

W.M.)
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 Claimant-Petitioner)
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 v.)
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 FRED WAHL MARINE) DATE ISSUED: 10/27/2009
 CONSTRUCTION)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Order Granting Attorney’s Fees and the Order Denying Reconsideration of Fee Award of William Dorsey, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Dennis R. VavRosky (VavRosky MacColl, P.C.), Portland, Oregon, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Order Granting Attorney’s Fees and the Order Denying Reconsideration of Fee Award (2005-LHC-1178) of Administrative Law Judge William Dorsey 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 was awarded permanent total disability benefits in this case, and the Board affirmed the award. *W.M. v. Fred Wahl Marine Constr.*, BRB No. 07-0503 (Dec. 13, 2007). Claimant’s counsel filed an initial and four supplemental petitions for an attorney’s fee with the administrative law judge. The total amount requested was \$70,889.25, representing 140.125 hours of work at an hourly rate of \$350, 41.5 hours of

work at an hourly rate of \$110, and \$17,281 in expenses.¹ In its initial objection, employer challenged only counsel's hourly rate; however, following counsel's third supplemental request, it objected to the hourly rate, the hours, and the costs requested in that supplement.

Counsel submitted a variety of evidence attempting to demonstrate his entitlement to an hourly rate of \$350.² Based on counsel's evidence and on employer's evidence of fees in past West Coast longshore cases, the administrative law judge concluded that counsel's proof that his market billing rate is \$300 per hour is "too thin to be persuasive" and that nothing establishes that his rate is \$350 per hour. Order at 12. As he rejected the various surveys and depositions,³ he found that the best guide to a reasonable hourly rate is evidence of the amount paid in other recent longshore cases, and he awarded counsel a rate of \$275 per hour, stating that this is higher than counsel and other attorneys have received recently in longshore cases, yet it is generally consistent with employer's evidence, and reflects an upward adjustment to keep the rate current. Additionally, the administrative law judge cited the Altman Weil Survey as a "cross-check" to validate this rate. *Id.* The administrative law judge found that \$275 per hour comported with the amount of the benefits awarded, the complexity of the issues, and the quality of the representation. Order at 13. Ultimately, the administrative law judge awarded a fee of \$58,518, representing 134.5 hours of work at an hourly rate of \$275, plus \$4,565 in legal assistant fees, plus \$16,965.50 in expenses. The administrative law judge denied counsel's motion for reconsideration and reaffirmed \$275 as a reasonable hourly rate.

Claimant's counsel appeals the fee award. He challenges the administrative law judge's reduction of the hourly rate from \$350 to \$275 and argues that the administrative law judge erred in failing to address the fee and costs requested in the third supplemental

¹Counsel's initial request was for 127.25 hours of work at a rate of \$350 per hour, plus 41.5 hours at a rate of \$110 per hour, plus \$16,965.50 in expenses. In supplemental requests, counsel sought a fee for 4.25 hours, .5 hour, 5.625 hours, and 2.5 hours of additional work, respectively, all at an hourly rate of \$350. Additionally, in the third supplement, he requested \$315.50 in expenses.

²Counsel submitted contractual fees paid by three private clients, a fee awarded by the Oregon Court of Appeals, the Morones Survey, the *Laffey* Matrix, the Crow deposition, fees awarded by the Ninth Circuit, a fee awarded in Savannah, Georgia, the Altman Weil Survey, the Oregon State Bar 2007 Economic Survey, the Skerritt deposition, and a fee awarded in an ERISA case.

³The administrative law judge fully explained his reasons for rejecting the evidence. Order at 7-15; Order on Recon. at 3-4.

petition. With regard to the hourly rate, and in light of the recent decision issued by the United States Court of Appeals for the Ninth Circuit in *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), counsel argues that the Board should vacate the fee award and remand the case for further consideration and/or give counsel a chance to remedy his failure to establish his market rate. Employer responds, urging affirmance.

In *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), involving a fee awarded by the Board, the Ninth Circuit acknowledged that the definition of a “reasonable attorney’s fee” was the same for all federal fee-shifting statutes, *Christensen*, 557 F.3d at 1052, 43 BRBS at 7(CRT) (citing *City of Burlington v. Dague*, 505 U.S. 557 (1992)), and that most fee awards under such statutes are calculated using the lodestar method, which multiplies a reasonable hourly rate by the number of hours worked.⁴ The fee must be calculated using the prevailing market rates in the relevant community. *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT). In *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973 (9th Cir. 2008), the Ninth Circuit addressed a fee under the Fair Debt Collection Practices Act and expressed the concern that defining “relevant community” under the FDCPA is problematic. As there is no private market, and “[i]n order to encourage able counsel to undertake FDCPA cases, as Congress intended, it is necessary that counsel be awarded fees commensurate with those which they could obtain by taking other types of cases” including ones in the private market where the fees are paid by the clients. *Camacho*, 523 F.3d at 981 (quoting *Tolentino v. Friedman*, 46 F.3d 645, 652 (7th Cir. 1995)). This concern, the court stated, is equally present in cases under the Longshore Act. *Christensen*, 557 F.3d at 1053-1054, 43 BRBS at 8(CRT). The Ninth Circuit stated that continued use of a rate over a long period in a given community and defining the “market” in this way merely “recast[s]” awards made by previous courts and calls it a “market,” rather than independently examining an actual market. *Christensen*, 557 F.3d at 1054, 43 BRBS at 8(CRT) (citing *Student Pub. Interest Research Group of N.J. v. AT&T Bell Laboratories*, 842 F.2d 1436, 1446 (3^d Cir. 1988)); see also *Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008) (*de facto* policy of awarding flat rate improper).

In *Van Skike*, the court addressed appeals of fees awarded by the administrative law judge and district director and affirmed by the Board. The court stated that both the administrative law judge and the district director provided detailed analyses of their

⁴Other considerations, which could affect the fee, include for example: novelty or difficulty of the issue; skill needed; customary fee; time limitations imposed on attorney; amount involved/results obtained; experience of attorney; and, undesirability of the case. *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT).

rejection of the evidence proffered for the hourly rate determination. However, as their analyses did not take the concerns espoused in *Christensen* into consideration, the court vacated the fee awards and remanded them for further consideration. *Van Skike*, 557 F.3d at 1047, 43 BRBS at 14-15(CRT);⁵ *see also H.S. v. Dep't of Army/NAF*, 43 BRBS 41 (2009).

Although the administrative law judge in this case addressed the hourly rate evidence and fully explained his rationale for rejecting or accepting it, he rendered his decision before the Ninth Circuit issued *Christensen* and *Van Skike*. Consequently, the administrative law judge's fee award must be vacated and the case remanded to him for further consideration in light of that intervening law. *Van Skike*, 557 F.3d at 1047, 43 BRBS at 14-15(CRT); *H.S.*, 43 BRBS 41. Specifically, although the administrative law judge's initial reliance solely on rates paid in prior longshore cases was remedied, to a degree, by his reliance on the Oregon Economic Survey, his reliance solely on the workers' compensation portion of that survey is problematic. The Ninth Circuit prohibited the use of only other longshore cases, except when the applicant has failed to carry his burden of showing that some other rate is applicable.⁶ *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT). The court explicitly stated that consideration must be given to the rates an attorney could receive if he were to take other types of cases where there is a private market and the clients pay the fees. *Van Skike*, 557 F.3d at 1047, 43 BRBS at 14(CRT); *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT); *Camacho*, 523 F.3d at 981.

⁵Additionally, the court held that reduction of the hourly rate due to the lack of complexity of the issues was improper. Rather, adjustments for the lack of complexity of a case should be made in considering the number of hours worked and not in the hourly rate awarded. Therefore, the court vacated that aspect of the district director's fee award also. *Id.* at 1048, 43 BRBS at 15(CRT).

⁶The Ninth Circuit stated that a fee applicant may be granted a chance to cure his failure to carry the burden of establishing his market rate if the reasons given by the court for rejecting the requested rate could not have been anticipated by the applicant. *Van Skike*, 557 F.3d at 1047, 43 BRBS at 14(CRT); *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT). As counsel here asserts some "surprise" with the administrative law judge's reasons for rejecting his evidence, on remand, the administrative law judge must address this argument. Contrary to counsel's assertions before the Board, however, he is not entitled to an opportunity to cure the defects in his evidence merely because the administrative law judge rejected it; the opportunity to cure is given at the discretion of the body awarding the fee. *Id.*

Hours & Costs

Counsel, *in toto*, requested a fee for 140.125 hours of his work time. The administrative law judge awarded a fee for 134.5 hours. The difference is the result of the administrative law judge's failure to address the fee and costs requested in counsel's third supplemental fee petition dated September 19, 2007. In it, counsel requested payment for 4.5 hours spent replying to employer's objections, and .875 hours spent on the deposition of Mr. Skerritt, for a total of 5.625 hours, plus \$315.50 for the deposition time and the court reporter fee.⁷ Employer objected to this additional request. Counsel was permitted to reply, and he sought an additional fee for 2.5 hours for that reply.⁸

The administrative law judge did not address the third supplemental request or employer's objections thereto.⁹ Consequently, on remand the administrative law judge must consider this supplemental petition and employer's objections thereto and determine whether counsel is entitled to a fee for those hours and costs.

⁷Counsel stated that the deposition times and costs represented half of the actual amount expended. The other half was requested in the fee petition for *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *rev'd in part and aff'd, vacated and remanded, and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), and No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), *cert. denied*, 544 U.S. 960 (2005).

⁸Employer did not object to the fee requested in the fourth supplemental request, which the administrative law judge approved.

⁹The administrative law judge also did not address the Skerritt deposition.

Accordingly, the administrative law judge's fee award is vacated, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge