



BRB No. 17-0085

CHARLOTTE OCHOA)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: <u>July 27, 2017</u>
JONES STEVEDORING COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Attorney Fee Order After Remand and the Order Denying Reconsideration of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz and Genavee Stokes-Avery (Law Offices of Charles Robinowitz), Portland, Oregon, for claimant.

James McCurdy and Bradley J. Krupicka (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 After Remand and the Order Denying Reconsideration (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 it is 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); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This attorney's fee case is before the Board for the second time. To recapitulate, claimant and employer reached a Section 8(i) settlement, 33 U.S.C. §908(i), in February

1992 for claimant's 1990 work-related injuries. The parties did not settle claimant's entitlement to future medical benefits under Section 7 of the Act, 33 U.S.C. §907. In 2010, employer refused claimant's request for authorization for an MRI of her back. 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.

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. 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, plus \$2,343.70 in costs. Employer filed objections, challenging as excessive the requested hours and the hourly rate for attorney services. Judge Pulver retired before addressing the fee petition, and the case was assigned to Administrative Law Judge Larsen.

In an Order issued on November 13, 2014, Judge Larsen (the administrative law judge) awarded the requested hourly rate for legal assistant time, but rejected counsel's evidence supporting his requested hourly rate of \$450. The administrative law judge awarded counsel 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 counsel a fee of \$16,927.50 and \$2,343.70 in costs. *Id.* at 5-6. Claimant's counsel appealed the fee award.

Pertinent to this appeal, the Board vacated the awarded \$360 hourly rate, pursuant to *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015), because the administrative law judge erred in not addressing fee data claimant's counsel submitted from the 2012 Oregon State Bar Survey (2012 OSB Survey) and in relying on the lack of complexity of this case to reduce the hourly rate. *Ochoa v. Jones Stevedoring Co.*, BRB No. 15-0097 (Jan. 21, 2016) (unpub.). The Board also vacated the administrative law judge's denial of counsel's request for a fee that accounted for the delayed payment of the fee. The Board stated that, in light of the decision by the United States Court of Appeals for the Ninth Circuit in *Modar v. Maritime Services Corp.*, 632 F. App'x 909, 49 BRBS 91(CRT) (9th Cir. 2015), the administrative law judge must address counsel's request by determining whether there has been a delay in payment of the fee that warrants an award based on current rates or present value of past rates. *Ochoa*, slip op. at 8.

On remand, the administrative law judge found, based on excerpted pages claimant submitted from the 2012 OSB Survey, that counsel is entitled to a fee based on an hourly rate of \$350. The administrative law judge further found that any delay in payment of the fee was not significant enough to warrant an enhanced hourly rate. The administrative law judge denied counsel's motion for reconsideration.

On appeal, claimant's counsel challenges the hourly rate awarded and the denial of a delay enhancement. Employer responds that the administrative law judge's Order on remand should be affirmed. Claimant's counsel filed a reply brief.¹

Claimant's counsel first contends the administrative law judge provided no basis on remand for awarding a fee based on an hourly rate of \$350. Claimant asserts that the administrative law judge erred by not considering his over 40 years of experience, the fact that the 2012 OSB Survey results include part-time lawyers, which lower average rates, and other fee awards to him by the Board and the Ninth Circuit. Counsel also asserts the administrative law judge erred by not reconsidering the Goldsmith and Markowitz exhibits, which he submitted with his fee petition.

In his Order on remand, the administrative law judge addressed the 2012 OSB Survey. The administrative law judge summarized claimant's submission as comprising two tables from four pages in the 2012 OSB Survey. One table represented all attorneys who responded to the fee survey. This table provides that, at the time of the survey, Portland attorneys billed an average hourly rate of \$284, with a median rate of \$275. EX 5 at 3. The second table provides hourly rate data by years of experience. *Id.* at 3-4. The survey provides that Portland area attorneys with more than 30 years of experience billed an average hourly rate of \$340 and a median rate \$350. Based on the paucity of data claimant submitted from the 2012 OSB Survey, the administrative law judge found that it is "nothing more than a very general guideline." Order at 2. Specifically, the administrative law judge noted that the survey lumps together all areas of practice and law firm size. *Id.* The administrative law judge found that he cannot determine "how the reported hourly rates may be skewed, one way or another, by variations in the rates charged by lawyers doing dissimilar work." *Id.* The administrative law judge found that, "since dissimilar work skews both upward and downward," he would accept the median hourly rate as it is "as accurate a number as I can reasonably infer from the record." *Id.* The administrative law judge chose the median rate of \$350 from the table representing lawyers with more than 30 years of experience, "[I]n deference to [counsel's] years of

¹ Claimant has filed a motion to strike two administrative law judge fee orders employer appended as exhibits to its response brief. Employer opposes the motion to strike. Although the Board may take notice of other judicial decisions, *see Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000), employer offers these decisions as factual, i.e., "evidentiary," support for its contention that the administrative law judge did not err. As these fee orders were not presented to the administrative law judge in the first instance, the Board may not consider them as support for employer's contention. Accordingly, we grant claimant's motion to strike.

experience.” *Id.*

Contrary to counsel’s contention, the administrative law judge considered counsel’s significant experience by choosing to credit the 2012 OSB Survey table representing the hourly rates billed by attorneys with over 30 years of experience. Moreover, the Board previously affirmed as rational the administrative law judge’s rejection of the Goldsmith declaration and the Markowitz affidavit. *Ochoa*, slip op. at 5-6. Accordingly, the administrative law judge was not required to reconsider these exhibits on remand. *See generally Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010). As it is claimant’s counsel’s burden to show that the requested hourly rate is reasonable, the administrative law judge acted within his discretion in addressing only the 2012 OSB Survey on remand, as directed by the Board, rather than additionally addressing Board and Ninth Circuit fee cases that were not initially submitted by counsel with his fee petition.²

The administrative law judge performed a reasoned analysis of the limited 2012 OSB Survey data counsel submitted, and he provided a rational basis for his findings in support of his proxy market rate determination. *Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT). Consequently, as the \$350 hourly rate awarded is within the range of rates established by the 2012 OSB Survey table for attorneys with over 30 years of experience in Portland, claimant’s counsel has failed to establish that the administrative law judge abused his discretion in finding that \$350 per hour represents a reasonable 2011 market rate. *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). The administrative law judge’s finding that the proxy market rate for counsel in 2011 is \$350 per hour is affirmed.

Counsel also contends the administrative law judge erred by not adjusting his fee to account for the nearly three-year delay between the time the majority of services were rendered in 2011 and 2012 and the date the administrative law judge’s initial fee order was issued on November 13, 2014.

On remand, the administrative law judge stated that the less than two-year delay between the date counsel submitted his petition on April 12, 2013, and the dates most of his services were provided in 2011 and 2012 did not merit a delay “enhancement.” Order at 3. The administrative law judge also stated that, “[F]ee enhancements are appropriate

² The administrative law judge sustained employer’s objection to claimant’s post-fee petition submission of *Petitt v. Sause Bros.*, No. 12-70740 (9th Cir. Sept. 24, 2014), and the Board held that the administrative law judge did not abuse his discretion in this regard. *Ochoa*, slip op. at 4-5.

in cases of extreme delay.” *Id.* As noted in our prior decision, *Ochoa*, slip op. at 8 n.15, the issue of 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). The relevant period in this case thus is the period between May 9, 2011 and April 5, 2013, and the issuance of the administrative law judge’s fee award on November 13, 2014. *See also Allen v. Bludworth Bond Shipyard*, 31 BRBS 95, 97 (1997). Accordingly, we must vacate the administrative law judge’s denial of a delay enhancement and remand the case for the administrative law judge to address this issue.³ *See Modar*, 632 F. App’x at 910 (citing *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994)).

Accordingly, we affirm the administrative law judge’s award of an hourly rate of \$350 for attorney services in 2011. The fee award is affirmed, but the case is remanded for the administrative law judge to determine if counsel is entitled to an additional fee to account for the delay in payment of the fee.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

³ The administrative law judge correctly stated that counsel is not entitled to an enhanced fee due to delay caused by appeals of fee awards. *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). However, this case does not involve this principle.