

BRB No. 10-0365

HEIDI EBERLY-SHERMAN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DEPARTMENT OF ARMY/NAF)	DATE ISSUED: 11/10/2010
)	
Self-Insured Employer-)	
Respondent)	DECISION and ORDER

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

Charles Robinowitz, Portland, Oregon, for claimant.

Raymond H. Warns, Jr. (Holmes, Weddle & Barcott, P.C.), Seattle, Washington, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2008-LHC-01960) 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 shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Following an approval of a Section 8(i), 33 U.S.C. §908(i), settlement in October 2007, the parties disputed claimant's entitlement to reimbursement for out-of-pocket medical expenses and payment of future medical bills, and claimant filed an enforcement action. In July 2009, the parties reached an agreement; however, further factual disputes arose and negotiations ensued. The parties subsequently presented their stipulations to the administrative law judge on November 24, 2009, and she approved them. Counsel had submitted an initial fee request on August 24, 2009, and supplemental requests on

November 3 and November 30, 2009. The total fee requested was \$9,312.50, representing 21.5 attorney hours at an hourly rate of \$400, plus 4.75 legal assistant hours at an hourly rate of \$150. The administrative law judge awarded a reduced fee of \$7,331.90, representing a reduction in hours as well as in counsel's hourly rate. Specifically, the administrative law judge reduced counsel's hourly rate to \$338, based on the Board's initial decision in *Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *modified on recon.*, 44 BRBS 39 (2010), *recon. denied*, __ BRBS __, BRB No. 03-0302 (Sept. 23, 2010). Claimant's counsel appeals the fee award, challenging the awarded hourly rate. Employer responds, urging affirmance.

In awarding a fee in this case, the administrative law judge addressed the decisions of the United States Court of Appeals for the Ninth Circuit in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). She then addressed the Board's decision on remand in *Christensen*, 43 BRBS 145, which set Portland, Oregon, as the relevant community for claimant's counsel and used the 95th percentile rates from the 2007 Oregon Bar Survey in determining that a 2009 hourly rate of \$338 is reasonable. She stated:

In light of the fact that the instant case involves services provided by Mr. Robinowitz in the same time frame already addressed by the Board in its remand decision in *Christensen*, I see no reason to make a new determination as to the relevant community and prevailing market rate that should be applied to Mr. Robinowitz's services.

Attorney Fee Order at 4.

On appeal, counsel contends that the rates for workers' compensation attorneys reflected in the 2007 Oregon Bar Survey are not "market" rates, and that, consequently, the administrative law judge erred in adopting the hourly rates inclusive of such figures as calculated by the Board in *Christensen*, 43 BRBS 145. Counsel argues that the Board corrected its *Christensen* order on reconsideration in May 2010, and the administrative law judge in this case did not have the benefit of that corrected decision. *Christensen*, 44 BRBS 39. Therefore, counsel asks the Board to vacate the administrative law judge's fee order and remand the case to her for further consideration.

The Board addressed counsel's Oregon Bar Survey contention in the claimant's motion for reconsideration in the *Christensen* case. Specifically, the Board agreed with claimant that the rates for workers' compensation attorneys reflected in that Survey should not be included in an hourly rate calculation. *Christensen*, 44 BRBS 39. As the administrative law judge adopted the Board's decision on this issue in *Christensen*, and

for the reasons stated in the decision on reconsideration in that case, 44 BRBS 39, we modify the fee award of the administrative law judge to reflect claimant's counsel's entitlement to a fee based on the hourly rate of \$384 for counsel's legal services.¹ Therefore, claimant's counsel is entitled to a fee of \$8,254.20, representing 20.05 attorney hours at \$384 per hour, plus 3.7 legal assistant hours at \$150 per hour.²

Accordingly, the administrative law judge's Attorney Fee Order is modified to reflect counsel's entitlement to a fee of \$8,254.20.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

¹For the reasons stated in the Board's second decision on reconsideration in *Christensen*, we reject employer's assertion that the Board misunderstood the nature of attorney's fees under the Oregon workers' compensation statute and, therefore, erred in excluding workers' compensation rates in determining a reasonable hourly rate for the Portland, Oregon, community. *Christensen*, slip op. at 1-2 (Sept. 23, 2010).

²Although the administrative law judge acknowledged that some of counsel's services were provided in 2008, she awarded the 2009 rate for all services, as the majority was provided in 2009. The administrative law judge reduced the total fee request by 2.5 hours. These findings are affirmed as they are unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).