



BRB No. 16-0173

JOSEPH PETITT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SAUSE BROTHERS)	DATE ISSUED: <u>Sept. 21, 2016</u>
)	
and)	
)	
SEABRIGHT INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Following Remand of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Genavee Stokes-Avery and Charles Robinowitz (Law Office of Charles Robinowitz), Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, L.L.P.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Following Remand (2016-LHC-00942) of Administrative Law Judge Richard M. Clark 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, based on 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).

Claimant was injured at work on September 24, 2003. The parties agreed on all issues except for the degree of claimant's loss in wage-earning capacity due to his injury. Although employer prevailed before the administrative law judge and the Board on that issue, the United States Court of Appeals for the Ninth Circuit reversed the Board's decision and remanded the case for a recalculation of claimant's loss in wage-earning capacity. *Petitt v. Sause Brothers*, 730 F.3d 1173, 47 BRBS 35(CRT) (9th Cir. 2013). On remand, claimant obtained additional benefits.

Thereafter, counsel submitted several fee petitions to the administrative law judge; the final amended version was submitted in April 2015.¹ Therein, counsel sought an attorney's fee of \$21,055 for 49.25 hours of attorney services and .75 hour of legal assistant services provided after the rejected settlement offer. He also sought a fee for \$2,550 for six hours of attorney services in 2014 and 2015, related to the issue on remand. Further, counsel submitted a supplemental fee petition in the amount of \$2,231.25 for 5.25 hours of attorney services regarding additional work, including a reply brief, on the remand issue. In all, counsel sought an additional fee of \$25,836.25, representing 60.5 hours for attorney services at an hourly rate of \$425 and .75 hour for legal assistant services at an hourly rate of \$165. Counsel asserted that, due to the delay in payment of the fee, he was entitled to the current claimed hourly rate of \$425 for all attorney services. Employer filed objections to the fee petitions.

The administrative law judge found that the relevant community for determining a market-based hourly rate is Portland, Oregon. The administrative law judge found that counsel did not establish his entitlement to an hourly rate of \$425. Decision and Order on Remand at 5, 8. In determining an appropriate proxy rate, the administrative law judge considered the 2012 Oregon Bar Survey and also adopted the reasoning of administrative law judges in prior cases, including *Braun v. U.S. Barge, LLC*, 2012-LHC-01747 (2015), *vacated in part*, BRB No. 16-0189 (Aug. 25, 2016), *Ochoa v. Jones Stevedoring Co.*, 2011-LHC-00623 (2014), *vacated in part*, BRB No. 15-0097 (Jan. 21, 2016), and *Castillo v. Sundial Marine Tug & Barge Works, Inc.*, 2010-LHC-00341 (2013), *modified and aff'd*, BRB No. 13-0356 (2014). Decision and Order on Remand at 7-9. The administrative law judge found counsel entitled to an hourly rate of \$360 in 2015, and that, to account for the delay in payment of a fee, he awarded a fee for all services at that rate. The administrative law judge awarded a legal assistant rate of \$150

¹ Previously, in an Attorney Fee Order dated July 14, 2011, the administrative law judge awarded claimant's counsel an attorney's fee of \$9,209, plus costs of \$599.10. This award was for services rendered prior to July 9, 2008, when claimant rejected a settlement offer from employer and, thereafter, did not obtain greater benefits. The administrative law judge denied counsel a fee for services rendered after that date. *See* Order Following Remand at 7; Attorney Fee Order at 3.

per hour. He disallowed 5.875 of the requested time, and he awarded counsel a total fee of \$19,777.50. *Id.* at 10-12. Claimant appeals the fee award. Employer responds, urging affirmance, and claimant filed a reply brief.²

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); *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 falls 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).

Counsel first challenges the administrative law judge’s awarded hourly rate of \$360, asserting that, in light of *Shirrod*, the administrative law judge’s award cannot stand because it is based upon awards issued by other administrative law judges who considered incorrect factors in their analyses. Employer responds that the administrative law judge properly considered the 2012 Oregon Bar Survey, and his rate analysis should be affirmed. In light of the recent decision in *Shirrod*, we agree that the hourly rate awarded for counsel’s services must be vacated and the case remanded for reconsideration.

In *Shirrod*, the Ninth Circuit, within whose jurisdiction this case arises, reiterated that, in awarding a fee under the Act, an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT). Consequently, 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. The Ninth Circuit held that, when the relevant market is identified as Portland, as here, the results of the Oregon Bar Survey must be addressed when setting a proxy hourly rate because it

² As no party challenges the fee awarded for legal assistant services, it is affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

provides information on attorney fees specific to Portland. *Id.* Additionally, unless proven otherwise, reported rates for state workers' compensation attorneys are not representative of a market rate and cannot be used to determine a proxy market rate for attorneys under the Longshore Act because state workers' compensation rates are generally capped by state law and, thus, are artificially low. *Id.*, 809 F.3d at 1092, 49 BRBS at 98-99(CRT); *Christensen v. Stevedoring Services of America*, 44 BRBS 39, 40, *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F.App'x 912 (9th Cir. 2011).

As stated above, the administrative law judge relied on *Castillo, Wilson v. Honeywell Technology Solutions, Inc.*, 2010-LDA-00074 (June 29, 2011), *aff'd*, BRB No. 11-0762 (June 15, 2012), and other cases to arrive at the \$360 hourly rate. These cases included in their calculations of counsel's hourly rate the consideration of factors such as state-wide rates and workers' compensation rates, factors which were rejected in *Shirrod*. Thus, although the administrative law judge also properly considered the 2012 Oregon Bar Survey, we must vacate the fee award. We remand the case for the administrative law judge to award counsel a fee for services based on a market hourly rate for the Portland, Oregon, community that does not include consideration of improper factors. *Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT).

Counsel next contends the administrative law judge erred in denying a delay adjustment because the \$360 hourly rate he considered "current" was based on a 2013 award by another administrative law judge. Counsel contends it was erroneous to use a 2013 rate, especially as over 40 hours of the work was performed between 2008 and 2010 and the fee award was not issued until 2015. The administrative law judge found that counsel did not submit persuasive evidence to show that the market rate changes frequently enough to require an upward adjustment of the \$360 rate. Decision and Order on Remand at 9. Nevertheless, the administrative law judge agreed that counsel is entitled to a fee that accounts for delay because it had been over seven years since the case began and over four years since the original fee was awarded. To account for this delay, the administrative law judge awarded all services at "the current market rate of \$360 per hour[.]" *Id.* at 10. As we have vacated this hourly rate, on remand the administrative law judge must reconsider how the award will reflect the delay in payment of the awarded fee. *Modar v. Maritime Services Corp.*, 632 F.App'x 909, 49 BRBS 91(CRT) (9th Cir. 2015); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).

Finally, of the 5.875 hours of services disallowed by the administrative law judge, counsel contends it was erroneous to deny a fee for 5.625 hours. Counsel asserts that the administrative law judge erred in denying three hours for time spent on an earlier reply brief and in arbitrarily cutting in half, to 2.625, the hours requested for additional work on the merits on remand. The administrative law judge explained his reasons for disallowing this time, *see* Decision and Order on Remand at 12, and counsel has not

shown an abuse of the administrative law judge's discretion in this regard. *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT).

Accordingly, we vacate the administrative law judge's award of an hourly rate of \$360 for attorney services, and we remand the case for reconsideration of this issue consistent with this decision. In all other respects, the administrative law judge's Decision and Order Following Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge