

CLUREN ANTHONY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WASHINGTON UNITED TERMINALS	)	DATE ISSUED: 03/08/2011
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Order Approval of Attorney Fee of Karen P. Staats, District Director, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., for claimant.

Raymond J. Warns, Jr. (Holmes, Weddle & Barcott), Seattle, Washington, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Approval of Attorney Fee (Case No. 14-147666) of District Director Karen P. Staats 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 shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Following a settlement between the parties in this case, claimant's counsel, Matthew Sweeting, filed a fee petition with the district director for work performed before her between March 22, 2007, and January 29, 2010. Counsel sought a fee of \$3,145, representing 7.4 hours at an hourly rate of \$425. Counsel submitted evidence in support of his requested hourly rate. Employer filed objections, challenging the hourly rate, the relevant market community, and some of the time requested. The district director found that Tacoma, Washington, is the relevant market, and that counsel is entitled to an hourly rate of \$220. Based on employer's objections, she disallowed .6 hour of the requested time and awarded a fee for 6.8 hours of work. Accordingly, she awarded counsel a total fee of \$1,496.

Counsel appeals the district director's fee award, arguing that she erred in basing her hourly rate determination on the prevailing rates for Oregon workers' compensation cases, in finding Tacoma, rather than Seattle, to be the relevant market community, and in using information from an undisclosed website to convert Portland rates to Tacoma rates. Employer responds, urging affirmance of the district director's fee award.

In this case, counsel, who has the burden of establishing the relevant community and a reasonable prevailing market rate, submitted evidence in an effort to establish that his requested hourly rate of \$425 is reasonable. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9<sup>th</sup> Cir. 2009); *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9<sup>th</sup> Cir. 2009). The district director relied on an attorney's fee awarded by an administrative law judge in a different case, wherein he addressed the relevant law and determined that the same evidence submitted by counsel to the district director in this case did not meet his burden of establishing the market rate in the relevant community.<sup>1</sup> This administrative law judge, therefore, used the workers' compensation rates from the Oregon State Bar 2007 Economic Survey to establish the prevailing market rate. The administrative law judge used a cost-of-living calculator from an undisclosed website to adjust the Portland, Oregon, rates to rates appropriate for Seattle, Washington. The district director in this case adopted the administrative law judge's rationale to find that the Oregon Bar Survey is the appropriate starting point. However, as she determined that all of counsel's services were provided from his office in Tacoma, she concluded that the Portland rates must be adjusted downward to reflect the lower cost-of-living in Tacoma. Order at 2.

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<sup>1</sup>*Estate of Poasa v. A.P.M. Terminals*, 2008-LHC-00842 – 00847 (Aug. 18, 2009) (attorney fee order).

Counsel first argues that Seattle, not Tacoma, Washington, is the relevant market. The district director found that counsel's services were provided solely from his offices in Tacoma, as this case did not proceed to a formal hearing. The district director provided a rational basis to conclude that Tacoma, Washington, is the relevant community in this case and counsel has not established that the district director abused her discretion. *See generally Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009); *Christensen v. Stevedoring Services of America [Christensen I]*, 43 BRBS 145 (2009), *modified on recon. [Christensen II]*, 44 BRBS 39 (2010), *recon. denied [Christensen III]*, 44 BRBS 75 (2010).

Counsel also argues that the district director erred in using exclusively the workers' compensation rates from the Oregon Bar Survey to determine the prevailing market rate. Although it is not error, *per se*, for the district director to rely on a prevailing rate analysis from another case, the Board has declined to include the workers' compensation rates from the Bar Survey in determining a reasonable hourly rate for work performed before the Board. The Board stated that such rates are not "market rates."<sup>2</sup> *Christensen II*, 44 BRBS at 40. The Board's decision was rendered after the district director issued her fee order in this case. As the district director's hourly rate determination rests exclusively on the workers' compensation rates in the Oregon Bar Survey, we vacate the district director's fee award and remand the case for further consideration of the hourly rate issue. *See generally Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Christensen III*, 44 BRBS at 75; *Christensen II*, 44 BRBS at 40.

Although we have vacated the fee award, for purposes of judicial efficiency we shall address counsel's remaining argument. Counsel contends the district director erred in using information from an unidentified website to adjust Portland rates to Tacoma rates. Employer asserts that Mr. Sweeting was involved in the prior case, referenced by the district director in which information from the website was used, and, therefore, is well aware of how the cost-of-living adjustment was made in that case. As such, it argues he cannot now claim that use of that website was unexpected, contrary to law, and a denial of due process. Mr. Sweeting may well be aware of which website was used. However, a review of the district director's order, and the administrative law judge's order on which she relied, does not identify the particular website; therefore, the Board is unable to review the propriety of the district director's action. As the Board is unable to ascertain whether the decision to adjust the Portland rates downward by seven percent

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<sup>2</sup>The Board stated that the workers' compensation rates were either judicially set or represented volume discounts for defense work. *Christensen II*, 44 BRBS at 40. The Board denied the employer's motion for reconsideration of this issue in *Christensen III*, 44 BRBS at 75.

was reached in a valid manner, we cannot affirm this aspect of the hourly rate calculation. On remand, if the district director opts to calculate the hourly rate by using a cost-of-living adjustment, as is within her discretion, *see generally Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4<sup>th</sup> Cir. 2009); *B&G Mining, Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6<sup>th</sup> Cir. 2008), she must fully explain her rationale and computations.

Accordingly, the district director's fee award is vacated, and the case is remanded for further consideration consistent with this opinion.<sup>3</sup>

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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<sup>3</sup>As counsel does not dispute the number of hours awarded, that aspect of the fee award is affirmed as unchallenged. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).