

D.T. )  
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 Claimant-Petitioner )  
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 v. )  
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 ROGERS TERMINAL AND SHIPPING ) DATE ISSUED: 09/21/2009  
 CORPORATION )  
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 Self-Insured )  
 Employer-Respondent ) DECISION and ORDER

Appeal of the Order on Attorney's Fees of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

William M. Tomlinson and Kennedy K. Luvai (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order on Attorney's Fees (Case No. 14-137169) of District Director Karen P. Staats 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case has previously been before the Board. To briefly reiterate the facts relevant to this appeal, claimant sustained a work-related injury to his left shoulder on January 11, 2002, for which employer voluntarily paid temporary total disability and medical benefits. Claimant returned to work on October 19, 2002, and employer filed a

Notice of Final Payment or Suspension of Compensation (LS-207) on October 21, 2002. On January 21, 2003, claimant filed a claim for permanent partial disability benefits. The contested issues presented for adjudication were claimant's average weekly wage and the extent of his continuing disability, if any.

In his Decision and Order, the administrative law judge awarded claimant temporary and permanent partial disability benefits of \$8.34 per week. On appeal, the Board affirmed the administrative law judge's determination of claimant's average weekly wage and his finding that claimant sustained a real, but small, loss of wage-earning capacity due to his inability to perform certain jobs because of pain and discomfort. *D.T. v. Rogers Terminal & Shipping Corp.*, BRB Nos. 07-1003/A (Aug. 29, 2008)(unpub.).

Subsequently, claimant's counsel submitted a fee petition in the amount of \$4,204.50, representing 12 hours of legal services performed before the district director at an hourly rate of \$350, and \$4.50 in costs. Employer filed objections to the fee petition, and claimant's attorney replied to employer's objections and requested an additional fee of \$350 for one hour spent by counsel preparing the reply. In her Compensation Order-Approval of Attorney's Fee (Initial Fee Order), the district director reduced the requested hourly rate to \$240, found that employer is not liable for an attorney's fee for services provided before March 30, 2005, and disallowed the additional one hour requested for counsel's reply to employer's objections. Therefore, the district director awarded claimant's counsel a fee of \$2,880, representing 12 hours at \$240 per hour, plus costs of \$4.50. The district director held claimant liable for a fee for 4.5 hours of services provided from January 8, 2003 through March 21, 2005, for a total of \$1,080, and held employer liable for the remaining fee of \$1,800 for 7.5 hours of services, plus the \$4.50 in costs.

Claimant appealed the district director's fee award to the Board. The Board held that the district director abused her discretion in failing to address the affidavit of William B. Crow, a lawyer in the practice of civil litigation in Oregon, which claimant's counsel submitted to support the reasonableness of his requested hourly rate of \$350. The Board therefore vacated the district director's award of an hourly rate of \$240, and remanded the case for further consideration of the appropriate hourly rate in this case. The Board also vacated the district director's finding that employer is not liable for services performed before March 30, 2005, and remanded for further consideration, pursuant to Section 28(a), 33 U.S.C. §928(a), of the date that employer's fee liability commenced. *D.T. v. Rogers Terminal & Shipping Corp.*, BRB No. 08-0473 (Sept. 25, 2008)(unpub.).

In her Order on Attorney's Fees (Order on Remand), the district director determined that the Crow affidavit was neither relevant nor persuasive evidence of the

prevailing hourly rates for Portland, Oregon area attorneys representing claimants under the Longshore Act. She therefore again found that an hourly rate of \$240 is appropriate “taking into account the quality of the representation, the complexity of the legal issues involved, and the amount of the benefits awarded.” Order on Remand at 2. The district director further found that employer is liable for a fee for services performed from January 21, 2003 through September 15, 2007, and that claimant is liable for the .25 hour itemized on January 8, 2003, prior to the date the claim for permanent partial disability benefits was filed. *Id.* at 2-3. She additionally allowed three-fourths of the hour itemized for preparation of claimant’s counsel’s reply to employer’s objections. *Id.* at 3. Accordingly, the district director awarded claimant’s attorney a fee of \$3,060, representing 12.75 hours at \$240 per hour, plus \$4.50 in costs; claimant was found liable for .25 hour and employer was found liable for the remaining 12.5 hours plus the costs. *Id.*

On appeal, claimant challenges the hourly rate awarded by the district director. Claimant further contends that the district director erred in finding claimant, rather than employer, liable for the fee for work performed before January 21, 2003. Employer responds, urging affirmance of the district director’s determination that \$240 is a reasonable hourly rate. In addition, claimant’s counsel seeks an attorney’s fee totaling \$5,778.75, for work performed before the Board in claimant’s prior appeal, BRB No. 08-0473.<sup>1</sup> Employer has filed objections to counsel’s fee petition.

Claimant first contends that the district director erred by reducing his requested hourly rate from \$350 to \$240. Claimant argues in this regard that the district director committed legal error on remand by rejecting counsel’s evidence of the “market” hourly rates of comparable attorneys in Portland, Oregon, and relying instead on hourly rate determinations made by the Board, administrative law judges and district directors in other longshore cases. For the reasons stated in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9<sup>th</sup> Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9<sup>th</sup> Cir. 2009), we vacate the hourly rate determination made by the district director, and we remand the case for her to determine a reasonable hourly rate consistent with these decisions.<sup>2</sup> *See also H.S. v. Dept. of Army/NAF*, 43 BRBS 41 (2009).

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<sup>1</sup> The total fee request of \$5,778.75 represents 13 hours of attorney time at an hourly rate of \$375 and .5 hour of legal assistant time at an hourly rate of \$120 itemized in counsel’s initial fee petition and an additional 2.25 hours of attorney time at \$375 per hour for preparation of counsel’s reply to employer’s objections.

<sup>2</sup> Claimant also argues that the district director erred in reducing his attorney’s requested hourly rate on the basis of the complexity of the legal issues involved. *See*

Claimant next contends that employer is responsible for claimant's attorney's fee for work performed prior to January 21, 2003, citing the recent decision in *Dyer v. Cenex Harvest States Cooperative*, 563 F.3d 1044 (9<sup>th</sup> Cir. 2009), in which the United States Court of Appeals for the Ninth Circuit held that once liability under Section 28(a) is established, employer is liable for a reasonable attorney's fee for both pre- and post-controversion services. *Id.*, 563 F.3d at 1048. *See also S.T. v. California Terminals*, \_\_\_ BRBS \_\_\_, BRB No. 08-0713 (June 19, 2009), slip op. at 2-3. We therefore remand the case, in view of this intervening case law, for reconsideration of employer's liability for a fee for services rendered prior to January 21, 2003.

Lastly, we address claimant's counsel's request for an attorney's fee for work performed before the Board in BRB No. 08-0473. As the case is being remanded and the degree of success which claimant will ultimately achieve is yet to be determined, we deny the fee request at this time. Upon completion of the proceedings before the district director on remand, claimant's counsel may refile his fee petition with the Board. 20 C.F.R. §802.203(c).

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Cl't's Petition for Review at 4; Order on Remand at 2; Initial Fee Order at 1-3. As correctly noted by claimant, the Ninth Circuit in *Van Skike* specifically disapproved the practice of reducing counsel's requested hourly rate based upon the lack of complexity of the issues involved in the case; the court held in this regard that the lodestar methodology for determining a reasonable attorney's fee accounts for the complexity of the issues in the number of hours itemized by counsel, and not in the hourly rate determination. *Van Skike*, 557 F.3d at 1048, 43 BRBS at 15(CRT). Thus, the district director's determination on remand of a reasonable hourly rate for counsel's services must not be made on the basis of the complexity of the legal issues involved in this case. *Id.*

Accordingly, the Order on Attorney's Fees of the district director is vacated, and the case is remanded for further consideration consistent with this opinion. Claimant's petition for an attorney's fee for work performed in BRB No. 08-0473 is denied at this time.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge