BRB No. 11-0312

EDWIN SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EAGLE MARINE SERVICES	)	DATE ISSUED: 11/30/2011
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order on Attorney's Fees of Karen P. Staats, District Director, United States Department of Labor.

Matthew S. Sweeting, Tacoma, Washington, for claimant.

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

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

PER CURIAM:

Claimant appeals the Order on Attorney's Fees of District Director Karen P. Staats (Case No. 14-144454) 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Following a settlement between the parties in this case, claimant's counsel filed a fee petition with the district director for work performed before her office. Specifically, counsel sought a fee of $8,624.18, representing 18.3 hours of attorney services at an hourly rate of $425, 1.8 hours of legal assistant services at an hourly rate of $110, plus costs of $648.68. Employer filed objections to the fee petition.

In her fee order, the district director reduced the hourly rates to $235 for attorney work and to $90 for legal assistant services. The district director reduced .65 of an hour

for specific attorney services she stated were duplicative or excessive. She stated that 1.8 hours counsel charged as attorney services should be reduced to the paralegal rate as the requested services did not require independent legal judgment. The district director rejected employer's objection to $18.50 for copying medical records. Accordingly, the district director awarded counsel a fee totaling $4,732.68, representing 16 hours of attorney time at $235 per hour, 3.6 hours of legal assistant services at $90 per hour, and the requested costs of $648.68.

On appeal, claimant challenges the hourly rate allowed for attorney services, the reduction of .65 of an hour, and the characterization as paralegal work the 1.8 hours requested for attorney services. Employer responds, urging affirmance.

We first address the challenge to the awarded hourly rate. In *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), involving an appeal of fees awarded by the Board, the United States Court of Appeals for the Ninth Circuit held that the Board erred in limiting the hourly rates to those awarded in longshore cases in a geographic region. The court stated that the Board "must define the relevant community more broadly than simply [as] fee awards under the [Act.]" *Id.*, 557 F.3d at 1055, 43 BRBS at 8-9(CRT). Thus, a "reasonable" hourly rate must reflect the rate: (1) that prevails in the "community" (2) for "similar" services (3) by an attorney of "reasonably comparable skill, experience, and reputation." *See Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39 (2010), *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, No. 10-73574, 2011 WL 3267679 (9th Cir. Aug. 1, 2011). This analysis applies as well to attorney's fee awards issued by administrative law judges and district directors. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).

In this case, claimant's counsel submitted as evidence to support the requested hourly rate of $425: his own declaration; a United States District Court (W.D. Washington) attorney's fee award to Judith Lonnquist in an employment discrimination case; two stipulated attorney's fee awards to Terry Barnett in Washington state workers' compensation cases; the *Laffey* Matrix with adjustments from the Federal Locality-Based Comparability Payments and Pay Increases in 2009 for General Schedule Employees; a synopsis of a National Law Journal annual survey of billing rates for the nation's largest law firms; the deposition testimony of Attorney Nate Manakee regarding the fair market value of claimant's attorney's legal services; and, a fee order issued by the Board in a case where claimant's counsel did the initial work, which awarded a different appellate counsel a fee based on an hourly rate of $460.

The district director initially stated that the fee awards to Mr. Barnett and Ms. Lonnquist, based on hourly rates of $325 and $350, are "not compelling" evidence as to the market rate for counsel's work in this case given the differences in experience and professional reputation between those attorneys and claimant's counsel and since the cases involving Mr. Barnett and Ms. Lonnquist were more complex,[1] *i.e.*, involved cases that went to trial and/or were appealed. The district director next found that the *Laffey* Matrix and the National Law Journal annual survey are likewise not relevant to a determination of counsel's hourly rate in this case, because these documents are not comparable in terms of the type of cases or firms involved, and they are not indicative of the hourly rates prevailing in the relevant community, *i.e.*, the former is based on the Washington, D.C. area, while the latter generally addresses nationwide billing rates for large firms.[2] Additionally, the district director summarily stated that the deposition of Nate Manakee is not "controlling evidence from the prevailing community." Order on Attorney's Fees at 4. The district director thus found that claimant's counsel did not meet his burden of providing satisfactory evidence of a market rate in the relevant community where he practices law. Thus, the district director concluded, based on the lack of complexity of the case and claimant's net recovery of $3,750, that claimant's counsel is entitled to an hourly rate of $235.

We must vacate the district director's hourly rate determination as she did not award counsel a market rate for his services. The district director's rejection of counsel's hourly rate evidence and, in turn, her award of an hourly rate of $235, based on the lack of complexity in this case is erroneous. *Van Skike*, 557 F.3d at 1048, 43 BRBS at 15(CRT) (any reduction of the fee due to a lack of complexity in the case must be reflected in the hours awarded and not in the hourly rate awarded); *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009). Moreover, the district director did not provide any explanation for rejecting the deposition of Mr. Manakee. Thus, her finding that claimant's counsel has not submitted satisfactory evidence on the hourly rate issue cannot be affirmed.

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[1]The district director stressed that the fee application documents work that "did not require preparation for trial," and only involved the making of telephone calls, reviews of records, and the writing/review of letters "the longest of which was 6 lines." Order on Attorney's Fees at 4.

[2]The district director found that counsel submitted the same evidence to support his fee application in *V.P. v. APM Terminals, et al.*, 2008-LHC-00842 (Aug. 18, 2009), and that this evidence was similarly rejected by the administrative law judge in that case. In that decision, the administrative law judge awarded counsel a fee based on an hourly rate of $285. *Id.*, slip op. at 15.

On remand, the district director must address Mr. Manakee's deposition testimony to determine whether it is sufficient to establish the prevailing market rate. Should the district director determine that claimant's counsel failed to provide sufficient evidence to establish a market rate,[3] she may derive an appropriate market-based hourly rate based on fee awards in cases arising under the Act that were issued after the Ninth's Circuit's decisions in *Christensen* and *Van Skike*. It is apparent that the district director, in awarding counsel a rate of $235, merely defaulted to the rate she awarded attorneys in this market before *Christensen* was decided. *See, e.g., Van Skike*, 557 F.3d at 1046-1047, 43 BRBS at 14-15(CRT); *Sherman*, 43 BRBS 41. On remand, the district director must provide an explicit rationale in support of her hourly rate determination in accordance with applicable law.

Claimant challenges the district director's disallowance as attorney work for activity she characterized and allowed as paralegal work. The district director rationally characterized as paralegal work two-tenths of an hour expended on August 22, 2005, September 2, 2005, September 6, 2005, October 3, 2007, July 11, 2008, and July 28, 2008, on three letters of representation, two letters requesting records, and a letter requesting a medical evaluation. Claimant has not met his burden of showing that the district director abused her discretion in characterizing as paralegal these services totaling 1.2 hours. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995). Claimant also challenges the administrative law judge's disallowance of two-tenths of an hours on February 24, 2006, for a letter to employer's attorney regarding the denial of medical care, two-tenths of an hour on June 26, 2006, for a letter to an attorney regarding legal representation of a third party, and two-tenths of an hour on October 5, 2007, for a letter to employer's claims adjuster regarding unauthorized contact with physicians. These three activities, although correspondence-related, are not paralegal tasks involving routine cover letters or scheduling appointments. Rather, the June 26, 2006 letter required legal judgment and the other two letters advocated on claimant's behalf. *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *see Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994). Consequently, we modify the district director's fee award to reflect that counsel is entitled to a fee for attorney services for a total of six-tenths of an hour, which was improperly characterized by the district director as paralegal

[3]The district director did not abuse her discretion in rejecting the *Laffey* Matrix and the National Law Journal annual survey as these exhibits do not pertain to the Seattle-Tacoma market. *See Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010). Moreover, to the extent that her decision is based on a lack of comparable skills, experience, and reputation, the district director did not abuse her discretion in rejecting, as evidence of the market rate for counsel's work, the fee awards made to Ms. Lonnquist and Mr. Barnett. *See Christensen*, 43 BRBS 145.

work, representing work performed on February 24, 2006, June 26, 2006, and October 5, 2007.

Claimant challenges the district director's decision to disallow or reduce various services itemized in counsel's fee petition contending that the time recorded was appropriate for the tasks undertaken. Specifically, claimant assigns error to the district director's reduction from three-tenths of an hour to a quarter-hour for letters drafted on September 3, 2005, and September 17, 2005, and her reduction from two-tenths of an hour to an eighth of an hour for reviewing letters on June 26, 2006, and November 1, 2007. Claimant's assertion on appeal is insufficient to meet his burden of establishing that the district director abused her discretion in reducing the time requested for these entries. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). However, after stating that the letters drafted on September 3, 2005, and September 17, 2005, should not have taken more than a quarter of an hour each, the district director reduced by three-tenths of an hour the total of six-tenths of an hour requested for these two entries. Since the district director allowed one-half hour for drafting these two letters, the district director should have reduced the total time requested of six-tenths of an hour by one-tenth of an hour. Accordingly, we modify the district director's reduction for these services rendered on September 3, 2005, and September 17, 2005, from three-tenths of an hour to one-tenth of an hour. The district director also reduced by two-tenths of an hour time requested on September 25, 2007. The district director stated that there are two entries on the fee petition requesting two-tenths of an hour that day for reviewing the notice of controversion. Claimant's counsel's fee petition requests two-tenths of an hour on September 25, 2007, to "Review Notice of Controversion from OWCP, review file for status," and two-tenths of an hour for "Letter to Karen Staats at OWCP responding to the Notice of Controversion from Joe Aumell." Petition for Approval of Attorney's Fees and Costs at 12. As the tasks described on the fee petition are not duplicative, we reverse the district director's disallowance of two-tenths of an hour on this basis. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Accordingly, the district director's Order on Attorney's Fees is vacated and the case is remanded for the district director to award counsel an attorney's fee based on a market rate. The district director's Order is modified to allow as attorney time six-tenths of an hour for work performed on February 24, 2006, June 26, 2006, and October 5, 2007, two-tenths of an hour she mistakenly subtracted from time she found allowable, and two-tenths of an hour she mischaracterized as duplicative. In all other respects, the district director's Order on Attorney's Fees is affirmed.

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