

DOMINIC DIBARTOLOMEO)
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 Claimant-Petitioner)
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 v.)
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 FRED WAHL MARINE CONSTRUCTION) DATE ISSUED: 08/30/2010
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 and)
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 SEABRIGHT INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Attorney Fee Order and Order Denying Claimant’s Counsel’s Motion for Reconsideration to Amend October 22, 2009 Attorney Fee Order of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Russell A. Metz (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 Attorney Fee Order and Order Denying Claimant’s Counsel’s Motion for Reconsideration to Amend October 22, 2009 Attorney Fee Order (2008-LHC-01249) of Administrative Law Judge Gerald M. Etchingham 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); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim under the Act for an injury to his left thumb on February 13, 2007, which employer controverted. On December 22, 2008, the parties submitted a proposed agreement under Section 8(i) of the Act, 33 U.S.C. §908(i), to settle the claim for compensation, penalties, and past and present medical benefits. The settlement agreement did not resolve claimant's right to future medical care for the left thumb injury or claimant's attorney's fee. The administrative law judge issued a decision approving the settlement on December 23, 2008.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting a fee of \$6,457, representing 16.5 attorney hours at a rate of \$375 per hour, and 2.25 hours of legal assistant time at an hourly rate of \$120. Employer responded, challenging the hourly rates and making objections to specific entries. With his reply to employer's objections, counsel requested a fee for an additional 2.25 hours of attorney time. The administrative law judge issued an order for supplemental evidence in support of, or in opposition to, counsel's fee petition in light of recent cases issued by the United States Court of Appeals for the Ninth Circuit. *See Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). Claimant's counsel requested an additional 2.75 hours for time expended on a memorandum in response to the administrative law judge's order and, based on the evidence he submitted with the memorandum, counsel amended his fee petition to request an hourly rate of \$400 for his work and an hourly rate of \$150 for his assistant. Claimant's counsel requested an additional hour for a reply memorandum to employer's response to the administrative law judge's order. In sum, claimant's counsel requested a fee of \$9,337.50, representing 22.5 hours of attorney time at \$400 per hour and 2.25 hours of legal assistant time at \$150 per hour.

In his Attorney Fee Order (Order), the administrative law judge reduced the hourly rate for claimant's counsel to \$316.42 and the hourly rate for legal assistant work to \$110. The administrative law judge denied as clerical work one-quarter hour requested by counsel to telephone claimant regarding additional records. The administrative law judge also denied one hour of legal assistant time spent scheduling a deposition and preparing a confirmation letter. Accordingly, the administrative law judge awarded claimant's counsel a fee of \$7,177.85, representing 22.25 hours of attorney time at an hourly rate of \$316.42 and 1.25 hours of legal assistant time at an hourly rate of \$110. The administrative law judge denied counsel's motion for reconsideration of the reduction in the requested hourly rates.

On appeal, claimant's counsel challenges the administrative law judge's hourly rate determinations and his reduction of the time requested for specific entries. Employer responds, urging affirmance of the fee award.

Claimant challenges the administrative law judge's disallowance of activity characterized as clerical work. We reject this contention of error. The administrative law judge rationally disallowed one-quarter hour of attorney time expended on October 18, 2008, involving a "telephone [call] with claimant regarding additional records," as he could find this was a clerical task. Order at 4 *citing* Claimant's Counsel's Fee Petition at 2. Claimant also challenges the administrative law judge's disallowance of one hour of legal assistant time requested on October 1, 2008, to schedule a deposition and prepare a confirmation letter. The administrative law judge noted counsel's response to employer's objection to this entry that several calls were necessary to make arrangements and that only one-half hour would have been necessary if employer had returned the initial call. Order at 3. The administrative law judge found that the additional hour, therefore, involved making unsuccessful telephone calls, which the administrative law judge found is clerical work, and he allowed one-half hour of legal assistant time for this entry. *Id.* at 4. Time spent on traditional clerical duties by an attorney is not compensable, *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980), and clerical services are part of an attorney's overhead. As claimant has not met his burden of showing that the administrative law judge abused his discretion in disallowing the time for services he rationally characterized as clerical, the number of hours awarded by the administrative law judge is affirmed. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

Claimant objects to the hourly rates awarded by the administrative law judge for attorney and clerical work. In *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT), involving an appeal of fees awarded by the Board, the Ninth Circuit stated that the definition of a "reasonable attorney's fee" is the same for all federal fee-shifting statutes, *Christensen*, 557 F.3d at 1052, 43 BRBS at 7(CRT) *citing* *City of Burlington v. Dague*, 505 U.S. 557 (1992), and that most fee-shifting awards are calculated using the lodestar method, which multiplies a reasonable hourly rate by the number of hours reasonably expended.¹ *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT). The Ninth Circuit held that the Board erred in limiting the relevant community rates to those awarded in longshore cases in a geographic region. The court stated that the Board "must define the relevant community more broadly than simply [as] fee awards under the [Act.]" *Christensen*, 557 F.3d at 1055, 43 BRBS at 8-9(CRT). Thus, a "reasonable" hourly rate must reflect the rate: (1) that prevails in the "community" (2) for "similar" services (3) by an attorney of "reasonably comparable skill, experience, and reputation." *See Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39 (2010). This analysis applies as well to attorney's fee awards issued by

¹Other factors which could affect the award of the fee include, for example: novelty or difficulty of the issue; skill needed; customary fee; time limitations imposed on attorney; amount involved/results obtained; experience of attorney; and, undesirability of the case. *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT).

administrative law judges and district directors. *Van Skike*, 557 F.3d at 1046-1047, 43 BRBS at 13-14(CRT).

In this case, counsel submitted as evidence to support the requested hourly rate of \$400 his résumé and estimation of the value of his services in non-longshore cases, the 2008 Morones Survey of commercial litigation rates in the Portland area, affidavits from William B. Crow, Phil Goldsmith and David Markowitz, whom the administrative law judge characterized as expert witnesses on the matter of attorney fees, and a fee award based on an hourly rate of \$325 in *Valentine v. Equifax*, 543 F.Supp. 2d 1232 (D.Or. 2008). The administrative law judge found that the Morones Survey represents the hourly rates of an elite sub-group of commercial litigators and is, therefore, insufficient to establish a proxy rate for a fee award under the Act. The administrative law judge found that Mr. Crow, a commercial litigator, is unqualified to gauge the market rate for claimant's counsel's services because he is unfamiliar with the basics of longshore litigation. The administrative law judge found that Mr. Goldsmith and Mr. Markowitz did not provide any examples of an hourly rate approaching \$350 to \$400 charged by an attorney engaged in work similar to that of claimant's counsel. The administrative law judge found unpersuasive the hourly rate awarded in *Valentine*, as he did not credit counsel's subjective assertion that his trial skills are comparable to the attorney in that case, with whom the administrative law judge was unfamiliar. The administrative law judge also stated it is unclear that the skills employed in *Valentine* are comparable to those required in this case. Finally, in the absence of any corroborating evidence, the administrative law judge found that counsel's assertion that he has averaged \$325 to \$400 per hour in non-longshore cases cannot serve to establish that the requested rate of \$400 is reasonable.

The administrative law judge found that he must estimate the value of counsel's services in the Portland, Oregon, market, since claimant's counsel did not establish a normal billing rate or suitable proxy thereof. The administrative law judge stated that he would rely on data from the 2007 edition of *The Survey of Law Firm Economics*, which measures skills similar to those used in longshore claims, and factors specific to this claim such as counsel's years of experience, geographic location, and overall ability. The administrative law judge averaged the hourly rates provided in the survey for attorneys who practice in the areas of employment, maritime, personal injury, and workers' compensation law, and the hourly rate charged by lawyers, like counsel, who have more than thirty-one years of experience. Based on this survey data, the administrative law judge found that the average proxy market rate is \$266.60. The administrative law judge then adjusted the hourly rate to \$309 to account for counsel's expertise, which he stated is well above average, by finding counsel entitled to a fee based on the average rate in 2007 of the upper quartile of attorneys surveyed in these practice areas. Since the work performed by counsel occurred in 2008, the administrative law judge further adjusted the

hourly rate by the average increase in attorney salaries in 2008 of 2.4 percent, to conclude that claimant's counsel is entitled to a fee based on an hourly rate of \$316.42.

On appeal, counsel contends that the administrative law judge erred by determining his hourly rate based on *The Survey of Law Firm Economics*, which provides average rates charged statewide, rather than using a method that focuses solely on the average rates in Portland, Oregon, where counsel practices. In his order on reconsideration, the administrative law judge rejected this argument. The administrative law judge found that the Oregon State Bar 2007 Economic Survey shows that the discrepancy between Portland area rates and Oregon statewide rates is not uniform. The administrative law judge found that while this survey states that the hourly billing rate for personal injury attorneys and attorneys with more than thirty-one years of experience is greater in the Portland area than statewide, the rate charged by workers' compensation attorneys is lower in Portland than the statewide average. The administrative law judge, therefore, concluded that such variations do not support increasing the hourly rate above \$316.42. In his fee order, the administrative law judge also found that the Oregon State Bar 2007 Economic Survey is less credible than *The Survey of Law Firm Economics* since it is published only every four to five years and it does not provide the hourly billing rates for attorneys practicing maritime or employment law. Order at 7 n.2.

In *Blum v. Stenson*, 465 U.S. 886 (1984), the Supreme Court held that "reasonable fees" should be calculated according to the "prevailing market rates in the relevant community." The *Christensen* court stated that the relevant community is generally the forum where the district court sits. *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT) citing *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973 (9th Cir. 2008). In this case, the district court is located in Portland, Oregon, and its jurisdiction includes the entire state of Oregon. Counsel's office is located in the city of Portland. Thus, the appropriate community in this case could reasonably be found to be the state of Oregon, the greater Portland metropolitan area, or the city of Portland. See *Christensen*, 43 BRBS at 146. In the absence of counsel's production of satisfactory evidence to establish a reasonable hourly rate, the administrative law judge acted within his discretion to determine counsel's hourly rate based on statewide data contained in *The Survey of Law Firm Economics*. The administrative law judge rationally found that this statewide survey best establishes a proxy rate for claimant's counsel's services since it measured the hourly rates charged by lawyers employing legal skills most comparable to those required in longshore practice. Therefore, we affirm the administrative law judge's reliance on the statewide data contained in *The Survey of Law Firm Economics* to determine a reasonable hourly rate. See *Van Skike*, 557 F.3d at 1044 n.2, 1045, 43 BRBS at 12 n.2, 13(CRT); see also *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT).

Counsel also contends the administrative law judge erred by adjusting his proxy hourly market rate to that applicable to attorneys in the “upper quartile.” Counsel argues that the affidavits of Mr. Crow, Mr. Goldsmith, and Mr. Markowitz establish that, using the administrative law judge’s methodology based on the 2007 edition of *The Survey of Law Firm Economics*, he is entitled to the proxy rate of \$364 for attorneys whose abilities are rated as within the “ninth decile.” The administrative law judge found that counsel’s legal expertise is well above average based on his graduating from a prestigious law school, clerking for a federal judge, and arguing hundreds of cases, including several successful appeals to the Ninth Circuit. Order at 8. The administrative law judge found that the quality of counsel’s representation in this case met but did not significantly exceed his expectations for an attorney of counsel’s many years of experience. The administrative law judge noted that this finding justifies awarding counsel the proxy rate for attorneys in the upper quartile, rather than the higher rate for attorneys in the ninth decile. *Id.* at 8 n.3.

We reject claimant’s contention of error. Section 702.132, 20 C.F.R. §702.132, provides, *inter alia*, that the fee award shall account for the quality of counsel’s representation. In this case, the administrative law judge rationally rejected the attorney affidavits claimant provided because Mr. Crow, Mr. Goldsmith, and Mr. Markowitz were unfamiliar with the hourly rates charged by attorneys performing work similar to counsel’s actual practice. *See B&G Mining, Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008). Moreover, the administrative law judge’s reliance on his own evaluation of counsel’s expertise in this case to find that counsel is entitled to a rate received by attorneys in the upper quartile is reasonable, within his discretion, and in accordance with law. *See Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT); n.1, *supra*.

Counsel next argues that the administrative law judge erred by including the average rates charged by workers’ compensation attorneys in calculating the proxy market rate. Counsel asserts that the upper-quartile hourly rate of \$200 for workers’ compensation attorneys in *The Survey of Law Firm Economics* does not reflect a market-based rate, citing a statement from the 2009 Small Law Firm Economic Survey. We reject claimant’s contention that the administrative law judge erred. The statement cited merely notes that workers’ compensation attorneys report lower hourly rates. It does not give a reason for that fact, and the administrative law judge could rationally find that workers’ compensation rates should be included because this category of work requires skills similar to those employed in longshore claims. The administrative law judge is afforded considerable discretion in determining factors relevant to a market rate in a given case, *see generally Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *B&G Mining*, 522 F.3d 657, 42 BRBS

25(CRT), and is not bound by the Board's determinations in other cases. *See Christensen*, 44 BRBS at 40-41.

Regarding the \$110 per hour rate awarded for legal assistant work, the administrative law judge rejected Mr. Goldsmith's opinion that an hourly rate of \$150 should apply, as it is based on the Morones Survey. The administrative law judge found, based on the factors in Section 702.132(a) and his knowledge of longshore practice, that an hourly rate of \$110 for legal assistant services is appropriate in this case. Order at 9. We affirm this determination as the administrative law judge adequately addressed the relevant factors and counsel has not shown that the administrative law judge abused his discretion.

Finally, counsel contends that the administrative law judge erred in awarding the fee at the rate in effect when the services were rendered in 2008, rather than the rate when the fee order was issued in 2009. Counsel did not raise this delay enhancement contention before the administrative law judge either in his initial fee application or in his motion for reconsideration. Since counsel did not seek an hourly rate enhanced for delay, the administrative law judge did not err in not addressing this factor. *See Van Skike*, 557 F.3d at 1048-1049, 43 BRBS at 15-16(CRT). Moreover, a one-year delay does not require that the administrative law judge adjust the fee to reflect current rates. *See Christensen*, 557 F.3d at 1055-1056, 43 BRBS at 9-10(CRT); *Anderson v. Director, OWCP*, 917 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Therefore, we reject counsel's contention.

Accordingly, the administrative law judge's attorney's fee award is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge