



BRB No. 18-0079

DAVID ORPILLA)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: <u>July 24, 2018</u>
)	
HAWAII STEVEDORES,)	
INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

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

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Steven M. Birnbaum (Law Office of Steven M. Birnbaum, PC), San Rafael, California, for claimant.

David L. Doeling (Aleccia & Mitani), Long Beach, California, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order and the Order Denying Reconsideration (2017-LHC-00400) 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 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 claimant's claim for binaural hearing loss. Before a formal hearing was scheduled, the parties reached a stipulated agreement wherein employer agreed to pay claimant permanent partial disability benefits for a 10.15 percent binaural hearing loss. Thereafter, claimant's counsel filed a petition for an attorney's fee of \$5,483.25, representing 9.2 hours of his own work at an hourly rate of \$525 and 3.35 hours of paralegal work at an hourly rate of \$195. Employer objected to the fee petition, disputing its liability for an attorney's fee. Claimant filed a reply.

In his Attorney Fee Order, the administrative law judge determined that claimant's counsel is entitled to an attorney's fee paid by employer. Attorney Fee Order at 2. The administrative law judge concluded, however, that counsel failed to justify his requested hourly rate because only one of the exhibits submitted by counsel specifically supported an hourly rate of \$525. Attorney Fee Order at 5. He also rejected claimant's counsel's assertion that San Francisco, California, is the relevant legal market. Based on the reasoning of Administrative Law Judge Gee in a recent case with similar facts involving claimant's counsel, the administrative law judge concluded that the relevant community is Honolulu, Hawaii. Attorney Fee Order at 6-7 (citing *Anderson v. Hawaii Stevedores, Inc.*, 2011-LHC-01015 (Dec. 29, 2016), *aff'd*, BRB No. 17-0281 (Oct. 31, 2017), *appeal pending*, No. 17-73512 (9th Cir.)). He also adopted Judge Gee's market rate analysis and awarded counsel an hourly rate of \$350. The administrative law judge awarded the hours claimed for attorney and paralegal work, and thus awarded a fee of \$3,751.50. Attorney Fee Order at 8.¹

Claimant's counsel appeals the fee award, contending the administrative law judge erred in relying on *Anderson* to conclude that Honolulu is the relevant legal market. Employer responds, urging affirmance.

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" under the Act. *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Blum v. Stenson*, 465 U.S. 886 (1984).

¹ Employer filed a motion for reconsideration of the Attorney Fee Order on the grounds that it is not liable for an attorney's fee, which the administrative law judge denied. Order Denying Reconsideration.

An attorney’s reasonable hourly rate is “to be calculated according to the prevailing market rates in the relevant community.” *Blum*, 465 U.S. 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.

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). “A determination of the ‘relevant community’ in Longshore Act cases should focus on the location where the litigation took place.” *Shirrod*, 809 F.3d at 1087, 49 BRB at 96(CRT). The factors to be considered in determining the location of the litigation include the location of claimant’s and employer’s counsel’s offices and where the hearing took place. *See id.* The Ninth Circuit stated:

Recognizing that the relevant decisionmaker has wide—but not unlimited—discretion when making attorney’s-fee awards, ... we ultimately left it to the BRB, ALJs, and District Directors to determine the “relevant community” and the prevailing market rates in that community, as long as the decisionmaker provides adequate justification.

Id., 809 F.3d at 1087, 49 BRBS at 95(CRT) (internal citations omitted).

In this case, the administrative law judge concluded that the relevant community is Honolulu. The administrative law judge noted that while a hearing did not take place in this case, if one had, it would have been in Honolulu. He further noted that employer and claimant are both located in Hawaii. Attorney Fee Order at 6. Based on these facts and the reasoning Judge Gee applied in *Anderson*, the administrative law judge concluded that the relevant community is Honolulu.² *Id.* at 7.

Counsel contends the administrative law judge erred in concluding that Honolulu, rather than San Francisco, is the relevant community for determining the market rate for his services. Counsel argues that, unlike *Anderson*, there was no hearing or depositions taken in this case, and all the legal work he performed was from his office in the San

² In *Anderson*, Judge Gee determined that the relevant community was Hawaii because the claimant and the employer (the same employer as in this case) are located in Hawaii and counsel “holds himself out as doing Longshore work in the Hawaii legal market... regularly takes Hawaii Longshore cases and maintains an office in Honolulu.” *Anderson v. Hawaii Stevedores, Inc.*, 2011-LHC-01015 (Dec. 29, 2016), slip op. at 7.

Francisco area. He also maintains that his work in this case was in 2016 and he has not had permanent office space in Hawaii since 2015.

Counsel's arguments are unavailing. The administrative law judge addressed appropriate factors in determining the relevant community, stating that claimant is a resident of Hawaii, employer is located in Hawaii, and any hearing in this case would have been held in Honolulu. Attorney Fee Order at 6. The administrative law judge quoted from *Anderson* to note that similarly in this case, counsel "has intentionally inserted himself into the Hawaii legal market. It is incongruous to actively solicit clients in a community but then proclaim when it comes time to seek fees that the legal market in that community is irrelevant." Attorney Fee Order at 7 (quoting *Anderson v. Hawaii Stevedores, Inc.*, 2011-LHC-01015 (Dec. 29, 2016), slip op. at 8).

Counsel has not established that the administrative law judge abused his discretion in finding that Hawaii is the relevant community. We note that the location of counsel's main office in the San Francisco area is the single factor cited by counsel that supports that location as the relevant community. All the other factors support the administrative law judge's conclusion that Hawaii is the relevant community, namely, that counsel solicits work in Hawaii, maintains an office presence in Honolulu,³ claimant and employer are both based in Hawaii, the audiograms that were the basis for claimant's claim for benefits were conducted in Hawaii, and any hearing, if it had taken place, would have been in Honolulu. The administrative law judge provided "adequate justification" for his finding that Honolulu is the relevant community in this case and, therefore, we affirm this finding. *Shirrod*, 809 F.3d at 1087, 49 BRBS at 95(CRT).⁴

We also reject counsel's contention that the administrative law judge erred in adopting the reasoning of *Anderson* in setting the market rate. While the Ninth Circuit has indicated that an administrative law judge should not look solely to past attorney's fee awards under the Act in order to set the market rate, the court also stated that the decision

³ We observe that counsel's website states: "Offices in San Rafael, CA & Honolulu, HI." An address and phone number for the Honolulu office are provided. <http://www.injuredworkersatty.com/> (accessed July 19, 2018). In *Anderson*, Judge Gee found it insignificant that counsel's Honolulu office may not be staffed given that he "intentionally inserted himself into the Hawaii legal market." *Anderson*, 2011-LHC-01015, slip op. at 8.

⁴ We reject claimant's contention that it is unclear if the "Hawaii market" in *Anderson* is the same as the "Honolulu market." Judge Gee explained in *Anderson* that there is no "functional difference" between the two terms. *Anderson*, 2011-LHC-01015, slip op. at 8 n.10.

maker is not required to make new determinations in every case but merely to “make such determinations with sufficient frequency that it can be confident—and we can be confident in reviewing its decisions—that its fee awards are based on current rather than merely historical market conditions.” *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT). The administrative law judge noted that *Anderson* was decided less than a year prior to his decision and also that counsel submitted the same evidence in support of his requested hourly rate in *Anderson* as he did in this case. The administrative law judge explained his reasoning for following the analysis of *Anderson* and rationally concluded that the facts in *Anderson* were similar enough to make the reasoning applicable to this case. In addition, as counsel does not challenge the hourly rate of \$350 as being inappropriate for the Hawaii legal market, the administrative law judge’s hourly rate determination is affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Accordingly, the administrative law judge’s Attorney Fee Order and the Order Denying Reconsideration are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge