U.S. Department of Labor

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

DRAGAN D. SPANJOL Claimant-Respondent v. PORT MAINTENANCE GROUP, INCORPORATED Employer-Petitioner TOTAL TERMINALS, INCORPORATED and SIGNAL MUTUAL INDEMNITY ASSOCIATION Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	BRB No. 20-0246 DATE ISSUED: 12/23/2020
DRAGAN D. SPANJOL Claimant-Petitioner v.	)	BRB No. 20-0039

PORT MAINTENANCE GROUP, INCORPORATED	)	
Employer-Respondent	)	DECISION and ORDER

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

Jeffrey M. Winter, San Diego, California, for Claimant.

John T. Marin (Laughlin, Falbo, Levy & Moresi), San Diego, California, for Port Maintenance Group, Incorporated.

Matthew W. Boyle (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Port Maintenance Group, Incorporated (PMG) appeals Administrative Law Judge Christopher Larsen's Decision and Order Awarding Benefits and Order Denying Reconsideration, and Claimant appeals Judge Larsen's Attorney Fee Order (2017-LHC-01032, 2018-LHC-00840) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case arises out of Claimant's claims for binaural hearing loss against employers PMG and Total Terminals, Incorporated (TTI). Claimant, engaged in longshore employment since 2004,[1] worked with PMG as a mechanic for fourteen days in June and

[1]He spent roughly ten years working for Harbor Industrial as a crane mechanic and thereafter obtained mechanic, clerk, and UTR jobs through the ILWU dispatch hall with

July 2015. This represented his last covered work prior to a September 8, 2015 audiogram which revealed Claimant had a 21.3 percent binaural hearing impairment. His last longshore employment occurred on November 30, 2015, when, while working as a yard clerk for TTI, he sustained injuries to his shoulders and left hand.[2] CX 7 at 26-29, 32-33. He has not worked since that date. CX 11 at 18. A second audiogram, conducted on March 2, 2017, showed Claimant had a 10.9 percent binaural hearing loss.

At the time Claimant worked for PMG in 2015, it operated a maintenance company involved with the repair of chassis and tires at Pier S, a 160-acre undeveloped property located within the harbor district of the Port of Long Beach (the Port). CX 15 at 38; HT at 95. PMG registered as a business in California in 2013, and prior to starting road-ability work at Pier S, it operated a tire shop at the Matson facility on Pier C. HT at 23. As a pre-requisite for hiring longshore labor and working at the port, PMG engaged the Pacific Maritime Association (PMA) to pay its employee wages, including those earned by Claimant. CX 15 at 49-50.

Claimant was hired as an ILWU Mechanic Journeyman, or more specifically according to PMG as a chassis mechanic, to run the road-ability lane at Pier S. *Id.* at 14-15; HT at 45-46. Before each work shift, Claimant reported to PMG's tire shop at Pier C to pick up any necessary heavy impact tools for work and a utility truck which he then drove to Pier S. HT at 27. Once at Pier S, Claimant performed mandatory ILWU roadworthiness maintenance inspections of container-bearing chassis, i.e., he checked the lights, reflectors, mud flaps, brake system, tires and wheels, and performed any necessary repairs to ensure the chassis passed inspection. CX 15 at 28; HT at 28, 55. The chassis, which always arrived with containers, either loaded or empty, originated from various locations, including maritime terminals within the Port, where they would be used to move containerized cargo. HT at 25-26, 28-30. Once inspected, the chassis left Pier S to carry containers over public roads or return them to the terminals. *Id.* at 22-23, 56. PMG did not have insurance coverage under the Act, 33 U.S.C. §904(a),[3] during the time it employed Claimant. HT at 39.

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various employers, including PMG and TTI, at the Port of Long Beach. CX 11 at 15; HT at 72-73; CX 5 at 25.

[2]Claimant filed a separate claim for these injuries against TTI, which was resolved through a Section 8(i) settlement agreement, 33 U.S.C. §908(i), approved by Administrative Law Judge Evan H. Nordby's decision issued on June 20, 2019.

[3]Section 4(a) of the Act states:

Once operated as a site for oil and gas production, Pier S was purchased by the Port in 1994 and remediated of oil and gas contamination. CXs 16-18. An asphalt cap was installed over the property, though no permanent structures were placed on the site. *Id.* In an effort to reduce congestion at its terminals, the Port opened a temporary container depot on a 30-acre plot in the northeast portion of Pier S on December 29, 2014. *Id.* In 2015, Pasha Stevedoring and Terminals (Pasha) received approval from the Port to operate the facility up to 24 hours per day, 7 days per week for the storage of empty containers, wheeled loaded containers, and chassis. *Id.* Pasha, in turn, subleased Pier S to Franco Trucking (Franco), which used that location as a container storage depot for its customers. In 2015, PMG entered into a verbal agreement with Franco to do road-ability work at its Pier S depot. *Id.*

Pier S is a rectangular-shaped property located on Terminal Island, California, within the Port. CX 15. It is bordered on the north and east by navigable waterways that lead to the Pacific Ocean, i.e., the Cerritos Channel to the north and the Inner Harbor and Turning Basin to the east, and on the west primarily by the Yusen marine terminal affiliated with the Port of Los Angeles. *Id.* To the south, it is bordered by Pier T, though the two properties are separated by Interstate 710, the Seaside Freeway. *Id.* Access to Pier S is via a public service road which runs through Pier T, parallel and adjacent to the Seaside Freeway, then turns under the Freeway and into Pier S. *Id.*

During Claimant's employment with PMG, Pier S had no cranes for removing cargo directly from ships, but UTRs and transtainer cranes were regularly used on site to facilitate the movement of containers.[4] HT at 76. Additionally, marine clerks worked the gate at Pier S, recording equipment moving into and out of the facility. CX 11 at 26, 29, 32; CX 15 at 46-47; HT at 58, 71. Surrounding properties, notably Pier T, and Piers A and C, which are respectively across the Cerritos Channel and the Inner Harbor/Turning Basin from Pier S, all housed active marine terminals with cranes. HT at 76.

> Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. . . .

See also 33 U.S.C. §932.

[4]A UTR, or yard hustler, is a motorized rig used to move containers, chassis, and bomb carts around the Port. A transtainer is a large gantry crane used to load and unload containers onto chassis or railway wagons or to stack containers on top of each other in a container yard.

In his decision dated August 7, 2019, the administrative law judge found Claimant's work for PMG constitutes maritime employment pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3), and that Pier S, where Claimant performed that work, is an "adjoining area" and thus a covered situs under Section 3(a) of the Act, 33 U.S.C. §903(a). He next found Claimant's last covered employment prior to the September 8, 2015 determinative audiogram was with PMG. Accordingly, he ordered PMG to pay Claimant benefits for his 21.3 percent binaural hearing loss.[5] *See* 33 U.S.C. §§908(c)(13), 907. The administrative law judge denied PMG's motion for reconsideration.

Thereafter, Claimant's counsel filed attorney's fee petitions with the administrative law judge, seeking $47,502.72, for 59.9 hours of attorney work at an hourly rate of $515 (Winter), 36 hours of attorney work at an hourly rate of $385 (Ellis and MacInnes), 9.8 hours of paralegal work at an hourly rate of $130 (Lacina), and costs of $1,520.22. PMG objected to the requested rates, hours, and costs, alleging counsel is entitled only to an attorney's fee of $9,028.00 and $951.24 in costs. The administrative law judge reduced the hourly rates requested for attorney work, as well as some of the hours and costs, and approved an attorney's fee totaling $33,401.42, payable by PMG.[6]

On appeal, PMG challenges the administrative law judge's findings that Claimant met the situs and status requirements of the Act and that it, rather than TTI, is the responsible employer liable for Claimant's benefits. BRB No. 20-0246. Claimant responds, urging affirmance of the administrative law judge's decision on the merits. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge's situs and status findings should be affirmed, but offers no opinion on the remaining issues. TTI did not file a response brief. PMG filed a reply brief. Claimant appeals the administrative law judge's attorney's fee award, challenging his reductions in the hourly rates, number of hours, and costs. BRB No. 20-0039.[7] PMG

[5]The administrative law judge ordered PMG to pay Claimant 42.6 weeks of permanent partial disability benefits at a compensation rate of $1,377.02, totaling $58,661.52, plus medical benefits, based on the September 8, 2015 determinative audiogram administered by Dr. Stewart Horn and evaluated by Dr. Norman Cantor demonstrating the 21.3 percent binaural hearing loss. 33 U.S.C. §908(c)(13)(B), (19).

[6]The fee award is for 53 hours of attorney work at $410 per hour (Mr. Winter), 33 hours of attorney work at $300 per hour (Ms. Ellis and Mr. MacInnes), and 6.2 hours of paralegal work at $130 per hour, plus $965.34 in costs.

[7]The Board consolidated these appeals in an Order issued April 30, 2020.

responds, urging affirmance of the administrative law judge's Attorney Fee Order. Claimant has filed a reply brief.[8]

BRB No. 20-0246

Covered Claim

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a) ("situs"), and that the employee's work is maritime in nature and is not specifically excluded by the Act ("status"). 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977).

Section 3(a)

PMG contends the administrative law judge erred in finding Claimant satisfied the situs requirement of the Act, because Pier S is neither an enumerated situs adjoining navigable waters nor an "other adjoining area" customarily used for a maritime purpose. PMG asserts the evidence does not support the administrative law judge's finding that Pier S meets the test for a covered adjoining area established by the United States Court of Appeals for the Ninth Circuit in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). PMG maintains that although Pier S is adjacent to water and near other maritime terminals, it is not directly associated with or contiguous to any marine terminal and its use was entirely oriented to land, not maritime transportation, such that it is not suitable for maritime purposes under *Herron*. The Director and Claimant each respond that, contrary to PMG's position, Pier S has the requisite functional and geographical nexus with navigable waters to establish it is an adjoining area in accordance with *Herron* and, thus, is a covered situs pursuant to Section 3(a).

Section 3(a) of the Act states:

[8]Claimant also submitted a Motion for Supplemental Authority in BRB No. 20-0039, requesting that the Board consider its decisions in *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 54 BRBS 13 (2020), and *Preciado v. Navy Exch.*, BRB No. 20-0050 (June 30, 2020) (unpub.), in resolving the appeal of the administrative law judge's Attorney Fee Order. The Board, by Order dated July 8, 2020, informed the parties it would address Claimant's "supplemental authority in its decision."

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a). In order to be covered by the Act, a claimant must be injured on an enumerated situs adjoining navigable water (pier, wharf, dry dock, etc.), or an "other adjoining area" customarily used for a maritime purpose. *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180(CRT) (9th Cir. 1993). Claimant was not injured while he was working upon navigable waters or on an enumerated site; thus, as the administrative law judge correctly found, the issue is whether Claimant's injury occurred on an "other adjoining area."

An area can be considered an "adjoining area" within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity. *See Herron*, 568 F.2d 137, 7 BRBS 409; *see also Triguero v. Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991). The Ninth Circuit, within whose jurisdiction this case arises, concluded an "adjoining area" must have both a functional and a geographical relationship with navigable waters but need not depend on physical contiguity with those waters. *Herron*, 568 F.2d at 141, 7 BRBS at 411. In *Herron*, the Ninth Circuit stated consideration should be given to the following factors, among others, in determining if a site is an "adjoining area:"

> the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

Id.

Contrary to Employer's contentions, the administrative law judge's findings are supported by substantial evidence and in accordance with law. The record establishes the proximity of Pier S to navigable waters is dictated by maritime concerns such that it has a functional nexus with maritime activities. This is evident by the undisputed facts that the Port contracted with Pasha to set up a container storage depot on Pier S, which in turn, prompted Pasha to engage PMG to run a road-ability lane as part of its overall operation at that facility. PMG X 2. There also is no dispute that the primary purpose for the container

storage depot on Pier S, i.e., "in order to help relieve cargo congestion" at the Port "and the resulting pressure on the goods movement system," *id.*, was to enhance maritime operations within the Port and, thus, relates to loading and unloading activities at the various marine terminals therein.

The chassis repaired at Pier S were used throughout the Port's marine terminals to carry containers, as well as to carry cargo away from the Port. CX 15 at 28. The road-ability checks Claimant performed on the chassis, 90 percent of which were carrying containers, were therefore directly linked to the loading/unloading process. *Coleman v. Atlantic Container Service, Inc.*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990) (court stated the fact the claimant worked primarily on making loaded chassis/container rigs roadworthy does not diminish his involvement in the loading and unloading process, as without such work, the unloading process would stop indefinitely at the Port); *Sea-Land Services, Inc. v. Director, OWCP* [*Ganish*], 685 F.2d 1121 (9th Cir. 1982) (affirming the Board's finding of coverage for a mechanic who repaired trailers used to move containers and forklifts engaged in loading and unloading).

Moreover, as the administrative law judge found, the map of the Port indicates Pier S is bordered on two sides by navigable water, both of which connect to the Pacific Ocean, and it sits in an area primarily devoted to maritime pursuits. PMG EXs 1, 2. It is undisputed Pier S is located within the Port and the neighboring properties are primarily dedicated to maritime commerce. *Id.* In this regard, Pier T directly adjoins Pier S to the south, and it is in close proximity to Piers A and C, which are directly across the navigable waterways that abut Pier S respectively to the north and east. All three of these neighboring Piers are home to active marine terminals. *Id.* Substantial evidence supports the administrative law judge's finding that Pier S has both a functional and a geographical relationship with navigable waters. We, therefore, affirm his finding that Pier S constitutes an "adjoining area" and conclusion that Claimant was injured on a covered situs under Section 3(a). *See Herron*, 568 F.2d 137, 7 BRBS 409.

Section 2(3)

PMG contends the administrative law judge erred in finding Claimant satisfied the status requirement of Section 2(3), because his job duties with PMG were directed solely to land transportation and unrelated to the loading and unloading operation of any marine terminal.[9] The Director and Claimant urge affirmance of the administrative law judge's

[9]PMG concedes if Claimant worked at a terminal, "case law has consistently found that chassis and container mechanics at a marine terminal have maritime status." PMG Br. at 12.

finding that Claimant established the status requirement under Section 2(3) of the Act as it accords with law.

Section 2(3) of the Act provides:

> The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. . . .

33 U.S.C. §902(3). Generally, a claimant satisfies the status requirement if he is engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). To satisfy this requirement, he need only "spend at least some of [his] time" in indisputably maritime activities. *Caputo*, 432 U.S. at 273, 6 BRBS at 165. Workers are engaged in covered employment if they work "in intermediate steps of moving cargo between ship and land transportation." *P.C. Pfeiffer Co.*, 444 U.S. at 83, 11 BRBS at 328.

PMG's contentions lack merit. First, as the administrative law judge found, PMG's statement that the chassis inspected by Claimant at Pier S were exclusively involved in land transportation from a "non-maritime terminal site" is belied by testimony from Claimant and John Rule, an owner of PMG, that some of the chassis Claimant worked on were returned to the loading/unloading terminals upon completion of his work. Decision and Order at 6, 25-27; *see also* HT at 22, 29, 54-55, 56, 59; CX 15 at 28. Second, the fact that Claimant's work was performed at Pier S where no loading or unloading of ships occurred does not necessarily mean the work has no maritime purpose. Repair and maintenance of equipment used in the loading and unloading process are integral to that process and such work is, therefore, covered employment. *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *Coleman*, 904 F.2d 611, 23 BRBS 101(CRT).

Under *Schwalb*, land based activity confers status if it is "an integral or essential part of loading or unloading a vessel." *Schwalb*, 493 U.S. at 46, 23 BRBS at 99(CRT). Addressing this language in the context of a claimant whose work involved repairing chassis and containers, the United States Court of Appeals for the Eleventh Circuit, in *Coleman*, stated:

> Maintenance of the chassis in good working order is essential to prevent the loading and unloading process from breaking down. They must be kept in good condition to support the containers attached to them at dockside. They must be maintained in order to be hauled by hustlers as well as tractor trucks.

Coleman, 904 F.2d at 618, 23 BRBS at 107(CRT). Consequently, work as a chassis and/or container mechanic serves a maritime purpose as it is essential to the loading/unloading process. *Ramos v. Container Maint. of Florida*, 45 BRBS 61 (2011), *aff'd sub nom. Ramos v. Director, OWCP*, 486 F. App'x 775 (11th Cir. 2012); *Ganish*, 685 F.2d 1121; *Arjona v. Interport Maint. Co., Inc.*, 31 BRBS 86 (1997); *Insinna v. Sea-Land Service, Inc.*, 12 BRBS 772 (1980) (container mechanic who repaired chassis and containers for longshoring operations was involved with the sea as well as the land phase of employer's operations and thus covered).

Claimant's work inspecting and repairing chassis entailed keeping them in good condition for transporting containers around the Port, as well as overland transportation. As such, his "overall employment facilitates the movement of cargo between ship and land transportation and is maritime in nature." *Coleman*, 22 BRBS at 311 (citing *P.C. Pfeiffer Co.*, 444 U.S. 69, 11 BRBS 320). Additionally, his work assignment removing special apparatus affixed to containers, which assist with the loading and unloading process, served a maritime purpose. HT at 25-26, 64-65, 70. Claimant's duties as a chassis mechanic for PMG establish he spent at least some of his time in indisputably covered work and thus, satisfy the Act's status requirement. *Caputo*, 432 U.S. at 273, 6 BRBS at 165. We therefore affirm the administrative law judge's finding that Claimant was a maritime employee pursuant to Section 2(3) at the time of his injury.

As Claimant's work for PMG in June/July 2015, running the road-ability lane at Pier S, satisfies the situs and status requirements, we affirm the administrative law judge's conclusion that Claimant is covered under the Act. 33 U.S.C. §§902(3), 903(a).

Responsible Employer

PMG contends the administrative law judge erred in holding it liable for Claimant's hearing loss because the record establishes TTI was the last maritime employer to expose Claimant to loud noise. In this regard, PMG maintains Claimant's testimony that his hearing loss was aggravated and worsened by his work with TTI, in conjunction with Dr. Smith's 2017 audiogram and evaluation, establishes TTI's liability for Claimant's current hearing loss as identified by that 2017 audiogram. Claimant asserts the administrative law judge properly found the 2015 audiogram is the determinative audiogram for purposes of his entitlement to benefits and PMG's liability.

The responsible employer in a hearing loss case is the last covered employer to expose the claimant to injurious stimuli prior to the administration of the audiogram determinative of his disability. *See Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *see also Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). The "determinative audiogram" establishes the

amount of compensation benefits. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 962, 31 BRBS 206, 212(CRT) (9th Cir. 1998); *Port of Portland*, 932 F.2d 836, 24 BRBS 137(CRT); *see also Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991). There must be a "rational connection" between the onset of the employee's disability and his exposure to injurious stimuli with a particular employer. *Port of Portland*, 932 F.2d at 840-841, 24 BRBS at 143-145(CRT); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, the responsible employer is the last employer covered under the Act who, by exposing the claimant to injurious noise, could have contributed causally to the disability evidenced on the determinative audiogram. *Jones Stevedoring Co. v. Director, OWCP* [*Taylor*], 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

It is for the administrative law judge to weigh the audiograms submitted and determine the appropriate weight to be given that evidence. *See Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991); *Labbe v. Bath Iron Works Corp*., 24 BRBS 159 (1991). In this case, the administrative law judge fully addressed and rejected PMG's contention that the 2017 audiogram is determinative of Claimant's work-related hearing loss. He rationally accorded little weight to that audiogram because of its divergence with the results of the 2015 audiogram and because it lacked supporting documentation as to its reliability.[10] He further provided a rational basis for finding the 2015 audiogram presented a reliable depiction of Claimant's

[10]We reject PMG's contention that it be allowed to develop the record to admit calibration evidence for the 2017 audiogram and the declaration of the audiologist, Dr. Woodruff, to bolster Dr. Smith's report. In his March 2, 2017 report, Dr. Smith explained "we utilized our audiometric examination for rating purposes," because "our results are somewhat different than the results of [the 2015] audiogram." CX 6. Dr. Smith "incorporated" the prior testing into his files, but did not explain the difference in results between the two tests or provide information to confirm the reliability of the 2017 audiogram. *Id*. PMG had ample opportunity to review this evidence and, if it deemed it necessary, request additional information in a timely fashion on the issue of Claimant's hearing loss. Instead, it sought to submit additional evidence for the first time in a motion for reconsideration to the administrative law judge, only after the administrative law judge discredited the 2017 audiogram in his decision. Consequently, review of the case reveals PMG did not exercise due diligence in developing the record in defense of Claimant's claim prior to the hearing. *Smith v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). Accordingly, PMG has not established the administrative law judge abused his discretion in finding on reconsideration it did not show good cause for re-opening the evidentiary record. *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).

hearing impairment and thus, concluded it is the determinative audiogram. As the administrative law judge acted within his discretion in finding the 2015 audiogram reliable and probative, and in crediting it over the 2017 audiogram, *Bruce*, 25 BRBS 157, we affirm his conclusion that it is the determinative audiogram for purposes of calculating benefits in this case. *Ramey*, 134 F.3d at 962, 31 BRBS at 212(CRT).

Therefore, as PMG was the last employer to expose Claimant to injurious noise prior to the onset of his disability as demonstrated by the determinative 2015 audiogram, we affirm the administrative law judge's finding that PMG is the responsible employer as it is rational, supported by substantial evidence, and in accordance with law. *Port of Portland*, 932 F.2d at 840-841, 24 BRBS at 143-145(CRT); *Cordero*, 580 F.2d 1331, 8 BRBS 744; *Roberts v. v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229, 232 (1997). Accordingly, we affirm the administrative law judge's findings that Claimant is entitled to, and PMG is liable for, benefits for Claimant's 21.3 percent binaural hearing loss.

BRB No. 20-0039

Claimant's counsel (Jeffrey Winter) appeals the administrative law judge's Attorney's Fee Order. The amount of an attorney's fee award is discretionary and will not be set aside on appeal 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).

Counsel contends the administrative law judge erred in rejecting all the evidence offered to support his requested hourly rate of $515 and in using, instead, an improperly recycled hourly rate from prior decisions issued by the same regional Office of Administrative Law Judges (OALJ). He maintains the administrative law judge's hourly rate determination for his work is merely a "perpetuation of a self-referential fee market as forbidden by the Ninth Circuit in *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009)." Brief at 2. We agree.

The Supreme Court has held 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); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The Court has also held an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see also Perdue*, 559 U.S. at 551; *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT).

As an initial matter, we affirm the administrative law judge's designation of Long Beach, California, as the relevant community for purposes of determining the market rate for Counsel's services because his underlying factual findings,[11] which are unchallenged on appeal, constitute "adequate justification" for that conclusion such that it accords with law. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1087, 49 BRBS 93, 96(CRT) (9th Cir. 2015); *see also Gates v. Deukmejian*, 987 F.2d 1392, 1404-1406 (9th Cir. 1992). Once the administrative law judge determined Long Beach is the relevant community for determining Counsel's hourly rate, *see* Attorney Fee Order at 4, the burden was on Claimant's counsel 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." *Blum*, 465 U.S. at 896 n.11; *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT).

In this case, Counsel submitted nine exhibits in support of his requested hourly rate of $515,[12] which the administrative law judge primarily rejected because they address "the wrong relevant community," i.e., he found Counsel's supporting documents only "address reasonable rates in San Diego" and, as such, are insufficient "to establish market rates in Long Beach." *Id.* Consequently, pursuant to *Christensen*, 557 F.3d at 1055, 43 BRBS at

[11]The administrative law judge relied on the following: Claimant's employment and injury occurred in Long Beach; Claimant resides in San Pedro, a fifteen minute drive from Long Beach; and the hearing occurred in Long Beach. Attorney Fee Order at 4.

[12]Counsel submitted: a declaration from Attorney Ronald Burdge supporting a median market rate in the San Diego area of $650 per hour based on data from his Consumer Law Survey and opining Counsel's work warrants a reasonable hourly rate in the range of $575 to $596; his own declaration addressing his current hourly rates and certificates attesting to his qualifications; a declaration from Attorney Timothy Brictson stating the "prevailing market rates" in the San Diego area support Counsel's requested hourly rate of $515, but concluding his own reasonable hourly rate "is at least $425 an hour;" the Laffey and United States Attorney's Office fee matrices; two pages entitled "Section I: High Level Data Cuts" professing to show mean billing rates for "partners" and "associates" in various cities, including San Diego, in 2013-2014; and two cases awarding an attorney's fee, one by the United States Court of Appeals for the Ninth Circuit in a case arising under the Act (*Shah v. Worldwide Language Resources, Inc.*, No. 16-72307 (9th Cir. Oct. 4, 2018) (Order)) and one by the District Court for the Southern District of California in a civil rights case (*Fisher v. City of San Diego*, Case No. 12-CV-1268-LAB-NLS (S.D. Cal. Aug. 14, 2013)), purportedly substantiating Counsel's requested hourly rate.

9(CRT),[13] he looked to recent hourly rates awarded attorneys in the relevant community of Long Beach. He awarded Counsel a rate of $410 per hour, citing four awards by administrative law judges.[14] He also awarded MacInnes a rate of $325 per hour and Ellis a rate of $300 per hour.[15] *Id.* at 12-13.

We cannot affirm the $410 per hour award for Counsel's services. The administrative law judge appears to have reverted to the "tautological, self-referential enterprise" condemned in *Christensen*, 557 F.3d at 1054, 43 BRBS at 8(CRT), by merely adopting rates awarded by other administrative law judges. *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 54 BRBS 13 (2020). Administrative law judges are not required to blindly accept the rates claimed by claimants' counsel, but, in view of the "inherently difficult" nature of establishing a market rate in a market in which there are no paying clients, "the rates charged in private representations may afford relevant comparisons." *Blum*, 465 U.S. at 896 at n.11.

As required by the regulation at 20 C.F.R. §702.132(a), Counsel supplied his "normal billing rate," $515 per hour. The administrative law judge correctly recognized Winter's burden is "to produce satisfactory evidence – in addition to [his] own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," even though "there is no private market for attorney's fees under the LHWCA." Attorney Fee Order at 4 (quoting *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT)). However, by

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[13]The Ninth Circuit stated it may be reasonable to look at what administrative law judges and the Board have awarded in other cases, where "the applicant has failed to carry this burden."

[14]The administrative law judge relied on the following awards: *Lampton v. J&M Associates, Inc.*, OALJ No. 2010-LHC-02108 (Jan. 8, 2013) (awarded an hourly rate of $365 for work performed between 2010-2012); *Jenkins v. Yusen Terminals, Inc.*, OALJ No. 2013-LHC-00815 (Apr. 29, 2016) (awarded hourly rates of $345 for work performed in 2013-2014 and $352.59 for work performed in 2015); and *Benitez v. Navy Exchange Service Command*, OALJ Nos. 2015-LDA-00086, 00087 (Oct. 13, 2017) and *Hasbrouck v. Edwards AFB Child Development Center*, OALJ Nos. 2015-LHC-01911, 01912 (Oct. 23, 2017) (awarded an hourly rate of $380 in both instances). None of these fee awards was appealed to the Board.

[15]We affirm, as unchallenged on appeal, the administrative law judge's award of these hourly rates to MacInnes and Ellis, as well as the award of an hourly rate of $130 for paralegal work.

summarily rejecting Counsel's evidence as not pertinent to the Long Beach market, the administrative law judge denied Claimant's counsel the opportunity to meet his burden of producing evidence that his requested rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience and reputation. *See Christensen,* 557 F.3d at 1053, 43 BRBS at 8(CRT) (stating if the reasons given by the adjudicator would not have been anticipated by a reasonable fee applicant, it may be appropriate to allow that applicant "to cure its failure to carry the burden"); *see also Hernandez,* 54 BRBS 13. Consequently, we vacate the administrative law judge's award to Winter of an hourly rate $410 and remand the case for further consideration of this issue. On remand, the administrative law judge must allow the parties the opportunity to submit evidence of market rates in Long Beach. *Id.*

Counsel also challenges certain reductions the administrative law judge made to requested hours and costs. Counsel contends the administrative law judge erred in denying, as clerical work, a total of 3.1 hours expended on various emails sent between the attorneys in this case (2 hours) and received from the administrative law judge's law clerk (1.1 hours). Counsel further contends the administrative law judge erred in denying certain expenses related to copying exhibits as overhead.

The administrative law judge found the time entries relating to emails in this case, to which PMG objected as non-compensable clerical tasks, "can be broken down into two categories: scheduling and intra-office communications." Attorney Fee Order at 11. He determined the emails among the parties involving the scheduling of depositions and availability are clerical in nature and, thus, not compensable. In contrast, he found intra-office communications, either via email or in person, are reasonable and compensable. Accordingly, the administrative law judge denied 3.9 hours expended by Counsel's office for emails generated for scheduling purposes. *Id.* at 11-13.

We agree with Counsel that the administrative law judge erred in summarily denying a fee for the two hours expended on the scheduling of depositions. As a general matter the order of depositions can be critical to the development of a case. Moreover, the cooperation of all parties' counsel and the deponent are required. To the extent this work requires independent legal judgment, it is compensable. We, therefore, vacate the administrative law judge's denial of a fee for two hours Counsel expended on such efforts and remand for him to determine whether the services rendered on these tasks required independent legal judgment or instead are clerical in nature. However, we affirm the disallowance of the remaining 1.9 hours as the administrative law judge permissibly found the entries failed to establish Counsel exercised independent legal judgment, and Counsel has not established an abuse of discretion in this regard. *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT).

As for Counsel's claimed costs, the administrative law judge found PMG's objections to two charges generated by Knox Attorney Service, Incorporated (Knox), "for copies and exhibit binders totaling $209.63" and "for exhibit tabs and binders totaling $93.25" valid, as those expenses "should be included in overhead." He therefore disallowed a total of $302.78 associated with those costs.

In *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989), the Board stated an administrative law judge is not mandated either to award photocopying costs or to disallow them as included in office overhead. Rather, he must evaluate the expenses such as those for photocopying in a given case to determine whether they are separately compensable and may award actual reasonable costs for these services. *Id.* In denying the cost for the services performed by Knox, the administrative law judge did not give a reason why he believed these expenses constituted office overhead. Nor did he consider whether any of the costs were other than normal overhead. In light of this, and as the copying services in question may be viewed as trial preparation services billable to this particular case rather than viewed as general office overhead, we vacate the denial of these costs and remand the case for the administrative law judge to undertake a specific analysis of these expenses.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits and Order Denying Reconsideration. With respect to the Attorney Fee Order, we affirm Long Beach is the relevant legal community and the hourly rates awarded to attorneys MacInnes and Ellis and the paralegal(s). We vacate the administrative law judge's hourly rate determination for Winter, his denial of time pertaining to the scheduling of depositions, and the Knox photocopying costs, and remand this case for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge