U.S. Department of Labor

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

BRB No. 17-0483

CURTIS COFFEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 02/19/2019
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Barry R. Lerner (Barnett, Lerner, Karsen & Frankel, P.A.), Ft. Lauderdale, Florida, for claimant.

John F. Karpousis and Michael J. Dehart (Freehill, Hogan & Mahar, L.L.P.), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant's counsel appeals the Supplemental Decision and Order Awarding Attorney Fees (2014-LDA-00221) 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 Longshore Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the DBA). 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, an abuse of discretion, or not in accordance with law. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

On January 31, 2017, the administrative law judge issued a decision awarding claimant medical benefits. Claimant's counsel filed a petition for an attorney's fee in which he requested $67,278.49, representing 125.2 hours of attorney work at an hourly rate of $465, 7.9 hours of paralegal work at an hourly rate of $165, plus $7,756.99 in costs. Employer filed objections. On May 10, 2017, the administrative law judge awarded counsel a fee for his work. The administrative law judge found that Atlanta, Georgia, is the relevant community for determining counsel's hourly rate. He found $359 per hour to be a reasonable rate for counsel's work and $103 per hour to be a reasonable rate for paralegal work. He approved 106.35 hours of attorney work[1] and 6.9 hours of paralegal work, and awarded a fee of $38,890.35. Supp. Decision and Order at 4, 8. The administrative law judge denied all travel-related costs but approved the remaining $6,352.99 in costs. Thus, the administrative law judge awarded claimant's counsel a total employer-paid fee of $45,243.34. *Id.* at 9.

Counsel appeals the fee award, contending the administrative law judge's relevant community determination, market rate findings, and disallowance of all travel costs are erroneous. Employer responds, urging affirmance.

The Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a federal fee-shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). The Court has also held that 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; *see also Kenny A.*, 559 U.S. at 551. The burden is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those

[1] Sixteen hours of the disallowed time was for travel outside claimant's locality. Supp. Decision and Order at 6-8.

prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation. *Loranger v. Stierheim*, 10 F.3d 776 (11th Cir. 1994); *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988); *see also Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009).

Counsel contends South Florida, where he is based, is the relevant market for his services. Counsel cites a number of decisions wherein the Board previously used South Florida as the relevant market for his services. Counsel also contends the administrative law judge erred in denying all requested costs related to travel between his office in Ft. Lauderdale and Atlanta, where the hearing was held,[2] including airfare, car rental, and parking.[3]

Under the law of the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, one factor which may establish the relevant market is the location of the court. *ACLU v. Barnes*, 168 F.3d 423, 437 (11th Cir. 1999) ("relevant market" is Atlanta, where the case was filed and heard; non-local attorneys not entitled to their New York rates); *Brooks v. Georgia State Board of Elections*, 997 F.2d 857 (11th Cir. 1993) ("relevant market" is Atlanta, where attorneys were based, because court accepted evidence that there were no local attorneys who could handle the case in Brunswick, where the trial was held); *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 317 (4th Cir. 1988) (community in which the court sits is the appropriate starting point for selecting the proper rate). When the claimant's attorney is not from the community where the court sits, the attorney may be awarded a fee based on "non-local" rates if the claimant establishes there were no qualified local attorneys to take his claim. *See Barnes*, 168 F.3d at 437; *Brooks*, 997 F.2d at 869; *see also Holiday*, 591 F.3d 229, 43 BRBS 71-72(CRT);[4] *Hanson*, 859

[2] "Except for good cause shown, hearings shall be held at convenient locations not more than 75 miles from the claimant's residence." 20 C.F.R. §702.337. Claimant lives approximately 30 miles from downtown Atlanta, in McDonough, Georgia.

[3] Counsel asserts he has been claimant's attorney for more than nine years and "it would set a chilling effect on continuous representation" if his representation ceased merely because his travel time and costs would not be reimbursed. He also contends the administrative law judge's decision did not discuss the "quality and quantity" of attorneys practicing under the DBA in Atlanta so as to support the conclusion regarding the availability of local counsel.

[4] In *Holiday*, the United States Court of Appeals for the Fourth Circuit held that the relevant community for awarding an attorney's hourly rate is generally the community where the court sits. However, where a claimant has hired "extrajurisdictional" counsel, a

F.2d at 317. Similarly, if a claimant retains counsel from outside his locality, he must establish the lack of available competent local counsel in order to hold the employer liable for non-local travel time and costs, because travel costs and fees for travel time may be awarded only where the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986); *Swain v. Bath Iron Works Corp*., 14 BRBS 657 (1982) (travel time between claimant's residence in Bath, Maine and counsel's office in Boston denied). There must be a factual foundation supporting the administrative law judge's allowance or disallowance of non-local counsel's travel time and expenses. *B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009); *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006).

In addressing the relevant market in this case, the administrative law judge stated:

> Generally, the community in which the court sits is the appropriate starting point for selecting the proper rate. Exceptions to this guideline are when local counsel is unable to take the case or the complexity of the case means no attorney available locally can handle the claim. That is not the case with the present claim. As the hearing was held in Atlanta, Georgia, I find that this is the appropriate market for determining the hourly rate.

Supp. Decision and Order at 4 (internal citations omitted). In denying non-local travel costs, the administrative law judge stated that employer provided evidence of Atlanta-based DBA attorneys who are qualified to handle claimant's case. *Id.* at 4, 8.

A review of employer's objections to counsel's fee petition reveals it provided the name and website information of one firm in Atlanta that purportedly represents claimants

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two-step test must be satisfied before the attorney may be awarded the prevailing rate in his home community. *Holiday*, 591 F.3d at 229, 43 BRBS at 71-72(CRT) (citing *Hanson*, 859 F.2d at 317). The test is: 1) did the attorney offer services that were not available in the local market? and 2) did the claimant choose reasonably or was the attorney "unnecessarily expensive"? *Id.* If the services were not available locally and the claimant chose reasonably, the court may award the prevailing rate from the attorney's home market. *Hanson*, 859 F.2d at 317; *see also Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 179 (4th Cir. 1994). In addressing whether the services were available locally, the Fourth Circuit explained that "the complexity and specialized nature of a case may mean that no attorney, with the required skills, is available locally[.]" *Rum Creek*, 31 F.3d at 179 (quoting *Hanson*, 859 F.2d at 317).

in DBA cases. The administrative law judge summarily accepted this evidence without explaining whether employer's statement was accurate, or addressing the availability and ability of this firm to represent claimant. Because the administrative law judge did not fully address the issue, we vacate his finding that Atlanta, Georgia, is the relevant market for establishing counsel's hourly rate, as well as his finding that counsel's out-of-area travel time and costs are not reimbursable. On remand, the administrative law judge must address the issue of the availability and competency of local counsel to take claimant's claim and fully explain his conclusions. *Barnes*, 168 F.3d at 437; *Brooks*, 997 F.2d at 869; *see also Holiday*, 591 F.3d at 229, 43 BRBS at 71-72(CRT). His finding will then form the basis for whether Atlanta, Georgia, or South Florida is the relevant market community and whether claimant's counsel is entitled to reimbursement for the time and cost of travel between Ft. Lauderdale and Atlanta. The administrative law judge may re-open the record to permit additional briefing if necessary.

Counsel also contends the administrative law judge erred in calculating the hourly rate for his services. The administrative law judge stated: "This office routinely awarded $331.00 per hour for experienced attorney work and $95 per hour for para legal (sic) work performed in 2013 under the LHWCA." Supp. Decision and Order at 4. Although the administrative law judge updated this 2013 figure by applying increases in the Consumer Price Index to ultimately arrive at an hourly rate of $359 for counsel's work in this case, claimant correctly contends this finding cannot be affirmed.

An attorney's awarded hourly rate must be based on the prevailing market rates in the relevant community, taking into consideration the rates of attorneys who perform similar services and have comparable skills, experience, and reputation. *Loranger*, 10 F.3d at 781. All fee awards must be sufficiently explained. *Id.*; *Norman*, 836 F.2d at 1304; *see also Carter v. Caleb Brett, LLC*, 757 F.3d 866, 48 BRBS 21(CRT) (9th Cir. 2014); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999); 20 C.F.R. §702.132(a). The administrative law judge stated only that his chosen base rate of $331 was "routinely awarded" by his office for work performed in 2013. Supp. Decision and Order at 4. He cited no evidence or law to support that this rate was a market rate, did not explain how updating the 2013 rate for inflation accurately represents the current market rate,[5] and did not address the evidence submitted by the parties. Because he has not explained how he arrived at his base rate, we vacate the administrative law judge's hourly rate for attorney services, and we

[5] *See Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT) (Tribunals need not re-analyze the hourly rate issue in every case, provided the analysis occurs with sufficient regularity to reflect current market rates).

remand this case for further consideration.[6] *See Norman*, 836 F.2d at 1305. On remand, the administrative law judge must explain how he arrived at his awarded hourly market rate.[7] *Id.*

Accordingly, the administrative law judge's fee award is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

[6] Claimant does not challenge the hourly rate for paralegal work; we affirm that rate. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[7] With the exception of time for travel, claimant has not appealed the hours of work approved by the administrative law judge; those hours are affirmed. *Scalio*, 41 BRBS 57 (2007).