U.S. Department of Labor

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

BRB No. 21-0348

MAURICE HENDRICKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRAPAC, LLC	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: 7/29/2022
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Attorney Fee Order of Stewart F. Alford, Administrative Law Judge, United States Department of Labor

Norman Cole (Brownstein Rask LLP), Portland, Oregon, for Claimant.

William N. Brooks II (Law Offices of William N. Brooks), Long Beach, California, for Employer/Carrier.

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

BOGGS, Chief Administrative Appeals Judge and GRESH, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Stewart F. Alford's Attorney Fee Order (2018-LHC-01614) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (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. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant sustained a work-related back injury on January 6, 2016, prompting him, through attorney Eric Dupree (counsel), to file a claim for benefits against Employer under the Act.[1] In his decision dated February 14, 2020, the ALJ awarded Claimant permanent total disability benefits from March 28, 2018, based on an average weekly age of $2,190, as well as medical benefits. Claimant's counsel subsequently filed an itemized fee petition with the ALJ seeking an attorney's fee totaling $216,235.26, representing 190.8 hours of counsel's services at $725 per hour ($138,330), 86.5 hours of Paul Myers's services at $495 per hour ($42,817.50), 1.9 hours of Paul LaZarr's services at $350 per hour ($665), and 108.20 hours of paralegal/law clerk time at $150 per hour ($16,230), plus costs of $18,192.76. Fee Petition Ex. 14.[2] Employer filed objections to counsel's requested hourly rate, the total hours billed, and the total requested costs. Counsel then filed a reply brief, accompanied by additional exhibits and declarations, to which Employer objected.

[1] Claimant, represented by Edward Bull III, also filed a civil lawsuit against the Port of Oakland, which resulted in a net settlement payment to Claimant of $611,251.31, plus $140,000 to be held in trust for future medical treatment related to the work injury. The ALJ subsequently found Employer entitled to a credit for the total amount of the settlement, $751,251.31, as an offset to its liability for Claimant's disability and medical treatment.

[2] In support of his fee, counsel submitted the following evidence: 1) his own declaration and resume; 2) Mr. Myers's and Mr. LaZarr's resumes; 3) John Hillsman's 2017 declaration; 4) Charles Naylor's 2017 declaration; 5) Joshua Gillelan II's 2009 and 2012 declarations; 6) Ronald Burdge's 2020 declaration; 7) Deborah Water's 2018 declaration; and 8) historical rates of attorney's fees awarded him by the Office of Workers' Compensation Programs, the Office of Administrative Law Judges, the Benefits Review Board, and the United States Court of Appeals for the Ninth Circuit. Fee Petition Exs. 1-13.

The ALJ first declined to accept much of the evidence counsel submitted with his reply brief. He then reduced the requested hourly rates, the number of hours, and costs, awarding counsel a total of $120,470.30 in attorney's fees and $14,424.20 in costs, payable by Employer. Pertinent to the issues raised in this appeal, he awarded counsel $531 per hour.[3] Order at 17-18. He also denied counsel's request for travel-related fees and costs, totaling fifteen hours of "billable travel time" and $3,768.56 in travel expenses. Finally, the ALJ denied all time relating to a third-party state court action, representing 30.3 and .4 hours claimed by counsel and Mr. Myers, respectively, because such time is "not recoverable in the Longshore matter." *Id.* at 15.

On appeal, counsel challenges the ALJ's exclusion of the supplemental exhibits submitted in his reply to Employer's objections, the $531 hourly rate awarded to him, and the denial of his travel expenses and time associated with Claimant's third-party state court claim. Employer responds, urging affirmance. Counsel has filed a reply brief.

Supplemental Exhibits Excluded by ALJ

Counsel argues the ALJ's summary rejection of the declarations of Maurice Hendricks, Derrick Muhammad, Edward Bull III, and Ronald Burdge violated his due process rights as it improperly denied him an opportunity to meet his burden of producing evidence in support of his requested attorney's fee. He asserts his submission of these exhibits, attached to his reply to Employer's objections, complied with the ALJ's February 14, 2020 order outlining a procedure for addressing attorney's fees and costs, and were relevant as they directly addressed Employer's objections to counsel's fee petition. Counsel states submitting these documents as part of his reply was appropriate because he could not have anticipated the need for any of these declarations before Employer offered written objections to his travel time and expenses.

Evidentiary determinations are committed to the ALJ and will not be set aside unless the challenging party shows he abused his discretion. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). The party seeking to admit additional evidence must exercise diligence in developing the claim, and an ALJ will not be found to have abused his discretion when he gave the parties ample opportunity to submit its evidence. *Smith v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 22 BRBS 46 (1989). Moreover, the right to procedural due process in an administrative proceeding

[3] Based on the parties' agreement, the ALJ found San Francisco is the relevant community for determining counsel's market rate. D&O at 5. We affirm this finding as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

encompasses a party's "meaningful opportunity to present [its] case." *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *see also Goldberg v. Kelly*, 397 U.S. 254 (1970). Counsel has not shown the ALJ abused his discretion in excluding the four declarations submitted in reply to Employer's objections.

Claimant's counsel must submit a complete fee petition with an hourly breakdown of time spent, professional status of the person performing the work, and the hourly billing rate of each person. 20 C.F.R. §702.132. Counsel, as the fee applicant, bears the burden of proof in establishing the reasonableness of his requested hourly rate. *Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009). In his underlying decision awarding benefits to Claimant, the ALJ acknowledged counsel's eligibility for attorney's fees and instructed the parties on the fee petition procedure. Decision and Order at 47. He ordered Claimant's counsel to serve his fee petition on opposing counsel and then ordered the parties to "initiate a verbal discussion" "in an effort to amicably resolve any dispute concerning the amount of fees requested." *Id.* The ALJ stated:

> Claimant's counsel is ordered to file within 30 days of the date of the initial fee petition was served a Final Application for Fees and Costs that comports with 20 C.F.R. §702.132 and shall incorporate any changes agreed to during the [parties'] discussions. Within 21 calendar days after service of the Final application, Employer's counsel shall file and serve a Statement of Final Objections detailing the objections to the fees and costs sought and the basis for the objections. Claimant's counsel may file a reply to any employer opposition 14 days after the opposition is served. No other reply briefs are permitted.

Id., at 47-48; *see* Order at 2. Therefore, the ALJ allowed counsel and Employer to submit a final fee petition and final objections, respectively, and then allowed counsel time to submit a limited reply brief addressing Employer's final objections. Order at 4. He structured the submissions in this manner to afford each side an opportunity to respond and be heard, while at the same time trying "to avoid" "a second major litigation with depositions, discovery periods, and endless rounds of briefs." *Id.*

As noted, counsel submitted the four additional affidavits with his reply to Employer's objections. *Id.* The ALJ excluded those exhibits because he "did not provide for the submission of additional evidence with the reply brief" and he did not want to create a second litigation over attorneys' fees – a position he clearly articulated to the parties in setting out the briefing schedule. *Id.*; *see also Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983).

Contrary to counsel's contention, he had a "meaningful opportunity" to submit any and all exhibits he deemed necessary to support his fee request with his final fee petition, something the ALJ stated was "incumbent on Claimant" to do. Order at 4. The evidence that counsel submitted in support of his fee request was evidence the ALJ found counsel "should and could have" submitted at the time he filed his final fee petition. *Id*. This conforms with counsel's burden of proof and the requirement of 20 C.F.R. §702.132(a) that counsel file a "complete statement" in support of his fee petition.[4] Moreover, although counsel argues he was denied an opportunity "to meet its burden of producing evidence supporting the time, rate and expenses for his services," he has not sufficiently explained why the excluded declarations could not have been submitted with his final fee petition. For these reasons, we hold the ALJ neither violated counsel's right to due process nor acted in a manner that was arbitrary, capricious, or an abuse of discretion. *Eldridge*, 424 U.S. at 349; *Kelly*, 397 U.S. 254; *see generally Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Smith*, 22 BRBS 46.

The ALJ's Hourly Rate Determination of $531 for Counsel[5]

Counsel challenges his awarded hourly rate. He asserts the ALJ erred in basing his hourly rate on the "average" hourly rate in San Francisco for attorneys with forty-one years' experience in consumer law. He maintains the declarations he submitted in support of his requested hourly rate demonstrate he is "highly qualified" and has skills and experience entitling him to a rate for attorneys in the 95th percentile. Counsel also asserts the ALJ's award of $531 per hour rate conflicts with the ALJ's statement, in evaluating Mr. Myers's rate, that "[i]n the San Francisco consumer law market, an attorney with sixteen to twenty

[4] 20 C.F.R. §702.132(a), in part, states:

> The application shall be supported by a complete statement of the extent and character of the necessary work done, described with particularity as to the professional status (e.g., attorney, paralegal, law clerk, or other person assisting an attorney) of each person performing such work, the normal billing rate for each such person, and the hours devoted by each such person to each category of work.

[5] We affirm the ALJ's finding of the San Francisco Bay area as the relevant market for determining counsel's market rate, his use of the Consumer Law Survey to derive his hourly rate findings, and the awarded hourly rates of $425 for Mr. Myers, $150 for Mr. LaZarr, and $150 for paralegal work as these findings are unchallenged on appeal. *Scalia v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

years of experience could reasonably bill paying clients $556.00 an hour." Order at 10. Moreover, counsel argues that at the very least, because the ALJ adopted a rate based on Mr. Burdge's 2017-2018 survey data, he should have adjusted those rates for inflation. to reflect counsel's itemized services through June 1, 2020.

Reasonable attorney's fees are to be calculated according to the prevailing market rates and should include fees attorneys could obtain in other types of cases. *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT). An ALJ must consider all relevant rate evidence before him, *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009), and he must explain all his rationale for assessing the fee. *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 48 BRBS 21(CRT) (9th Cir. 2014); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). It is within the ALJ's discretion to determine the appropriate percentile when assessing hourly rates from locality charts so long as he fully considers all relevant evidence, provides specific explanations for his findings, and does not rely on improper factors. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021) (placing counsel in either the 75th or 95th percentile "was a judgment call that the ALJ could reasonably have resolved either way.").

Relying in large part on Mr. Burdge's statement that the hourly rate for an "average practitioner with Dupree's 41 years of experience" would be "no less than $531 per hour in San Francisco," Fee Petition Ex. 8 at 13, the ALJ awarded counsel $531 per hour because it compensates him at the prevailing market rate for similar work – consumer law in San Francisco – at a sufficient rate to attract qualified counsel to Longshore cases. Order at 9. As the ALJ found, the Hillsman, Naylor, Gillelan, and Waters declarations do not sufficiently articulate an hourly rate for the relevant San Francisco market. In this regard, Mr. Hillsman and Mr. Naylor broadly defined the relevant market beyond just San Francisco, with Mr. Hillsman stating it includes "the San Diego, Los Angeles, and San Francisco Bay areas," Fee Petition Ex. 4 at 4-5, and Mr. Naylor stating it represents "the Los Angeles and San Diego metropolitan areas," Fee Petition Ex. 5 at 3. Additionally, neither Mr. Gillelan nor Ms. Waters identified or mentioned any market rate relevant to counsel's work, Fee Petition Exs. 6, 7 and 9. Accordingly, we affirm the ALJ's rejection of these declarations as evidence establishing counsel's market rate in this case.

Nevertheless, we hold the ALJ's hourly rate determination is flawed for the other two reasons counsel raises. First, the ALJ did not adequately explain why he determined counsel was entitled to the "average hourly rate" rather than his request for a rate commensurate "with his status and reputation as one of the nation's foremost Longshore claimants' attorneys," Fee Petition at 4. In particular, the record contains statements from all the declarants attesting to counsel's superior qualifications, skill, and experience – statements which, if credited, could support counsel's position that he is entitled to an hourly rate which exceeds that of an "average" attorney. Second, the ALJ's award of an

hourly rate of $531 for counsel appears inconsistent with his subsequent statement in discussing Mr. Myers's hourly rate that, in the San Francisco consumer law market, "an attorney with sixteen to twenty years of experience could reasonably bill paying clients $556.00 an hour."[6] We therefore must vacate the ALJ's $531 hourly rate determination for counsel and remand for reconsideration in light of this evidence. On remand, the ALJ must reconsider the relevant rate evidence and explain his reasoning for settling on a particular hourly rate for counsel. The ALJ has wide latitude in addressing this matter and we emphasize, in contrast to counsel's suggestion, he is not compelled to award the 95th percentile rates on remand. *Seachris,* 994 F.3d 1066, 55 BRBS 1(CRT); *see generally Eastern Associated Coal Corp. v. Director, OWCP [Gosnell],* 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 288 (4th Cir. 2010). Further, as counsel states, the ALJ may adjust the 2017 survey data on remand to account for inflation in order to reflect counsel's hourly rate at the time of his 2020 services. *Id.*

On remand, the ALJ must reconsider counsel's hourly rate. He must consider and weigh counsel's evidence in support of his position that he is "one of the nation's foremost Longshore claimants' attorneys," Fee Petition at 4, in assessing the quality of his work for purposes of determining his hourly rate. He must also explain his determination in light of his earlier finding that $556 per hour is appropriate for attorneys with sixteen to twenty years of experience. The ALJ must fully explain how he reached his decision, regardless of whether he awards a fee based on an "average" rate or an "above average" rate. *Carter*, 757 F.3d 866, 48 BRBS 21(CRT); *Holiday v. Newport News Shipbuilding & Dry Dock Co.,* 44 BRBS 67 (2010); *Jensen,* 33 BRBS 97; *Keith v. Gen. Dynamics Corp.,* 13 BRBS 404 (1981).

Travel Time & Expenses Denied by ALJ

Counsel contends the ALJ erroneously denied him fifteen hours of services and $3,768.56 in expenses for travelling between his office in San Diego to San Francisco to represent Claimant in this Longshore claim. He maintains the ALJ had no basis to conclude Claimant could have obtained similarly qualified counsel in San Francisco because, contrary to the ALJ's finding, the record does not demonstrate such competent options existed.

[6] The ALJ rejected the $556 hourly rate for Mr. Myers because such a rate "would encompass a more extensive legal role than simply drafting pleadings," rather than the work Mr. Myers performed in this case, which he found is "more typical for an associate with, at most, six to ten years of experience practicing consumer law." The same rationale seemingly cannot be used to describe counsel's work in this case.

Fees for travel time, including those associated with a claimant's hiring of an out-of-town attorney, may be awarded where counsel establishes the travel is necessary, reasonable, and in excess of that normally considered to be overhead. See *B.H. [Holloway] v. Northrup Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009); *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006); *Brinkley v. Dep't of the Army/NAF*, 35 BRBS 60 (2001) (Hall, C.J., dissenting on other grounds); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Griffin v. Virginia Int'l Terminals, Inc*., 29 BRBS 133 (1995). An adjudicator may question the reasonableness of a claimant procuring an out-of-town attorney if there is reason to believe competent counsel was readily available locally. *See generally McClain v. Lufkin Industries, Inc.*, 649 F.3d 374, 382 (5th Cir. 2011); *Hadix v. Johnson*, 65 F.3d 532, 535 (6th Cir. 1995). The claimant's counsel bears the initial burden of showing it was necessary to resort to procuring an out-of-town attorney. *Id.*

The ALJ found the relevant geographic market for determining counsel's market rate in this case is the San Francisco Bay Area for that is where Claimant's injury occurred, where he lives, and where the hearing took place. Order at 12. Thereafter, the ALJ stated, "[n]o serious argument can be made by Claimant that there is not competent counsel in the San Francisco Bay Area," for "[n]umerous longshore practitioners" from that area regularly appear before him in Longshore matters. *Id.* He also acknowledged Employer's evidence demonstrating the availability of Longshore practitioners in the relevant geographic area. Because he found the record demonstrated Claimant could have obtained competent counsel in San Francisco, the ALJ denied counsel's recovery of fees and costs associated with his travel between San Diego and San Francisco as they were neither reasonable nor necessary.

In this case, counsel did not put forth any evidence to support his burden until he replied to Employer's objections, which contained evidence indicating the availability of local Longshore counsel. However, as noted above, the ALJ rationally excluded counsel's evidence as untimely filed because counsel should have submitted this evidence with his initial petition. Order at 4. Counsel, therefore, has not established Claimant's need to hire an out-of-town attorney; thus, while counsel's services are compensable, his travel is not. *McClain*, 649 F.3d at 382; *Hadix*, 65 F.3d at 535. Moreover, contrary to counsel's contention, Employer's partial internet list identifying local Longshore counsel, in conjunction with the ALJ's familiarity with the San Francisco Bay legal market and the availability of competent Longshore counsel located there, constitutes substantial evidence supporting the ALJ's finding that Claimant did not demonstrate he could not have obtained

competent counsel in the San Francisco Bay area.[7] Accordingly, we affirm the ALJ's finding that counsel has not proven Claimant required the services of an out-of-town attorney, as well as his resulting denial of counsel's travel expenses relating to his representation of Claimant in this case as unreasonable because counsel has not shown them to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *Tahara*, 511 F.3d 950, 41 BRBS 53(CRT).

ALJ's Denial of Time Relating to Claimant's Third-Party Civil Suit[8]

Counsel contends the ALJ's disallowance of 30.3 hours of his time and .4 hours of Mr. Myers's time to participate in mediation sessions relating to Claimant's third-party civil suit was inherently incredible, patently unreasonable, and not supported by substantial evidence. He maintains Claimant's third-party civil suit could not have been settled without Employer's carrier's consent, so his presence was vital to secure Claimant's Longshore claim rights to avoid a "§33 bar from an unapproved third-party settlement" and to assess how a "third party recovery would operate as a credit." Cl's Br. at 30-31. In addition, he maintains the trial judge in Claimant's third-party suit "ordered [him] to attend the mediation." *Id.*

Generally, an attorney is not entitled to a fee under the Act for services performed in a collateral action. *Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd sub nom. Kahny v. Director, OWCP*, 729 F.2d 777 (5th Cir. 1984) (table). However, an attorney's fee may be awarded for such services where they also are necessary to establish entitlement under the Act. *Eaddy v. R.C. Head & Co.*, 13 BRBS 455 (1981). It is counsel's burden to show the services were necessary to establish entitlement under the Act. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

[7] We distinguish the holdings in *Holloway*, 43 BRBS 129, and *Baumler*, 40 BRBS 5, because, unlike in those cases, this case contains evidence constituting a factual foundation for the ALJ's finding as to the availability of local counsel.

[8] On November 30, 2016, Claimant, represented by separate counsel, filed suit against the Port of Oakland for injuries that arose from his Longshore incident alleging the dangerous conditions of the public property that the Port of Oakland owned was the proximate and direct cause of his back injury. In February 2019, Claimant obtained approval from Employer to enter into a settlement agreement and release to resolve his third-party lawsuit. Claimant's civil suit settled at a global settlement conference, but his Longshore claim was not resolved during the conference.

After setting out the pertinent case law, the ALJ found counsel did not demonstrate the services he performed in Claimant's third-party suit against the Port of Oakland were necessary to Claimant's Longshore claim. In reaching this determination, the ALJ found that although the state court ordered counsel's attendance at the third-party mediation, this alone did not make his attendance necessary to the prosecution of Claimant's Longshore claim. Furthermore, he found no evidence in the record establishing the mediations were global efforts attempting to resolve both Claimant's Longshore and the third-party claims. He therefore reduced counsel's total requested time by 30.3 hours and Mr. Myers's time by .4 hours.

Although counsel correctly points out Claimant's involvement in the third-party settlement is relevant to his Longshore claim for purposes of Section 33 of the Act, 33 U.S.C. §933, he has not, as the ALJ found, demonstrated the time spent on Claimant's third-party action was reasonably necessary to establish Claimant's entitlement to benefits under the Act.[9] Thus, Claimant's Longshore counsel's participation in the third-party mediation, which resulted in a third-party settlement only, had nothing to do with his efforts to establish Claimant's entitlement to benefits under the Act and the resulting successful prosecution of his Longshore claim. Consequently, we affirm the ALJ's reductions pertaining to time counsel and Mr. Myers expended in the third-party proceedings.

[9] Section 33 of the Act is generally designed to foreclose injured employees from double recoveries where they receive both benefits under the Act and civil damages from a successful negligence action. Section 33(a) explicitly provides an employee need not elect between his compensation remedy and a third-party suit. In this case, Claimant's attorney in his third-party suit, Mr. Bull, III, had experience in representing employees in claims arising under the Act and was no doubt already aware of the possible implications any third-party settlement might have on Claimant's Longshore claim. Therefore, we disagree with our dissenting colleague's conclusion that counsel's presence at the third-party mediation was necessary to establish or protect his entitlement under the Act. Section 33(g) requires that: 1) the claimant inform the employer when a claim is made that someone other than the employer is liable to the claimant for damages because of the claimant's injury (or death); and 2) the employer's written approval must be obtained before a third-party settlement is executed where the third-party legal action results in a settlement for an amount less than the compensation to which the claimant would be entitled under the Act. Both statutorily-required actions could be accomplished by Claimant's counsel in the third-party claim and counsel did not submit any evidence or argument demonstrating the time counsel claimed was necessary under the Act. It is counsel's burden to establish that his claimed time was necessary as an expense for Claimant's Longshore claim, and it was within the ALJ's discretion not to find such a necessity where none was demonstrated.

Accordingly, we vacate the ALJ's hourly rate determination for counsel's services and remand the case for further consideration consistent with this decision. We affirm the ALJ's Attorney Fee Order in all other respects.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

BUZZARD, J., concurring and dissenting:

I concur in the majority opinion, with the exception of its determination that the ALJ permissibly denied all of counsel's fees relating to Claimant's third-party state court settlement. An ALJ could rationally determine that some of the 30.3 and .4 hours Mr. Dupree and Mr. Myers spent, respectively, participating in the state court settlement was excessive or unnecessary to protect Claimant's Longshore interests. *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 54 BRBS 13 (2020) (ALJ is in the best position to assess whether the fee requested is commensurate with the success obtained); *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986) (ALJ's disallowances were reasonable).

Some of that time is clearly compensable, however, as Section 33(g) of the Longshore Act, 33 U.S.C. 933(g), limits a claimant's recovery depending on the outcome of the separate, third-party settlements and, in certain circumstances, requires the Longshore employer's approval of that settlement.[10] *Estate of Cowart v. Nicklos Drilling*

[10] Section 33(g) requires the person entitled to compensation to obtain the Longshore employer's approval of settlements with third parties for an amount less than the compensation due under the Act; failure to obtain approval where required is an absolute bar to the receipt of benefits:

> If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an

Co., 505 U.S. 469, 26 BRBS 49(CRT) (1992). At a minimum, this would necessarily include the time Longshore counsel spent reviewing the terms of the third-party settlement, discussing those terms with Claimant's separate counsel in the third-party state court claim,[11] and securing approval of the settlement, if necessary, from the Longshore employer. I therefore would remand this issue for the ALJ to determine a reasonable amount to award counsel for these services.

GREG J. BUZZARD
Administrative Appeals Judge

> amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1)

[11] That Claimant's counsel in the third-party state court action, Mr. Bull, allegedly has experience in Longshore Act claims is irrelevant to whether the services rendered by Claimant's separate Longshore counsel in this claim are compensable. As counsel of record in this Longshore Act claim, Mr. Dupree and Mr. Myers had an independent duty to represent Claimant in pursuing his rights under the Longshore Act irrespective of whether Mr. Bull also has some understanding of the Act.