



BRB No. 15-0076

ALTON GLASS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: <u>Sept. 23, 2015</u>
HUNTINGTON INGALLS INDUSTRIES,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney Fee and Costs of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Attorney Fee and Costs (2014-LHC-01267) of Administrative Law Judge Dana Rosen 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 it is shown by the challenging party to be arbitrary, capricious, based on 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) (4<sup>th</sup> Cir. 2009); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained injuries to his right foot and knee while working for employer on August 9, 2013, for which employer ultimately agreed to pay claimant temporary total disability benefits from November 1, 2013.<sup>1</sup> Claimant's counsel, thereafter, filed a petition seeking an attorney's fee of \$4,152, representing 9.33 hours of attorney work at an hourly rate of \$400 and 3.5 hours of paralegal work at an hourly rate of \$120, plus \$2,359.32 in costs, for work before the administrative law judge. The administrative law judge, after reducing the hourly rate and number of hours requested for both attorney and paralegal work, approved an attorney's fee, payable by employer, totaling \$5,186.82, representing 8.45 hours of attorney work at \$300 per hour and 3.25 hours of paralegal work at \$90 per hour, and \$2,359.32 in costs.

On appeal, claimant's counsel challenges the administrative law judge's hourly rate determinations. Employer responds, urging affirmance of the administrative law judge's decisions. Claimant's counsel has filed a reply brief.<sup>2</sup>

Claimant's counsel contends that the administrative law judge's award of an hourly rate of \$300 for attorney work is not supported by any evidence or consistent with hourly rate awards he received in prior decisions.<sup>3</sup> Counsel asserts that the administrative law judge erroneously emphasized the lack of affidavits from other attorneys within the locale, and erred in not relying on the evidence he submitted regarding hourly rates he has been awarded in the past and increases in the cost of living.

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

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<sup>1</sup>Employer voluntarily paid temporary total disability benefits from August 13 through October 31, 2013. Claimant sought additional benefits and the district director recommended that employer pay claimant temporary total disability benefits from November 1, 2013. The case was transferred to the Office of Administrative Law Judges (OALJ) but the parties reached their agreement prior to the date of the formal hearing.

<sup>2</sup>Claimant's counsel filed both a "Supplemental Brief in Support of Claimant's Petition for Review" on March 24, 2015, and a Reply Brief on May 13, 2015. Counsel has also attached an administrative law judge decision awarding counsel an hourly rate of \$390 for attorney work and an hourly rate of \$108 for paralegal work performed in 2014. The Board is not empowered to accept new evidence and, thus, we will not consider this attachment in the disposition of counsel's appeal. 20 C.F.R. §802.301(b).

<sup>3</sup>We affirm the administrative law judge's findings that counsel is entitled to 8.45 hours for attorney services and 3.25 hours for paralegal services as they are unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

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 falls on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation. *Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Blum*, 465 U.S. at 896 n.11; *Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4<sup>th</sup> Cir. 2010).

Relying on the regulations and relevant case law,<sup>4</sup> and acknowledging that counsel's expertise and effectiveness have been demonstrated in similar cases arising under the Act, the administrative law judge found that, based on counsel's experience and "the administrative record," the prevailing rate for highly competent counsel practicing under the Act in the Hampton Roads area is \$300 per hour. Decision and Order at 3. In reaching this conclusion, the administrative law judge found that counsel's fee petition is flawed because counsel did not submit: 1) evidence, including affidavits from other attorneys practicing in the Hampton Roads area, establishing that his requested hourly rate of \$400 is consistent with what is considered the local attorney hourly rate for similar services; or 2) information that would support an upward cost-of-living adjustment for the \$300 hourly rate. The administrative law judge also found that \$90 per hour is appropriate for the paralegal work performed in this case based on "experience" and the prevailing rate for other paralegals practicing under the Act. *Id.* The administrative law judge found that counsel did not introduce any evidence as to the paralegals' experience or qualifications, or affidavits from other local attorneys practicing in the Hampton Roads area regarding the rates for their paralegals in cases arising under the Act or involving maritime work in general. *Id.* The administrative law judge thus approved hourly rates of \$300 for attorney work and \$90 for paralegal work performed in this case.

In support of his hourly rate requests in this case, i.e., \$400 for attorney work and \$120 for paralegal work, counsel submitted evidence of rates he and his paralegals received in prior cases, along with evidence to support an upward adjustment to those figures to reflect current rates. Specifically, counsel submitted to the administrative law judge: 1) a Board Order dated March 30, 2010, *Green v. Ceres Marine Terminals, Inc.*, BRB Nos. 09-0294/A (Mar. 30, 2010) (unpub. Order), awarding counsel an hourly rate of

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<sup>4</sup>The administrative law judge generally reviewed the pertinent case law regarding the calculation of the "lodestar" figure as articulated in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5<sup>th</sup> Cir. 1974), and the requirements of Section 702.132(a), 20 C.F.R. §702.132(a). Decision and Order at 2.

\$350 for attorney work and an hourly rate of \$150 for paralegal work; 2) an administrative law judge decision, issued in 2012, awarding counsel hourly rates of \$315 for attorney work and \$95 for paralegal work; 3) an administrative law judge decision, issued in 2013, awarding counsel hourly rates of \$324 for attorney work and \$95 for paralegal work; and 4) charts listing the Legal Services Component of the Consumer Price Index (CPI), Lawyer (2009-2013), Legal Services Component of CPI, Paralegal (2009-2013), the Federal Locality Rate Adjusted CPI, Lawyer (2009-2013), and the Laffey Matrix (2003-2013).

In finding that hourly rates of \$300 for attorney work and \$90 for paralegal work are “the prevailing rate[s]” in the Hampton Roads area, the administrative law judge stated that she relied on “experience and the administrative record.” Decision and Order at 3. The administrative law judge, however, did not identify what, in her “experience or the administrative record,” led her to conclude that these hourly rates are the prevailing rates in the Hampton Roads area. *Id.* In particular, the administrative law judge was not presented with any evidence awarding those rates,<sup>5</sup> nor did she cite any other cases awarding those rates. Thus, as we are unable to assess the basis for the administrative law judge’s findings, we must conclude that, at present, the fee award is arbitrary and cannot be affirmed. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT).

Moreover, the administrative law judge did not provide a sufficient basis for rejecting counsel’s evidence. Prior fee awards may constitute “inferential evidence” of a prevailing market rate in cases arising under the Act. *Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4<sup>th</sup> Cir. 2013); *Cox*, 602 F.3d at 290; *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Newport News Shipbuilding & Dry Dock v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4<sup>th</sup> Cir. 2004); *Stanhope*, 44 BRBS 107. Additionally, contrary to the administrative law judge’s suggestion, affidavits of other attorneys are not “required” to set the prevailing market rate. *Cox*, 602 F.3d at 289-290 (the court, citing *Robinson v. Equifax Information Services, L.L.C.*, 560 F.3d 235, 245 (4<sup>th</sup> Cir. 2009), “recognized a range of sources” that could provide evidence to support an hourly rate determination: 1) evidence of fees the attorney received in the past; 2) affidavits of other local attorneys who are familiar with the applicant’s skills and the type of work in the relevant community; and/or 3) evidence of rates awarded in other administrative proceedings of similar complexity). Furthermore, prior rates should be adjusted for inflation, when appropriate, so that the rate is based on current, rather than historical,

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<sup>5</sup>We note that employer did not object to the fee counsel requested for work performed before the administrative law judge and that counsel’s supporting evidence established he received hourly rates at the OALJ level of \$315 for attorney work and \$95 for paralegal work performed in 2011, and \$324 for attorney work and \$95 for paralegal work performed in 2013.

market conditions. See generally *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9<sup>th</sup> Cir. 2009); *Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F.App'x 912 (9<sup>th</sup> Cir. 2011). Thus, claimant's evidence of rates he previously received for work in the Hampton Roads area and his request that those fees be adjusted for inflation to reflect his rate as of 2014, when he provided the services in this case, may constitute sufficient evidence of a prevailing market rate.<sup>6</sup> *Gosnell*, 724 F.3d at 572-574. In view of the absence of evidence to support the administrative law judge's market rate determinations and her erroneous rejection of counsel's evidence for lack of supporting affidavits, we must vacate her hourly rate determinations and remand the case for further consideration of this issue. On remand, the administrative law judge must reconsider counsel's evidence of fee awards in other cases and provide the specific basis for her conclusions regarding the market rate for the services of counsel and paralegals. *Gosnell*, 724 F.3d 561; *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Brown*, 376 F.3d 245, 38 BRBS 37(CRT).

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<sup>6</sup>We reject, however, counsel's use of the Board's Order in *Green v. Ceres Marine Terminals, Inc.*, BRB Nos. 09-0294/A (Mar. 30, 2010) (unpub. Order), as evidence of his market rate because the claimant's award of benefits in that case was reversed on appeal. *Green v. Ceres Marine Terminals, Inc.*, 656 F.3d 235, 45 BRBS 67(CRT) (4<sup>th</sup> Cir. 2011). Thus, counsel never received an attorney's fee in that case, and the Board's fee award cannot serve as a basis for setting a market rate.

Accordingly, the administrative law judge's hourly rate determinations are vacated, and the case is remanded for further consideration consistent with this opinion.<sup>7</sup> In all other respects, the administrative law judge's Decision and Order Awarding Attorney Fee and Costs is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge

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<sup>7</sup>Counsel has submitted a fee petition for work performed before the Board in this appeal. In the event that counsel prevails before the administrative law judge on remand, counsel may resubmit a fee petition to the Board. 20 C.F.R. §802.203(c).