



BRB No. 16-0631

BRADLEY DILLON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLACKWATER SECURITY	)	
CONSULTING	)	
	)	DATE ISSUED: <u>Nov. 6, 2017</u>
and	)	
	)	
INSURANCE COMPANY OF THE STATE	)	
OF PENNSYLVANIA	)	
	)	
Employer/Carrier-	)	ORDER on MOTION for
Respondents	)	RECONSIDERATION

Claimant has filed a timely motion for reconsideration of the Board’s Decision and Order in *Dillon v. Blackwater Security Consulting*, BRB No. 16-0631 (June 8, 2017) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant’s counsel also has submitted a petition for an attorney’s fee for work performed before the Board.

In its decision, the Board affirmed the administrative law judge’s ultimate conclusion that employer established suitable alternate employment, but held that three of the jobs identified by employer were not, in fact, suitable for claimant based on restrictions identified by the administrative law judge. The Board modified claimant’s post-injury wage-earning capacity to exclude the three unsuitable positions. The Board also affirmed the administrative law judge’s denial of claimant’s request for reimbursement for the medical expenses he incurred with Dr. Brodkin.

In his motion for reconsideration, claimant contends the Board erred in affirming the administrative law judge’s finding that employer is not liable for the cost of treatment with Dr. Brodkin. Claimant also contends that, in modifying claimant’s post-injury wage-earning capacity, the Board neglected to adjust the wage rate for inflation.

Employer filed a response brief, arguing only that claimant’s medical benefits contention should be denied. Claimant filed a reply brief.

We reject claimant's contention concerning employer's liability for the treatment by Dr. Brodtkin. The Board fully addressed this issue in its decision and claimant has not raised any error in the Board's consideration of it. Accordingly, we deny claimant's motion for reconsideration with regard to this issue.

Claimant also contends that his modified wage-earning capacity should be discounted to reflect the wages the suitable post-injury jobs would have paid at the time of claimant's injury. The courts and the Board have held that wage-earning capacity should be adjusted for inflation to reflect the wages that a post-injury job would have paid at the time of claimant's injury such that average weekly wage and wage-earning capacity are on equal footing. 33 U.S.C. §§908(h), 910; *see Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir. 1986); *Quan v. Marine Power & Equipment*, 30 BRBS 124 (1996). The administrative law judge used the percentage change in the National Average Weekly Wage (NAWW) to discount claimant's post-injury wage-earning capacity by a ratio of .891 as of November 22, 2013 and .872 as of November 19, 2014 to reflect the wages the suitable alternate employment would have paid at the time of injury. Decision and Order at 48.

We agree with claimant that the Board's decision modifying his wage-earning capacity failed to adjust for inflation. Claimant's modified wage-earning capacity excluding the jobs which the Board held were unsuitable is therefore discounted to \$544.85 as of November 22, 2013<sup>1</sup> and \$565.01 as of November 19, 2014.<sup>2</sup> Accordingly, we grant claimant's motion for reconsideration with regard to his wage-earning capacity and modify our previous decision to reflect claimant's discounted wage-earning capacity. In all other respects, the Board's previous decision is affirmed.

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board in the appeal of this case. 33 U.S.C. §928; 20 C.F.R. §802.203. He seeks a total of \$10,645.00, representing 11.80 hours of work by Mr. Grossman at an hourly rate of \$450 and 19.40 hours of work by Mr. Thaler at an hourly rate of \$275. In support of his claimed hourly rates, claimant's counsel submitted: (1) a copy of a 2016 Real Rate Report: Lawyer Rates, Trends, and Analysis; (2) an affidavit from another attorney confirming the reasonable prevailing hourly rate in South Florida for attorneys of comparable experience; and (3) copies of recent attorney's fee orders for counsel's work in other longshore matters. Employer responds that counsel's proposed hourly rate

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<sup>1</sup> \$611.50 x .891 = \$544.85.

<sup>2</sup> \$647.95 x .872 = \$565.01.

of \$450 is excessive and that he is entitled to an hourly rate of \$350.<sup>3</sup> Employer also objects to the total hours claimed, averring that .6 hours should be deducted from claimant's counsel's total claimed hours and 7.3 hours deducted from co-counsel's claimed hours. Employer asserts that claimant's counsel is entitled to an attorney's fee of \$7,142.50.

The Board recently awarded Mr. Grossman an hourly rate of \$372 for work performed in 2015-2016. *DiCecca v. Battelle Mem. Inst.*, BRB No. 15-0504 (Mar. 6, 2017) [*DiCecca II*].<sup>4</sup> We are satisfied that the market rate analysis in *DiCecca II* is appropriate for counsel in this case as well. See *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1055, 43 BRBS 6, 9(CRT) (9<sup>th</sup> Cir. 2009) (a new rate determination need not be made in every case as long as the rates reflect current market conditions). We will apply the percentage increase in the NAWW to reflect the fact that the work in this case was performed in 2016 and 2017. This results in an hourly rate of \$380 for Mr. Grossman's services.<sup>5</sup> In addition, we award Mr. Thaler the claimed rate of \$275.

Employer objects to the number of hours requested in the fee petition, arguing that it contains some excessive billing, block billing, and entries for which claimant's counsel is not entitled to a fee because claimant did not prevail on the issue of medical reimbursement. See Ex. B of Emp. Brief Regarding Attorney's Fees. The number of hours for which a fee is awarded must be reasonably commensurate with the necessary work performed in pursuing claimant's successful appeal. See 20 C.F.R. §802.203(e). We agree with employer that claimant's counsel is not entitled to a fee for .3 hours for work performed on June 27, 2017 as it relates to the issue of medical expense reimbursement on which claimant did not prevail. We find employer's other objections to be without merit. We conclude that counsel's lodestar fee is \$9,705, representing 11.50 hours of work at an hourly rate of \$380 and 19.40 hours of work at an hourly rate of \$275.

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<sup>3</sup> Employer does not object to the suggested hourly rate of \$275 for co-counsel. See Emp. Brief Regarding Attorney's Fees at 4.

<sup>4</sup> In *DiCecca II*, the fee award was based on the "Real Rate Report 2014" for market rates of Miami partners practicing in labor and employment law and adjusted by the percentage increase in the NAWW.

<sup>5</sup> The increase in the national average weekly wage was 2.17 percent for the fiscal year 2017. See <https://www.dol.gov/owcp/dlhwc/NAWWinfo.htm>. Applying that percentage increase to \$372 results in a figure of \$380.

We note, however, that claimant did not prevail on the entirety of his appeal. He prevailed on the issue of suitable alternate employment, thereby lowering his post-injury wage-earning capacity, but did not prevail on the issue of reimbursement for his medical expenses, which he claimed was over \$4,200. The Supreme Court has stated that attorney's fee awards in fee-shifting statutes should be for an amount that is reasonable to the results obtained and that the most critical factor is the degree of success. *See Hensley v. Eckerhart*, 461 U.S. 421, 435-37 (1983). In accordance with this standard, the Board has previously affirmed across-the-board reductions in attorney's fees to reflect a claimant's limited success in his appeal. *See, e.g., Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1990) (affirming a 50 percent reduction in an attorney's fee as reasonable given claimant's limited success in establishing causation but not entitlement to disability benefits); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999) (affirming a 90 percent reduction in attorney's fees to reflect claimant's limited success in establishing entitlement to medical benefits but not temporary total disability benefits). We find that claimant's attorney's fee should be reduced to reflect his lack of success on the issue of medical expenses. We conclude that a total fee of \$7,500 appropriately reflects claimant's degree of success. Accordingly, we award claimant's counsel an attorney's fee of \$7,500.<sup>6</sup>

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<sup>6</sup> Proportionally, this represents a fee of \$3,375 for Mr. Grossman's services and \$4,125 for Mr. Thaler's services.

Accordingly, claimant's motion for reconsideration is granted in part. We modify claimant's post-injury wage-earning capacity for inflation as stated herein. In all other respects, the Board's Decision and Order is affirmed. 20 C.F.R. §802.409. We award claimant's counsel an attorney's fee of \$7,500, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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GREG J. BUZZARD  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge