



In the Matter of:

HARRY SMITH,

ARB CASE NOS. 12-112  
12-113

COMPLAINANT,

ALJ CASE NO. 2006-STA-032

v.

DATE: September 12, 2013

LAKE CITY ENTERPRISES, INC.,

and

CRYSTLE L. MORGAN,

RESPONDENTS.

**Appearances:**

*For the Complainant:*

**Richard R. Renner, Esq., Kohn, Kohn and Colapinto, L.L.P., Washington, District of Columbia**

*For the Respondents:*

**Brent L. English, Esq., Law Offices of Brent L. English, Cleveland, Ohio**

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Deputy Chief Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals Judge**

**ORDER AWARDING ATTORNEY'S FEES**

Harry Smith filed a complaint under the whistleblower protection provisions of the Surface Transportation Assistance Act (STAA)<sup>1</sup> and its implementing regulations.<sup>2</sup> After a hearing, a Department of Labor Administrative Law Judge (ALJ) determined that

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<sup>1</sup> 49 U.S.C.A. § 31105 (Thomson/West Supp. 2013)(STAA).

<sup>2</sup> 29 C.F.R. Part 1978 (2012).

Smith's employer, Lake City Enterprises, Incorporated (LCE), violated the STAA and awarded Smith back pay and compensatory damages. The ALJ also found that LCE's owner, Crystle L. Morgan, was personally liable for damages.<sup>3</sup>

The Administrative Review Board (ARB or Board) affirmed the ALJ's decision but remanded the case for the ALJ to consider Smith's motion to re-open the record, recalculate the amount of back pay, determine if front pay was appropriate, and assess interest and the amount of Smith's insurance benefits.<sup>4</sup> On remand, the ALJ awarded Smith an additional \$19,162.44 in back pay, which included insurance benefits, for a total of \$36,961.63 plus interest, but denied an award of front pay.<sup>5</sup> Smith appealed to the ARB, which increased the award of back pay to \$65,162.44 and affirmed the ALJ's order denying front pay.<sup>6</sup>

Subsequently, the ALJ issued a Supplemental Decision and Order (Supp. D. & O.) awarding attorney's fees of \$7,280.00 plus costs of \$440.13 for a total amount of \$7,720.13.<sup>7</sup> Both parties appealed the ALJ's supplemental decision to the ARB, which consolidated the appeals for resolution.

#### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978.<sup>8</sup> The ARB reviews an ALJ's award of attorney's fees under an abuse-of-discretion standard,<sup>9</sup> which includes determining whether the ALJ's factual findings are supported

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<sup>3</sup> *Smith v. Lake City Enters., Inc.*, ALJ No. 2006-STA-032 (ALJ May 21, 2008).

<sup>4</sup> *Smith v. Lake City Enters., Inc.*, ARB Nos. 08-091, 09-033; ALJ No. 2006-STA-032 (ARB Sept. 28, 2010).

<sup>5</sup> *Smith v. Lake City Enters., Inc.*, ALJ No. 2006-STA-032 (ALJ Aug. 24, 2011).

<sup>6</sup> *Smith v. Lake City Enters., Inc.*, ARB No. 11-087, ALJ No. 2006-STA-032 (ARB Nov. 20, 2012).

<sup>7</sup> *Smith v. Lake City Enters., Inc.*, ALJ No. 2006-STA-032 (Sept. 11, 2012).

<sup>8</sup> Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1978.109(a).

<sup>9</sup> *See Grissom v. The Mills Corp.*, 549 F.3d 313, 320 (4th Cir. 2008) (reviewing for abuse of discretion district court's attorney's fee award in Sarbanes-Oxley Act whistleblower action).

by the substantial evidence of record,<sup>10</sup> and considering de novo whether the ALJ's legal conclusions are in accordance with applicable law.<sup>11</sup>

Effectively, the ARB has embraced the abuse-of-discretion standard applied by federal appellate courts in the review of a district court's attorney fee award. "[R]eview of the district court's award is sharply circumscribed; we have recognized that because a district court has close and intimate knowledge of the efforts expended and the value of the services rendered, the fee award must not be overturned unless it is clearly wrong."<sup>12</sup> Consideration is given to "whether the decision-maker failed to consider a relevant factor, whether he [or she] relied on an improper factor, and whether the reasons given reasonably support the conclusion."<sup>13</sup> Additionally, abuse of discretion will be held to occur if the tribunal "did not apply the correct legal standard . . . or if it misapprehended the underlying substantive law."<sup>14</sup>

## DISCUSSION

The STAA provides: "If the Secretary issues an order [finding a STAA violation] and the complainant requests, the Secretary may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint . . . ."<sup>15</sup> Reasonableness is the key. The ARB has endorsed the lodestar method for calculating attorney's fees. This method requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate.<sup>16</sup>

An attorney seeking a fee award must submit evidence documenting the hours worked and the rates claimed, as well as records identifying the date, time, and duration

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<sup>10</sup> 29 C.F.R. § 1978.109(c)(3); *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted).

<sup>11</sup> *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

<sup>12</sup> *Grissom*, 549 F.3d at 320 (citing *Plyler v. Evatt*, 902 F.2d 273, 277-78 (4th Cir. 1990)).

<sup>13</sup> *Johnson v. United States*, 398 A.2d 354, 365 (D.C. 1979).

<sup>14</sup> *Hunt v. National Broadcasting Co., Inc.*, 872 F.2d 289, 292 (9th Cir. 1989). *See also Kickapoo Tribe of Indians v. Babbit*, 43 F.3d 1491, 1497 (D.C. Cir. 1995).

<sup>15</sup> 49 U.S.C.A. § 31105(a)(3)(B).

<sup>16</sup> *Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 1998-STA-008, slip op. at 5 (ARB May 29, 2003).

necessary to accomplish each specific activity and all claimed costs. In addition, the attorney must demonstrate the reasonableness of his hourly fee by producing evidence that the requested rate is in line with fees prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.<sup>17</sup>

A request for the award of attorney's fees and litigation costs incurred before an ALJ is within the jurisdiction of the ALJ to decide initially, subject to ARB review.<sup>18</sup> A request for the award of attorney's fees and litigation costs incurred before the ARB is within the jurisdiction of the ARB to decide.<sup>19</sup>

*Complainant's arguments on appeal*

Smith's attorney, Richard R. Renner, initially challenges the hourly fee rate of \$325.00 that the ALJ approved. He argues, as he did before the ALJ, that he is entitled to an hourly rate of \$495.00 based on the prevailing rates established by the U.S. Department of Justice's Laffey Matrix<sup>20</sup> for attorneys in the Washington, D.C. metropolitan area, where Renner had relocated and currently resides.<sup>21</sup>

The ALJ was well within his discretion, and in accord with ARB precedent, to deny the request for the increased hourly rate. The ALJ properly concluded that the relevant market community for determining a reasonable hourly billing rate for the legal work performed before the ALJ is the place where the case was filed, which in this case was Cincinnati, Ohio.<sup>22</sup> The ALJ reasonably determined that Renner's relocation to an area where hourly rates for legal services are larger (D.C.) does not require an increase in the hourly rate larger than that in the community where the complaint was filed (Ohio).

It is well established that hourly rates for determining an attorney's fee award for legal services performed before an ALJ are the prevailing rate in the relevant community,

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<sup>17</sup> *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, -161; ALJ No. 2003-STA-055, slip op. at 3 (ARB Apr. 3, 2008).

<sup>18</sup> 29 C.F.R. § 1978.109(d)(1).

<sup>19</sup> 29 C.F.R. § 1978.110(d).

<sup>20</sup> The United States Attorney's Office for the District of Columbia provides updated data for the Laffey Matrix, which shows hourly rates for attorneys with varying years of experience who practice in the D.C. metropolitan area and before federal agencies. *See* [http://www.justice.gov/usao/dc/divisions/Laffey\\_Matrix\\_2003-2013.pdf](http://www.justice.gov/usao/dc/divisions/Laffey_Matrix_2003-2013.pdf).

<sup>21</sup> Complainant's Brief at 5-16.

<sup>22</sup> *Clemmons v. Ameristar Airways, Inc.*, ARB No. 11-161, 2004-ALJ-011, slip op. at 5 (ARB Apr. 27, 2012); *see also Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, 2004-ALJ-011, slip op. at 3 (ARB June 7, 2011).

in this case where the complaint was filed, and that the attorney requesting a fee must “produce satisfactory evidence - in addition to the attorney’s own affidavits - that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.”<sup>23</sup> While Renner submitted affidavits from two attorneys who asserted that the \$495.00 hourly rate Renner requested was reasonable, no evidence was produced indicating that such a rate is prevailing in the Cincinnati, Ohio area for attorneys with Renner’s years of practice, experience, and expertise.

The ALJ appropriately rejected Renner’s argument that since he had moved to Washington, D.C. and joined a D.C. law firm, his hourly rate should be calculated according to the prevailing rates in that area.<sup>24</sup> Instead, the ALJ determined that \$325.00 an hour was a reasonable hourly rate for the legal services Renner performed upon consideration of “the quality of the representation, Mr. Renner’s reputation, expertise, and experience, and the nature of the issues involved, the prevailing market rates, and the level of the proceedings to which this claim was raised.”<sup>25</sup> In the absence of any evidence indicating that the \$325.00 hourly rate the ALJ awarded was *not* the prevailing market rate for the Cincinnati metropolitan area, we affirm the ALJ’s rate determination as was well within his discretion and in accord with applicable law.<sup>26</sup>

Renner next argues that the ALJ erred in discounting the hours of service he rendered before the U.S. Court of Appeals for the Sixth Circuit and the bankruptcy court in representing Smith, as well as before the ARB. Renner provided a list of services from June 22, 2008, to April 30, 2012, and sought fees for 89.9 hours at \$495.00 an hour plus costs of \$3,110.43 for him and \$77.52 for Smith, totaling \$47,688.45. He also asserts that he is entitled to fees for preparing his fee petition, for travel time to the remand hearing and the bankruptcy court pre-trial, and for additional costs and expenses.<sup>27</sup>

The ALJ found that that the entries for legal services from June 22, 2008, to September 28, 2010, and August 29, 2011, to April 30, 2012, were for services rendered while the case was on appeal to the ARB and/or pending in bankruptcy court. The ALJ

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<sup>23</sup> *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984); *Jackson v. Butler & Co.*, ARB Nos. 03-116, -144, ALJ No. 2003-STA-026, slip op. at 11 (ARB Aug. 31, 2004).

<sup>24</sup> Supp. D. & O. at 2-4.

<sup>25</sup> *Id.* at 3-4.

<sup>26</sup> While the ALJ did not address the issue of a delay in Renner’s receipt of fees, the \$325.00 hourly rate constitutes an increase over the ALJ’s previous fee award rate of \$300.00 that he had approved in his October 14, 2008 decision awarding legal fees, which the ARB affirmed in 2010, *Smith*, ARB Nos. 08-091, 09-033; slip op. at 13-14. We consider this increase reasonable for the time Smith’s case was on remand before the ALJ in 2011-12.

<sup>27</sup> Complainant’s Brief at 20-25.

noted that the only entries for work on remand before the ALJ over which he had jurisdiction were those from October 18, 2010, to August 29, 2011, and the legal fee preparation item on April 30, 2012. The ALJ appropriately concluded that he could not award fees for services performed before another tribunal and considered that only those services totaling 29.9 hours plus part of the time spent preparing the fee petition on April 30, 2012, could be considered by the ALJ for award, of which 22.4 hours were held to be compensable.<sup>28</sup>

In considering whether the fees requested were reasonably incurred in the successful prosecution of a complaint, the ARB has held that services peripheral to the litigation are not compensable. For example, an attorney's time spent on accounting and tax issues related to a complainant's damages is not compensable because the services were not integral to litigation of the case.<sup>29</sup> Further, an ALJ has no authority to award attorney's fees for services before a federal court of appeals or a bankruptcy court.<sup>30</sup> The ALJ properly considered only those services rendered before him.

Renner argues that the ALJ erred in reducing by half entries for travel to the ALJ hearing on April 4 and 5, 2011 and to the bankruptcy court on February 10, 2012 because he had submitted only half the number of combined hours actually spent.<sup>31</sup> The ALJ properly disregarded travel to and from the bankruptcy court as beyond the scope of his jurisdiction to award legal fees and costs. The ALJ recognized that Renner was entitled to compensation for one-half the 13.8 hours he spent in travel time to attend the ALJ's hearing, and the ALJ properly reduced these hours to 6.9 hours for purposes of award.<sup>32</sup> Further, the ALJ properly reduced the time requested for preparing the legal fee petition because it included many entries for work performed before other tribunals.<sup>33</sup>

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<sup>28</sup> Supp. D. & O. at 4-5, 6.

<sup>29</sup> *Pierce v. U.S. Enrichment Corp.*, ARB Nos. 06-055, -058, 119; slip op. at 3 (ARB Feb. 27, 2009).

<sup>30</sup> 29 C.F.R. § 1978.109(d)(1). On the other hand, the ARB retains in certain circumstances authority to award legal fees and costs of litigation in proceedings before a federal court of appeals or a bankruptcy court, provided the representation involved is integral to the underlying whistleblower complaint. *Pierce*, ARB Nos. 06-055, -058, 119; slip op. at 3.

<sup>31</sup> Complainant's Final Brief at 24-25.

<sup>32</sup> See *Smith*, ARB Nos. 08-091, 09-033; slip op. at 14 (travel time is generally compensated, but often at a reduced rate) (citations omitted).

<sup>33</sup> Supp. D. & O. at 5.

Respondent Crystle Morgan contends that Renner is not entitled to a \$325.00 hourly rate, the Laffey Matrix is not applicable, and Renner should be paid no more than \$3,000.00 for his services on remand.<sup>34</sup> For the reasons previously addressed, we reject the Respondent's arguments on appeal.

Finally, Renner's argument that the delay in the award of his legal fees be considered is not unreasonable. The ALJ issued his decision awarding fees on September 11, 2012. Renner's appeal and the Respondent's cross-appeal in opposition to the ALJ's award have resulted in almost a year's delay in payment. Consequently, in fairness and equity, and consistent with legal authority, we add a five percent increase to the ALJ's hourly rate of \$325.00, raising that rate to \$340.00 an hour.<sup>35</sup> The total award to which Renner is entitled for his legal services on Smith's behalf on remand is thus to \$7,616.00.

### CONCLUSION

We find that the ALJ acted within his discretion and in accord with applicable law in concluding that Renner is entitled to the legal fees and litigation costs awarded. Due to the delay in payment, we modify the ALJ's award to reflect the increased hourly rate and order the Respondent to pay Renner a total of \$8,056.13, which constitutes \$7,616.00 in attorney's fees at the increased rate of \$340.00 an hour and \$440.13 in litigation expenses.

**SO ORDERED.**

**PAUL M. IGASAKI**  
Chief Administrative Appeals Judge

**E. COOPER BROWN**  
Deputy Chief Administrative Appeals Judge

**LISA WILSON EDWARDS**  
Administrative Appeals Judge

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<sup>34</sup> Respondent's Response Brief at 1-4.

<sup>35</sup> See *Doyle v. Hydro-Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022, slip op. at 15-16 (ARB May 17, 2000), *overturned on other grounds*, *Doyle v. United States Sec'y of Labor*, 285 F.3d 243 (3d Cir. 2002) (fee enhancement premised on the amount of the award plus the amount of the award multiplied by the percentage change in Consumer Price Index – All Urban Consumers, U.S. city average (CPI-U)); see *Collins v. The Village of Lynchburg, Ohio*, ARB No. 09-040, ALJ No. 2006-SDW-003, slip op. at 2-3 (ARB June 30, 2009) (affirming the ALJ's application of the *Doyle* formula).