



BRB No. 17-0167

MICHAEL KOELHE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LABOR READY)	
)	DATE ISSUED: <u>Sept. 13, 2017</u>
and)	
)	
NEW HAMPSHIRE INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney’s Fees and Costs and the Supplemental Decision and Order on Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Paul M. Doolittle, Jacksonville, Florida, for claimant.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney’s Fees and Costs and the Supplemental Decision and Order on Reconsideration (2014-LHC-01426) of Administrative Law Judge Daniel F. Solomon 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. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS

67(CRT) (4th Cir. 2009); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured on November 1, 2013, while working for employer when 4,000 pounds of copper collapsed on him, injuring his left and right shoulder, breaking his nose, lacerating his face, and detaching an ear. Employer paid benefits, but claimant filed a claim for additional benefits on or around January 3, 2014, which employer controverted. An informal conference was held on April 22, 2014, and a Memorandum of Informal Conference was issued on April 29, 2014, recommending that employer pay claimant additional benefits and authorize medical treatment. Employer controverted the recommendations, and the parties prepared for a hearing. One week before the hearing, the parties reached an agreement resolving all disputed issues and stipulating that claimant's counsel is entitled to fees and costs. On March 24, 2015, the administrative law judge issued a Decision and Order approving the parties' stipulations.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting \$54,270.15 in attorney's fees and costs. This figure represents 51.2 hours of partner (Paul Doolittle) time at \$400 per hour (\$20,480); 103.8 hours of associate (Zachary Tucker) time at \$200 per hour (\$20,760); 15.5 hours of full-time law clerk (Tenielle James Patrick) time at \$150 per hour (\$2,325); 7.60 hours of part-time law clerk (Rebecca Bartlett) time at \$135 per hour; 52.2 hours of paralegal (Christine Bentley and Britney Smith) time at \$125 per hour (\$6,525); 12.95 hours of legal assistant (Rhianna Hamwey and Zeildet Garzon) time at \$95 per hour (\$1,230.25); 5.1 hours of legal secretary (Justine Shields) time at \$65 per hour (\$331.50), and \$1,592.40 in costs. In support of these hourly rates, counsel submitted an affidavit specifying the credentials of all staff members except for the legal secretary. Counsel additionally cited the Survey of Law Firm Economics and referenced a prior fee award in a Defense Base Act case for work before an administrative law judge in *Patrick v. Serv. Employees Int'l*, Case Nos. 2009-LDA-0313, 2009-LDA-0426 (June 10, 2010) (unpub.). Employer objected to the hourly rates requested¹ and filed an additional 39 pages objecting to specific line-item entries as being "inter-office communication," "unnecessary," "insufficient description," "clerical," "excessive," and/or "duplicative."² Employer also urged the administrative

¹ Specifically, employer asserted that Mr. Doolittle's rate should be reduced to \$350 per hour; Mr. Taylor's rate should be reduced to \$150 per hour; the law clerks' rates should be reduced to \$75 per hour; and the rates of the paralegals, legal assistants and legal secretary should be reduced to \$50 per hour.

² In total, employer asked that Mr. Doolittle's time be reduced to 32.85 hours; Mr. Tucker's time be reduced to 72.15 hours; the combined law clerks' time be reduced to 17.3 hours; the paralegals' time be reduced to 35.5 hours; legal assistant time be reduced

law judge to reduce the requested total by 10 percent to reflect claimant's limited success in this case. Thus, employer urged the administrative law judge to award claimant's counsel no more than \$24,599.16 in attorney's fees and costs.³ Claimant's counsel replied to the objections.

The administrative law judge found \$400 to be a reasonable hourly rate for partner time and \$200 to be a reasonable hourly rate for associate time in light of the awards in similar cases, the time and labor required for this particular case, and the novelty and difficulty of issues involved in this case. Finding that counsel did not provide support for the range of hourly rates requested for the rest of his legal staff, all of whom the administrative law judge described as "legal assistants," the administrative law judge awarded an hourly rate of \$75 for both law clerks, the paralegal, both legal assistants, and the legal secretary. In support of this award, the administrative law judge referenced only his experience "having determined hundreds of similar fee petitions." Fee Order at 4. With respect to employer's other objections, the administrative law judge reduced Mr. Doolittle's time by 0.2 hour, finding a January 14, 2014 charge for email correspondence with employer's claims adjuster to be clerical. The administrative law judge also disallowed 4.2 hours of Mr. Tucker's time as being clerical. The administrative law judge summarily overruled the remainder of employer's objections and rejected employer's request for a 10 percent reduction. Accordingly, the administrative law judge awarded claimant's counsel \$47,321.25 in attorney's fees⁴ and \$1,592.40 in costs, for a total award of \$48,913.65, payable by employer.

Claimant's counsel moved for reconsideration, asking the administrative law judge to reconsider the hourly rate awarded for the separate professional statuses of law clerks, paralegals, and legal assistants. Claimant's counsel referenced the varying degrees of his staff's experience. He noted that the full-time law clerk is a licensed attorney and cited the 2009 Survey of Law Firm Economics (the Survey), which indicates staff attorney billable rates ranged from \$150 in the lower quartile to an average of \$233 per hour, and

to 5.4 hours; and the legal secretary's time be reduced to 1.55 hours. In conjunction with the rate reductions requested, employer proposed that the services provided by claimant's counsel totaled \$25,740.

³ Employer did not challenge the \$1,592.40 requested costs.

⁴ This represents 51 hours of Mr. Doolittle's time at \$400 per hour (\$20,400); 99.6 hours of Mr. Tucker's time at \$200 per hour (\$19,920); and 93.35 hours of combined time for services rendered by the law clerks, paralegals, legal assistants, and legal secretary (\$7,001.25).

the 2013 National Utilization and Compensation Survey Report (the Report), which states highly qualified and experienced paralegals billed an average of \$126 per hour in 2010 and \$124 per hour in 2012. Counsel also stated that “it is routine in the legal market to bill law clerks at higher rates than paralegals.” Finally, counsel cited the Board’s decisions in *McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011), and *Akins v. Drummond Comp., Inc.*, BRB No. 15-0335 BLA (May 10, 2016) (unpub.), as support for the requested law clerk, paralegal, and legal assistant rates. The administrative law judge summarily denied counsel’s motion for reconsideration, stating only that, “the cases cited in the motion are not precedent and the work done by the aforementioned individuals was clerical in nature.” Order on Recon. at 1. Claimant’s counsel appeals only the hourly rate awarded for work performed by counsel’s full-time law clerk, part-time law clerk, paralegals, and legal assistants. Counsel asserts that the administrative law judge failed to adequately explain his rationale for assigning each professional the same hourly rate. Employer has not responded to this appeal.

The starting point for awarding an attorney’s fee is the lodestar method, whereby a court multiplies a reasonable hourly rate by the number of hours reasonably expended. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).⁵ “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. Stevenson*, 465 U.S. 886, 895-896 (1984))). The party seeking the fee bears the burden of establishing the prevailing rate by showing “satisfactory evidence.” *Id.* This analysis applies as well to the work of legal support staff. *Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013). The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has stated that “satisfactory evidence” is “more than the affidavit of the attorney performing the work.” *Loranger*, 10 F.3d at 781. The Eleventh Circuit also has stated that a court “is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value.” *Id.* (quoting *Norman*, 836 F.2d at 1303).

We agree with claimant’s counsel that the administrative law judge’s hourly rate determination in this case for counsel’s law clerks, paralegals, and legal assistants cannot be affirmed. Initially, the administrative law judge’s finding on reconsideration that the work done by the law clerks, paralegals, and legal assistants in this case was “clerical” in nature, is inconsistent with his Supplemental Order overruling employer’s objections to specific time entries as clerical. Order on Recon. at 1; Fee Order at 4. Further, although

⁵ The Supreme Court admonishes that fee requests should not result in second major litigations. *Hensley*, 461 U.S. at 437.

the administrative law judge referenced his experience with “hundreds of similar fee petitions” in finding \$75 per hour to be a reasonable rate, he did not identify what in his experience led him to conclude that such was the prevailing market rate for services performed by five different staff members with varying degrees of education and experience. Moreover, nothing in the parties’ submissions supports this rate, and the administrative law judge did not reference any other cases awarding this rate or the criteria at 20 C.F.R. §702.132. The administrative law judge did not provide a basis for the Board to review his market rate determinations and thus we conclude the award is arbitrary. *Holiday*, 591 F.3d at 228, 43 BRBS at 71(CRT); *see Finnegan v. Director, OWCP*, 69 F.3d 1039, 1041, 29 BRBS 121, 122-123(CRT) (9th Cir. 1995).

As counsel’s fee petition contains evidence addressing the hourly rates for work performed by his staff, the administrative law judge erred in failing to address this evidence.⁶ Additionally, while the administrative law judge is correct in noting that prior fee awards are not binding precedent, prior awards may constitute “inferential evidence” of a prevailing market rate in cases arising under the Act.⁷ *Gosnell*, 724 F.3d 561. In view of the absence of support for the administrative law judge’s \$75-rate determination, we vacate the administrative law judge’s awarded hourly rate for the full-time law clerk, part-time law clerk, paralegals, and legal assistants, and we remand the case for further consideration of this issue. On remand, the administrative law judge must address counsel’s evidence and arguments and provide the specific basis for his market rate determinations. *Loranger*, 10 F.3d 776; *see also Gosnell*, 724 F.3d 561; *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT).

Accordingly, the administrative law judge’s \$75-hourly rate award for counsel’s staff is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Supplemental Decision and Order Awarding Attorney’s

⁶ The administrative law judge did not address claimant’s counsel’s assertions that: 1) the Survey supports the rate requested for full-time law clerk services; 2) the Report supports the rate requested for paralegal services; 3) routine legal billing practice justifies a higher billing rate for full- and part-time law clerk services than for paralegal services; and 4) individual differences in education and experience support different billing rates among professional statuses.

⁷ We agree with the administrative law judge that the Board’s decision in *McDonald*, 45 BRBS 45, is of little value in setting a market rate for Jacksonville, Florida, as the services there were performed in San Francisco. The work in *Akins*, BRB No. 15-0335 BLA, was performed in the Birmingham area, which could be relevant to the Jacksonville market. In that case, the Board affirmed, as unchallenged on appeal, the district director’s award of \$150 per hour for paralegal services.

Fees and Costs and the Supplemental Decision and Order on Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge