



BRB No. 14-0389

THOMAS C. FANNON)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: <u>May 26, 2015</u>
CERES TERMINALS, INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order – Partial Award of Attorney Fees and the Supplemental Decision and Order on Reconsideration – Approval of Reconsideration Request, Approval of Requested Hourly Rate & Partial Award of Attorney Fees of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Bernard J. Sevel (Arnold, Sevel & Gay, P.A.), Towson, Maryland, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order – Partial Award of Attorney Fees and the Supplemental Decision and Order on Reconsideration – Approval of Reconsideration Request, Approval of Requested Hourly Rate & Partial Award of Attorney Fees (2012-LHC-01354, 01355, 01356) of Administrative Law Judge Richard T. Stansell-Gamm 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. *Eastern Associated Coal Corp. v. Director, OWCP*, 724 F.3d 561 (4th Cir. 2013).

Following the issuance of a decision awarding claimant ongoing temporary total disability and medical benefits, claimant's counsel filed a petition with the administrative law judge for an attorney's fee for work performed before the Office of Administrative Law Judges. Counsel documented a fee of \$19,827.50, representing 56.65 hours of attorney services at an hourly rate of \$350 and expenses of \$971.09. Counsel reduced his requested fee to \$17,586.99 in light of the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).¹ Employer, in response, filed objections to counsel's requested hourly rate and specific time entries.

In his Supplemental Decision and Order, the administrative law judge awarded counsel an hourly rate of \$250, approved 55.1 hours of attorney services, and determining that, pursuant to *Hensley*, counsel's fee should be reduced by 11 percent, awarded counsel a fee of \$12,259.75, and expenses in the amount of \$971.09, payable by employer.² 33 U.S.C. §928; 20 C.F.R. §702.132.

Claimant filed a timely petition for reconsideration with the administrative law judge. In his Supplemental Decision and Order on Reconsideration, the administrative law judge acknowledged that he had not fully discussed all of claimant's counsel's evidence regarding the appropriate hourly rate, and that counsel, in support of his motion, submitted new evidence not previously available to him at the time he filed his fee petition. After consideration of the parties' positions and evidence, the administrative law judge approved counsel's request for an hourly rate of \$350. Consequently, upon reconsideration, the administrative law judge awarded counsel \$18,134.74, representing an attorney's fee of \$17,163.65, and expenses of \$971.09.³

¹ In *Hensley*, the Court held that a fee award under a fee-shifting scheme should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. In this case, counsel was unsuccessful in obtaining disability benefits for claimant during the period of September 18, 2009 to September 28, 2011; counsel did succeed in obtaining for claimant ongoing temporary total disability benefits commencing September 28, 2011, and medical treatment, which included left shoulder surgery.

² $(55.1 \text{ hours} \times \$250 \text{ per hour}) \times .89 = \$12,259.75.$

³ $(55.1 \text{ hours} \times \$350 \text{ per hour}) \times .89 = \$17,163.65.$

On appeal, employer challenges the administrative law judge's finding that \$350 is the prevailing hourly rate for attorney services in the Baltimore, Maryland area. Claimant responds, urging affirmance.⁴

The Supreme Court has held that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); see *Perdue v. Kenny A.*, 559 U.S. 542 (2010). It is claimant's counsel's burden to submit satisfactory evidence of the prevailing market rate for the relevant community. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010); *Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010). This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, which stated in *Cox* that "[i]n addition to the attorney's own affidavits, the fee applicant must 'produce satisfactory specific evidence of the prevailing market rates in the relevant community for the type of work for which he seeks an award.'" *Cox*, 602 F.3d at 289 (quoting *Plyler v. Evatt*, F.2d 273, 277 (4th Cir. 1990)). The Fourth Circuit provided examples of the kinds of evidence that the fee applicant could submit to satisfy this burden, including: affidavits of other local attorneys who are familiar with the applicant's skill and the type of work in the relevant community; evidence of fees the fee applicant has received in the past; and evidence of rates awarded in other administrative proceedings of similar complexity. *Cox*, 602 F.3d at 290. Evidence of fee awards in comparable cases provides inferential evidence of the prevailing market rate in the relevant community, and may be relied on by the fact-finder to set the market rate in a given case. *Eastern Associated Coal Corp.*, 724 F.3d 561; *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004).

In support of claimed hourly rate of \$350 for work in 2012, claimant's counsel relied on three administrative law judge fee orders awarding counsel an hourly rate of \$350, and a recently-issued Board decision affirming one of these awards.⁵ Employer, in response, relied on attorney's fee petitions filed by two Baltimore, Maryland-based attorneys for work in 2009 and 2010 in which rates of \$200 and \$225 were requested, and also contended that claimant's counsel's 1998 hourly rate may be extrapolated, using cost-of-living adjustments, to determine counsel's 2012 hourly rate as no more than \$282.

⁴ Claimant has attached to his response brief an excerpt from an administrative law judge's fee award in the case of *Young v. Army Central Insurance Fund*. As this document was not referenced to the administrative law judge, we have not considered it in reaching our decision in this case. 20 C.F.R. §802.301(b).

⁵ See *Terry v. Amstar Corp./American Sugar Refining, Inc.*, BRB Nos. 13-0477/A (Jun. 18, 2014), *aff'g* 2012-LHC-01180; *Riddle v. Harsco Corp.*, 2001-LHC-01595 (Feb. 6, 2013); *Werwie v. Desbuild, Inc.*, 2012-LDA-00568.

In his Supplemental Order on Reconsideration, the administrative law judge specifically stated that he had reconsidered the parties' positions and evidence on this issue, and determined that the previous fee awards to claimant's counsel in Longshore Act cases are the more persuasive evidence for establishing the prevailing hourly rate in Baltimore for an attorney of claimant's counsel's experience. Therefore, the administrative law judge awarded claimant's counsel a fee based on an hourly rate of \$350. Supplemental Decision and Order on Reconsideration at 3-4.

Employer has not established that the administrative law judge abused his discretion in relying on previous fee awards in setting the market hourly rate in this case. Contrary to employer's contention, the administrative law judge fully acknowledged the basis for employer's contention that the claimed rate of \$350 is excessive; thus, the administrative law judge's decision does not violate the Administrative Procedure Act. *Eastern Associated Coal Corp.*, 724 F.3d 561; see Supplemental Decision and Order on Reconsideration at 3. We note in this regard that employer did not establish the qualifications of the other attorneys whose petitions employer submitted. Moreover, the administrative law judge acted within his discretion in concluding that claimant's evidence of recent fee awards he received is the more persuasive evidence. *Cox*, 602 F.3d 276; *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Brown*, 376 F.3d 245, 38 BRBS 37(CRT). Therefore, we affirm the administrative law judge's award of an hourly rate of \$350 for attorney work in this case. *Eastern Associated Coal Corp.*, 724 F.3d 561. As employer does not appeal any other aspect of the administrative law judge's fee award, we affirm the award of fees and costs of \$18,134.74.⁶

⁶ The enforceability of this award is contingent upon claimant's continued success. See generally *Christensen v. Stevedoring Services of America*, 430 F.3d 1032, 39 BRBS 79(CRT) (9th Cir. 2005). We note that both employer and claimant appealed the administrative law judge's underlying award to the Board; on March 18, 2015, the Board was constrained to remand the case to the district director for reconstruction of the record as it could not be located. BRB Nos. 14-0186 and 14-0186A.

Accordingly, the Supplemental Decision and Order – Partial Award of Attorney Fees and the Supplemental Decision and Order on Reconsideration – Approval of Reconsideration Request, Approval of Requested Hourly Rate & Partial Award of Attorney Fees of the administrative law judge are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

RYAN C. GILLIGAN
Administrative Appeals Judge