U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 17-0281

DAVID K. ANDERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HAWAII STEVEDORES, INCORPORATED	)	
	)	
	)	DATE ISSUED: Oct. 31, 2017
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	DECISION and ORDER

Appeal of the Attorney Fee Order and the Order Denying Motion for Reconsideration of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Steven M. Birnbaum, San Rafael, California, for claimant.

James P. Aleccia and David L. Doeling (Aleccia & Mitani), Long Beach, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order and the Order Denying Motion for Reconsideration (2011-LHC-01015) of Administrative Law Judge Jennifer Gee 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 it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in

accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant sustained significant head injuries as a result of a January 10, 2008 accident while working for employer in Hawaii. By decision dated May 6, 2016, the administrative law judge awarded claimant disability and medical benefits.[1] Subsequently, claimant's counsel filed petitions for an attorney's fee totaling $264,325.05 for legal services provided and costs incurred while the case was pending before the administrative law judge.[2] Employer objected to the fee petition. Claimant filed a reply and employer filed a sur-reply. In her Attorney Fee Order dated December 29, 2016, the administrative law judge found that Hawaii is the relevant community for determining the market hourly rate for counsel's services, reduced the requested hourly rates, as well as some hours and costs sought by counsel, and approved an attorney's fee and costs totaling $156,593.93, payable by employer.[3] In disallowing some of the requested costs, the administrative law judge found counsel's submission lacked documentation verifying the amount or the relevance and necessity of the cost.

Claimant's counsel filed a motion for reconsideration regarding the administrative law judge's determination that Hawaii is the relevant legal market and denial of certain costs. The administrative law judge denied the motion. With respect to the costs, the administrative law judge found counsel's additional submissions inadequate to justify awarding the costs given the lack of "accurate, organized, contemporary" records that explain the amount and necessity of the cost.

On appeal, claimant's counsel challenges the administrative law judge's finding that Hawaii is the relevant community for setting the market rate and her denial of four specific expenses. Employer responds, urging affirmance.

Counsel contends the administrative law judge erred by using Hawaii, rather than the San Francisco Bay Area, as the relevant community for determining the proxy market

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[1]Specifically, the administrative law judge ordered employer to pay claimant temporary total disability benefits from January 10, 2008 to June 21, 2010, and ongoing permanent total disability benefits thereafter.

[2]Counsel sought a fee for 391.33 hours of attorney time at an hourly rate of $525, 169.55 hours of paralegal time at an hourly rate of $195, and $25,814.55 in expenses.

[3]The administrative law judge calculated the fee award as follows: 365.825 hours of attorney work at an hourly rate of $350, 107.525 hours of paralegal work at an hourly rate of $100, 20 hours of paralegal work at an hourly rate of $75, and $16,302.68 in costs.

rate for his services. Counsel contends that the United States Court of Appeals for the Ninth Circuit, in *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015), and *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), advocates for rates "based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status," as articulated in the Board's regulation at 20 C.F.R. §802.203. Counsel maintains that parties in longshore cases in Hawaii routinely retain counsel from the mainland.

The United States Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a federal fee-shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). It is well established that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895. The burden is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation. *See Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Blum*, 465 U.S. at 896 n. 11; *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT); *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).

As this case arises within the jurisdiction of the Ninth Circuit, the determination as to an appropriate hourly rate is guided by the court's decision in *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT).[4] Discussing the phrase "relevant community," the Ninth Circuit, in *Shirrod*, stated:

> In civil litigation, we typically recognize the forum where the district court sits as the "relevant community" for purposes of fee-shifting statutes. *Christensen*, 557 F.3d at 1053; *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997). By analogy, a determination of the "relevant community" in Longshore Act cases should focus on the location where the litigation took

[4]In *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT), the court vacated the Board's affirmance of the administrative law judge's fee award, concluding it was erroneous because, even after finding the relevant community to be Portland, Oregon, the administrative law judge awarded an hourly rate based on state-wide rate information rather than on rate information tailored to the Portland community.

> place. But, because district courts are not involved in cases under the Longshore Act, we must look to other indicia to determine where the litigation took place and, thus, which is the "relevant community." Here, all factors point to Portland as the location of the litigation: Counsel to Shirrod and Pacific Rim maintain their offices in Portland; hearings before Judge Berlin occurred in Portland.

Shirrod, 809 F.3d at 1087, 49 BRBS at 96(CRT). The court further stated:

> Recognizing that the relevant decisionmaker has wide—but not unlimited—discretion when making attorney's-fee awards, *see Kenny A.*, 559 U.S. at 558, we ultimately left it to the BRB, ALJs, and District Directors to determine the "relevant community" and the prevailing market rates in that community, as long as the decisionmaker provides adequate justification. *Christensen*, 557 F.3d at 1055.

Id., 809 F.3d at 1087, 49 BRBS at 95(CRT).

In this case, the administrative law judge fully addressed the parties' contentions and the pertinent facts in terms of appropriate case law in resolving the "relevant community" issue. The administrative law judge rationally relied on the facts that: claimant and employer are both located in Hawaii; the injury occurred in Hawaii; all of claimant's treating physicians and nearly all of his medical treatment took place in Hawaii; the depositions were taken in Hawaii; and, perhaps most importantly, the formal hearing in this case was held in Hawaii. Additionally, the administrative law judge found it compelling that counsel "holds himself out as doing Longshore work in the Hawaii legal market and competes for clients with other attorneys in that market," as evidenced by the fact that counsel "regularly takes Hawaii Longshore cases and maintains an office in Honolulu."[5] Attorney Fee Order at 7. These facts provide "adequate justification" for

[5]On appeal, counsel contends he has not had any permanent space in Hawaii reserved exclusively for him since December 2015, and that the administrative law judge incorrectly stated that he maintains an office in Hawaii. This contention is belied by the fact that the letterhead on a cover letter, dated January 13, 2017, which counsel submitted to the administrative law judge with his Motion for Reconsideration of the administrative law judge's Attorney Fee Order lists an office address for counsel in Honolulu, Hawaii. Moreover, even assuming that counsel has not had permanent office space in Hawaii reserved for himself since December 2015, the vast majority of work for which counsel seeks a fee was performed prior to December 2015.

the administrative law judge's finding that Hawaii is the relevant community.[6] *Shirrod,* 809 F.3d at 1087, 49 BRBS at 96(CRT). Counsel thus has not shown that the administrative law judge abused her discretion in finding, based on the specific facts of this case, that Hawaii is the relevant community for purposes of determining the proxy market rate for counsel's services. *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT). Accordingly, we affirm this finding. As a result, we affirm the hourly rates awarded by the administrative law judge as they are not challenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Counsel next contends that the administrative law judge unreasonably disallowed some of his requested costs. Counsel maintains that to the extent the administrative law judge found any of his entries for costs unclear and/or insufficiently documented, she should have issued an order for counsel to supplement them appropriately. Counsel states that where the administrative law judge found in her initial decision that certain costs were duplicative or lacked documentation, he remedied this by submitting with his motion for reconsideration the additional documentation requested. He therefore specifically requests that the Board modify the administrative law judge's attorney's fee award to include four previously denied costs totaling $3,105,[7] which counsel documented in his motion for reconsideration.

Claimant's counsel's fee petition should be a self-sufficient document from which the administrative law judge can assess the reasonableness of the request for fees and costs and whether the services for which counsel seeks recompense were necessary for the prosecution of the claim. Section 28(d), 33 U.S.C. §928(d), states "[i]n cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such employer or carrier as costs, fees and mileage for necessary witnesses

[6]The administrative law judge rejected counsel's contention that because counsel's expenses occur in the Bay Area, it is fair that he be paid Bay Area rates for his services. The administrative law judge rationally found that "from the perspective of the consumer of legal services in Hawaii, payment is being made by a Hawaii client for a dispute focused on Hawaii, so it would be fair to pay Hawaii rates. Just because Claimant's Counsel has opted to live in the Bay Area does not mean he should be able to ply his wares in Hawaii at San Francisco rates." Order Denying Mot. for Recon. at 3.

[7]Claimant's counsel specifically requests that the administrative law judge's denial of fees for Dr. Palozzi ($1,080), the Ralph Rosenberg Depositions Payment ($325), the Dr. Likewise Deposition fee ($700), and the payment to reimburse Signal for Dr. Drazin's deposition ($1,000) be reversed. The administrative law judge's denial of other costs sought by counsel is affirmed as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

attending the hearing at the instance of claimant. Both the necessity for the witness and the reasonableness of the fees of expert witnesses must be approved by the hearing officer, the Board, or the court, as the case may be." *See also* 20 C.F.R. §702.135. The burden is on counsel to submit a sufficiently documented application for costs. *See generally Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem*., 202 F.3d 259 (4th Cir. 1999); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.,* 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

In this case, the administrative law judge found that counsel failed to adequately itemize his costs in his original fee petition. Attorney Fee Order at 61-63. On reconsideration, counsel submitted receipts matching the itemized expenses at issue. In denying reconsideration, the administrative law judge stated that counsel provided only "conclusions with a stack of paper." Order Denying Mot. for Recon. at 4. Specifically, the administrative law judge stated that although counsel offered evidence of the amount of the costs, he did not explain how they relate to the claim or to the services rendered, particularly given his admission that the previous request for costs contained significant inaccuracies. *Id.*

It was within the administrative law judge's discretion to find that counsel did not adequately document his costs in the original fee petition, that employer's objections put counsel on notice that more information regarding particular expenses was required, and that counsel did not correct those deficiencies prior to the issuance of the initial fee award. Moreover, the administrative law judge permissibly found inadequate counsel's attempt to remedy the prior deficiencies by attaching cancelled checks to his motion for reconsideration, as there remained a lack of specificity and/or an adequate explanation as to why those costs were reasonable and necessary. Counsel has failed to establish an abuse of discretion or legal error in the administrative law judge's rejection of these four costs. Consequently, the administrative law judge's denial of these four costs is affirmed.[8] *Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994).

[8]It is well established that fee petitions shall be supported by "a complete statement of the extent and character of the necessary work done, described with particularity." 20 C.F.R. §702.132(a). It therefore behooves counsel to submit a fully-documented fee petition at the outset, rather than view his initial submission as the starting point for negotiating his attorney's fee. As the United States Supreme Court stated, courts 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*, 563 U.S. 826, 838 (2011).

Accordingly, the administrative law judge's Attorney Fee Order and the Order Denying Motion for Reconsideration are affirmed.

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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RYAN GILLIGAN
Administrative Appeals Judge