

U.S. Department of Labor

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



BRB No. 23-0220

CINDY L. TITUS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AIR FORCE INSURANCE FUND	)	
	)	DATE ISSUED: 08/27/2024
and	)	
	)	
AIR FORCE INSURANCE FUND NAFI	)	
WCC	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Attorney Fee Order and Order Granting Reconsideration in Part and Denying Reconsideration in Part of Christopher Larsen, Administrative Law Judge, United States Department of Labor

Charles Robinowitz (Law Office of Charles Robinowitz), Portland, Oregon, for Claimant.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS, and JONES, Administrative Appeals Judges

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Christopher Larsen’s Attorney Fee Order and Order Granting Reconsideration in Part and Denying Reconsideration in Part (2019-LHC-01090) rendered on a claim filed pursuant to the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §§901-950, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§8171-8173 (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, an abuse of discretion, or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 955-56 (9th Cir. 2007).

On March 23, 2018, Claimant sustained work-related injuries to her abdomen, lower back, and left leg, prompting her, through attorney Charles Robinowitz (Counsel), to file a claim for benefits against Employer under the Act.<sup>1</sup> In his Decision and Order Awarding Benefits dated September 29, 2022, the ALJ awarded Claimant temporary total disability benefits from March 24, 2018, through October 1, 2019, and permanent total disability benefits beginning October 2, 2019, based on an average weekly wage of \$454.99, as well as medical benefits. On October 31, 2022, Counsel filed an itemized fee petition with the ALJ seeking an attorney's fee totaling \$159,702.49, representing \$152,909.75 for 210.91 hours of Counsel's services at \$725 per hour, \$3,850.75 for 25.05 hours of legal assistants' services ranging from \$100 to \$200 per hour,<sup>2</sup> plus costs of \$2,941. Fee Pet. at 18-19. Employer and its Carrier (Employer) filed objections to Counsel's requested hourly rate, the total hours billed, and the total requested costs. Counsel filed a reply brief, accompanied by a supplemental declaration.

In his Attorney Fee Order dated January 24, 2023 (Fee Order), the ALJ initially determined Salt Lake City, Utah, is the "relevant community" for purposes of establishing a market hourly rate. Fee Order at 2-4. Based on that community, he reduced Counsel's rate from his requested \$725 per hour to \$450 per hour, finding the latter figure reasonably represents the market rate for the relevant community. *Id.* at 4. He further granted the various requested hourly rates for the legal assistants and the entirety of Counsel's requested hours and costs. *Id.* at 5-7. Accordingly, the ALJ awarded Counsel a total of \$98,760.25 in attorney's fees and \$2,941.99 in costs, payable by Employer. *Id.* at 7.

Counsel filed a timely motion for reconsideration of the ALJ's Fee Order on February 6, 2023, accompanied by a second supplemental declaration with two exhibits. He argued the ALJ erred in finding Salt Lake City, Utah, is the relevant community and, therefore, in awarding him an hourly rate of \$450. Mot. for Recon. at 2-4. *Id.* Further, he asserted the ALJ should have allowed 7.6 hours for preparing a reply to Employer's

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<sup>1</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit because Claimant sustained her injuries in Utah. 33 U.S.C. 921(c); see *Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

<sup>2</sup> Counsel requested: \$520 for 2.6 hours at \$200 per hour; \$536.25 for 3.25 hours at \$165 per hour; \$240 for 1.5 hours at \$160 per hour, \$1,980 for 13.2 hours at \$150 per hour, \$539.50 for 4.15 hours at \$130 per hour, and \$35 for .35 hour at \$100 per hour. Decl. of Oct. 31, 2022, at 18-19.

objections and an additional 4.9 hours for preparing the motion for reconsideration. *Id.* at 5.

In his Order Granting Reconsideration in Part and Denying Reconsideration in Part dated February 27, 2023 (Order on Recon.), the ALJ denied Counsel's request for reconsideration of his relevant community and hourly rate determinations, finding his arguments are not in accordance with how the United States Court of Appeals for the Tenth Circuit determines the relevant community and otherwise are untimely because Counsel's particular assertion regarding a "dearth" of competent attorneys in the Salt Lake City region was raised for the first time on reconsideration. Order on Recon. at 1-2. Nonetheless, he granted Counsel's request, in part, and awarded a fee for both the 7.9 hours he spent replying to Employer's opposition, as well as the 4.9 hours he spent preparing the Motion for Reconsideration, and therefore awarded Counsel an additional attorney's fee of \$5,760, representing 12.8 hours at \$450 per hour, payable by Employer. *Id.*

On appeal, Counsel challenges the ALJ's award of a \$450 hourly rate and his determinations that Counsel did not raise the relevant community issue until he filed a motion for reconsideration and that Salt Lake City, Utah, is the relevant community.<sup>3</sup> Employer has not filed a response brief. Counsel's arguments have merit.

In his Fee Order, the ALJ refused to accept Counsel's request for an hourly rate of \$725 based on his experience, the declaration of Robert E.L. Bonaparte, past fee awards and the market rate for attorneys in Portland, Oregon. Fee Order at 3-5. He determined Counsel requested a Portland, Oregon hourly rate "without any discussion" of the relevant community and further stated Counsel "d[id] not address this issue."<sup>4</sup> *Id.* at 3. Additionally, he found the relevant community for hourly rates is Salt Lake City, Utah,

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<sup>3</sup> We affirm, as unchallenged on appeal, the ALJ's findings regarding the total hours approved, the hourly rates and total fees awarded for legal assistant services, and the total costs awarded. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007); Fee Order at 5-7; Order on Recons. at 2.

<sup>4</sup> In reaching this conclusion, the ALJ noted he could not determine whether Counsel considers Portland, Oregon hourly rates relevant because the relevant community is "the entire Defense-Base-Act bar wherever located throughout the nation, or for some other reason," and the Tenth Circuit has not accepted the national rate argument in ERISA cases. Fee Order at 3 n.1 (citing *D.K. v. United Behav. Health*, 2021 WL 4060937 (D. Utah Sep. 7, 2021)). The ALJ's repeated references to the Defense Base Act, 42 U.S.C. §§1651-1655, in addressing the hourly rate issue, Fee Order at 3 n.1, 4; Order on Recon. at 2, are misplaced as this case arises under the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§8171-8173.

rather than Portland, Oregon, because: 1) Claimant was injured in and lives near Ogden, Utah; 2) Claimant received most of her medical treatment in Ogden, Utah; 3) of the nine witnesses who testified at the hearing, at least eight testified from locations near Salt Lake City or Ogden, Utah; 4) he had scheduled an in-person hearing at a convenient location near Claimant's residence in Utah, even though all litigation ultimately was conducted remotely via videoconference; and 5) the claim has "no meaningful connection" with Portland, Oregon, other than Counsel's office location. *Id.*

On the facts of this case, we agree that the ALJ erred in not considering Counsel's arguments on the relevant community issue. First, in his fee petition, Counsel requested Portland, Oregon hourly rates, with supporting documentation, despite not specifically raising the relevant community as an issue. Fee Order at 3. In his reply to Employer's objections, Counsel explained why Portland rates should apply:

[C]laimant hired me to represent her because she was unable to find an attorney in the Salt Lake City area who represented claimants under the [Act]. I had previously represented a claimant who lived in the Salt Lake City area who had a claim under the Defense Base Act. He also was unable to find an attorney to represent him in the Salt Lake City area.

Suppl. Decl. of Dec. 15, 2022, at 1-2; Claimant's Brief at 3-5. Both documents were submitted before the ALJ issued his Fee Order on January 24, 2023. While Counsel did not use the term "relevant community" in either his fee petition or his reply to Employer's objections containing his first supplemental declaration, he presented the issue by stating reasons for requesting Portland, Oregon hourly rates. *Id.* Therefore, the ALJ erred in finding Counsel raised the relevant community argument for the first time in his motion for reconsideration.<sup>5</sup> *Moore v. Paycor Inc.*, 11 BRBS 482, 492-493 (1979); *see Van Skike*

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<sup>5</sup> In his fee order, the ALJ stated Counsel, "without any discussion of 'relevant community,' provide[d] evidence only of hourly rates which are, or might be, charged by lawyers in Portland, Oregon." Fee Order at 3 (citing Fee Pet. at 20-22; Decl. of Robert E.L. Bonaparte at 5-12). In this regard, Counsel's declaration and supporting exhibits accompanying his initial fee petition solely reference hourly rates in and around Portland, Oregon, thereby making it evident he was seeking market rates for Portland as the relevant community. Fee Pet. at 20-23. In support of his requested hourly rate, Counsel extensively discussed his ties to that region, *id.*, and presented evidence exclusive to the Portland market. *Id.*, Exhibits A, B. Moreover, the ALJ did not note or discuss Counsel's contention in his supplemental declaration which identified additional reasons Portland, Oregon, is the relevant community for determining reasonable hourly rates in this case. *See* Suppl. Decl. of Dec. 15, 2022, at 1-2. Despite Counsel not having requested leave to submit a reply to Employer's objections to his fee petition, the ALJ's decision to accept that brief and

*v. Dir., OWCP*, 557 F.3d 1041, 1043 (9th Cir. 2009); *Johnson v. Dir., OWCP*, 183 F.3d 1169, 1171 (9th Cir. 1999). We therefore vacate the ALJ's finding that Counsel did not timely raise the relevant community issue before him. Consequently, we vacate the ALJ's finding that Salt Lake City is the relevant community and the awarded hourly rate.

On remand, the ALJ must reconsider the relevant community issue, including properly addressing all relevant law and evidence.<sup>6</sup> He also must explain all factors he considered in making his decision. 5 U.S.C. §557(c)(3)(A); *see generally Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). Thereafter, he must arrive at a reasonable hourly rate for Counsel's services based on his relevant community finding and then, if necessary, recalculate Counsel's total fee award based on those findings.

Accordingly, we vacate the ALJ's findings that Counsel did not timely raise the relevant community issue, that Salt Lake City, Utah, is the relevant community, and that Counsel is entitled to an hourly rate of \$450. We remand the case for further consideration

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supplemental declaration and award Counsel a fee for the service indicates the ALJ considered it reasonable and necessary work.

<sup>6</sup> As we have vacated the ALJ's relevant community finding, we need not address whether the ALJ correctly applied Tenth Circuit law. However, the ALJ's reliance on *D.K. v. United Behav. Health*, 2021 WL 4060937 (D. Utah Sep. 7, 2021), appears misplaced because that case does not address the relevant community issue. Rather, the Tenth Circuit has specifically addressed criteria for determining market rates in the relevant community, *see e.g. Jane L. v. Bangerter*, 61 F.3d 1505, 1510 (10th Cir. 1995); *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983).

consistent with this opinion. In all other respects, we affirm the ALJ's Attorney Fee Order and Order Granting Reconsideration in Part and Denying Reconsideration in Part.

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge