

JOSEFINA CRUZ)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NAVY EXCHANGE SERVICE)	DATE ISSUED: 11/27/2013
COMMAND)	
)	
and)	
)	
AS & G CLAIMS ADMINISTRATION,)	
INCORPORATED)	
)	
Self-Insured Employer/)	
Claims Adjuster-)	
Respondent)	DECISION and ORDER

Appeal of the Attorney Fee Order and the Orders Denying Extension of Time of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Eric A. Dupree and Paul R. Myers (Dupree Law, APLC), Coronado, California, for claimant.

William N. Brooks (Law Offices of William N. Brooks), Long Beach, California, for self-insured employer/adjustor.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order and the Orders Denying Extension of Time (2011-LHC-01452) of Administrative Law Judge Richard M. Clark 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §5171 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it 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 administrative law judge for work performed before the Office of Administrative Law Judges from May 12, 2011 to May 10, 2012.¹ Specifically, counsel sought a fee of \$38,928.32, representing 24.4 hours of attorney services by Eric Dupree at an hourly rate of \$500, 66.5 hours of attorney services by Paul Myers at an hourly rate of \$300, and 8.8 hours of paralegal services by Max Rottenstein and Monica Cruz at an hourly rate of \$150, plus costs of \$5,458.32. Employer filed objections to the fee petition.

In his fee order, the administrative law judge reduced the hourly rates to \$375 for Mr. Dupree, to \$250 for Mr. Myers, to \$125 for Ms. Cruz, and to \$100 for Mr. Rottenstein. The administrative law judge, after making reductions in the requested hours and costs, awarded claimant's counsel a fee totaling \$30,745.32, representing \$25,942.50 for attorney and paralegal time, and costs of \$4,802.82. Within 10 days of the administrative law judge's Order, claimant's counsel filed a motion for an extension of time in which to file a motion for reconsideration of the fee order. The administrative law judge granted counsel a seven-day extension. Within the seven days, claimant's counsel requested another one month's extension. The administrative law judge denied this motion.

On appeal, claimant challenges the hourly rates allowed for attorney services and the denial of his request for an extension to file a motion for reconsideration. Employer responds, urging affirmance. Claimant has filed a reply brief.

Claimant challenges the administrative law judge's findings that San Diego, California, is the relevant legal market for determining counsel's hourly rates and that claimant did not submit sufficient evidence to establish a market rate determination for San Diego. In his decision, the administrative law judge found that the relevant community is San Diego since the hearing was held in San Diego and counsel maintain their office in Coronado, California; therefore, counsel's business overhead is based on the San Diego area economy. Attorney Fee Order (Order) at 3.

¹The administrative law judge issued an order on January 25, 2012, which adopted the parties' stipulations that claimant sustained work-related injuries for which she is entitled to medical benefits, temporary total disability benefits from July 23, 2008 to February 24, 2011, and continuing permanent partial disability compensation thereafter. The administrative law judge also directed claimant's counsel to file his petition for an attorney's fee within 21 days of the order.

The United States 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 also Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that 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." *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 1055, 43 BRBS 6, 8-9(CRT) (9th Cir. 2009); *see also Christensen v. Stevedoring Services of America*, 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*, 445 F.App'x 912 (9th Cir. 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). Moreover, the administrative law judge is afforded considerable discretion in determining factors relevant in a given case. *See generally Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657 (6th Cir. 2008).

The *Christensen* court stated that the relevant community is generally the forum where the district court sits. *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT) *citing Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973 (9th Cir. 2008). In this case, the United States District Court for the Southern District of California is located in San Diego. Notwithstanding counsel's assertion that he practices regularly within the jurisdiction of the federal district courts in Los Angeles and San Francisco as well, the administrative law judge acted within his discretion in finding that San Diego is the relevant market in this case based on the location of counsel's office and the hearing in this particular case. *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT); *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *McDonald v. Aecon Technology Corp.*, 45 BRBS 45 (2011); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009). The administrative law judge's finding is rational and therefore is affirmed. *Id.*

Claimant next challenges the administrative law judge's finding that counsel did not submit sufficient evidence to establish a market rate for San Diego. In his Order, the administrative law judge adopted the reasoning and conclusions of Administrative Law Judges Berlin and Pulver, respectively, in *Nasser v. L-3 Communications*, 2006-LDA-00150 (Nov. 15, 2011), and *Bell v. SSA Terminal*, 2010-LHC-01306 (Jan. 1, 2011), in finding unpersuasive many of the same exhibits counsel submitted in this case. Order at 5. Specifically, the administrative law judge found of limited relevance the Ninth Circuit's fee awards in *Nasser v. Director, OWCP*, No. 09-70706 (9th Cir. Oct. 2011), as it is based upon the entire Southern California market, rather than limited to the San Diego market, and *SSA Marine v. Lopez*, No. 08-72267 (9th Cir. Dec. 2, 2011), as it is a fee award to an appellate attorney based in Washington D.C. *Id.* at 6; *see CXs 6, 7.*

Similarly, the administrative law judge gave “little weight” the Altman-Weil hourly rate attorney surveys² and rejected the “Dupree Matrix,”³ because this evidence did not provide specific information about the pertinent San Diego market. *Id.* at 7; *see* CXs 9, 10.

Once the administrative law judge rationally determined that San Diego is the relevant community for determining counsel’s hourly rates, the burden fell on claimant’s counsel 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.” *Blum*, 465 U.S. at 896 n.11; *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT); *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010); *Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010). Thus, the administrative law judge acted within his discretion in rejecting counsel’s evidence from other legal markets in California on the basis that this evidence is not relevant to the San Diego market. *See Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *B&G Mining, Inc.*, 522 F.3d 657.

Claimant argues that the fee award by the Ninth Circuit in *Nasser*, *supra*, and cases included in the Dupree Matrix that arose within the United States District Court for the Southern District of California, which encompasses San Diego, are relevant to determining an hourly rate for the San Diego market. We reject claimant’s contention that the administrative law judge erred in rejecting this evidence. In *Nasser*, the appellate commissioner stated that the relevant community is Southern California. *Nasser*, No. 09-70706, slip op. at 12. Moreover, counsel does not aver that any of the fee awards in his matrix for the Southern District of California focused only on San Diego as the relevant community.⁴ *See Van Skike*, 557 F.3d at 1044 n.2, 1045, 43 BRBS at 12 n.2, 13(CRT);

²The Altman-Weil 2008 Survey of Law Firm Economics is comprised of data from Los Angeles, Long Beach and Santa Ana. CX 10.

³The “Dupree Matrix,” compiled by claimant’s counsel, contains data from approximately 150 district court fee awards from 2008 to 2010 for the United States District Courts in the Southern, Central and Northern Districts of California, CX 13, which the administrative law judge found “is not a reliable indicia of the prevailing San Diego market rate for attorneys of similar skill, experience, and reputation.” Order at 8-9. Moreover, the administrative law judge rationally found that the matrix does not provide sufficient information to determine an appropriate hourly rate for Mr. Myers, who is less experienced than Mr. Dupree. *Id.*

⁴Moreover, we note that, contrary to claimant’s assertion that the administrative law judge erred by rejecting the fee surveys and declarations of William Dysart and John Hillsman that counsel submitted with their fee petition, CXs 9-12, the administrative law

see also Christensen, 557 F.3d at 1053, 43 BRBS at 8(CRT). Therefore, we affirm the administrative law judge’s finding that counsel did not submit sufficient evidence to establish a market rate for the San Diego market as claimant has not shown the finding to be arbitrary, capricious, an abuse of discretion or not in accordance with law.

Claimant next challenges the administrative law judge’s determination of the hourly rates for Mr. Dupree and Mr. Myers. The Ninth Circuit stated that where, as here, the administrative law judge rationally finds that counsel has failed to provide sufficient evidence to establish a market rate, the administrative law judge may derive an appropriate market-based hourly rate based on fee awards in cases arising under the Act. *See Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT). In this regard, the administrative law judge examined four Longshore Act fee awards to Mr. Dupree that were based on hourly rates of \$340, \$368, \$385, and \$400.⁵ Order at 11. Based on these other awards and “the information provided in this matter,” the administrative law judge found that Mr. Dupree is entitled to an hourly rate of \$375, based upon his skill, reputation in the community, and extensive experience, finding that, “the hourly rate of \$375 reflects the current market rate for Mr. Dupree in San Diego.” *Id.* The administrative law judge also referenced several fee awards issued by the District Court for the Southern District of California in other fee-shifting matters, and found that they “generally” were in the range of the hourly rates awarded to Mr. Dupree in longshore cases. The administrative law judge found that Mr. Myers is entitled to a fee based upon an hourly rate of \$250, which the administrative law judge found is consistent with the \$200 to \$225 hourly rate that Mr. Myers has been awarded for comparable services in the San Diego market in the past, as well with his longshore experience and attorney’s fee awards to other associates with comparable experience.⁶ *Id.* at 13.

Claimant contends the administrative law judge erred in finding that the nine non-longshore, federal cases support the awarded hourly rate of \$375. Claimant avers that these cases, instead, support the requested, higher rate of \$500 per hour. The

judge stated that, “[T]he declarations address the general skill, reputation, and experience of the attorneys in this matter and will be considered for that purpose.” Order at 7, 12.

⁵These cases are: *Nasser v. L-3 Communications*, 2006-LDA-00150 (Nov. 15, 2011); *Azua v. Nat’l Steel & Shipbuilding, Co.*, 2007-LHC-01099 (July 13, 2010); *Bell v. SSA Terminal*, 2010-LHC-01306 (Jan. 1, 2011); and *Azua v. Nat’l Steel & Shipbuilding, Co.*, BRB No. 11-0475 (Apr. 12, 2012).

⁶The administrative law judge based the paralegal hourly rates upon the \$125 hourly rate charged by the Dupree law firm in the past and the differing levels of experience of Ms. Cruz and Mr. Rottenstein. The awarded paralegal hourly rates of \$125 and \$100 are not challenged on appeal.

administrative law judge referenced these federal cases in footnote 5 of his Order. *See* Order at 12 n.5. The cases were decided between June 2010 and July 2012 and awarded partner hourly rates in the range of \$325 to \$550 and associate hourly rates in the range of \$180 to \$278. *Id.* The administrative law judge briefly referenced the circumstances of each fee award, and he acted within his discretion in finding that, as a whole, they support market rates of \$375 and \$250.⁷ Claimant has not established an abuse of the administrative law judge's discretion in this regard.

Finally, we reject claimant's contention that the administrative law judge erred in refusing to extend the time for claimant to prepare a motion for reconsideration. The administrative law judge extended the time once, for seven days, but would not extend it further. We find no abuse of discretion in this decision. The administrative law judge correctly observed that the Supreme Court has commented on the nature of fee-shifting litigation on more than one occasion. *See* Order Denying Extension of Time at 1-2 (Nov. 8, 2012). Specifically, the Court has stated that, "[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 v. Vice*, 131 S.Ct. 2205, 2216 (2011). Moreover, "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The administrative law judge rationally found that counsel had sufficient time to prepare fee documents addressing the relevant market and that further litigation on the market rate issue was not warranted. Counsel has not established that the administrative law judge abused his discretion in this matter, and the hourly rates awarded are supported by the cases the administrative law judge cited. We, therefore, affirm the administrative law judge's award of hourly rates of \$375 to Mr. Dupree and of \$250 to Mr. Myers. *McDonald*, 45 BRBS 45.

⁷Contrary, to counsel's contention, the administrative law judge rationally explained how the higher rates were outliers. Order at 12 n.5.

Accordingly, the administrative law judge's Attorney Fee Order and the Orders Denying Extension of Time are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETY JEAN HALL
Administrative Appeals Judge