U.S. Department of Labor

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

BRB No. 18-0040

JEANNE JOHNSTON (Widow of ROY JOHNSTON) Claimant-Petitioner v. HAYWARD BAKER and KEMPER INSURANCE COMPANY AND LUMBERMAN'S MUTUAL CASUALTY COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: Aug. 29, 2018 DECISION and ORDER

Appeal of the Attorney Fee Order of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Eric A. Dupree (Dupree Law), Coronado, California, and Lara D. Merrigan, San Rafael, California, for claimant.

Kelly Walsh, Jonathan Tweedy, Mark Tufts and Taylor Bologna (Brown Sims), New Orleans, Louisiana, for employer/carrier.

Matthew W. Boyle (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order (2011-LHC-00983; 2011-LHC-00984) of Administrative Law Judge Christopher Larsen 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). The amount of an attorney's fee award is discretionary and will not be set aside unless it is 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).

This case arises out of claim for disability benefits filed by the employee (decedent) and for death benefits filed by claimant, decedent's putative widow. Judge Pulver awarded decedent's estate disability benefits, but denied the death benefits claim. Claimant appealed to the Board, which vacated the denial of death benefits and remanded for the administrative law judge to re-address whether claimant was decedent's widow. *Johnston v. Hayward Baker*, 48 BRBS 59 (2014).

On remand, Judge Larson (the administrative law judge) awarded death benefits to claimant.[1] His order on remand stated that claimant's counsel is entitled to a reasonable attorney's fee and should file a fee application within the specified time. The administrative law judge also set a deadline for the parties to confer in order to attempt to resolve any disputes concerning counsel's fee.

Claimant's counsel, Eric Dupree, filed a timely fee petition for $516,715, representing 471.7 hours of his time at an hourly rate of $575, 520 hours for the time of his associate, Paul Myers, at an hourly rate of $425, and 9.3 hours for the work of paralegals at an hourly rate of $150, plus costs of $39,711.69. Employer filed a response brief, arguing that the appropriate hourly rate should be $385 for Mr. Dupree and $240 for Mr. Myers, and also objecting to the number of hours charged. Claimant's counsel filed a reply to the objections, followed by a Supplemental Fee Petition dated September 8, 2017,

[1] Judge Pulver retired in the interim.

seeking an additional $5,075 for preparation of the reply brief and other services from June 16, 2017. The administrative law judge struck the Supplemental Fee Petition, stating that counsel had not sought permission to file it. Attorney Fee Order at 2.

The administrative law judge listed the evidence counsel filed in support of the claimed hourly rates, which consisted of: (1) a copy of the attorneys' resumes (CXs 1, 2); (2) a declaration from attorney John R. Hillsman stating that he gave up his Longshore practice due to its comparatively low fees and that hourly rates of $575 and $425 are in line with the market rates for similarly qualified attorneys in San Diego, Long Beach, and San Francisco (CX 3); (3) a declaration from attorney Charles Naylor, who stated that he gave up his Longshore practice because the fees were too low and that the requested hourly rates are in line with the open market rate for similar services in Los Angeles and San Diego (CX 4); (4) a copy of a declaration by attorney Joshua Gillelan prepared for a different case stating that the skill level required for Longshore claims is similar to that required by other civil litigation (CX 5); (5) a copy of a supplemental declaration by attorney Joshua Gillelan prepared for a different case denying bias in Mr. Dupree's favor (CX 6); (6) a declaration from attorney Ronald Burdge, who specializes in consumer law and court-awarded attorney's fees and who compiled the U.S. Consumer Law Attorney Fee Survey Report, opining that Longshore law is comparable to consumer law for purposes of establishing a market rate for attorney fees (CX 7); (7) an extract from the U.S. Consumer Law Attorney Fee Survey Report for 2015-2016 (CX 8); (8) Mr. Dupree's time records (CXs 9, 10); and (9) the resumes of the paralegals who worked on the case (CXs 11-15). Attorney Fee Order at 4-6.

The administrative law judge rejected the opinions that Longshore work is of the same complexity as other civil litigation. Attorney Fee Order at 7. The administrative law judge also concluded that the market rates for Los Angeles and San Francisco are not relevant to the market rate for San Diego, where counsel practices. *Id.* He therefore concluded that claimant's counsel failed to demonstrate that his requested rates are in line with those prevailing in the community for similar services of comparable lawyers. He applied the rates he awarded to counsel in a recent Longshore case and thus awarded $400 per hour for Mr. Dupree's work, $275 per hour for Mr. Myers's work, and $150 per hour for the paralegals' work. *Id.* at 8.

The administrative law judge further stated that the number of hours billed was "staggering," noting that it was disproportionately more than the time usually awarded in Longshore cases. Attorney Fee Order at 10. He accepted a number of employer's objections to the hours claimed and reduced the hours accordingly. He also found that the time spent preparing the fee petition was excessive and disallowed 20 hours of Mr. Myers's time and $833.33 for the cost of obtaining the declaration from Mr. Burdge. *Id.* The administrative law judge concluded that Mr. Dupree could reasonably claim 406.1 hours,

Mr. Myers 412.1 hours, and the paralegals 112.8 hours. *Id.* at 11. Accordingly, the administrative law judge awarded claimant's counsel $351,565.86, representing an attorney's fee of $312,687.50, and costs of $38,878.36. *Id.* at 12.

On appeal, claimant's counsel challenges the fee award, contending the administrative law judge erred in not accepting the claimed hourly rates and in disallowing time spent on the fee petition and the cost of retaining Mr. Burdge.[2] He also contends the administrative law judge erred in striking the Supplemental Fee Petition. Employer filed a response brief, urging affirmance. Claimant's counsel filed a reply brief.[3]

Claimant's counsel contends the administrative law judge's hourly rate awards cannot be affirmed because he failed to make a finding as to the relevant labor market and did not adequately address the evidence submitted in support of the claimed hourly rates. He also contends that the administrative law judge erroneously reduced the hourly rates due to the lack of complexity of Longshore cases and based the hourly rate entirely on a previous Longshore award.

The United States Supreme Court has held that the lodestar method, which multiplies a reasonable hourly rate by the number of hours reasonably expended in preparing and litigating the case, is used to arrive at a "reasonable attorney's fee" in fee-

[2] On July 29, 2018, claimant filed a motion to vacate the administrative law judge's Attorney Fee Order pursuant to the Supreme Court's decision in *Lucia v. Sec. & Exch. Comm'n,* 138 S. Ct. 2044 (2018), asserting that the administrative law judge was not properly appointed pursuant to the Appointments Clause of the United States Constitution, U.S. Const. Art. II, sec. 2, cl. 2. The Director, Office of Workers' Compensation Programs, responds, urging rejection of claimant's motion because the issue was not timely raised. We agree with the Director. Claimant did not raise any issue concerning the administrative law judge's appointment in his initial brief to the Board, and thus forfeited his Appointments Clause argument. The Appointments Clause issue is "non-jurisdictional," *see Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009), and thus is subject to the doctrines of waiver and forfeiture. *Id.*; *see Lucia*, 138 S. Ct. at 2055 ("one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief"). Moreover, contrary to claimant's contention, *Lucia* does not represent a "change in law" such that he is entitled to raise the issue at this juncture. *Lucia,* 138 S. Ct. at 2053, citing *Freytag v. Comm'r,* 501 U.S. 868 (1991).

[3] The Board denied counsel's motion to file an Amended Petition for Review in an Order dated March 28, 2018.

shifting statutes such as the Act. *Blum v. Stenson*, 465 U.S. 886 (1984). An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Id.* at 895. The burden is on the fee applicant 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. *See Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Blum*, 465 U.S. at 896 n. 11; *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015).

The administrative law judge rejected the statements of Mr. Naylor and Mr. Gillelan that Longshore work requires skills comparable to those required for other civil litigation, noting that practice under the Act is intended to be faster and simpler. He was also unpersuaded by the statements of Mr. Hillsman and Mr. Naylor as to appropriate hourly rates because they "lump all of California's coastal cities into a single entity." Attorney Fee Order at 7. He stated: "To the extent the declarants' determinations of an appropriate fee in San Diego has been informed by fees charged in San Francisco and Los Angeles, the court is unpersuaded by them." *Id.* The administrative law judge therefore concluded that counsel did not demonstrate that his requested rates are in line with those prevailing in "the community" and relied on a previous case, *Alexander v. Navy Exchange Service Command*, 2014-LHC-02014, to award an hourly rate of $400 to Mr. Dupree, $275 to Mr. Myers, and $150 for the paralegals' work. *Id.* at 8.

We reject counsel's contention that the administrative law judge failed to explicitly identify the relevant legal market. That the administrative law judge found San Diego to be the relevant market is evident from the passage quoted above. Attorney Fee Order at 7. We also note that the record supports a finding of San Diego as the relevant community because decedent and claimant resided, and claimant's counsel's office is located, in the San Diego area. *See Shirrod*, 809 F.3d at 1087, 49 BRBS at 96(CRT). We therefore affirm the administrative law judge's implied finding that San Diego is the relevant community for determining the hourly rates in this case, as well as the administrative law judge's rejection of the statements of Mr. Naylor and Mr. Hillsman because they were based on rates for other areas of California.

We also reject counsel's contention that the administrative law judge erred in considering the complexity of Longshore litigation compared to that of other civil litigation in reducing the hourly rate. While an administrative law judge is not permitted to consider the complexity of the case before him in comparison to other Longshore cases in order to set the market rate, *see Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT)

(9th Cir. 2009), he is entitled to determine if Longshore work is "comparable" to that of other types of cases to determine the market rate. *See Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT). In this case, the administrative law judge rationally rejected the general statements of Mr. Naylor and Mr. Gillelan that Longshore cases are of similar complexity to "civil litigation" warranting an award of the claimed rates.[4]

We conclude, however, that the administrative law judge's determination of the appropriate hourly rate for San Diego cannot be affirmed as he did not fully address the evidence counsel supplied in support of his fee petition. *See* 5 U.S.C. §557(c)(3)(A). The administrative law judge did not discuss Mr. Burdge's affidavit or his Consumer Law Attorney Fee Report, which provided fee data for the San Diego market. The administrative law judge's finding that Longshore work is not comparable to other "civil litigation" is insufficient to rule out all other types of work. We therefore vacate the administrative law judge's hourly rate awards and remand the case for him to reconsider the hourly rate in light of the Burdge evidence concerning the market rate in San Diego.[5]

Counsel next contends the administrative law judge erred in reducing the hours allowed for preparing the fee petition. The administrative law judge found that "the time spent on the fee petition was excessive." Attorney Fee Order at 10. The administrative law judge noted that counsel spent considerable time and expense in obtaining statements to support his fee request that were not persuasive and, accordingly, disallowed 20 hours out of a total of 39.20 hours claimed. *Id.*

In determining the compensability of an attorney's work, an administrative law judge should consider whether the hours claimed are "reasonable" for the "necessary work done" in the case before the administrative law judge and the fee award is commensurate with the degree of success obtained. 20 C.F.R. §702.132(a). An administrative law judge has the discretion to disallow a fee for hours found to be duplicative, excessive, or unnecessary. *See Tahara*, 511 F.3d 950, 41 BRBS 53(CRT); *see Anderson v. Director*,

---

[4] The administrative law judge noted that administrative practice under the Act is intended to be "faster, cheaper, and simpler" than civil litigation, and includes presumptions that aid claimants' cases. Attorney Fee Order at 6-7. Thus, he stated that while Mr. Dupree may be a "fine lawyer," he is not entitled to the same hourly rate as might be awarded in "complicated civil litigation." *Id.* at 7.

[5] If counsel's evidence is insufficient to establish a market rate in San Diego, the administrative law judge may, within his discretion, look to other recent fee awards under the Act to set the hourly rate. *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1055, 43 BRBS 6, 9(CRT) (9th Cir. 2009).

OWCP, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996) (hours not "reasonably expended" on the fee petition may be excluded from the time claimed for preparation of the application).

We reject counsel's assignment of error. It was well within the administrative law judge's discretion to determine that the time spent on the fee petition was excessive. Counsel has not established an abuse of discretion in this regard. *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). Therefore, we affirm the administrative law judge's reduction of 20 hours of Mr. Myers's time.

Counsel further contends the administrative law judge erred in striking the Supplemental Fee Petition in which he requested a fee, inter alia, for time spent preparing his reply to employer's objections to the fee petition. In an Order Extending Time issued on August 16, 2017, the administrative law judge granted claimant's counsel until August 22, 2017 to file his report and reply with respect to attorney's fees. Counsel's reply was served by mail on August 22, 2017. Thereafter, on September 8, 2017, counsel served by mail his Supplemental Fee Petition for services performed from June 22, 2017 to September 8, 2017. The administrative law judge stated that the Supplemental Fee Petition was filed without permission and "in derogation of the procedure the court outlined in the Decision and Order" for filing fee documents. Attorney Fee Order at 2. The administrative law judge therefore struck the supplemental petition in its entirety. *Id.*

We agree that this action cannot be affirmed. Although counsel did not seek permission to file the Supplemental Fee Petition, having permitted counsel to file a report and reply with respect to attorney's fees, the administrative law judge abused his discretion in refusing to consider counsel's entitlement to a reasonable attorney's fee for that work. *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009); *B.C. [Christensen] v. Stevedoring Service of America*, 41 BRBS 107 (2007). Therefore, we vacate the striking of the entire Supplemental Fee Petition, and we remand the case for the administrative law judge to award counsel a reasonable fee, taking into account the degree of his success, for the preparation of his reply.[6]

Lastly, counsel argues that the administrative law judge erred in disallowing the $833.33 pro-rated cost of obtaining the Burdge declaration. We disagree. Under Section 28(d) of the Act, employer is not liable for costs incurred in support of claimant's counsel's

[6] We affirm, however, the denial of fees for the remainder of the services itemized in the Supplemental Fee Petition, as the administrative law judge did not abuse his discretion in finding that the petition was filed without his permission.

fee petition. 33 U.S.C. §928(d); *see generally Ziegler Coal Co.*, 326 F.3d 894; *Stevedoring Services of America v. Price*, 432 F.3d 112, 1114 n.1, 39 BRBS 85, 86 n.1(CRT) (9th Cir. 2006). Therefore, we affirm the administrative law judge's disallowance of the cost of obtaining the Burdge declaration. The administrative law judge's award of costs of $38,878.36 is therefore affirmed.

Accordingly, the administrative law judge's hourly rate awards are vacated. The case is remanded for the administrative law judge to address the Burdge declaration and the 2015-2016 extract from the U.S. Consumer Law Attorney Fee Survey Report for the relevant community of San Diego. We also vacate the administrative law judge's disallowance of any attorney's fee for the preparation of counsel's reply brief, and we remand the case for the administrative law judge to address counsel's entitlement to a fee for that service in accordance with this decision. In all other respects, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge