate, the number of hours and costs, Administrative Law Judge Christopher Larsen (the administrative law judge)² approved an attorney's fee, payable by employer, totaling \$101,368.26, representing 245.49 hours of attorney work at \$305 per hour, and \$26,493.81 in costs.

On appeal, claimant's counsel challenges the administrative law judge's hourly rate determination, as well as his reduction in the number of compensable hours.³ Employer responds, urging affirmance of the administrative law judge's attorney's fee award. Claimant's counsel has filed a reply brief.

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); *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; *see also Kenny A.*, 559 U.S. at 551. The burden falls on the fee applicant 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." *Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Blum*, 465 U.S. at 896 n.11; *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1053, 43 BRBS 6, 8(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS

¹Judge Pulver noted that the settlement agreement did not cover any claims for future medical benefits relating to claimant's work injuries.

²Judge Pulver retired prior to ruling on the attorney's fee petition and the case was assigned to Judge Larsen to resolve this aspect of the case.

³We reject, as moot, counsel's request that the Board take judicial notice of the case file created by the Office of Administrative Law Judges, as it is part of the record forwarded to the Board.

11(CRT) (9th Cir. 2009). The Supreme Court has stated that, “[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 v. Vice*, 131 S.Ct. 2205, 2216 (2011).

We reject counsel’s contentions of error regarding the administrative law judge’s setting a market rate with reference to a prior hourly rate award of Administrative Law Judge Steven B. Berlin in another case.⁴ The administrative law judge found, after an extensive consideration of the pleadings and supporting evidence filed by the parties, *see* Attorney Fee Order at 3-8, that counsel did not produce satisfactory evidence to support a finding that his requested hourly rate of \$400 is in line with the rate prevailing in the San Francisco community for similar services by lawyers of comparable skill, experience, and reputation. The administrative law judge thus utilized the base hourly rate of \$285 awarded by Judge Berlin and adjusted that figure to reflect the circumstances of this case, i.e., that the work was performed in San Francisco in 2011-2013.⁵

In this case, the administrative law judge discussed extensively why counsel’s evidence was insufficient to establish his entitlement to the claimed hourly rate of \$400. Attorney Fee Order at 3-8. Claimant’s counsel has not raised any specific objection to the methodology used by the administrative law judge nor has he established that the administrative law judge abused his discretion in making this determination. *Stanhope*, 44 BRBS 107. When counsel has not met his burden of establishing a market rate, the administrative law judge may rely on awards in other cases arising under the Act. *Christensen*, 557 F.3d at 1055, 43 BRBS at 8-9(CRT); *see also Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004). In awarding counsel a rate of \$305, the administrative law judge modified the base rate to ensure that the award is based on current, rather than historical, market conditions. *Christensen*, 557 F.3d at 1055, 43 BRBS at 8-9(CRT); *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). Accordingly, as the administrative law judge addressed and rationally rejected counsel’s evidence, and as counsel has not established an abuse of the administrative law judge’s discretion in

⁴The administrative law judge relied on “Judge Berlin’s excellent post-*Christensen* analysis in *Estate of V.P. v. APM Terminals*” [2008-LHC-00842]. Attorney Fee Order at 8. Judge Berlin’s order provided a market rate analysis for Tacoma, Washington in 2008.

⁵The administrative law judge recognized that “the economy generally was not robust in 2008, and San Francisco is more expensive than Tacoma.” Attorney Fee Order at 8.

setting the rate with reference to Judge Berlin's award, we affirm the award of a \$305 hourly rate in this case. *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT); *Stanhope*, 44 BRBS at 108.

In determining the number of hours reasonably expended by counsel in this case, the administrative law judge first reduced the requested hours by the entire 41.5 hours counsel allegedly spent on his reply in support of his fee petition because the issues raised by that brief "exceeded the scope of the original petition, and the opposition in response," and because the evidence upon which the reply brief was based is "largely unhelpful" to his making an attorney's fee determination. Attorney Fee Order at 10. The administrative law judge also disallowed: 1) 5.25 unexplained hours requested in counsel's second fee petition; 2) 8 of the 16 hours claimed for Dr. Costa's deposition; and 3) 5.5 of the 11 hours claimed for the October 24, 2012 hearing on the ground that the matter "was continued without going forward." *Id.* The administrative law judge also "sustain[ed] Employer/Carrier's objections set forth at pages 6 through 9 of its Opposition" and thus, disallowed another 107.95 hours as excessive, noting that counsel failed to use "billing judgment." *Id.* at 9-10.⁶ He thus concluded that counsel "reasonably spent" 245.49 hours representing claimant in this case. *Id.* at 10.

Upon review of the administrative law judge's reductions in the requested hours, we agree with counsel that the administrative law judge erroneously denied 5.5 of the 11 hours claimed by counsel to prepare for, and attend, the October 24, 2012 hearing which, in contrast to the administrative law judge's statement, was actually held before Judge Pulver.⁷ The administrative law judge, however, sufficiently explained his reasons for the other reductions made to the requested hours. *See* Attorney Fee Order at 9-10; *see generally Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). Counsel has not demonstrated an abuse of the administrative law judge's discretion with regard to these reductions. *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); *see generally Fox*, 131 S.Ct. at 2216; *see also Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006). Consequently, we modify the administrative law judge's award of an attorney's fee by granting counsel an additional 5.5 hours for attending the October 24, 2012 hearing before Judge Pulver. We thus modify the administrative law judge's Order to reflect

⁶The administrative law judge properly noted that counsel cannot attempt to shift to employer a fee that would not be properly billed to his own client. Attorney Fee Order at 9 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)).

⁷The transcript of the October 24, 2012 hearing indicates that it commenced at 9:30 am and concluded at 5:30 pm.

counsel's entitlement to a fee totaling \$76,551.95, representing 250.99 hours at an hourly rate of \$305.⁸

Accordingly, the administrative law judge's Attorney Fee Order is modified to reflect inclusion of 5.5 hours for work relating to the October 24, 2012 hearing held before Judge Pulver. In all other respects, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

⁸Claimant's counsel has not established that the administrative law judge abused his discretion in disallowing counsel's Supplemental Reply Declaration and the declaration of Mr. Rosen. The administrative law judge rationally found that counsel did not have permission to file as many reply briefs as he wished and that counsel failed to heed the admonition that fee requests should not result in a second major litigation. *See Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009). Accordingly, we reject counsel's contention that the administrative law judge erred in not awarding him the \$2,500 cost counsel incurred in obtaining Mr. Rosen's expert opinion regarding hourly rates. Attorney Fee Order at 8.