



BRB No. 17-0058

TARIQ YUNIS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ACADEMI, LLC)	
)	DATE ISSUED: <u>Sept. 28, 2017</u>
and)	
)	
ALLIED WORLD ASSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Attorney Fee Order of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Barry R. Lerner (Barnett, Lerner, Karsen & Frankel, P.A.), Ft. Lauderdale, Florida, for claimant.

Nicholas W. Earles and Jason Gillette (Schouest, Bamdas, Soshea & BenMaier, PLLC), Houston, Texas, for employer/carrier

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order (2015-LDA-00399) 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), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the DBA). 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, e.g., Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

Claimant sustained a work-related injury in April 2013. The case was referred to the Office of Administrative Law Judges for a hearing on two occasions. The issues between the parties were resolved prior to the scheduled hearings. In December 2015, the parties requested that the case be remanded to the district director, with the administrative law judge retaining jurisdiction over the outstanding issue of attorney's fees. Claimant's counsel, Barry Lerner, requested a fee of \$24,319.50, representing 52.3 hours of attorney time at an hourly rate of \$465, plus \$1,292.05 in costs. Employer objected to the hourly rate and the number of hours billed.

In his Attorney Fee Order (Order), the administrative law judge denied claimant's counsel a fee for work performed prior to February 23, 2015, when the district director first issued a written recommendation on contested issues. The administrative law judge found that, as Mr. Lerner maintains his office in Ft. Lauderdale, Florida, the relevant legal community for establishing his hourly rate is the U.S. District Court for the Southern District of Florida. Order at 5. The administrative law judge found counsel's submission of fee awards under the DBA to his law partner, David Barnett, "relevant in establishing the general rate that attorneys in his law firm have received in Longshore litigation," but "not persuasive of his hourly fee." *Id.* The administrative law judge also rejected Mr. Lerner's reliance on the percentage change in the National Average Weekly Wage to extrapolate his current hourly rate from his hourly rate in 1995. *Id.* The administrative law judge concluded that Mr. Lerner did not offer sufficient evidence to meet his burden of establishing a current market rate. *Id.*

The administrative law judge derived a market rate by averaging the \$465 hourly rate awarded to Mr. Lerner in a DBA case, *Essar v. All World Language Consultants*, 2014-LDA-00752 (Jul. 15, 2015), with the hourly rates awarded in eight fee awards issued by the District Court for the Southern District of Florida in 2015 and 2016 to derive an average hourly rate of \$350.38 for Mr. Lerner's services.¹ *Id.* at 8-9. The administrative law judge found that this hourly rate recognizes Mr. Lerner's experience, as well as the fact that his requested hourly rate of \$465 is well above the market rate in the Southern District of Florida. *Id.* at 9. The administrative law judge further reduced the number of hours requested by 2.2 hours and allowed the requested costs. Accordingly, the administrative law judge awarded Mr. Lerner a fee of \$6,722.94, representing 15.5 hours of attorney time at an hourly rate of \$350.38, plus costs of \$1,292.02. *Id.* at 11-12.

¹ The hourly rates awarded in these eight cases range from \$240 to \$475. *See* Order at 9 n.2.

On appeal, claimant's counsel challenges the administrative law judge's hourly rate finding.² Employer responds, urging affirmance.

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). "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994) (quoting *Norman v. Housing Auth.*, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing *Blum v. Stenson*, 465 U.S. 886, 895-896 (1984)).³ The party seeking the fee bears the burden of establishing the prevailing rate by presenting "satisfactory evidence." *Id.*

In rejecting Mr. Lerner's submission of fee awards to Mr. Barnett to establish a market rate, the administrative law judge stated, "[As] the Ninth Circuit has cautioned, fees should not be awarded only based upon what ALJs have awarded in cases under the Act. *Christensen*, 557 F.3d at 1054." *Id.* at 8. However, there is case precedent allowing prior fee awards to be used as a "barometer" or inferential evidence of the prevailing market rate, especially if they involved a market rate analysis. *Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013); *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1032, 1055, 43 BRBS 6, 9(CRT); *B&G Mining, Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008); *Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010) (Order). "Satisfactory evidence necessarily must speak to rates actually billed and paid in similar lawsuits." *Norman*, 836 F.2d at 1299. The administrative law judge noted that Mr. Lerner and Mr. Barnett have about the same level of experience. Order at 7. Thus, the administrative law judge erred by rejecting counsel's market rate evidence merely on the basis that it consisted of prior

² Claimant also included with his petition a motion to consolidate this appeal with *Abassi v. Mission Essential Personnel*, BRB No. 17-0059. Employer responded, opposing consolidation. We deny claimant's motion to consolidate the appeals inasmuch as they involve different employers and attorneys, the qualifications of the attorneys differ, and they come within the jurisdiction of different circuit courts of appeal. 20 C.F.R. §802.104.

³ We note that the administrative law judge did not recognize that this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011).

awards under the Act without ascertaining whether the prior awards were based on a market rate analysis.

In setting the market rate in this case, the administrative law judge relied on eight cases he selected to represent the market rate for the Southern District of Florida, averaged with the fee award in the *Essar* case. In his fee Order, the administrative law judge provided the LEXIS citations to these cases and the rates awarded. For some of the cases, the administrative law judge supplied the attorneys' number of years of practice and/or the statute under which the fees were awarded. Order at 6 n.3. However, the administrative law judge did not provide an explanation as to how these cases were chosen from among all fee awards in the relevant time frame, the market analysis provided in each case, and, most importantly, how these cases represent "similar services by lawyers of comparable skill, experience, and reputation." *Loranger*, 10 F.3d at 781; *see also Blum*, 465 U.S. at 896 n.11. Although an administrative law judge may take official notice of judicial decisions, *see Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000), the administrative law judge failed to provide notice of his intent to do so. The administrative law judge's summary reliance on these fee awards was prejudicial because he did not allow claimant's counsel an opportunity to challenge the administrative law judge's finding that these cases are relevant to establishing a market rate.

Therefore, we vacate the administrative law judge's hourly rate finding and remand the case. On remand, the administrative law judge must allow the parties to address the relevance of the district court fee awards chosen by the administrative law judge, as well as to submit case support for their positions if they so choose. In his order on remand, the administrative law judge must provide a sufficient explanation of his market rate determination that allows the Board to review whether his analysis is rational and in accordance with law, in the event the fee award is appealed. "The court's order on attorney's fees must allow meaningful review—the [] court must articulate the decisions it made, give principled reasons for those decisions, and show its calculation." *Norman*, 836 F.2d at 1304.

Accordingly, the administrative law judge's finding that counsel's market hourly rate is \$350.38 is vacated, and the case remanded for further proceedings in accordance with this opinion. In all other respects, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge