

BRB No. 03-0302

BRUCE CHRISTENSEN)
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 Claimant-Petitioner)
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 v.)
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 STEVEDORING SERVICES OF AMERICA) DATE ISSUED: 11/18/2009
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 and)
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 HOMEPORT INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents) ORDER

This case is before the Board on remand from the United States Court of Appeals for the Ninth Circuit. *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009). In its Order dated July 25, 2006 and Order denying claimant’s motion for reconsideration dated November 17, 2006, awarding claimant’s counsel an attorney’s fee in BRB No. 03-0302, the Board awarded counsel a fee based on an hourly rate of \$250 for attorney services, rejecting evidence offered to support an hourly rate of \$350 for services performed in Portland, Oregon.¹ These orders were appealed to the United States Court of Appeals for the Ninth Circuit.

In vacating these decisions, the Ninth Circuit started with the principle that a “reasonable attorney’s fee” is calculated in the same manner in all federal fee-shifting statutes. The hourly rate should be calculated with reference to the “prevailing market rates in the relevant community.” The “relevant community” is generally where the district court sits. The Ninth Circuit stated that it is improper to define the market as consisting of only longshore cases in any geographic area, as that merely “recasts”

¹ Counsel filed a fee petition in 2006, after the Ninth Circuit ruled on the merits of the case, *Christensen v. Director, OWCP*, 171 F. App’x 162 (9th Cir. 2006), seeking a then-current hourly rate of \$350 for work performed in 2003 and 2004. The Board previously had awarded a fee in a related appeal, BRB No. 03-0761; that fee award is not at issue here.

awards made in previous decisions and calls it a “market.” The court stated that the Board must justify the rates it awards and cannot merely reference the regulations at 20 C.F.R. §802.203, or state that the rate is appropriate for the geographic region. The court declined to identify specifically either the appropriate market or the evidence the Board should rely upon in determining a “market” rate. The court continued, however, by noting that there is no private market under the Longshore Act, and that, therefore, it is necessary that counsel be awarded a fee “commensurate with those which [he] could obtain by taking other types of cases.” *Christensen*, 557 F.3d at 1053-1054, 43 BRBS at 8(CRT), citing *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973 (9th Cir. 2008); see also *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), vacating in part *D.V. [Van Skike] v. Cenex Harvest States Cooperative*, 41 BRBS 84 (2007); *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942 (9th Cir. 2007).

Subsequent to the Ninth Circuit’s decision in this case, employer filed a supplemental response to counsel’s fee petition, to which claimant replied. The Board thus has before it several fee petitions: counsel’s 2006 fee petition seeking an hourly rate of \$350;² counsel’s fee petition for his 2006 motion for reconsideration (4.75 hours); and a current fee petition for his responses to employer’s supplemental memorandum and to the Board’s 2009 order (8.75 hours, plus .75 hour of assistant time at \$150 per hour). Counsel claims his current rate is \$400 per hour. Claimant’s counsel supports his rate requests with the “Morones Surveys” of 2004 and 2008, the “Crow Affidavit,” and the “Goldsmith Affidavit,” for the purpose of establishing that he should receive an hourly rate commensurate to that which is paid to commercial litigation attorneys. Employer responds with the “Skerritt Affidavit” and the Oregon Bar Survey, contending that commercial litigation work does not provide an appropriate comparison. Employer avers that the appropriate market consists of workers’ compensation and personal injury cases, and that use of the 2007 and 2008 Oregon Bar survey of rates for workers’ compensation and personal injury attorneys demonstrates that hourly rates of \$220-270 are appropriate for claimant’s counsel.

Pursuant to the Ninth Circuit’s decision, the Board therefore must determine a “reasonable” hourly rate: (1) that prevails in the “community” (2) for “similar” services (3) by an attorney of “reasonably comparable skill, experience, and reputation.” *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT), citing *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). Counsel should be awarded a fee “commensurate with those which [he] could obtain by taking other types of cases.” *Christensen*, 557 F.3d at 1053-1054, 43 BRBS at 8(CRT). We shall address each element in turn.

² The Ninth Circuit rejected claimant’s contention that the Board erred in declining to enhance the fee award for the delay in payment of the fee. *Christensen*, 557 F.3d at 1056, 43 BRBS at 10(CRT).

Community

Employer contends, based on the statement in *Christensen* that the “relevant community” is usually where the district court sits, *see Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT), that the appropriate community in this case is either all of Oregon, as there is only one district court in the state, the greater Portland metropolitan area, or the city of Portland. Claimant does not specifically address this except to assume that “downtown Portland” is the relevant area. We hold that counsel’s “community” is the city of Portland, as counsel has his office there and thus his business overhead is based on the economic circumstances of the urban area.

Similar Services/Other Types of Cases

The *Christensen* court stated that there is no private market to set rates for longshore cases, in that the rates are judicially set only in cases in which the claimant prevails. *Id.*, 557 F.3d at 1054, 43 BRBS at 8(CRT). Hence, a “market rate” for longshore work must take into account the rate that counsel could charge private, paying clients for “similar” services. Counsel contends that he could receive a rate of \$400 per hour for commercial or business litigation work. Employer counters, in essence, that claimant could not obtain commercial litigation work at that rate as he is a solo practitioner. Employer also contends that such work is not comparable as there are no lengthy trials, and never any jury trials, in longshore cases. Employer also notes that the rules of evidence and procedure are relaxed in administrative hearings. Both parties support their positions with documentation.

The Board has considered the parties’ documentation and is persuaded that rates paid to commercial/business litigators in Portland do not provide an appropriate basis for setting a market rate. Mr. Skerritt’s affidavit persuasively establishes that, in the relatively small legal market of Portland, a workers’ compensation practice and a business litigation practice cannot be viewed as “similar.” Moreover, the rates set out in the Morones Surveys are for firms with five or more attorneys specializing in commercial litigation. Mr. Skerritt states that business litigation routinely requires the work of a team of attorneys, and that certain work is delegated to paralegals or less experienced attorneys at a lower cost to the client; as claimant’s counsel is a solo practitioner he cannot delegate work in this manner, nor could he expect a client to pay him \$400 per hour to perform all the work himself.

The 2007 Oregon Bar Survey, which the United States Federal District Court for the District of Oregon uses as its baseline for attorney's fee rates,³ provides average hourly rates for various types of work, both plaintiff and defense. Employer urges the use of rates indicated for plaintiff personal injury cases. Claimant's counsel responds that this work is of a contingent nature and not based on a true hourly market rate. After review of the types of attorney work presented in the Bar Survey, we hold that general plaintiff civil litigation cases supply evidence of a "similar" market for counsel's services in Portland. Moreover, we hold that his hourly rate should be set by reference to an average of the rates for workers' compensation, plaintiff personal injury civil litigation, and plaintiff general civil litigation cases. This methodology is appropriate because it accounts for the actual nature of counsel's work, which involves primarily workers' compensation and personal injury cases, and it incorporates rates he could receive from paying clients for similar services.

Rate for Attorney of "reasonably comparable skill, experience, and reputation"

Claimant's counsel has 40 years of experience and has successfully appealed and/or defended many cases before the Board and the United States Court of Appeals for the Ninth Circuit. Thus, we will use the 95th percentile rates from the 2007 Bar Survey for services sought in this case in the 2006 fee petition. The 95th percentile rates are as follows: workers' compensation - \$225; plaintiff personal injury civil litigation - \$350; non-personal injury plaintiff civil litigation - \$350. The average of the rates is \$308 per hour for work performed in 2006. For the ensuing years, we will use the percentage increase in the Federal locality pay table for Portland.⁴ The percentage increases are as follows: (1) 2007 – 2.11%; (2) 2008 – 3.45%; (3) 2009 – 3.76%. Thus, the hourly rate for services performed in 2007 is \$314.50, in 2008 is \$325.50, and in 2009 is \$338.⁵

The fee previously awarded by the Board in BRB No. 03-0302 compensated counsel for 12.50 hours of attorney services.⁶ This fee is now awarded at the hourly rate of \$308. In addition, counsel is also entitled to a fee for the 2006 motion for

³ See http://www.ord.uscourts.gov/attorney_fee_statement.pdf. The 2008 Bar Survey does not present data that correlates geographic region, practice area, and years of practice in a single table as does the 2007 Survey.

⁴ <http://www.opm.gov/oca/09tables/index.asp>.

⁵ Figures are rounded to the nearest 50 cents.

⁶ The Board also awarded a fee for .25 hour of legal assistant services at \$110 per hour.

reconsideration (4.75 hours of attorney services) and for the services rendered before the Board in 2009 (8.75 hours of attorney time and .75 hour legal assistant time). The number of hours requested for these additional services is reasonable, and we award a fee for them at the hourly rate of \$338 for attorney work and at the requested hourly rate of \$150 for legal assistant services.

Accordingly, the Board awards claimant's counsel an hourly rate of \$308 for the 12.50 hours of attorney services for which a fee was awarded in the Board's Order dated July 25, 2006. The Board awards counsel an additional fee of \$4,675.50 for 13.50 hours of attorney services at an hourly rate of \$338 and .75 hours of legal assistant services at \$150 per hour. These fees are payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge