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| BERNARD BOROSKI |) | |
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| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
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| DYNCORP INTERNATIONAL |) | DATE ISSUED: <u>March 20, 2014</u> |
| |) | |
| and |) | |
| |) | |
| INSURANCE COMPANY OF THE |) | |
| STATE OF PENNSYLVANIA |) | |
| |) | |
| Employer/Carrier- |) | |
| Respondents |) | DECISION and ORDER |

Appeal of the Supplemental Decision and Order Awarding Attorney’s Fees and the Supplemental Decision and Order Denying Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants’ National Law Center), Washington, D.C., and Denty Cheatham (Cheatham, Palermo & Garrett), Nashville, Tennessee, for claimant.

Roger A. Levy and Stephanie Seaman Brown (Laughlin, Falbo, Levy & Moresi, L.L.P.), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney’s Fees and the Supplemental Decision and Order Denying Reconsideration (2004-LHC-02359) of Administrative Law Judge Richard K. Malamphy 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. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked for employer in Bosnia in its blade shop where he was exposed to chemical vapors. Relevant to this appeal, in a Decision and Order dated February 15, 2008, the administrative law judge awarded claimant permanent total disability benefits commencing April 19, 2002, for the loss of sight in both eyes related to that exposure.¹ On March 7, 2008, counsel filed a fee petition for work performed before the administrative law judge. On March 22, 2010, the administrative law judge awarded counsel a fee of \$211,415.49, representing 507.6 hours at the requested hourly rate of \$350, 25.5 hours of travel time at an hourly rate of \$175 per hour, and \$29,292.99 in costs.² Claimant appealed the fee award, and on March 15, 2011, the Board vacated the administrative law judge's findings regarding the fee and costs for travel between Nashville and Durham, but affirmed the remainder of the fee award. *Boroski v. DynCorp Int'l*, BRB No. 10-0438 (Mar. 15, 2011).

On remand, on October 6, 2011, the administrative law judge awarded counsel a fee for 21.25 hours for services, 20 hours for travel time, and \$529.62 for mileage that had previously been disallowed. On October 1, 2012, counsel filed a fee petition for work performed on remand for obtaining the increased travel-related fees and expenses. He requested payment for 15 hours of work at \$400 per hour for an additional fee of \$6,000. Employer did not respond to the fee petition. In addressing the fee for work performed on remand, the administrative law judge identified the factors he considered in awarding a fee, including counsel's stated billing rate increase in 2011 to \$400 per hour and his supporting documents, and he took judicial notice of the Altman Weil Survey.³ He also noted that counsel previously had asked for and received \$350 per hour for work representing claimant in this case. The administrative law judge then found:

¹ The award to claimant was ultimately affirmed. *DynCorp Int'l v. Boroski*, Case No. 3:12-cv-1150-J-JBT (M.D.Fla. Dec. 20, 2013).

² Counsel had requested 1,032.5 hours at an hourly rate of \$350 for a fee of \$361,375. He also requested costs in the amount of \$30,170.46, and 44 hours of travel time at a rate of \$175 per hour for a fee of \$7,700. In a supplemental request, counsel sought an additional \$14,787.50, representing 42.75 hours at \$350 per hour.

³ It appears to be a 2008 survey showing that the upper quartile rate for Tennessee attorneys who are partners is \$350.

[c]onsidering the nature of the issues involved, the degree of skill with which the Claimant was represented, the experience of Claimant's counsel, the complexity of the case, the amount of benefits obtained, the prevailing rates for attorneys in the Nashville, Tennessee area, and other relevant factors set out in 20 C.F.R. §702.132(a) (2008), the undersigned finds that a rate of \$350.00 per hour is appropriate in this case for Mr. Cheatham.

Supp. Decision and Order at 2. The administrative law judge approved all 15 hours requested and awarded a supplemental fee of \$5,250. *Id.*

Counsel filed a motion for reconsideration of the supplemental fee award, arguing that he is entitled to the requested rate of \$400 per hour based on the market rate in the relevant community. Employer responded, urging affirmance. Stating that counsel's work supporting his fee petition after remand did not involve an inordinate amount of labor or skill, did not prevent him from accepting other employment, did not involve significant time restraints, and was not an "undesirable" case, the administrative law judge declined to award a rate of \$400 per hour for services related to obtaining the travel fees and costs. The administrative law judge acknowledged counsel's 40 years of experience, but noted that it was unclear how much of that time was devoted to longshore cases. Further, although counsel stated he has been charging \$400 per hour since 2011, and even obtained that rate in a 2009 case, the administrative law judge found that, in his experience, longshore attorneys "typically receive \$300 to \$350 per hour[.]" and that counsel failed to show any longshore case in which he obtained the higher, \$400, rate. Supp. Decision and Order Denying Recon. at 2. The administrative law judge was unpersuaded by the two authorities counsel cited: a Tennessee district court case and an affidavit. In the district court case, the court awarded a law firm an attorney fee based on hourly rates ranging from \$315 for an associate to \$535 for a senior partner. That senior partner, Mr. Harbison, had previously submitted an affidavit stating that \$400 is a reasonable rate for an attorney situated similarly to counsel. The administrative law judge observed that counsel's association of four attorneys is not comparable to Mr. Harbison's law firm of 32 attorneys and that the law firm's attorneys, who were awarded hourly rates of \$315 and \$360, were editors of the Vanderbilt Law Review and former law clerks to federal judges. *Id.* at 2-3. Accordingly, the administrative law judge found that counsel "failed to provide evidence sufficient" to support an hourly rate of \$400. And, "taking into account the *Johnson* factors⁴ and the facts of this case," the administrative law judge found counsel entitled to an hourly rate of \$350 for services related to his fee. *Id.* at 3 (footnote added). Therefore, the administrative law judge denied the motion for reconsideration.

⁴ *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

Counsel appeals the award and the order denying reconsideration, arguing that the administrative law judge abused his discretion in awarding an hourly rate of \$350. He asserts it was improper to rely on past longshore cases rather than relying on the evidence presented, which he states establishes the prevailing market rate, and that employer did not submit evidence to contradict counsel's market rate evidence. Rather, counsel asserts that the evidence supports a market rate of \$400 per hour, as he is a general litigation practitioner with an established competitive market rate.

In awarding an attorney's fee, the courts have determined that the starting point is the lodestar, whereby a court multiplies the number of hours reasonably worked by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).⁵ "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994) (quoting *Norman v. Housing Auth.*, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing *Blum v. Stevenson*, 465 U.S. 886, 895-896 (1984))). The party seeking the fee bears the burden of establishing the prevailing rate by showing "satisfactory evidence." The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has stated that "satisfactory evidence" is "more than the affidavit of the attorney performing the work." *Id.* However, the Eleventh Circuit also stated that a court "is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value." *Loranger*, 10 F.3d at 781 (quoting *Norman*, 836 F.2d at 1303).

In support of his assertion that \$400 is the prevailing market rate, and that he is entitled to that hourly rate, counsel cited Mr. Harbison's affidavit and a district court case and, in his own affidavit, referenced four of his cases, wherein he charged and was paid \$400 per hour. As stated previously, the administrative law judge determined that the attorneys who worked on the district court case were not similarly-situated as counsel. Mr. Harbison's affidavit is dated 2009 and was submitted as a supplement to counsel's initial fee petition to support the requested hourly rate of \$350. Counsel refers to it now because there was one sentence at the end of the affidavit which stated: "In my opinion any other Nashville attorney with comparable skills, ability, and reputation, with his 43 years of experience at the present time, could and would normally and customarily charge \$400 or more per hour for his legal services." Harbison Affidavit at 4. Further, counsel's identified four cases from 2011-2012 included two divorces, one corporate litigation, and one estate dispute.

⁵ The Supreme Court admonishes that fee requests should not result in second major litigations. *Hensley*, 461 U.S. 424.

To the extent the administrative law judge required counsel to identify a longshore case as support for his fee petition, his statement is erroneous, as the relevant “market” is broader than only prior Longshore cases, *see Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); however, the error is harmless in this case. As stated previously, the Eleventh Circuit has concluded that a court “is itself an expert” and “may consider its own knowledge” regarding the reasonableness of a fee. *Loranger*, 10 F.3d at 781 (quoting *Norman*, 836 F.2d at 1303). Thus, prior fee awards may be used as a “barometer” or inferential evidence of the prevailing market rate, especially if they involved a market rate analysis. *Eastern Associated Coal Corp. v. Director, OWCP*, 724 F.3d 561 (4th Cir. 2013); *Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010) (Order). The Eleventh Circuit has stated that “satisfactory” evidence of the market rate requires more than the affidavit of the attorney who performed the work. *Loranger*, 10 F.3d at 781. Given that is essentially all counsel presented, as the administrative law judge rejected any similarity with the district court award, and the Harbison affidavit originally was used to support a requested hourly rate of \$350, claimant has not established that the administrative law judge erred in finding counsel did not present sufficient evidence warranting the higher rate. As the administrative law judge considered relevant factors and the regulation at 20 C.F.R. §702.132, and counsel has not established an abuse of the administrative law judge’s discretion, we affirm the rate of \$350 per hour for the work performed on remand. *Eastern Associated Coal*, 724 F.3d 561; *Loranger*, 10 F.3d 776.

Accordingly, the administrative law judge’s Supplemental Decision and Order Awarding Attorney’s Fees and the Supplemental Decision and Order Denying Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge