BRB No. 08-0164

A.P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: 08/28/2008
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER
	)	

Appeal of the Compensation Order – Approval of Attorney's Fees of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Scott E. Holleman (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order – Approval of Attorney's Fees (Case No. 14-108162) of District Director Karen P. Staats 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

This case, which has been before the Board previously, has an extensive procedural history. Relevant to this appeal, claimant sought benefits for two separate injuries sustained in the course of his employment with employer, one sustained on October 2, 1991, at which time employer's longshore carrier was Eagle Pacific Insurance Company (Eagle Pacific), and the other on July 3, 1998, at which time employer was insured by another longshore carrier, Homeport Insurance Company (Homeport). This appeal relates solely to the claim for the 1991 injury, which has been resolved. *A.P. v. Stevedoring Services of America*, BRB No. 07-0567 (Feb. 21, 2008) (unpublished). Regarding that claim, claimant, who ultimately prevailed with respect to the determination of his average weekly wage at the time of his 1991 injury, was awarded temporary total disability benefits from October 3, 1991, to November 23, 1992, to be paid by Eagle Pacific. As a result of his success on the average weekly wage issue, Eagle Pacific paid claimant an additional $11,502.23 in temporary total disability benefits and $10,156.46 in interest. Claimant was not successful, however, in his claim against Eagle Pacific for permanent partial disability benefits for his 1991 injury or, alternatively, for a nominal permanent partial disability award for that injury.

Claimant's attorney submitted a fee petition to the district director requesting a fee of $10,195.00, representing 27.5 hours of attorney services at an hourly rate of $350 and 4.75 hours of legal assistant services at an hourly rate of $120, for services rendered regarding this claim. Employer filed objections, objecting to the requested hourly rate and to specific entries, and asserting that the fee should be reduced based on claimant's limited success against Eagle Pacific.[1]

In her Compensation Order awarding claimant's counsel a fee, the district director first reduced counsel's requested hourly rates from $350 to $235 for attorney services and from $120 to $110 for legal assistant services. Next, having considered employer's objections to specific entries in the submitted fee petition, the district director disallowed various entries. Lastly, the district director made an across-the-board reduction in the fee on the basis of claimant's limited success against Eagle Pacific. Consequently, the district director awarded claimant's attorney a fee of $4,571.30, to be paid by Eagle Pacific.

[1] Claimant's counsel submitted a reply to employer's objections, in which he agreed that the one hour of attorney time itemized on December 28, 2000, should be deleted, but otherwise defended his fee request. He requested an additional fee of $1,225 for preparation of his reply to employer's objections, representing 3.5 hours at an hourly rate of $350.

On appeal, claimant challenges the district director's reduction in his counsel's requested fee. Employer responds, urging affirmance of the district director's fee award.

We first consider claimant's challenge to the district director's reduction in the hourly rate requested for attorney services.[2] The district director found the requested hourly rate of $350 excessive in view of the regulatory criteria of Section 702.132, 20 C.F.R. §702.132, and the "customary rates in the relevant geographic area of attorneys with similar experience handling similar issues before this office." Comp. Order at 2. Having rejected the documents submitted by claimant's attorney in support of his requested hourly rate, the district director found that nothing in his fee request justified an hourly rate of $350 for the legal services performed before her. *Id.* The district director therefore approved an hourly rate of $235.[3] *Id.*

The regulation governing fee awards, 20 C.F.R. §702.132, states, *inter alia,* that "[a]ny fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded . . . ." Pursuant to this regulation, the attorney must state his "normal billing rate." 20 C.F.R. §702.132(a). In this case, the district director appropriately considered the complexity of the case, the quality of representation, and the amount of benefits obtained, in accordance with Section 702.132.[4] *See Moyer v. Director, OWCP*, 124 F.3d 1378, 34 BRBS 134(CRT) (10th Cir. 1997); *D.V. v. Cenex Harvest States Cooperative,* 41 BRBS 84, 86 (2007).

Contrary to claimant's contention that the district director's reduction in the requested hourly rate is inconsistent with the decision of the United States Court of Appeals for the Ninth Circuit in *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942 (9th Cir. 2007), the district director rationally found that the documentation submitted by claimant's counsel in support of his requested rate was insufficient to establish a

[2] Claimant does not assign error to the district director's reduction in the hourly rate for legal assistant services.

[3] The district director observed that her award of an hourly rate based on a current rate for all work performed before her encompasses a delay enhancement since the hourly rate approved is much higher than what would have been approved when the claim was initiated. Comp. Order at 2.

[4] Contrary to claimant's argument on appeal, the decision of the United States Supreme Court in *Blum v. Stenson*, 465 U.S. 886 (1984), supports the principle that the complexity of a case is reflected not only in the number of hours expended but also in a reasonable hourly rate.

prevailing market rate of $350 for a longshore attorney in the Portland area.[5] *See* Comp. Order at 2; *B.C. v. Stevedoring Services of America*, 41 BRBS 107, 112-113 (2007); *see also D.V.*, 41 BRBS at 87. As the district director rationally rejected the evidence submitted by claimant's attorney to support an hourly rate of $350, she acted within her discretion in basing her hourly rate determination in part on the customary rates of similarly experienced attorneys handling similar issues before the district director. *See* Comp. Order at 3. In this regard, the courts and the Board have held that hourly rate determinations in comparable longshore cases may properly be considered as relevant evidence of the prevailing market rates in the relevant community. *See B & G Mining, Inc. v. Director, OWCP*, 522 F.3d 657, 664 (6th Cir. 2008); *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004); *B.C.*, 41 BRBS at 113; *D.V.*, 41 BRBS at 86-87; *see also Welch*, 480 F.3d at 947. Thus, as claimant has failed to demonstrate either legal error or an abuse of discretion in the district director's reduction of claimant's counsel's requested hourly rate, we affirm the approved hourly rate of $235. *See, e.g., D.V.,* 41 BRBS at 87.

Claimant further contends that the district director erred in disallowing 1.75 hours itemized on April 29, 2001 for the preparation of a previous fee petition filed on May 7, 2001, and .75 hour itemized on June 10, 2001 for review of employer's objections to that fee petition. The district director listed eight entries dating from 2001 to 2007, totaling 5.75 hours, which related to the preparation and filing of multiple fee petitions in this case. Comp Order at 4. She disallowed the two entries in 2001 as premature, stating that it is excessive "to bill for multiple submissions when the underlying claim is still being litigated and it is obvious that the attorney's fee issue is not ripe for resolution." *Id.* The district director approved the remaining 3.25 hours itemized from 2002 to 2007 that involved work related to attorney's fee matters. *Id.* On the facts presented in this case, we hold that the district director did not abuse her discretion in finding that the hours itemized for the preparation and filing of multiple fee petitions were excessive and in disallowing the 2.5 hours itemized in 2001.[6]

[5] In this regard, the district director properly declined to rely on the Morones Survey and the *Laffey* Matrix as evidence of the prevailing market rate for claimant's counsel's services. *See* Comp. Order at 3; *B.C.*, 41 BRBS at 113 n.5; *D.V.*, 41 BRBS at 87. Moreover, claimant has not demonstrated either legal error or an abuse of discretion by the district director with respect to her finding that the affidavit of Attorney William B. Crow is insufficient to establish that $350 represents the prevailing market rate for services performed in longshore cases by claimant's counsel. *Id.*

[6] Although the district director had the discretionary authority to award a fee in 2001, the extent of claimant's success against Eagle Pacific was still largely undetermined at that time. *Cf. B.C.*, 41 BRBS at 114 (Board held that the administrative

Lastly, claimant contends that the district director abused her discretion in reducing his counsel's requested fee on the basis of claimant's limited success against Eagle Pacific. In considering whether the fee should be reduced based on claimant's limited success against Eagle Pacific, the district director first determined that the work performed from January 3, 1992 through May 29, 1992 was related to the issues of claimant's entitlement to temporary total disability and to the determination of claimant's average weekly wage at the time of his 1991 injury; as claimant was fully successful on those issues, the district director did not reduce the fee awarded for work performed during that time period. Comp. Order at 3. Next, she found that a fee for work performed from April 23, 1993 through August 7, 2007 must account for claimant's limited success as he did not prevail on the claim against Eagle Pacific for permanent partial disability benefits or for a nominal award. *Id.* Having found that it was not possible to identify which entries pertained to which issues, the district director stated that she would approve only one-third of the total hours itemized for this period, after certain entries had been disallowed based on employer's specific objections. *Id.* As acknowledged on appeal by both claimant and employer, however, the district director made a computational error and actually approved two-thirds of the attorney time itemized for this period rather than the one-third that she intended to approve; thus, instead of approving only 5.92 hours of attorney time for this period, she awarded counsel a fee based on 11.83 hours. *Id.* at 4.

The United States Supreme Court has held that a fee award under a fee-shifting scheme should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 997 (1988). If the claimant achieves only partial or limited success, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. The courts have recognized the broad discretion of the adjudicator in assessing the amount of an attorney's fee pursuant to *Hensley* principles. *Id.* at 436; *see, e.g., Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Horrigan*, 848 F.2d 321, 21

---

law judge erroneously disallowed as premature and unnecessary time itemized for the preparation of a fee petition and a legal memorandum where the assessment of the extent of the claimant's success was not primarily contingent on the pending appeal of a single issue). In this case, it was not unreasonable for the district director to find that the filing of the 2001 fee petition was premature. Moreover, the district director rationally found that the total amount of time itemized for work related to the multiple fee petitions filed in this case was excessive. *See, e.g., Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986).

BRBS 73(CRT). Where the adjudicator has determined that the claimant has achieved only limited success, it is appropriate to make an across-the-board reduction in claimant's counsel's fee. *See Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91, 94 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 30-31 (1999).

Claimant's contention that the district director erred in finding that he was not successful on all issues is unavailing; contrary to claimant's arguments in this regard, he did not prevail on his claim for permanent partial disability benefits, or alternatively, a nominal award for his 1991 injury. Thus, the district director did not abuse her discretion in reducing the fee for the work performed from April 23, 1993 through August 7, 2007 on the basis of claimant's limited success.[7] *See Barbera*, 245 F.3d 282, 35 BRBS 27(CRT). As the fee in the amount of $4,571.30 awarded by the district director is reasonable in relation to the results obtained by claimant, we reject claimant's contention of error and affirm the district director's fee award. *See Hensley*, 461 U.S. 424; *Barbera*, 245 F.3d 282, 35 BRBS 27(CRT).

Accordingly, the district director's Compensation Order – Approval of Attorney's Fees is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[7] In its response brief, employer contends that the district director's actual reduction of one-third of the hours sought by claimant's counsel, as opposed to the two-thirds reduction that she intended to make, was appropriate in light of claimant's limited success. *See* Emp. Resp. Brief at 8.