

BRB No. 08-0358

P. T.)
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 Claimant-Petitioner)
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 v.)
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 NAVY PERSONNEL COMMAND/MWR) DATE ISSUED: 09/19/2008
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 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Attorney Fee Order of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., for claimant.

Normand R. Lezy (Leong Kunihiro Leong & Lezy), Honolulu, Hawaii, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2004-LHC-00448) of Administrative Law Judge Russell D. Pulver 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 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. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case has previously been before the Board. To recapitulate the relevant facts, claimant, a food services worker for employer, sustained a work-related injury to her right knee on June 20, 1999. She underwent two right knee surgeries. Claimant's left knee pain was diagnosed as due primarily to her favoring her right knee. Following the accident, claimant worked intermittently for employer on light duty and received

temporary total disability for several periods during which she was unable to work. 33 U.S.C. §908(b). Employer also paid claimant a scheduled award totaling \$1,362.78, based on a two percent permanent impairment of her right lower extremity. 33 U.S.C. §908(c)(2). After March 21, 2002, employer notified claimant that a light-duty work schedule was no longer available and that, pursuant to Dr. Smith's opinion, claimant no longer needed any work restrictions and could return to her full-duty job. Claimant did not return to work for employer. She eventually obtained sedentary part-time work as a parking lot attendant as of September 1, 2004. Claimant filed a claim for benefits based on her right and left knee injuries.

In his initial decision, the administrative law judge found that claimant sustained work-related injuries to her right and left knees and had not yet reached maximum medical improvement with regard to either condition. The administrative law judge determined that claimant could not return to her usual employment as of May 13, 2003, and that employer established the availability of suitable alternate employment. Nevertheless, the administrative law judge found claimant entitled to temporary total disability benefits from May 15, 2003, through September 1, 2004, as he found that claimant diligently sought suitable post-injury employment but was unsuccessful until she secured the parking lot attendant position on September 1, 2004. The administrative law judge found claimant entitled to temporary partial disability benefits thereafter based on her reduced earnings as a parking lot attendant. 33 U.S.C. §908(e). Claimant's counsel, Mr. Friedheim, was awarded an attorney's fee totaling \$23,603.20.

Employer appealed to the Board, challenging the administrative law judge's finding that claimant had not yet reached maximum medical improvement with regard to her knee injuries and the award of an attorney's fee. BRB No. 05-0796. In its decision, the Board affirmed the administrative law judge's finding that claimant's left knee injury had not reached maximum medical improvement. However, the Board held that the administrative law judge did not address all the relevant evidence concerning the permanency of claimant's right knee condition after her second surgery. Therefore, the Board vacated the administrative law judge's finding that claimant's right knee condition remained temporary and remanded the case for the administrative law judge to reconsider this issue pursuant to applicable law. The Board rejected employer's contentions regarding the administrative law judge's attorney's fee award. [*P. T.*] v. *Navy Personnel Command/MWR*, BRB No. 05-0796 (June 26, 2006) (unpub.).

In his decision on remand, the administrative law judge accepted the parties' stipulation that claimant's right knee reached maximum medical improvement on June 1, 2002, and he found claimant entitled to a scheduled award for a two percent permanent impairment of her right leg. 33 U.S.C. §908(c)(2). In his decision on reconsideration, the administrative law judge found that employer may not credit its prior temporary total

disability payments from December 8, 2001, to May 14, 2003, for claimant's left knee injury against its liability for claimant's permanent right knee impairment. The administrative law judge also found that claimant may receive concurrent awards for her right knee impairment and for her ongoing temporarily disabling left leg injury.

Claimant's counsel, Mr. Gillelan, submitted a fee petition requesting an attorney's fee totaling \$6,394.50, representing 14.7 hours of attorney work at an hourly rate of \$435 for work performed before the administrative law judge on remand. Employer filed objections to the fee petition. Claimant replied to employer's objections urging that his fee as originally requested be approved. Claimant also requested an additional \$1,305 for three hours expended replying to employer's objections. The administrative law judge awarded claimant's counsel an attorney's fee totaling \$3,675, representing 14.7 hours of attorney work at an hourly rate of \$250.¹

On appeal, claimant challenges the administrative law judge's fee award on remand. Employer responds, urging that the Board affirm the fee award in part and modify the award in part. Claimant has filed a reply brief.

Claimant contends that the administrative law judge erred by basing his hourly rate determination on the rates paid to longshore attorneys in the relevant geographic community rather than on rates derived from the *Laffey* matrix, which claimant's counsel submitted to the administrative law judge in support of his requested hourly rate. Claimant also argues that the administrative law judge erred by not crediting the *Laffey* matrix because it was the only evidence before the administrative law judge addressing the market rates charged for comparable work by attorneys with comparable qualifications to claimant's counsel. We reject these contentions of error and affirm the hourly rate awarded.

The Act and the regulations require that any fee awarded by an administrative law judge be reasonable and be commensurate with the necessary work performed, taking into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 33 U.S.C §928; 20 C.F.R. §702.132; *see also Hensley v. Eckerhart*, 461 U.S. 424 (1983). "Reasonable" rates typically correspond to the prevailing market rates in the relevant community. *Blum v. Stenson*, 465 U.S. 886 (1984). In his order, the administrative law judge found that claimant's counsel presented no evidence of the hourly rate he could charge non-contingency clients. The

¹ Claimant's counsel, Mr. Friedheim, was awarded a supplemental fee of \$2,587.75 for the delay in payment of the administrative law judge's initial fee award. Mr. Friedheim did not perform any work before the administrative law judge on remand.

administrative law judge found the *Laffey* matrix applicable to general civil litigators and that it does not establish the prevailing hourly rate in cases under the Act. Based on Board precedent, the administrative law judge found that he may set an hourly rate based on his familiarity with the fee awards made in other cases under the Act in the relevant community. The administrative law judge found that the current hourly rate for experienced practitioners in the major cities in the western United States is between \$225 and \$300 and that this rate incorporates the regulatory criteria in Section 702.132. The administrative law judge found, upon consideration of the complexity of the case and the other regulatory criteria, that the requested rate of \$435 is unsubstantiated and excessive and that the appropriate rate is \$250. Attorney Fee Order at 3.

We reject claimant's contention that the administrative law judge erred as a matter of law by not crediting the *Laffey* matrix to establish the applicable hourly rate. *D.V. v. Cenex Harvest States Cooperative*, 41 BRBS 84, 87 (2007). Moreover, the courts and the Board have held that hourly rate determinations in comparable cases may properly be considered as probative evidence of the prevailing market rates in the relevant community. See *B & G Mining Inc. v. Director, OWCP*, 522 F.3d 657 (6th Cir. 2008); *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2000); *B.C. v. Stevedoring Services of America*, 41 BRBS 107 (2007); *D.V.*, 41 BRBS 84; see also *Robins v. Matson Terminals, Inc.*, 2008 WL 2490442, No. 07-72479 (9th Cir. June 19, 2008). In this case, claimant does not challenge the administrative law judge's finding that the awarded hourly rate of \$250 is within the prevailing market rates for the Honolulu and San Francisco area communities. See Attorney Fee Order at 3 n.3. As the administrative law judge rationally applied the regulatory criteria, and claimant has failed to demonstrate either legal error or an abuse of discretion in the administrative law judge's reduction of claimant's counsel's requested hourly rate, we affirm the approved rate of \$250. See, e.g., *B.C.*, 41 BRBS at 113.

Claimant also assigns error to the administrative law judge's failure to address his request for an additional three hours of attorney time to reply to employer's objections to the fee petition submitted on remand. An attorney's fee is permitted for work performed by the attorney in preparing or defending an attorney's fee petition. See *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); see also *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003). Employer agrees that counsel is entitled to a fee for the full three hours requested. Thus, we modify the administrative law judge's fee award to include an additional fee of \$750, representing three hours at a \$250 hourly rate. See *B.C.*, 41 BRBS at 114.

Accordingly, the administrative law judge's Attorney Fee Order is modified to award claimant's counsel, Mr. Gillelan, an additional fee of \$750, representing three hours at a \$250 hourly rate. In all other respects, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge