U.S. Department of Labor

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

BRB Nos. 15-0360
and 15-0496

SHAHWALI SHAH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WORLDWIDE LANGUAGE RESOURCES, INCORPORATED	)	
	)	
	)	DATE ISSUED: Apr. 30, 2018
and	)	
	)	
ALLIED WORLD NATIONAL ASSURANCE COMPANY/BROADSPIRE	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Attorney Fee Order and the Order Denying Reconsideration of Christopher Larsen, Administrative Law Judge, and the Compensation Order Awarding Attorney Fees of Marco Adame II, District Director, United States Department of Labor.

Jeffrey M. Winter and Kim Ellis, San Diego, California, for claimant.

Maryann C. Shirvell and Jamie B. Horowitz (Laughlin, Falbo, Levy & Moresi, LLP), San Diego, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order and the Order Denying Reconsideration (2014-LDA-00614, 2014-LDA-00816) of Administrative Law Judge Christopher Larsen, and the Compensation Order Awarding Attorney Fees (OWCP Nos. 02-203273, 02-301197) of District Director Marco Adame II, rendered on a claim filed pursuant to the

provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the DBA).[1] 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 injuries from a helicopter crash that occurred on June 20, 2010, while he was working as an interpreter in Afghanistan. The parties stipulated to benefits for claimant's injuries, and he returned to work in 2012. When his second tour ended, claimant alleged he sustained cumulative traumatic injuries as well as post-traumatic stress disorder. In March 2015, the administrative law judge awarded claimant disability and medical benefits. Thereafter, claimant's counsel, Jeffrey Winter, filed fee petitions for his work before the administrative law judge and the district director.[2]

The administrative law judge awarded claimant's counsel a fee of $66,305.24, representing 107.9 hours of counsel's time at an hourly rate of $365, 24 hours of Kim Ellis's time at an hourly rate of $265, 27.05 hours of paralegal time at an hourly rate of $110, plus $7,586.24 in costs. Order at 7. The district director awarded counsel a fee of $8,480.50, representing 21.7 hours of counsel's time at an hourly rate of $365, adopting the administrative law judge's rate, plus 5.6 hours of paralegal time at an hourly rate of $100. Comp. Order at 5.

[1] The United States Court of Appeals for the Ninth Circuit reversed the Board's dismissal of BRB No. 15-0360 and affirmance of BRB No. 15-0496 and remanded the case to the Board to address the merits of the appeals. *Shah v. Worldwide Resources, Inc.*, 703 F. App'x 624, 51 BRBS 37(CRT) (9th Cir. 2017); *see* 20 C.F.R. §802.405(b).

[2] Counsel requested a fee for work performed before the district director in 2013 and 2014 in the amount of $9,705, representing 21.8 hours at an hourly rate of $425, plus 4 hours of paralegal time at an hourly rate of $110. For replying to employer's objections, counsel sought an additional fee for 1.6 hours of paralegal work. Counsel requested a fee for work performed before the administrative law judge in 2014 and 2015 in the amount of $75,797.24, representing 109.5 hours at an hourly rate of $425 for his work ($46,537.50), 24 hours at an hourly rate of $325 for Kim Ellis's work ($7,800), and 28.05 hours of paralegal time at an hourly rate of $110 ($3,085.50), plus $18,374.24 in costs. For replying to the objections, counsel requested an additional 5.9 hours at $425 per hour ($2,507.50); the administrative law judge struck the reply and the amended petition.

Counsel appeals the hourly rates awarded by the administrative law judge (BRB No. 15-0360) and the district director (BRB No. 15-0496) for attorney work.[3] He contends the administrative law judge erred in rejecting the evidence submitted to establish market rates and in awarding a fee based on rates in prior longshore cases.[4] Employer responds, asserting the administrative law judge considered all the evidence, properly applied *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), and sufficiently explained why he rejected counsel's evidence. In reply, counsel asserts the use of prior fee awards does not serve as evidence of a market rate.

Counsel practices in San Diego, California. His petition states that he has tried longshore cases for "25+ years," and that Ellis has practiced in Southern California for 19 years. In support of his requested hourly rates, counsel submitted to the administrative law judge the following evidence: 2013 Survey of Law Firm Economics; 2010 NLJ Billing Survey; and the declarations of attorneys McElroy, Horning, Dupree, and Brictson.

With regard to fee petitions in general, the administrative law judge stated:

> In a genuinely free market, a vendor may charge whatever the market will bear. Post-*Christensen* fee applicants have taken this principle to heart, arguing that *this* year's hourly rates must invariably be higher than *last* year's; that the *high* end of the market is essentially *typical*, and that nothing matters more than accumulated years of experience. * * * I think this view is wrong, because while the vendor in the genuinely free market can always charge whatever the market will bear, he or she can *never*, under any circumstances, charge a single penny more, regardless of the justification. . . . When a fee applicant presents evidence tending to establish a market value for his or her hourly rate, I cannot close my eyes to it. On the other hand, I do not have to apply an hourly rate simply because, in some conceivable circumstance, an applicant might charge it.

Order at 3 (emphasis in original). In rejecting the evidence counsel submitted to support the requested rates, the administrative law judge found that the 2013 Survey does not

[3] Therefore, the paralegal rates, hours approved, and costs awarded by both the administrative law judge and the district director are affirmed as unchallenged. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[4] Asserting that the district director simply followed the administrative law judge's lead in awarding counsel an hourly rate of $365, counsel filed a letter adopting the arguments raised in his briefs in BRB No. 15-0360.

distinguish by type of work or firm size, does not address the San Diego community (the nearest community is the "Pacific Region"), offers only a general impression of how an attorney's years of experience affects the rates charged by 150 firms across the country, and, for attorneys with 28 years of experience, shows the median rate is $310 – thus, counsel's requested rate is on the high side. He rejected the 2010 Survey because it also does not distinguish between types of work or firm size, and its focus is on large firms, only one of which is in San Diego. He noted that some of the attorneys in that firm charged an hourly rate of $350. He rejected the declarations of other attorneys because counsel did not explain how the work of either McElroy or Horning in civil rights litigation and complex business litigation, respectively, is comparable to his work in this case, and he found that Dupree and Brictson, who practice Longshore/DBA law, stand to benefit from higher hourly rate awards, and neither reported actual hourly rates awarded in disputed cases.[5]

While the administrative law judge agreed counsel was "highly professional and very good" in this case, he concluded the evidence submitted does not establish the reasonableness of the requested rates of $425 and $325. Order at 5. Rather, the administrative law judge found that the requested rates are at the high end of any range the evidence establishes. Nevertheless, he considered employer's proposed rates "too severe" and declined to award its suggested rates of $350 and $230 for counsel and Ellis, respectively. The administrative law judge then awarded counsel an hourly rate of $365 and Ellis an hourly rate of $265. *Id.* at 4-5.

The district director acknowledged the administrative law judge's awarded rates and stated:

> The fees awarded of $365.00 and $110.00 are not fees awarded in similar cases, but fees that were awarded in the same case for work conducted at the OALJ level. However, the work done at the District Office level prepared the case for victory at the OALJ level.

[5] The declaration of McElroy addressed his experience in civil litigation and civil rights matters, stated that most attorneys in the San Diego area who try cases before juries and argue before appellate courts charge between $400 and $600 per hour, and stated that he charges $425 per hour. The declaration of Horning addressed his experience in complex business litigation and set forth the range of rates his firm charges for legal work. The declarations of Dupree and Brictson highlighted their experience, stated that they personally know counsel, and praised counsel's experience and skills. Dupree stated that those attorneys with similar experience and skills in San Diego earn $400 to $450 per hour. Brictson stated that he charges $400 per hour and that $425 per hour is a reasonable rate for counsel.

> The District Director also reduces [counsel's] hourly rate from $425.00 to $365.00.

Comp. Order at 4. Essentially, the district director merely adopted the administrative law judge's rate for counsel's work.

The Supreme Court has held that an attorney's reasonable hourly rate in a fee-shifting scheme 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 v. Kenny A.*, 559 U.S. 542, 551 (2010); *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015). The burden is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation. *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT).

In this case, the administrative law judge implicitly, and correctly, found San Diego to be the relevant community for determining a market-based hourly rate. *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT); *see* Order at 4. The administrative law judge found that the 2013 Survey told him very little about "the San Diego area, in particular" and that the 2010 Survey contained information from only one San Diego firm. Order at 4. The administrative law judge also rationally concluded that claimant's claimed rate was "on the high side" of the median rate for the Pacific region. Thus, he rationally rejected this evidence as support for the claimed hourly rates.

Contrary to counsel's assertion, the administrative law judge also adequately addressed the other hourly-rate evidence submitted and sufficiently explained his reasons for rejecting it. Order at 4-5. The administrative law judge found that counsel did not establish that the non-longshore work of McElroy, Horning and Brictson entailed comparable skills to those in this case.[6] *Id.* Additionally, the administrative law judge found that the declarations of Dupree and Brictson, as well as counsel's own declaration, fail to report any actual fee awards they received in longshore cases. *See Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT) (if the fee applicant fails to carry his burden of establishing a market rate, it "may be reasonable . . . to look at what [was] awarded in other LHWCA cases in order to ascertain a reasonable fee"). Counsel has not established that the administrative law judge abused his discretion in rejecting counsel's claim to rates of $425 and $325. Therefore, the administrative law judge properly proceeded to address proxy market rates for the services of counsel and Ellis.

[6] Counsel's blanket statement that his work is comparable to the work of the other attorneys is insufficient to demonstrate error in the administrative law judge's finding that he did not establish how the work is comparable.

Shirrod holds that an awarded hourly rate must bear a nexus to the relevant market community. *Shirrod*, 809 F.3d at 1088, 49 BRBS at 96-97(CRT). It also holds that "if reliable data on attorney's fees in the 'relevant community' [does] not exist, using the proxy market rate – or the constituent rates on which it depends – could be permissible." *Id.*, 809 F.3d at 1088, 49 BRBS at 96(CRT). In this case, having rejected the submitted evidence, the administrative law judge summarily awarded counsel a rate of $365 per hour for his work and $265 for Ellis's work. Order at 5.

We cannot affirm these rates because the administrative law judge did not explain how he arrived at these figures or how they bear a nexus to the San Diego market.[7] *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009). Therefore, we vacate the hourly rate awards for counsel and Ellis. We remand the case for the administrative law judge to award a fee based on market-based rates and to explain the basis for his determinations. If necessary, the administrative law judge may permit the parties to submit additional evidence pertinent to San Diego prevailing market rates. *See Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT); *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT). Because the district director relied on the rate the administrative law judge awarded for counsel's services, and we have vacated that award, we must vacate the district director's fee award also. We remand the case to the district director for him to award counsel an attorney's fee based on a market-based rate.

Accordingly, we vacate the hourly rates awarded by the administrative law judge for the services of counsel and Ellis and the hourly rate awarded by the district director for counsel's services. The cases are remanded for further consideration of the prevailing

[7] Counsel contends the awarded rates are the result of the administrative law judge's using the prior longshore cases cited by employer. Counsel is incorrect. Although employer cited four previous longshore cases, the average of those awarded rates is $344, and the administrative law judge specifically rejected employer's suggested rate of $350 as being too low. Order at 5. Excluding the case counsel submitted in the stricken reply, there are no other prior longshore cases cited or in evidence. While counsel is generally correct that prior awards do not constitute market rate evidence, unless they are based on a market rate analysis, the Ninth Circuit has indicated that use of prior cases is sufficient in some circumstances. *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT).

attorney hourly rates consistent with this opinion. In all other respects, the fee awards of the administrative law judge and the district director are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge