**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 18-0072
and 18-0072A

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| GLENN M. MARTIN | ) | |
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| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | DATE ISSUED: Sept. 13, 2018 |
| | ) | |
| HAWAII STEVEDORES, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| SIGNAL MUTUAL INDEMNITY ASSOCIATION | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| Cross-Petitioners | ) | DECISION and ORDER |

Appeals of the Attorney Fee Order and the Order Denying Reconsideration of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Steven M. Birnbaum (Law Office of Steven M. Birnbaum, PC), San Rafael, California, for claimant.

David L. Doeling (Aleccia & Mitani), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Attorney Fee Order and the Order Denying Reconsideration (2017-LHC-00418) of Administrative Law Judge Christopher Larsen 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. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

This case arises out of claimant's claim for binaural hearing loss. The underlying facts relevant to the parties' appeals are not in dispute. On April 6, 2016, claimant underwent audiometric testing by Dr. Aviles, Au.D., which demonstrated an 11.6 percent binaural loss. Fee Pet. Exh. D. Claimant filed a claim for compensation alleging "cumulative trauma due to exposure to injurious levels of noise." Fee Pet., Exh. A. On May 19, 2016, the Office of Workers' Compensation Programs (OWCP) notified employer that a claim was filed. *Id*. On May 23, 2016, claimant demanded "treatment" for his hearing loss. Fee Pet., Exh. B.

On May 25, 2016, employer voluntarily paid claimant $2,812 for a one percent binaural hearing loss and filed a Notice of Controversion of Right to Compensation (LS-207). Fee Pet., Exh. C.[1] On June 29, 2016, claimant requested an informal conference on the issues of "medical treatment and PPD compensation." Fee Pet., Exh. D. On July 20, 2016, an OWCP claims examiner acknowledged the request, noting that the claim was not ready for a productive informal conference, and asking employer to submit a "position statement or controversion to requested compensation." *Id*. Employer did not respond. On October 19, 2016, claimant advised the claims examiner that he had not received a response from employer and again requested an informal conference. Fee Pet., Exh D. On

[1] The notice of controversion stated:

> Employer accepts hearing loss as potentially noise-induced, has volunteered 1% PPD, and awaits confirmation of rating, wages, and relationship to employment.
>
> Employer reserves the rights to amend this notice.

Fee Pet., Exh. C.

November 18, 2016, in lieu of an informal conference, the claims examiner issued a "Recommendation Without Conference," and recommended the following: 1) claimant met the Section 20(a), 33 U.S.C. §920(a), presumption for occupational hearing loss; and, 2) claimant has not established hearing loss for compensability purposes. *Id*. On the same date, claimant requested a hearing. *Id*.

On December 9, 2016, the OWCP referred the case to the Office of Administrative Law Judges (OALJ) for a formal hearing, and a hearing was scheduled for June 5, 2017. In the interim, claimant underwent an examination and audiogram with employer's experts. On April 27, 2017, after employer determined that the evaluations of its experts were unreliable, employer paid claimant an additional $29,807.20, so as to fully compensate him for the 11.6 percent binaural loss demonstrated on the April 2016 audiogram conducted by Dr. Aviles. On May 5, 2017, the parties stipulated to claimant's entitlement to $32,619.20 in permanent partial disability benefits for an 11.6 percent binaural hearing loss, and agreed to leave open the issues of medical benefits and attorney's fees. Fee Pet., Exh. R. On July 18, 2017, the administrative law judge approved the parties' stipulations. Thereafter, claimant's counsel sought a fee for services rendered while the case was pending before the administrative law judge, asserting his entitlement to an employer-paid fee pursuant to Section 28(b), 33 U.S.C. §928(b). Counsel requested a total of $5,337, representing 9.2 hours of his own work at an hourly rate of $525 and 2.6 hours of paralegal work at an hourly rate of $195. Employer objected to its liability for an attorney's fee under both Sections 28(a) and (b), 33 U.S.C. §928(a), (b), and to the requested hourly rates. Claimant replied.

The administrative law judge held employer liable for an attorney's fee pursuant to Section 28(b) because employer voluntarily paid some benefits and claimant thereafter used the services of an attorney to obtain greater benefits than employer had paid. In rejecting employer's assertion to the contrary,[2] the administrative law judge explained that employer declined to participate in an informal conference, and it agreed to pay increased benefits only after counsel requested a hearing and the case was transferred to the OALJ. Attorney Fee Order at 2.

The administrative law judge found counsel failed to justify the requested hourly rates because the evidence he submitted pertained to California markets, rather than Honolulu, Hawaii, which is the relevant market in this case. Attorney Fee Order at 5-7.

[2] Employer asserted that the criteria for fee liability under Section 28(b) were not satisfied because it accepted liability for claimant's hearing loss, and claimant did not recover greater compensation than employer voluntarily paid when it settled the claim prior to a formal hearing.

Adopting Administrative Law Judge Gee's market rate analysis in a recent case with similar facts involving claimant's counsel, the administrative law judge found an hourly rate of $350 represented a market rate for counsel's services in Honolulu. Attorney Fee Order at 6-7 (citing *Anderson v. Hawaii Stevedores, Inc.*, 2011-LHC-01015 (Dec. 29, 2016), *aff'd*, BRB No. 17-0281 (Oct. 31, 2017), *appeal pending*, No. 17-73512 (9th Cir.)). He awarded a fee based on paralegal rates of $105 and $75 per hour. The administrative law judge approved 9.2 hours for attorney work and 2.5 hours for paralegal work, and awarded counsel a fee of $3,479.50, payable by employer. Attorney Fee Order at 8. The administrative law judge summarily denied employer's motion for reconsideration.

On appeal, claimant's counsel contends the administrative law judge erred in finding Honolulu to be the relevant market. Employer responds, urging affirmance of the administrative law judge's market rate analysis. BRB No. 18-0072. Employer cross-appeals, asserting it cannot be held liable for counsel's fee under either Section 28(a) or (b). Counsel responds, urging the Board to affirm employer's liability under Section 28(b). Employer replied. BRB No. 18-0072A. Because resolution of employer's cross-appeal could be dispositive of claimant's appeal, we address it first.

Section 28 of the Act provides the authority for attorney's fee awards under the Act. 33 U.S.C. §928. Section 28(b) allows an employer-paid attorney's fee if an employer timely pays or tenders compensation and thereafter a controversy develops over additional compensation owed, and the claimant successfully uses the services of an attorney to obtain additional compensation. 33 U.S.C. §928(b);[3] *National Steel & Shipbuilding, Co. v. U.S.*

[3] Section 28(b) of the Act states in relevant part:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] shall set the matter for an informal conference and following such conference the [district director] shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded

*Dep't of Labor, OWCP*, 606 F.2d 875, 880, 11 BRBS 68, 73 (9th Cir. 1979). "There is no requirement that actual litigation take place before the administrative law judge in order to satisfy Section 28(b)." *Ross v. General Dynamics Corp.*, 11 BRBS 449, 451 (1979); *see also Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). The informal conference marks the conclusion of informal proceedings before the OWCP. *See Matulic v. Director, OWCP*, 154 F.3d 1052, 1060-1061, 32 BRBS 148, 154(CRT) (9th Cir. 1998); *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 611, 25 BRBS 65, 70(CRT) (9th Cir. 1991). If a dispute remains after the informal conference, and the claimant uses the services of an attorney to resolve the dispute at the administrative law judge level, the claimant is entitled to an employer-paid attorney's fee pursuant to Section 28(b). *Matulic*, 154 F.3d at 1060-1061, 32 BRBS at 154(CRT);[4] *Watts*, 950 F.2d at 611, 25 BRBS at 70(CRT).

Employer contends the administrative law judge erred in finding that it did not accept liability for the full extent of claimant's hearing loss within the context of the informal proceedings. Employer bases its argument on its May 25, 2016, LS-207, Notice of Controversion, wherein employer stated that it "accepts hearing loss as potentially noise-induced, has volunteered 1% PPD, and awaits confirmation of rating, wages, and relationship to employment." Fee Pet., Exh. C. Employer additionally relies on the facts that the parties stipulated prior to an administrative adjudication and that, in approving the parties' stipulations, the administrative law judge did not award compensation in excess of that which employer voluntarily paid claimant on April 27, 2017.[5]

We reject employer's contention. When the matter was pending before the OWCP, employer paid claimant for only a one percent binaural hearing loss and its LS-207 form

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> and the amount tendered or paid shall be awarded in addition to the amount of compensation.

33 U.S.C. §928(b).

[4] In *Matulic*, the OWCP issued recommendations without conducting an informal conference. In reversing the denial of attorney's fees under Section 28(b), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, found that the OWCP recommendations were the "functional equivalent" of an informal conference. *Matulic*, 154 F.3d at 1060, 32 BRBS at 154(CRT).

[5] We reject employer's contention that *Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 46 BRBS 15(CRT) (2012), defined the term "awarded" as used in Section 28(b) ("compensation thereafter awarded") to exclude compensation awarded in a stipulated compensation order. This issue was not before the Supreme Court in *Roberts*.

specifically preconditioned additional compensation on confirmation of the extent of claimant's disability and its relationship to work. *See generally Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1107, 37 BRBS 80, 83(CRT) (9th Cir. 2003) ("tender" is "an unconditional offer of money or performance to satisfy a debt or obligation"). The parties thereafter stipulated before the administrative law judge that claimant is entitled to compensation for an 11.6 percent binaural hearing loss. As the administrative law judge found, employer did not pay or tender compensation for the full extent of claimant's disability until after the case was transferred to the administrative law judge and a hearing was scheduled.[6] Thus, although employer subsequently paid increased compensation for the full extent of claimant's disability prior to the scheduled hearing, this resolution was not reached in informal proceedings, as it was obtained in negotiations at the administrative law judge level. *See Matulic*, 154 F.3d at 1060-1061, 32 BRBS at 154(CRT) (assessing fees under Section 28(b) where a written recommendation was issued without an informal conference and claimant prevailed on disputed issues); *National Steel*, 606 F.2d at 880, 11 BRBS at 73 (assessing fees under Section 28(b) where case was forwarded for formal hearing without a recommendation for disposal and claimant prevailed on disputed issue); *Kleiner*, 16 BRBS at 299 (employer liable under Section 28(b) where parties entered into stipulations on the day of the formal hearing); *Ross*, 11 BRBS at 451 (assessing fees under Section 28(b) where case settled prior to scheduled hearing and claimant prevailed on disputed issues). As claimant used the services of an attorney to obtain increased compensation before the administrative law judge, the administrative law judge correctly concluded that this case falls within the parameters of Section 28(b), and we affirm his finding that employer is liable for claimant's attorney's fee.[7] *Matulic*, 154 F.3d at 1060-1061, 32 BRBS at 154(CRT); *National Steel*, 606 F.2d at 880, 11 BRBS at 73; *Ross*, 11 BRBS at 451.

We turn next to claimant's counsel's appeal of the fee award. Counsel contends the administrative law judge erred in relying on *Anderson* to conclude that Honolulu is the relevant legal market. The lodestar method, which multiplies a reasonable hourly rate by the number of hours reasonably expended in preparing and litigating the case, is used to arrive at a "reasonable attorney's fee" under the Act. *Christensen v. Stevedoring Services*

[6] Contrary to employer's assertion, the administrative law judge did not award an attorney's fee pursuant to Section 28(b) because employer declined to participate in an informal conference. Rather, noting this fact in conjunction with productive negotiations commencing only after claimant requested a hearing, the administrative law judge rejected employer's assertion that the extent of its liability was resolved in informal proceedings.

[7] In light of our affirmance of an employer-paid fee award under Section 28(b), we need not address whether employer is liable under Section 28(a).

*of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Blum v. Stenson*, 465 U.S. 886 (1984). 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. The burden is 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. *See Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Blum*, 465 U.S. at 896 n.11.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015). "A determination of the 'relevant community' in Longshore Act cases should focus on the location where the litigation took place." *Shirrod*, 809 F.3d at 1087, 49 BRB at 96(CRT). The factors to be considered in determining the location of the litigation include the location of claimant's and employer's counsel's offices and where the hearing took place. *See id.* The Ninth Circuit stated:

> Recognizing that the relevant decisionmaker has wide – but not unlimited – discretion when making attorney's-fee awards, … we ultimately left it to the BRB, ALJs, and District Directors to determine the "relevant community" and the prevailing market rates in that community, as long as the decisionmaker provides adequate justification.

*Id.*, 809 F.3d at 1087, 49 BRBS at 95(CRT) (internal citations omitted).

In this case, the administrative law judge concluded that the relevant community is Honolulu. The administrative law judge found that while a hearing did not take place in this case, if one had, it would have been in Honolulu. He further found that both employer and claimant are located in Hawaii. Attorney Fee Order at 6. Based on these facts and the reasoning Judge Gee applied in *Anderson*, the administrative law judge concluded that the relevant community is Honolulu.[8] *Id.* at 7.

Counsel contends the administrative law judge erred in concluding that Honolulu, rather than San Francisco, is the relevant community for determining the market rate for

[8] In *Anderson*, Judge Gee determined that the relevant community was Hawaii because the claimant and the employer (the same employer as in this case) are located in Hawaii and counsel "holds himself out as doing Longshore work in the Hawaii legal market . . . regularly takes Hawaii Longshore cases and maintains an office in Honolulu." *Anderson v. Hawaii Stevedores, Inc.*, 2011-LHC-01015 (Dec. 29, 2016), slip op. at 7.

his services. Counsel argues that, unlike *Anderson*, there was no hearing or depositions taken in this case, and all the legal work he performed was from his office in the San Francisco area. He also maintains that his work in this case was in 2016 and he has not had permanent office space in Hawaii since 2015.

Counsel's arguments are unavailing; he has not established that the administrative law judge abused his discretion in finding that Hawaii is the relevant community. The administrative law judge addressed appropriate factors, stating that claimant is a resident of Hawaii, employer is located in Hawaii, and the hearing in this case would have been held in Honolulu. Attorney Fee Order at 6. The location of counsel's main office in the San Francisco area is the single factor cited by him to support that location as the relevant community. All the other factors support the administrative law judge's conclusion that Hawaii is the relevant community: counsel solicits work in Hawaii; maintains an office presence in Honolulu;[9] claimant and employer are both based in Hawaii; the audiograms were conducted in Hawaii; and the hearing, if it had taken place, would have been in Honolulu. Thus, as the administrative law judge concluded: "It is incongruous to actively solicit clients in a community but then proclaim when it comes time to seek fees that the legal market in that community is irrelevant." Attorney Fee Order at 6 (quoting *Anderson*, slip op. at 8). The administrative law judge provided "adequate justification" for his finding that Honolulu is the relevant community in this case and we therefore affirm this finding. *Shirrod*, 809 F.3d at 1087, 49 BRBS at 95(CRT).[10]

We also reject counsel's contention that the administrative law judge erred in adopting the reasoning of *Anderson* in setting the market rate of $350 per hour. While the Ninth Circuit has indicated that an administrative law judge should not look solely to past attorney's fee awards under the Act in order to set the market rate, the court also stated that the decision maker is not required to make new determinations in every case but merely to "make such determinations with sufficient frequency that it can be confident – and we can be confident in reviewing its decisions – that its fee awards are based on current rather than merely historical market conditions." *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT).

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[9] We observe that counsel's website states: "Offices in San Rafael, CA & Honolulu, HI." An address and phone number for the Honolulu office are provided. http://www.injuredworkersatty.com/ (accessed Sept. 5, 2018). In *Anderson*, Judge Gee found it insignificant that counsel's Honolulu office may not be staffed given that he "intentionally inserted himself into the Hawaii legal market." *Anderson*, slip op. at 8.

[10] We reject claimant's contention that it is unclear if the "Hawaii market" in *Anderson* is the same as the "Honolulu market." Judge Gee explained in *Anderson* that there is no "functional difference" between the two terms. *Anderson*, slip op. at 8 n.10.

The administrative law judge explained his reasoning for following the analysis of *Anderson*, noting that *Anderson* was decided less than one year prior to his decision and that counsel submitted the same evidence in support of his requested hourly rate. The administrative law judge rationally concluded that the facts in *Anderson* were similar enough to make its reasoning applicable to this case. *Id*. As counsel does not challenge the hourly rate of $350 as being inappropriate for the Hawaii legal market, the administrative law judge's hourly rate determination is affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Accordingly, the administrative law judge's Attorney Fee Order and the Order Denying Reconsideration are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge