



BRB No. 17-0581

LADONNA E. SEACHRIS )  
(Widow of CLOYD E. SEACHRIS) )

Claimant-Petitioner )

v. )

BRADY-HAMILTON STEVEDORE )  
COMPANY )

DATE ISSUED: May 7, 2018

and )

SAIF CORPORATION )

Employer/Carrier- )  
Respondents )

DECISION and ORDER

Appeal of the Attorney Fee Order and the Order Denying Reconsideration of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

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

Norman Cole (Sather, Byerly & Holloway LLP), Portland, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order and the Order Denying Reconsideration (2007-LHC-01747) of Administrative Law Judge Jennifer Gee 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. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Following the administrative law judge's issuance of a Decision and Order in 2016 awarding claimant death benefits and funeral expenses, claimant's counsel filed a petition for an attorney's fee for work performed before the Office of Administrative Law Judges (OALJ) between 2007 and 2016.<sup>1</sup> Counsel requested a fee totaling \$53,623.20, representing 100.55 hours of attorney time at an hourly rate of \$450, 17.95 hours of paralegal time at \$165 per hour, and \$5,413.95 in costs. Employer filed objections to counsel's fee petition. Counsel filed a reply to employer's objections, along with a request for an additional attorney's fee of \$2,407.50, representing 3.75 hours of lead attorney work at an hourly rate of \$450, and 3.2 hours of associate attorney work at an hourly rate of \$225; counsel additionally sought an award of nine percent interest on the claimed costs.

In her Attorney Fee Order, the administrative law judge awarded the claimed costs without interest, reduced the hourly rates claimed, and disallowed or reduced certain itemized entries. She approved an attorney's fee totaling \$36,560.50.<sup>2</sup> The administrative law judge denied counsel's motion for reconsideration.

On appeal, claimant's counsel challenges the administrative law judge's award of an attorney's fee and costs. Employer responds, urging affirmance. Claimant's counsel filed a reply brief.

### **Hourly Rates**

Counsel challenges the administrative law judge's hourly rate award, contending her determinations are arbitrary and not in accordance with law. Specifically, counsel

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<sup>1</sup> This case was referred to the OALJ on July 5, 2007. On August 26, 2010, the administrative law judge issued a Decision and Order Denying Benefits. On claimant's appeal, the Board affirmed the administrative law judge's decision. *Seachris v. Brady Hamilton Stevedore Co.*, BRB No. 11-0104 (July 22, 2011) (unpub.). Claimant appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit, which remanded the case for further proceedings. *Seachris v. Director, OWCP*, 538 F. App'x 813 (9th Cir. 2013). On April 26, 2016, the administrative issued her Decision and Order on Remand awarding claimant benefits under the Act.

<sup>2</sup> The administrative law judge's award represents 98.175 hours of lead attorney time at \$341.92 per hour, 1.2 hours of associate attorney time at \$250 per hour, and 17.95 hours of paralegal time at \$150 per hour.

asserts the administrative law judge erred in criticizing his legal skills and that it was an abuse of her discretion to not consider his significant experience or award him a market rate based on the top five percent of Portland, Oregon, attorneys as documented by the Oregon Bar Survey (OBS).

The United States Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a “reasonable attorney’s fee” under a federal fee-shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). It is well-established that an attorney’s reasonable hourly rate is “to be calculated according to the prevailing market rates in the relevant community.” *Blum*, 465 U.S. at 895. The burden is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *see Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Blum*, 465 U.S. at 896 n. 11.

As this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the determination as to an appropriate hourly rate is guided by the court’s decision in *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT), which reiterated that, in awarding a fee under the Act, an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT). The Ninth Circuit held that, when the relevant market is identified as Portland, as here, the results of the OBS should be addressed when it is necessary to set a proxy hourly rate because it provides information on attorney fees specific to Portland. *Id.*

The administrative law judge addressed, and rationally rejected, the evidence submitted by counsel in support of his requested hourly rate of \$450. Attorney Fee Order at 7-55. Initially, the administrative law judge acknowledged the relevant case precedent on this issue. *Id.* at 4-5. She then specifically rejected the Goldsmith declaration, the Markowitz declaration, and the Morones survey because they are outdated and refer to commercial/business litigation, which the administrative law judge found is not work similar to that practiced by counsel. *Id.* at 12-17; *see Christensen v. Stevedoring Services of America, Inc.*, 43 BRBS 145, 146 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff’d mem sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 455 F. App’x 912 (9th Cir. 2011). Citing *Shirrod*, 809 F.3d 1082,

49 BRBS 93(CRT), the administrative law judge considered the 2012 OBS, relying on the documented rates for plaintiff civil litigation/personal injury, plaintiff civil litigation/non-personal injury, and plaintiff general civil litigation cases, as well as prior administrative law judge, Board, and circuit court fee awards to attorneys under the Act, to calculate a proxy market for counsel's services in this case. The administrative law judge awarded counsel an hourly rate of \$317.92, based on the 75th percentile for these practice areas. Attorney Fee Order at 54. The administrative law judge adjusted this rate for inflation to \$341.92 by using the increase in the Consumer Price Index-Urban for Portland-Salem, Oregon (CPI-U) for the period of 2012 through 2016. *Id.* at 19-53; *see Shirrod*, 809 F.3d at 1092, 49 BRBS at 98-99(CRT); *Christensen*, 44 BRBS at 40.

Contrary to counsel's contention, the administrative law judge specifically stated that counsel's prior conduct was not a factor in her final determination as to the fee she awarded. *See Order Denying Recon.* at 4. Moreover, the administrative law judge considered counsel's legal experience in calculating a proxy market rate when she acknowledged counsel's "immense amount of experience" and indicated her respect for counsel's "expertise and the zeal with which he advocates for his clients." *See Attorney Fee Order* at 54. The administrative law judge, citing *Christensen*, 44 BRBS 75, for the proposition that hourly rates for the same attorney may vary from case to case and from level to level within one case, found that fees awarded for appellate work are not determinative with regard to the trial work performed by counsel in this case. Taking into consideration the evidence presented, including counsel's expertise and skill, the administrative law judge determined that the proxy market rate should be calculated using the 75th percentile rates of the 2012 OBS.

We reject counsel's contention that this is reversible error. The administrative law judge provided a thorough analysis of the market rate evidence under applicable law and a rational basis for her proxy market rate determination. *See Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT); *Christensen*, 44 BRBS at 40. As the \$317.92 hourly rate awarded represents a reasonable weighted average of the rates established by the 2012 OBS in the three practice area the administrative law judge rationally found to be relevant, *see Shirrod*, 809 F.3d at 1092, 49 BRBS at 98-99(CRT); *Christensen*, 44 BRBS at 40, claimant's counsel has failed to establish that the administrative law judge abused her discretion in finding that \$317.92 represents a reasonable market rate. *See Attorney Fee Order* at 52-53; *see generally Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011); *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). We therefore affirm the administrative law judge's finding that the proxy rate for counsel is \$317.92 per hour.

Counsel next challenges the administrative law judge's method of adjusting the market proxy rate for inflation. We agree with counsel that the administrative law judge's calculation cannot be affirmed.

When appropriate, prior rates should be adjusted for inflation so that the rate is based on current, rather than historical, market conditions. *See Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Christensen*, 43 BRBS 145. The administrative law judge is not required to use any particular method for calculating “current” market rates. *See generally Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT).

The administrative law judge found that attorneys filling out the 2012 OBS would be reporting their 2012 hourly rates. *See Attorney Fee Order* at 50. Thus, the administrative law judge adjusted the proxy rate of \$317.92 by the 7.56 percent rise in inflation in the Portland area between 2012 and 2016, as documented by the CPI-U, to result in a 2016 hourly rate of \$341.92. *Id.* at 50-54.

Contrary to the administrative law judge’s finding, the questionnaire accompanying the 2012 OBS specifically requests that responding attorneys provide “your usual billing rate per hour in 2011.”<sup>3</sup> Thus, the adjustment for inflation must take into consideration the change in economic circumstances between 2011 and 2016. The administrative law judge’s use of the CPI-U for the Portland area as a means of adjusting counsel’s market proxy rate for inflation is not contested. Using the CPI-U to calculate the increase between 2011 and 2016, we modify the administrative law judge’s decision to reflect counsel’s entitlement to an hourly rate of \$349.85, representing counsel’s 2011 market proxy rate of \$317.92, adjusted for inflation.<sup>4</sup>

Counsel also challenges the administrative law judge’s reduction from \$165 to \$150 of the hourly rate requested for work performed by his paralegal. Counsel asserts the administrative law judge erred in failing to consider prior paralegal fee awards and by not adjusting the awarded rate of \$150 for inflation. We disagree.

In addressing the requested paralegal rate of \$165 per hour, the administrative law judge found that counsel did not provide information regarding this individual other than the fact that he or she has over 20 years of experience. Additionally, the administrative law judge stated that, absent evidence of current market rates, she did not find convincing

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<sup>3</sup> *See* [https://www.osbar.org/\\_docs/resources/econsurveys/12economicsurvey.pdf](https://www.osbar.org/_docs/resources/econsurveys/12economicsurvey.pdf). (accessed May 3, 2018).

<sup>4</sup> Employer, in a supplemental brief dated February 2, 2018, concedes that the proper inflation calculation in this case results in an hourly rate of \$349.85. *See* [www.bls.gov/regions/west/data/consumerpriceindex\\_portland\\_table.pdf](http://www.bls.gov/regions/west/data/consumerpriceindex_portland_table.pdf). (accessed May 3, 2018).

counsel's declaration that paralegals receive \$165 per hour. The administrative law judge found that Oregon district courts and prior administrative law judge awards to paralegals in 2014 through 2016 support an hourly rate of \$150 per hour. *See* Attorney Fee Order at 55–56. Counsel has failed to establish that the administrative law judge abused her discretion in finding that an hourly rate of \$150 for paralegal work is reasonable. *See generally Fox*, 131 S.Ct. at 2216; *see also Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). We affirm the administrative law judge's award of this rate for services performed by counsel's paralegal.

### **Reductions in the Hours Requested by Counsel**

Counsel contends the administrative law judge erred in reducing from 2.25 to 1.125 hours the time claimed on April 21, 2014, for reviewing the file and drafting a memorandum on remand; disallowing 1.5 hours requested on November 20, 2014 and May 11, 2016 for research after the case was remanded; and reducing from 2.5 to .75 hours the time spend on May 13, 15, 16, 18, 2016 for drafting counsel's motion for reconsideration and supporting declaration.

The tests to be applied to the compensability of the attorney's work are whether the hours claimed are "reasonable" for the "necessary work done" in the case before the administrative law judge and the fee award is commensurate with the degree of success obtained. *See* 20 C.F.R. §702.132(a); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Thus, the administrative law judge may, within her discretionary authority, disallow a fee for hours found to be duplicative, excessive, or unnecessary, *see Tahara*, 511 F.3d 95, 41 BRBS 53(CRT), or reduce a fee where the request is not commensurate with the success obtained. *See generally Farrar v. Hobby*, 506 U.S. 103 (1992); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001). An administrative law judge is afforded "considerable deference" in determining what hours are "excessive, redundant, or otherwise unnecessary." *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT).

We affirm the administrative law judge's disallowance of 1.125 hours of the 2.25 hours claimed on April 21, 2014, by counsel for reviewing the file, drafting and revising his memorandum on remand to the administrative law judge, as she rationally determined that the totality of the time sought by counsel was unnecessary. Attorney Fee Order at 57-58. We affirm the administrative law judge's disallowance of the 1.5 hours on November 20, 2014 and May 11, 2016, for researching the compensation rate, as she rationally concluded this was an unnecessary exercise, *id.* at 59, and the reduction of 1.75 hours in May 2016 for the preparation of the motion for reconsideration and supporting declaration, as the administrative law judge provided a rational basis, namely that claimant could not have benefited from two of the three issues raised. *Id.* at 60-61. Counsel has not shown

an abuse of the administrative law judge's discretion in this regard. *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT).

### **Interest on Costs**

Before the administrative law judge, counsel sought an award of interest in the amount of nine percent on the award of costs. The administrative law judge awarded the claimed costs, *see* 33 U.S.C. §928(d), payable by employer, but denied interest on that award. While noting the equitable nature of counsel's argument, the administrative law judge denied the request, finding that the Act does not permit the paying of interest on costs incurred by claimant.<sup>5</sup> *See* Attorney Fee Order at 6-7. On appeal, counsel cites two administrative law judge decisions,<sup>6</sup> and urges the Board to award claimant an additional 23.8 percent of her costs in order to compensate claimant for the delay in employer's payment of her expenses.

We reject counsel's contention. The Act and its regulations do not provide for the award of interest on costs, and, other than the two administrative law judge decisions, counsel has not cited any law supportive of his contention. Moreover, the two cited cases themselves are devoid of any legal basis for the award of interest on costs. Consequently, counsel has failed to establish that the administrative law judge erred in denying his request for an interest assessment on the award of costs.

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<sup>5</sup> As it was undisputed that claimant had paid her attorney for the costs incurred in the furtherance of her claim, the administrative law judge ordered employer to directly reimburse claimant for the awarded costs. Attorney Fee Order at 7.

<sup>6</sup> In *Pennington v. Caicos Corp*, 34 BRBS 307(ALJ) (2000), an administrative law judge found, in her "judgment," that costs are different than attorney's fees and that, accordingly, "it would be patently unfair to not enhance the costs award." Consequently, without citing any supporting precedent, the administrative law judge awarded interest on costs "due to the delay in payment."

In *M.K. v. Holmes & Narver, Inc.*, 43 BRBS 604(ALJ) (2009), an administrative law judge, citing *Pennington*, increased the costs sought by the sum of the increases in the National Average Weekly Wage as a "means to compensate for the delay."

Accordingly, the administrative law judge's Attorney Fee Order is modified to reflect counsel's entitlement to an hourly rate of \$349.85. In all other respects, the administrative law judge's Attorney Fee Order and Order Denying Reconsideration are affirmed.<sup>7</sup>

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JUDITH S. BOGGS

Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge

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<sup>7</sup> As we are not remanding the case for further action by the administrative law judge, both claimant's motion to remand the case to a different administrative law judge and employer's motion to strike this motion are moot.