

STEPHEN L. WALKER)
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 Claimant-Petitioner)
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 v.)
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 KBR GOVERNMENT OPERATIONS) DATE ISSUED: 07/07/2011
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 and)
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 INSURANCE COMPANY OF THE STATE)
 OF PENNSYLVANIA)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

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

Jerry R. McKenney and Billy J. Frey (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney's Fees (2009-LDA-00168) of Administrative Law Judge C. Richard Avery 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 injured his right knee on July 8, 2008, during the course of his employment as a truck driver for employer in Iraq. Claimant was sent home to the United States where he received treatment for a knee sprain from Dr. George, who released claimant to return to work without restrictions on September 23, 2008. Claimant also received treatment for a psychological injury from Dr. Bricken, who opined that this condition was due, in part, to his knee injury. CX 9a at 12. Claimant obtained work as a plumber in the United States from a temporary agency in November 2008, and he secured full-time work as a plumber in February 2009.

In his decision, the administrative law judge found that claimant sustained a work-related knee injury in July 2008. The administrative law judge relied upon Dr. George's opinion to find that claimant was unable to work until his knee condition reached maximum medical improvement on September 23, 2008, at which time claimant had no further restrictions. The administrative law judge determined that claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), was \$1,613.51. The administrative law judge also determined that claimant was entitled to the medical treatment rendered by Drs. George and Bricken, but that claimant does not require further treatment for his work-related right knee or psychological conditions. The administrative law judge awarded claimant compensation for temporary total disability, 33 U.S.C. §908(b), from July 8 through September 23, 2008, and medical benefits for the prior treatment of Drs. George and Bricken. 33 U.S.C. §907.

Claimant's attorney submitted to the administrative law judge a petition for an attorney's fee of \$12,367.50, representing 29.1 hours at an hourly rate of \$425, plus costs of \$2,541.58. Employer filed objections to the fee request. In his supplemental decision, the administrative law judge reduced the requested hours by 2.9 and found claimant's counsel entitled to a fee based on an hourly rate of \$250. Accordingly, claimant's counsel was awarded a fee of \$6,550, representing 26.2 hours at an hourly rate of \$250, plus costs of \$2,541.58.

On appeal, claimant challenges the administrative law judge's reduction of the hourly rate to \$250. Employer responds, urging affirmance.

Claimant contends that the administrative law judge did not provide a sufficient explanation to support his determination that counsel is entitled to a fee based on an hourly rate of \$250. Claimant argues that, in light of the 2006 Altman-Weil Survey of Law Firm Economics that counsel submitted with his fee petition, and recent case law

addressing factors relevant to hourly rate determination, the administrative law judge must reconsider the applicable hourly rate. We agree.

In his supplemental decision, the administrative law judge's hourly rate finding reads, *in toto*, as follows:

Employer/Carrier argue claimant's counsel's requested hourly rate of \$425 is excessive in light of the prevailing hourly rate in the greater Houston area (where the claim was heard). To support this contention, Employer/Carrier have offered evidence the prevailing hourly rate in similar circumstances is \$250.00. On the other hand, claimant's counsel has offered evidence of instances where he has been awarded fees at an hourly rate of as much as \$400.00.

While claimant's counsel's requested hourly rate may be appropriate in other cases and other jurisdictions, I agree it is excessive in this instance, given the prevailing hourly rate in the geographic area in which this claim was heard, as well as the limited success achieved. Based on this, I find the requested hourly rate excessive and reduce it to an hourly rate of \$250.00.

Supplemental Decision and Order at 2. In sum, the administrative law judge's hourly rate finding purportedly is based on the "prevailing" hourly rate in the Houston area where the hearing in this claim was held,¹ as well as on the limited success claimant achieved. Regarding claimant's success, claimant prevailed on the contested issues of causation, temporary total disability from July 8 to September 23, 2008, average weekly wage of \$1,613.51, and medical benefits for the treatment.² Claimant did not prevail on his request for temporary partial disability, 33 U.S.C. §908(e), compensation from September 23, 2008 to February 2009, and for future psychological treatment.

In *Blum v. Stenson*, 465 U.S. 886 (1984), the United States Supreme Court held that "reasonable fees" in a fee-shifting scheme should be calculated according to the "prevailing market rates in the relevant community." Claimant does not dispute that the

¹Although counsel's practice is located in Ft. Lauderdale, Florida, the administrative law judge's finding that Houston, Texas is the relevant community for determining the appropriate hourly rate is acceded to on appeal. *See, e.g., B & G Mining, Inc. v. Director, OWCP*, 522 F.2d 657, 42 BRBS 25(CRT) (6th Cir. 2008).

²Employer argued that the correct average weekly wage was \$1,264.73. Employer's Post-Hearing Brief at 27.

Houston area is the relevant community, but that the administrative law judge did not properly determine the prevailing market rate in that community. In *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), the United States Court of Appeals for the Ninth Circuit determined that the relevant market is not limited to fees awarded in Longshore cases alone because such are not market based rates. The adjudicator must take into consideration the rates prevailing in the community for similar services by lawyers of reasonably comparable skills, experience, and reputation. In *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009), the United States Court of Appeals for the Fourth Circuit referenced several factors recognized as guides in a lodestar analysis, and held that the Board abused its discretion in finding that an hourly rate of \$250 was appropriate as the Board had stated only that that rate was the prevailing rate for counsel in the geographic area where the case arose. In *Stanhope v. Electric Boat Co.*, 44 BRBS 107 (2010) (Order), the Board, in addressing a fee petition for services rendered before the Board, stated that, while rates awarded in recent Longshore cases are some inferential evidence of the prevailing market rates in the relevant community, evidence submitted by the parties regarding prevailing market rates must also be addressed. *Id.* at 108 n. 5.

In this case, claimant's counsel submitted with his fee petition to the administrative law judge the 2006 Altman-Weil Survey of Law Firm Economics and a cost-of-living allowance table applied to attorney fees, which claimant's counsel averred is based on the United States Department of Labor's cost-of-living adjustment data.³ Claimant's Fee Petition at 9, 17- 21. The administrative law judge did not discuss this evidence with any specificity nor did he state the basis for his finding that \$250 is an appropriate hourly rate in this case. This case arises in the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has not addressed the specific methodology for determining an appropriate hourly rate for cases arising under the Act. However, in view of the Supreme Court's decision in *Blum*, 465 U.S. 886, we must vacate the fee award and remand the case for the administrative law judge to address specifically the parties' market rate evidence and to re-determine counsel's hourly rate consistent with law. The administrative law judge must provide a more detailed analysis of his hourly rate determination in view of the parties' documentation, and a rationale for

³Together with its objections to claimant's counsel's fee petition, employer submitted information regarding fee awards in three Longshore cases arising under the Defense Base Act (DBA) that were heard in the Houston area. In two cases, counsel were awarded fees based on an hourly rate of \$250, and in one case, counsel was awarded a fee based on an hourly rate of \$225, at his request. Employer's Objections at exs. B-D. Employer also submitted information regarding two DBA cases in the Houston, Texas, compensation district in which the district director awarded counsel's partner, David Barnett, a fee based on an hourly rate of \$250. Employer Objections at exs. F, G.

his fee award which reflects, *inter alia*, appropriate consideration of claimant's limited success. *See generally Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge