

GRANT L. WILSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HONEYWELL TECHNOLOGY)	DATE ISSUED: 06/15/2012
SOLUTIONS, INCORPORATED)	
)	
and)	
)	
CHARTIS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Awarding Attorney’s Fees and Costs and the Order Denying Reconsideration on Attorney’s Fees of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Alan G. Brackett and Wilton E. Bland, IV (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Awarding Attorney’s Fees and Costs and the Order Denying Reconsideration on Attorney’s Fees (2010-LDA-00074) of Administrative Law Judge Steven B. Berlin 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 Defense Base Act, 42 U.S.C. §1651 *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 Marcum v. Director, OWCP*, 12 BRBS 355 (1980).

Employer hired claimant as a mechanic to maintain military equipment stored on a merchant vessel on Diego Garcia Island in the Indian Ocean. On April 1, 2008, while working, claimant felt unusual chest pains and tightness, and he was diagnosed with possible early symptoms of a heart attack. Claimant filed a claim for benefits under the Defense Base Act. On December 28, 2010, the administrative law judge approved a Section 8(i), 33 U.S.C. §908(i), settlement agreement that resulted in a payment of \$11,000 in compensation to claimant and provided for payment of his attorney's fees and costs.

Claimant's counsel requested an attorney's fee of \$14,545, representing 33.25 hours of attorney services at \$400 per hour, seven hours of legal assistant services at \$150 per hour, and \$195 in costs incurred. Employer responded, objecting to the hourly rate and the number of hours requested. Counsel replied and requested compensation for an additional 6.25 hours of attorney time at \$400 per hour for work on the reply brief. The administrative law judge struck the reply from the record because "[r]epley briefs are not permitted without leave [under] 20 C.F.R. §18.6(b)." Order at 1. He reduced the hourly rate sought to \$316 and disallowed 0.9 hours of attorney time, but granted all of the requested paralegal fees and all costs. Because the administrative law judge struck claimant's reply to employer's objections under Section 18.6(b), 29 C.F.R. §18.6(b), he disallowed all time counsel spent preparing that reply brief. Consequently, the administrative law judge awarded a fee in the amount of \$11,467.60, representing 32.35 hours of attorney time at an hourly rate of \$316 (\$10,222.60), 7.0 hours of paralegal time at \$150 per hour (\$1,050) and \$195 for costs. The administrative law judge denied claimant's motion for reconsideration. Claimant appeals the administrative law judge's fee award, challenging his hourly rate determination and disallowance of specific entries itemized in counsel's fee petition. Employer responds, urging affirmance of the fee award. Claimant filed a reply brief.

Counsel contends the administrative law judge erred in awarding him an hourly rate of \$316 based upon decisions rendered by other administrative law judges. Counsel maintains that the hourly rate awarded therein was based on statewide survey data that included workers' compensation rates and was for work performed two to three years before the work in this case was performed. Counsel also argues that the administrative law judge erred in using an Oregon state average rate rather than the market rate prevailing in Portland where he works. Counsel also appeals the administrative law judge's finding that he should not be paid the rate for attorneys in the 95th percentile of the relevant market. We reject counsel's contentions of error as he has not demonstrated that the administrative law judge abused his discretion in awarding a fee of approximately \$11,000 in a case in which claimant recovered \$11,000. *See Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011).

Contrary to counsel's assertions, the administrative law judge rationally relied on the \$316 hourly rate awarded by administrative law judges in other cases. The United States Court of Appeals for the Ninth Circuit has stated that the failure of a fee applicant to carry his burden to produce satisfactory evidence of the relevant market rate may justify courts in looking to what other administrative law judges and the Board have awarded a fee applicant in contemporaneous cases, but if the court believes that an applicant has failed to carry its burden, it should say why the applicant has failed to do so. *See Van Skike v. Director, OWCP*, 557 F.3d 1041, 1047, 43 BRBS 11, 14(CRT) (9th Cir. 2009); *see also Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1051, 43 BRBS 69(CRT) (9th Cir. 2009). As counsel submitted the same evidence in this case as he did in the cases on which the administrative law judge relied it was within the administrative law judge's discretion to adopt the reasons Judges Etchingham and Gee gave for rejecting that evidence. As the administrative law judge found that counsel failed to produce satisfactory evidence of the relevant market rate in this case, the administrative law judge reasonably relied on rates other administrative law judges awarded counsel in contemporaneous longshore cases. *See Van Skike*, 557 F.3d at 1047, 43 BRBS at 14(CRT); *see also Christensen*, 557 F.3d at 1051, 43 BRBS at 9(CRT). Moreover, the administrative law judge did not err in relying on statewide rates and he fully explained his reasons for rejecting counsel's assertion that Oregon workers' compensation rates should not be considered. The administrative law judge is afforded considerable discretion in determining factors relevant to a market rate in a given case. *See generally Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *B&G Mining, Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008).

We also reject counsel's contention that his hourly rate should be based on rates of attorneys in the top five percent of statewide litigation attorneys rather than the upper quartile. Although the administrative law judge found counsel to be a "fine lawyer and a real asset to the Longshore bar," he concluded, based on his familiarity with counsel's performance at trial level in longshore cases, that counsel's work does not always warrant a fee based on a rate equivalent to the uppermost tier of attorneys. Order at 4. Consequently, the administrative law judge used the upper quartile rate. Order at 4. Section 702.132, 20 C.F.R. §702.132, provides, *inter alia*, that the fee award shall account for the quality of counsel's representation. As the administrative law judge assessed counsel's performance at the trial level and found it did not meet his expectations for an attorney in the top five percent of the profession, the administrative law judge acted within his discretion in using the top quartile rates. Therefore, we affirm

the administrative law judge's awarded hourly rate of \$316.¹ *See generally Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *B&G Mining*, 522 F.3d 657, 42 BRBS 25(CRT).

Counsel further challenges the administrative law judge's disallowance of the time spent on his reply brief, asserting that the administrative law judge erred in striking the brief. He argues that 20 C.F.R. §18.6(b) applies only to motions and that his attorney fee petition is not a motion. Section 18.6(b) states, in pertinent part, "Unless the administrative law judge provides 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). The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules) are applicable to proceedings under the Longshore Act unless they are "inconsistent with a rule of special application as provided by statute, executive order, or regulation." 29 C.F.R. §18.1(a). As the regulation governing attorney fees under the Act, 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 and in striking the reply brief. *See generally Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993). As the administrative law judge rationally struck the brief from the record, he did not err in disallowing a fee for its preparation. *See generally Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997). Accordingly, we affirm the administrative law judge's denial of this time.

Lastly, counsel challenges the administrative law judge's disallowance of 0.25 hour of attorney time, characterized as non-legal work, expended on February 24, 2010, on a call to claimant discussing when and where they would need to meet to prepare for the hearing. Time spent on traditional clerical duties by an attorney is not compensable, *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980), as clerical services are part of an attorney's overhead. Because claimant has not met his burden of showing that the administrative law judge abused his discretion in disallowing the time for services he rationally characterized as "clerical," we affirm the administrative law judge's disallowance of 0.25 hour of attorney time on February 24, 2010. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995). Therefore, as the fee awarded by the administrative law judge is reasonable for the services performed in view of claimant's recovery it is affirmed.

¹The administrative law judge rationally found that a higher rate is not warranted as "the record contains no evidence that attorneys in Oregon are increasing billing rates or have done so since the economic downturn began." Order at 3.

Accordingly, the administrative law judge's Order Awarding Attorney's Fee and Costs and Order Denying Reconsideration are affirmed.²

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

²We reject, as moot, counsel's assertion that if the Board remands the case to the administrative law judge, he should award a fee for time spent preparing the motion for reconsideration.