



BRB No. 18-0250

CLAUDIA ALEXANDER	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: 10/12/2018
v.	)	
	)	
NAVY EXCHANGE SERVICE	)	
COMMAND (NEXCOM)	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Awarding Attorney Fees and the Order Denying Request for Reconsideration in Part and Approving in Part of District Director’s Award of Attorney Fees Under 33 U.S.C. 928 of Marco A. Adame II, District Director, United States Department of Labor.

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

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

PER CURIAM:

Claimant appeals the Order Awarding Attorney Fees and the Order Denying Request for Reconsideration in Part and Approving in Part of District Director’s Award of Attorney Fees Under 33 U.S.C. 928 (Case No. 18-102693) of District Director Marco A. Adame II, 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. §8171 *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. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

The administrative law judge awarded claimant temporary total disability and medical benefits for work-related injuries to her wrists and elbows. *Alexander v. Navy Exch. Serv. Command*, 2014-LHC-02014 (May 9, 2016).<sup>1</sup> Thereafter, claimant's counsel, Eric Dupree, filed fee petitions with the district director and the administrative law judge. Before the district director, he requested a fee of \$5,106.50, representing 7.3 hours of work at an hourly rate of \$500 for his work, 2.2 hours of work at an hourly rate of \$300 for the work of Paul Myers, 4.5 hours of paralegal work at an hourly rate of \$150, and costs of \$121.50. Counsel requested a supplemental fee for work responding to the fee objections in the amount of \$3,680, representing 1.8 hours of work at an hourly rate of \$500 for himself, 3.7 hours at an hourly rate of \$300 for Myers, 6.5 hours at an hourly rate of \$250 for Alicia Bond, and .3 hour for paralegal work. The district director ultimately awarded counsel a total fee of \$7,302.50, representing \$3,940 for work itemized in the original fee petition and \$3,362.50 for work itemized in the supplemental fee petition. He awarded an hourly rate of \$400 for Dupree's work, \$275 for Myers' work, \$250 for Bond's work, and \$150 for paralegal work. Order Awarding Attorney Fees at 9; Order on Recon. at 3.

Claimant's counsel appeals the district director's fee award. He challenges the hourly rates awarded for his services and those of Myers. Counsel also challenges the district director's reliance on the administrative law judge's fee award in this case without giving the parties notice. Employer has not responded to this appeal.

In addressing the hourly rates, the district director stated:

Judge Larson (sic) concluded the evidence submitted by the claimant's counsel supported an hourly rate of \$400 for Mr. Dupree, \$275 for Mr. Myers and \$150 for paralegal services.

As the court diligently reached a determination in regards to the reasonable hourly rates for Mr. Dupree and his associates in this case, the District

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<sup>1</sup> Claimant appealed the administrative law judge's statement that her entitlement to temporary total disability benefits was to run until the date of maximum medical improvement. The Board agreed with claimant that this statement was contrary to law and would permit employer to unilaterally cease paying benefits. The Board modified the language to reflect that claimant is entitled to temporary total disability benefits "from August 1, 2013, to the present and continuing. . . ." *Alexander v. Navy Exch. Serv. Command (NexCom)*, BRB No. 16-0561 (July 19, 2017).

Director adopts those rates herein.

Order Awarding Attorney Fees at 2 (citations omitted).<sup>2</sup> On counsel's motion for reconsideration, asserting that the district director erred in relying on the administrative law judge's award because that award lacks a proper market rate finding, the district director stated:

Judge Larsen . . . listed the evidence that he reviewed. Judge Larsen's reasoning and explanation of the market rate appear to be valid and well reasoned. Although claimant's counsel has argued that Judge Larsen did not make a market rate finding, the District Director has found no evidence that Judge Larsen's Order was appealed nor was a Request for Reconsideration made.

The District Director adopted the reasoning and findings of Judge Larsen in his Attorney Fee Award. Since Judge Larsen did make a market rate determination along with well reasoned analysis the claimant's request to reconsider the hourly rate is denied.

Order on Recon. at 2.

On appeal, claimant's counsel contends the district director did not identify the relevant legal market or address the market rate evidence he submitted, and erred in relying on the administrative law judge's award without giving the parties notice and because it is a non-market award.<sup>3</sup> Counsel asks the Board to vacate the fee award and remand the case for an independent analysis of the evidence in accordance with the legal standards of the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises. We agree that the fee award cannot be affirmed.

The 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);

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<sup>2</sup> After finding that counsel failed to submit sufficient evidence to support his requested hourly rates, the administrative law judge relied on past cases and his own experience to award rates of \$400, \$275, and \$150 per hour. ALJ Fee Order at 3-10.

<sup>3</sup> Counsel does not appeal the hourly rates for Bond or the paralegals, the number of hours approved, or the costs awarded; those findings are affirmed as unchallenged. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

*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). The Court has also held 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; see also *Kenny A.*, 559 U.S. at 551. 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. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).

Initially, we reject counsel's general assertion that the district director erred in relying on the administrative law judge's fee award and in failing to notify the parties of his decision to do so. The Ninth Circuit has stated that tribunals need not re-analyze the hourly rate issue in every case, provided the analysis occurs with sufficient regularity to reflect current market rates. *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT). Moreover, it is not an abuse of discretion for a district director to rely on prior fee awards when the fact-finder concludes that the parties' evidence is insufficient to establish a market rate. *Id.* In this case, counsel submitted with his initial fee petition to the district director the same evidence the administrative law judge concluded did not support the claimed hourly rates of \$500 and \$300. As the administrative law judge addressed this evidence and explained why it was insufficient, it was reasonable for the district director to adopt the administrative law judge's findings in this regard. See *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); ALJ Fee Order at 3-10.

While counsel's fee petition was pending before the district director, however, counsel obtained additional, more current, evidence of rates for comparable services in the San Diego area. He submitted this new evidence to the district director, which the district director acknowledged but did not address. See Order on Recon. at 1. Because claimant submitted to the district director additional evidence to support his requested hourly rate that the administrative law judge did not possess, and, thus, could not have reviewed, counsel's assertion that the district director erred in relying solely on the administrative law judge's award has merit. We, therefore, vacate the district director's fee award based on hourly rates of \$400 and \$275 and remand the case for him to further consider this issue. On remand, the district director should consider all relevant evidence not addressed by the administrative law judge, explain his reasons for accepting or rejecting that evidence, and determine market-based hourly rates.<sup>4</sup> *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Van*

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<sup>4</sup> The district director did not specifically identify the relevant legal market. Although the administrative law judge did not explicitly find San Diego to be the relevant

*Skike*, 557 F.3d 1041, 43 BRBS 11(CRT); *Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010) (Order); *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009).

Accordingly, the district director's hourly rate awards for Dupree and Myers are vacated, and the case is remanded for further proceedings consistent with this opinion. In all other respects, the district director's fee orders are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

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market, he stated: "The six cases drawn from the Southern District of California's docket shed very little, if any, light on prevailing market rates in the San Diego area." Attorney Fee Order at 9. Thus, it appears the administrative law judge acknowledged San Diego as the relevant market, and the district director implicitly adopted this finding. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015). Nevertheless, on remand the district director must specifically identify the relevant market to avoid any confusion.