BRB No. 13-0055

RONNIE BELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SSA TERMINALS, LLC	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	DATE ISSUED: 11/26/2013
	)	
Employer/Carrier-Respondents	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor-Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Awarding Attorney's Fees and the Order on Reconsideration Modifying Fee Award of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Eric A. Dupree, Coronado, California, for claimant.

Laura G. Bruyneel (Bruyneel & Leichtnam, LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Awarding Attorney's Fees and the Order on Reconsideration Modifying Fee Award (2010-LHC-01306) of Administrative Law Judge Steven B. Berlin 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).

Claimant injured his right knee on August 31, 2009. Claimant timely filed a claim, but employer controverted it and did not pay claimant any benefits within 30 days of receiving notice of the claim.[1] The parties could not resolve their disputes before the district director, and the case was referred to the Office of Administrative Law Judges on April 12, 2010. Claimant returned to work on July 12, 2010, and on August 29, 2010, employer offered to stipulate to a compensation order awarding temporary total disability benefits based on an average weekly wage of $1,185.64[2] from September 1, 2009 through July 12, 2010, plus past and future medical care, and "reasonable attorney's fees and costs to be agreed to by the parties, and if no agreement can be reached, to be determined by the OWCP and OALJ." EX J at 20. Employer confirmed the offer in writing on September 21, 2010. EX J at 21. The offer was open for 10 days. *Id*. Claimant initially accepted the offer, but the settlement collapsed on October 1, 2010, as claimant's counsel refused to provide a fee demand with documentation or to negotiate fees until the remainder of the settlement was finalized and binding.

Four days later, on October 5, 2010, employer's expert, Dr. von Rogov, opined that claimant's condition had reached maximum medical improvement on July 12, 2010, and that he had a 22 percent loss of use of his leg. Based on Dr. von Rogov's report, employer began to pay compensation on October 8, 2010, without an award at the $790.43 rate, the rate at which it had earlier offered to settle, and paid past due permanent partial disability benefits under the schedule. On or about November 29, 2010, the parties resolved their dispute on the merits by stipulating to the same compensation rate, employer's liability for medical care, and attorney's fee arrangements as in employer's initial offer of September 21, 2010. Additionally, the parties stipulated that claimant reached maximum medical improvement on July 8, 2010, and had a 22 percent loss of use of his leg as a basis for computing permanent partial disability benefits under the

[1]As only the fee record is before us, it is unclear when claimant filed his claim. However, the parties stipulated that the claim was timely filed. As claimant was injured on August 30, 2009, and the case was referred to the Office of Administrative Law Judges on April 12, 2010, claimant must have filed between these two dates. The parties additionally stipulated that compensation was first paid on October 8, 2010. Thus, employer did not pay compensation within 30 days of receiving notice of claimant's claim.

[2]This would result in a compensation rate of $790.43 ($1,185.64 x $66^2/_3$). 33 U.S.C. §908(b).

schedule. The administrative law judge approved the parties' stipulations on January 11, 2011.

Regarding the fee issues that had not yet been resolved, on February 10, 2011, employer offered to settle fees and costs for $20,000. EX J-29. Claimant's counsel declined the offer and filed a fee application on February 14, 2011.[3] Employer filed its objections on March 28, 2011. Claimant's counsel filed a reply, and requested supplemental fees for additional time spent on the fee litigation.[4] Employer objected to the supplemental fee request. Without requesting leave, claimant's counsel filed on May 25, 2011, a reply to employer's objections to the supplemental fee petition; counsel additionally filed a second supplemental request for attorney fees.[5] The administrative law judge struck the May 25, 2011, reply pursuant to 29 C.F.R. §18.6(b).

In total, claimant's counsel sought an attorney's fee in the amount of $55,189.10, representing 66.85 hours for Mr. Dupree's services at $450 per hour, 86.3 hours for Mr. Myers's services at $250 per hour, and 15.1 hours of paralegal services at $125 per hour per hour, and $1,644.10 in costs. Considering claimant's fee petitions and hourly rate evidence, the administrative law judge reduced the hourly rates for Mr. Dupree and Mr. Myers to $385 and $225, respectively.[6] As the administrative law judge struck claimant's May 25, 2011, reply brief, he disallowed all fees and costs in connection with that pleading. The administrative law judge also reduced the number of billable hours allowed for Mr. Dupree to 57.7, for Mr. Myers to 62.4, and for paralegals to 10.7. This reduction in hours included, *inter alia*, time spent directing clerical staff on serving discovery on June 22, 2010, instructing a clerk to forward documents to opposing counsel on December 6, 2010, and instructing a paralegal to fax documents to claimant's physician on December 18, 2010, all of which the administrative law judge found to be clerical work.[7] Decision and Order at 12. The administrative law judge reduced the costs

[3]Counsel originally requested $35,829.10 in fees and costs.

[4]The administrative law judge allowed counsel to reply as employer had argued in its objections that claimant's fees should be reduced, pursuant to *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119, 122 (1986) (*en banc*), after counsel rejected the settlement offer. In his supplemental fee petition, counsel requested $15,917.50.

[5]Specifically, counsel requested an additional $3,442.50 in fees.

[6]Employer did not dispute the $125/hour rate for paralegal services.

[7]The administrative law judge made other reductions to the number of hours billed, but counsel does not challenge them on appeal.

to $1,513. Thus, the administrative law judge awarded a total of $39,105 to claimant's counsel.

Both parties filed motions for reconsideration. Claimant's counsel asserted the administrative law judge erred in setting the hourly rates and he submitted additional evidence. Employer, citing *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119, 122 (1986) (*en banc*), again argued that the fee award should be governed by Section 28(b), 33 U.S.C. §928(b), as of October 8, 2010, when employer tendered and paid all compensation owing and that counsel's services after this date did not result in increased compensation. *See* n. 4, *supra.* On reconsideration, the administrative law judge agreed with employer that its liability for fees terminated on October 8, 2010. and found counsel entitled only to the windup fees after October 8, 2010. Accordingly, he disallowed an additional 9.8 hours of Mr. Dupree's time ($3,773), 1.6 hours of Mr. Myers's time ($360), 2.4 hours of paralegal time ($300), and $300 in costs for an October 27, 2010 telephone conference, for a total reduction of $4,733. The administrative law judge refused to consider counsel's newly submitted evidence regarding market hourly rates and he re-affirmed his hourly rate determinations.[8] Thus, the administrative law judge awarded a total of $34,372 in fees and costs. Claimant appeals both orders, and employer responds, urging affirmance.

Claimant challenges the reduction in the hourly rates requested, averring that the administrative law judge erred in failing to presume that the requested rates represent reasonable hourly rates as counsel produced supporting evidence, and employer did not submit rebuttal evidence. *See Camacho v. Bridgeport Financial, Inc.,* 523 F.3d 973 (9th Cir. 2008) ("[a]ffidavits of the plaintiffs' attorney[s] and other attorneys regarding prevailing fees in the community, and rate determinations in other cases . . . are satisfactory evidence of the prevailing market rate."). We reject claimant's contention. "'The burden is on the fee applicant to produce satisfactory evidence . . . that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation.'" *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1053, 43 BRBS 6, 8(CRT) (9th Cir. 2009) (quoting *Blum v. Stenson,* 465 U.S. 886, 896 n.11 (1984)). Here, the administrative law judge thoroughly discussed the market rate evidence submitted, and he gave detailed reasons for finding it unrepresentative of a market rate in the San Francisco area for services

[8]Specifically, the administrative law judge found that "[g]enerally, motions for reconsideration are not an opportunity for parties to present evidence after a ruling, when the evidence was available to him at the time he briefed the issues initially." Therefore, the administrative law judge struck claimant's new exhibit, a publication available to claimant at the time of both his initial and supplemental petitions. Order on Reconsideration at 2 n.1.

similar to those counsel provided.[9] These findings are rational. *See, e.g., Christensen v. Stevedoring Services of America*, 43 BRBS 145 (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*, 445 F.App'x 912 (9th Cir. 2011) (Board rejected evidence submitted to establish market rate). As the evidentiary basis for counsel's requested rates was not limited to prevailing rates for similar services in the relevant community, the administrative law judge was not bound to accept counsel's claim to hourly rates of $450 and $250 despite a lack of rebuttal evidence from employer. *Id*.; *see also Camacho*, 523 F.3d 973. Moreover, the administrative law judge found that the data counsel submitted, when limited to that for similar services in the San Francisco area, support hourly rates of $385 and $225 for Mr. Dupree and Mr. Myers. Order at 10. Counsel has failed to establish that the administrative law judge abused his discretion in reaching this result. *See generally Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011).

Counsel additionally contends the administrative law judge erred in failing to address the evidence he submitted in his motion for reconsideration on the ground that this evidence was available to him at the time he filed his initial fee petition. Counsel asserts that he should have been given notice of defects in his evidence and an opportunity to cure them before the administrative law judge issued his fee award. As the Supreme Court stated, "[t]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection." *Fox*, 131 S.Ct. at 2216. Therefore, as counsel here was given 30 days following the administrative law judge's decision approving the stipulations to file a fee petition, he was provided ample opportunity to file an adequately-supported fee petition, and the administrative law judge did not abuse his discretion in excluding evidence on reconsideration that counsel could have submitted with his fee request. "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhardt*, 461 U.S. 424, 437 (1983). Moreover, the rates awarded are based on data counsel submitted. Accordingly, we affirm the administrative law judge's disallowance of the data submitted on reconsideration, and we affirm the hourly rates awarded as they are adequately supported by data submitted. *McDonald*, 45 BRBS 45; *see also Fox*, 131 S.Ct. 2205; *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT).

[9]Although counsel's office is in the San Diego area, claimant lives in Northern California and the hearing was scheduled to be held in San Francisco.

Counsel next challenges the administrative law judge's disallowance of 0.3 hour of Mr. Dupree's time and 0.1 hour of Mr. Myers's time spent directing clerical employees to perform clerical tasks on June 22, December 6, and December 18, 2010. Counsel asserts that the administrative law judge's proposition that such direction is excludable as "clerical" is unsupported by law. We disagree. Time spent on traditional clerical duties by an attorney is not compensable, *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980), as clerical services are part of an attorney's overhead. The administrative law judge rationally found that "[i]nstructing a paralegal to serve a discovery request" and "telling a clerk to forward settlement documents to opposing counsel [are] clerical." Order at 12. That the instruction comes from an attorney does not change the fact that the task to be performed is clerical. Claimant has not shown that the administrative law judge abused his discretion in disallowing the time for services he rationally characterized as "clerical." Consequently, we affirm his findings. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

Counsel additionally contends the administrative law judge erred in striking his reply to employer's objections to the supplemental fee application and disallowing the time spent preparing it. Contrary to counsel's assertion, Section 18.6(b) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules) is applicable to proceedings under the Longshore Act unless it is "inconsistent with a rule of special application as provided by statute, executive order, or regulation." 29 C.F.R. §18.1(a). As the regulation governing attorney fees under the Act, 20 C.F.R. §702.132, is silent as to the procedure for filing reply briefs, the administrative law judge acted within his discretion in applying Section 18.6(b) to this case. *See Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993). As counsel filed a reply brief without leave from the administrative law judge, the administrative law judge acted within his discretion in striking the brief and properly disallowed a fee for the time or costs spent preparing it. *See generally Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

Lastly, claimant challenges the administrative law judge's finding on reconsideration that he is not entitled to fees for services performed after October 8, 2010, pursuant to *Armor*, 19 BRBS at 122. Specifically, claimant contends the administrative law judge erred in applying the fee-limitation of *Armor* to this case, because *Armor* and its progeny arose under Section 28(b), whereas the fees award in this case arises under Section 28(a). We agree.

Section 28 provides the authority for awarding attorney's fees under the Act. 33 U.S.C. §928; *see Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). Generally, Section 28(a) applies when an employer declines to pay *any* compensation within 30 days of its receipt of a claim from the district director's office, if

claimant successfully prosecutes his claim.[10] 33 U.S.C. §928(a); *Richardson v. Continental Grain Co.,* 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). Section 28(b) of the Act applies when the employer pays or tenders benefits voluntarily, a controversy arises regarding the claimant's entitlement to additional benefits, and the claimant obtains an award after employer refuses to pay benefits recommended by the district director.[11] 33 U.S.C. §928 (b); *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d

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[10]Section 28(a), 33 U.S.C. §928(a), provides:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

[11]Section 28(b) states:

> If the employer or carrier pays or tenders payment of compensation without an award . . . and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] or Board shall set the matter for an informal conference and following such conference the [district director] or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse (sic) to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee . . . shall be awarded in addition to the amount of compensation. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b).

875, 11 BRBS 68 (9th Cir. 1979). An unconditional offer to settle a claim constitutes tender of compensation under Section 28(b). *Armor*, 19 BRBS at 122.

On reconsideration, the administrative law judge found that "in a series of unpublished decisions, the Board endorsed the rule that once an employer validly tenders payment, Section 28(b) applies." Order at 10 (citing *Vessel v. Todd Corp.*, BRB No. 97-1515 (July 22, 1998) (unpub.); *Usher v. Jones Oregon Stevedoring Co.*, BRB No. 99-605 (Mar. 9, 2000) (unpub.); *Trusty v. Ceres Marine Terminals, Inc.*, BRB No. 03-0311 (Jan. 16, 2004) (unpub.).[12] Applying this principle, the administrative law judge found that employer unconditionally tendered compensation without an award on October 8, 2010, for all amounts owing and followed up with a timely payment of compensation owed under the schedule as soon as there was a medical finding that claimant was at maximum medical improvement and had an impairment rating. As claimant achieved nothing more in the settlement to which he finally agreed in November 2010, the administrative law judge, citing *Armor*, found counsel was not entitled to fees for work performed after October 8, 2010.

We hold the administrative law judge erred in finding that the tender provisions of Section 28(b) apply to this case. The cases the administrative law judge cited to support his decision are unpublished and predate the more recent case law establishing that fee liability for an entire claim is governed by Section 28(a) where the employer fails to pay any benefits within 30 days of receiving notice of the claim and the claimant successfully prosecutes the claim, regardless of whether the employer subsequently pays benefits. *See Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT); *see also Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *A.M.* [*Mangiantine*] *v. Electric Boat Corp.*, 42 BRBS 30 (2008); *W.G.* [*Gordon*] *v. Marine Terminals Corp.*, 41 BRBS 13 (2007). Section 28(a) does not contain a provision by which employer can limit its liability for an attorney's fee by tendering compensation outside the 30-day period. *See Day*, 518 F.3d 411, 42 BRBS 15(CRT); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005). In this case, it is undisputed that employer did

[12]Only *Vessel*, BRB No. 97-1515, potentially supports the administrative law judge's position that a tender of compensation may limit fees already governed by Section 28(a), as the employers in *Usher*, BRB No. 99-605, and *Trusty*, BRB No. 03-0311, initially paid compensation without an award and the controversy arose over a dispute for additional compensation. In *Usher*, the Board specifically rejected counsel's argument that he was entitled to a fee under Section 28(a) because employer was paying disability and medical benefits under an administrative law judge decision at the time the new controversy arose. *Usher*, BRB No. 99-605, slip op. at 3. In *Trusty*, it is unclear when claimant filed his claim and employer began paying benefits; however, no party challenged the administrative law judge's finding that Section 28(b) applied.

not pay claimant any benefits during the 30 days following its receipt of the notice of the claim and that claimant successfully obtained benefits thereafter. Therefore, employer's liability for an attorney's fee in its entirety is governed by Section 28(a). *Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT); *see also Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003). Accordingly, the administrative law judge erroneously applied *Armor* to limit the fee in this Section 28(a) case, and we reverse this finding. As the administrative law judge originally addressed and found reasonable certain services after October 8, 2010, but then disallowed both a fee for those services and costs solely based on his application of *Armor*, we vacate the modifications he made on reconsideration. We modify the fee award to reflect the reinstatement of the $4,733 in fees accrued after this date that the administrative law judge had otherwise found to be reasonable. Order at 14-17. Consequently, we modify the administrative law judge's fee award to reflect that counsel is entitled to a total award of $39,105.

Accordingly, the administrative law judge's Order on Reconsideration is reversed in part and his fee award is modified to reflect that counsel is entitled to a total fee of $39,105, payable by employer. In all other respects, the administrative law judge's Order Awarding Attorney's Fees and Order on Reconsideration Modifying Fee Award are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge