



BRB No. 15-0498

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| JEDD RANKINS                   | ) |                                   |
|                                | ) |                                   |
| Claimant-Petitioner            | ) |                                   |
|                                | ) |                                   |
| v.                             | ) |                                   |
|                                | ) | DATE ISSUED: <u>June 20, 2016</u> |
| HUNTINGTON INGALLS INDUSTRIES, | ) |                                   |
| INCORPORATED                   | ) |                                   |
|                                | ) |                                   |
| Self-Insured                   | ) |                                   |
| Employer-Respondent            | ) | DECISION and ORDER                |

Appeal of the Supplemental Order Awarding Attorney Fees and Costs of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Supplemental Order Awarding Attorney Fees and Costs (2015-LHC-00377) of Administrative Law Judge Paul C. Johnson, Jr., 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, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a neck injury while working for employer on April 29, 2010. The parties reached an agreement while the case was pending before Administrative Law Judge Alan L. Bergstrom that claimant is entitled to, and employer liable for, disability

and medical benefits pertaining to the work-related neck injury, as well as an attorney's fee totaling \$5,355.90. Pursuant to the parties' agreement, Judge Bergstrom remanded the case to the district director. Subsequently, a dispute arose over claimant's entitlement to medical benefits for certain treatment provided to claimant by Dr. Morales. The parties, however, again reached an agreement after the case was referred to the Office of Administrative Law Judges (OALJ). Employer agreed to pay the outstanding medical bills of Dr. Morales, prompting Administrative Law Judge Paul C. Johnson, Jr. (the administrative law judge) to remand the case to the district director "for further handling."

Claimant's counsel, thereafter, filed an attorney's fee petition for work performed before the OALJ from December 13, 2014 through May 4, 2015. Counsel sought a fee of \$5,888,<sup>1</sup> representing 10.42 hours of attorney work at an hourly rate of \$400 and 13.75 hours of legal assistant work at an hourly rate of \$120. Employer filed objections to the fee petition. Claimant submitted a reply to the objections, which the administrative law judge, in his Supplemental Decision and Order, declined to consider. The administrative law judge approved an attorney's fee, payable by employer, totaling \$4,459.75, representing 8.83 hours of attorney work at \$300 per hour and 8.5 hours of legal assistant work at an hourly rate of \$97.

On appeal, claimant's counsel challenges the administrative law judge's refusal to consider his response to employer's objections. Counsel also challenges the reduction in his requested hourly rate for attorney services. Employer responds, urging affirmance of the administrative law judge's attorney's fee award. Counsel has filed a reply brief.

Counsel contends the administrative law judge erred in refusing to consider his reply to employer's objections because the administrative law judge's reliance on 29 C.F.R. §18.33(d) to support his rejection of the reply brief is improper in this case. Employer, in its response brief, maintains that the administrative law judge's refusal to consider the reply of claimant's counsel, if error at all, is harmless because the contention raised by counsel in his response to employer's objections, i.e., that the Old Dominion University Economics Department study cited by employer should be rejected, was not ultimately relevant to the administrative law judge's hourly rate determination.

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<sup>1</sup>The administrative law judge found that the amount of the requested attorney's fee "appears to include an error in calculation," as, based on the number of hours and hourly rates requested, the total fee should be \$5,818. Supp. Decision and Order at 1 n.1.

In his Supplemental Decision, the administrative law judge noted that claimant's counsel filed, on June 26, 2015, a reply to employer's objections to the fee petition. Citing 29 C.F.R. §18.33(d) (2015), he declined to consider that brief because "[n]o Order had issued granting permission to respond to Employer's objections." Supp. Decision and Order at 2. The administrative law judge also "reminded" counsel that his request for an attorney's fee should not result in a "second major litigation." *Id.* at n.2 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

We agree with claimant's counsel that the regulation cited by the administrative law judge to support his rejection of counsel's reply brief is inapplicable, as that provision specifically pertains to "*Opposition or other response to a motion filed **prior to hearing***," 29 C.F.R. §18.33(d) [emphasis added].<sup>2</sup> Thus, as written, Section 18.33(d) applies only to responses filed "prior to [the] hearing." *Id.* Counsel's response to employer's objections in this case was not a pre-hearing submission and, therefore, the administrative law judge erred in disallowing counsel's reply brief on the basis that counsel had not obtained permission to file the brief.<sup>3</sup> *Id.*

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<sup>2</sup>29 C.F.R. §18.33(d) (2015) states:

(d) *Opposition or other response to a motion filed **prior to hearing***. A party to the proceeding may file an opposition or other response to the motion within 14 days after the motion is served. The opposition or response may be accompanied by affidavits, declarations, or other evidence, and a memorandum of the points and authorities supporting the party's position. Failure to file an opposition or response within 14 days after the motion is served may result in the requested relief being granted. **Unless the judge directs otherwise, no further reply is permitted** and no oral argument will be heard prior to hearing.

(bold and underlining added).

<sup>3</sup>Although the administrative law judge properly noted that a request for an attorney's fee should not result in a "second major litigation," it does not appear that counsel's pleading escalates the issue in this proscribed manner. The Board permits a claimant's attorney to submit a "reasonable" reply to employer's objections to a fee petition. *See Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 157 (2009) (disallowing a portion of the fee requested for work on a reply brief when the response was disproportionate to the objections); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9<sup>th</sup> Cir. 1996).

Moreover, we reject employer's contention that the administrative law judge's error in disallowing counsel's reply brief is harmless. While counsel's response to employer's objections urged the administrative law judge to reject the Old Dominion University Economics Department study, which he did, the majority of the eight-page brief discusses other aspects of employer's objections, e.g., other evidence regarding requested hourly rates, as well as responses to employer's lack of specificity and line specific objections.

Consequently, we vacate the administrative law judge's hourly rate determination and remand the case for further consideration of counsel's hourly rate.<sup>4</sup> On remand, the administrative law must address counsel's evidence in support of his fee request and provide an adequate basis for his market rate determination.<sup>5</sup> Counsel's evidence of rates he previously received for work in the Hampton Roads area, some of which was not addressed by the administrative law judge due to his rejection of the reply brief, may satisfy counsel's burden of establishing a prevailing market rate. *See generally Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4<sup>th</sup> Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4<sup>th</sup> Cir. 2010); *Newport News Shipbuilding & Dry Dock v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4<sup>th</sup> Cir. 2004). Furthermore, we note that the rate awarded should be based on current, rather than historical, market conditions. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228, 43 BRBS 67, 71(CRT) (4<sup>th</sup> Cir. 2009).

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<sup>4</sup>Counsel does not raise any contentions with regard to the administrative law judge's award of an hourly rate of \$97 for work performed by the "non-attorney support staff" or the administrative law judge's award of 8.83 hours of attorney work and 8.5 hours of legal assistant work. Accordingly, these findings are affirmed as they are unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

<sup>5</sup>Counsel's reply to employer's objections also included a request for an additional attorney's fee of \$1,000 "for defending his initial fee request," representing one hour of attorney work at an hourly rate of \$400 and three hours of legal assistant work at an hourly rate of \$200. Counsel's request for this additional attorney's fee must also be addressed by the administrative law judge on remand.

Accordingly, the administrative law judge's disallowance of counsel's reply brief to employer's objections is reversed, his award of an hourly rate of \$300 for attorney work is vacated, and this case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Supplemental Order Awarding Attorney Fees and Costs is 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