

RICARDO VEGA)
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 Claimant-Petitioner)
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 v.)
)
 TRADESMEN INTERNATIONAL,) DATE ISSUED: 07/27/2012
 INCORPORATED)
)
 and)
)
 AMERICAN HOME ASSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Attorney Fee Order of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

John T. Marin (Laughlin, Falbo, Levy & Moresi), San Diego, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2007-LHC-01853) of Administrative Law Judge Jennifer Gee 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 may be set aside only if the challenging party shows it 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's counsel, Jeffrey M. Winter, filed a fee petition dated October 27, 2010, for work performed before the Office of Administrative Law Judges from July 30, 2007 to October 20, 2010. Claimant's counsel sought a fee of \$25,621.95, representing 70.9

hours of attorney services at an hourly rate of \$350, plus costs of \$806.95. Employer filed objections to the fee petition.

In her fee order, the administrative law judge addressed the decisions of the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), and she found that the exhibits counsel submitted were insufficient to support his requested hourly rate of \$350 for the relevant community of San Diego, California. The administrative law judge examined fee awards to claimant by other administrative law judges, and she concluded that counsel is entitled to a fee based on an hourly rate of \$310. The administrative law judge disallowed 10.35 hours by reducing 69 quarter-hour entries totaling 17.25 hours to 6.9 hours, as she allowed one-tenth of an hour for each of the disputed quarter-hour entries. The administrative law judge also disallowed \$183.40 for hotel costs. The administrative law judge awarded counsel a fee of \$19,393.05, representing 60.55 hours of attorney services at \$310 per hour, plus costs of \$623.55.

On appeal, claimant challenges the administrative law judge's hourly rate determination. Employer responds, urging affirmance. Claimant has filed a reply brief.

Claimant contends that the administrative law judge erred by not accepting the evidence counsel submitted in support of the requested hourly rate of \$350. Specifically, claimant asserts that this evidence was accepted as support for a \$350 hourly rate by the Board in counsel's fee petition in this case, *Vega v. Tradesman Int'l, Inc.*, BRB No. 09-0719 (Nov. 18, 2010) (Order) (unpub.), and by a United States district court in enforcement proceedings on the merits in this case, *Vega v. Tradesman Int'l, Inc.*, No. 10CV0459-LHB, 2011 WL 1157683 (S.D.Cal. Mar. 29, 2011). We reject claimant's contentions of error.

The administrative law judge is not bound by the rates awarded in this case by the Board and the District Court. See generally *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994). The Board has recognized that, pursuant to *Christensen* and *Van Skike*, "[h]ourly rates for the same attorney can vary from case to case and, within one case, from level to level." *Christensen v. Stevedoring Services of America*, 44 BRBS 75, 76 (2010). Moreover, the rate awarded by the Board was based on different surveys.¹ In addition, claimant has not established that the

¹In its Order, the Board noted that counsel provided the 2006 and 2008 editions of the Altman Weil Survey, the 2006 edition of the Helder Associates Survey, and copies of several federal cases from the Southern District of California involving awards of

administrative law judge arbitrarily concluded, or abused her discretion in finding, that the documents submitted by counsel fail to establish his entitlement to the \$350 rate claimed.² The administrative law judge gave a valid explanation for her rejection of the hourly rate requested and we decline to disturb this finding. *See generally McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011).

In this case, although the administrative law judge found that counsel did not establish that his documentation supported his requested rate of \$350 she did not merely dismiss his evidence and award a rate that is not supported by market data. Rather, in an extensive discussion, the administrative law judge found that the data provide a framework for determining a market rate, together with market rate analysis done by administrative law judges in other cases. Order at 11-13. The Ninth Circuit stated in *Christensen*, “Nor do we insist that in every fee award decision the [tribunal] must make new determinations of the relevant community and the reasonable hourly rate.” *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT). Thus, the administrative law judge did not err in advertent to decisions of other administrative law judges. The administrative law judge evaluated recent fee awards to counsel by other administrative law judges in which they also analyzed market data, and she determined that a rate of \$310 is an appropriate market rate as it is line with the median and average rates reported for the West Region in the 2009 edition of the Small Law Firm Economic Survey.³

In this regard, claimant also contends that in setting the rate of \$310, the administrative law judge erred by alluding to the complexity of the case in her hourly rate analysis, in contravention of law. *See Van Skike*, 557 F.3d at 1048, 43 BRBS at 15(CRT); *see also H.S. [Sherman] v. Dep’t of Army/NAF*, 43 BRS 41 (2009). In arriving

attorney’s fees, all of which reflect median or standard hourly rates equal to or greater than the \$350 hourly rate requested by Mr. Winter. *Vega*, slip op. at 2 n.3. In his final fee petition to the administrative law judge, counsel replaced the Altman Weil and Helder Associates Surveys with the August 2009 Edition of the Small Law Firm Economic Survey, the July 2009 Edition of The Survey of Small Law Firm Economics, and the 2009-2010 version of the *Laffey Matrix*. October 27, 2010 Fee Petition at 1.

²The administrative law judge stated that the cases submitted by counsel, “by his own admission,” were offered to show only that his requested rate is less than the rates awarded, and she rationally found that these cases do not show that “the rates were awarded to lawyers of comparable skill, experience and reputation as Mr. Winter or that they were awarded for similar service.” Attorney Fee Order at 10.

³The median rate reported was \$272 and the average rate was \$292. Attorney Fee Order at 14.

at her hourly rate finding, the administrative law judge stated she considered the hourly rates awarded to counsel in other cases arising under the Act, counsel's years of practice, trial experience, expertise, and the average and median rates in the survey data counsel provided. Attorney Fee Order at 11-13. The administrative law judge also stated, "[T]hough the per diem issue in this case was unusual, it was not a complex case, and the hearing lasted less than half a day." *Id.* at 14. As the administrative law judge considered several other factors and the rate is supported by reference to proper considerations, it was harmless error for the administrative law judge to state she was basing counsel's hourly rate, in part, on the lack of complexity of the case. Because claimant has not established that a rate of \$310 is arbitrary, capricious, not in accordance with law or based on an abuse of the administrative law judge's discretion, we affirm it.⁴

Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁴We reject, as factually inaccurate, claimant's contention that the administrative law judge erred in finding that counsel's hourly rate request went from \$335 in March 2010 to \$350 in July 2010. Attorney Fee Order at 13. Regarding claimant's assertion that a rate of \$350 is appropriate given the delay in payment of the fee, the record reflects that claimant's counsel did not seek an enhancement for delay before the administrative law judge. Thus, we decline to address this issue on appeal. *See Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT); *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999).