BRB No. 22-0180

RANDALL HARPER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TEMCO, LLC	)	
	)	DATE ISSUED: 12/14/2023
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Attorney Fee Order, the Order Denying Reconsideration, and the Order Granting Respondent's Motion for Reconsideration of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz and M. Elizabeth Duncan (Law Office of Charles Robinowitz), Portland, Oregon, for Claimant.

Robert E. Babcock and James R. Babcock (Babcock Holloway Caldwell & Stires, PC), Lake Oswego, Oregon, for Employer/Carrier.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order, the Order Denying Reconsideration, and the Order Granting Respondent's Motion for Reconsideration (2015-LHC-01365) of Administrative Law Judge (ALJ) Richard M. Clark rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (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, based on an abuse of

discretion, or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant filed a claim for head, neck, back, hearing, and vision injuries that occurred while working for Employer on February 5, 2014.[1] On April 10, 2018, the ALJ issued a decision and order approving a Section 8(i) settlement agreement, 33 U.S.C. §908(i), resolving all claims for disability compensation and medical benefits between Claimant and Employer. Attorney Fee Order (Fee Order) at 1. The settlement agreement stipulated Employer would pay attorney's fees and costs, but the parties could not agree upon an amount. *Id.*

Claimant's counsel, Charles Robinowitz, submitted his fee petition to the ALJ. He requested $71,756.25 in fees and $3,438.11 in costs, plus a 6.7% enhancement on costs for delay in payment. Declaration of Attorney Fees and Costs (Fee Pet.) at 15-16. He sought fees at the following rates: $520 per hour for himself; $285 per hour for associate attorney Genavee Stokes-Avery; $175 per hour for legal assistant Jamie Khan; and $150 per hour for legal assistant June Glisson.[2] *Id.* As support for his requested hourly rate, counsel submitted: 1) affidavits from Phil Goldsmith and David Markowitz; 2) an excerpt from the 2017 Oregon State Bar (OSB) Economic Survey; 3) an order from the Appellate Commissioner for the United States Court of Appeals for the Ninth Circuit regarding attorney fees in *Knutson Towboat Co. v Wakeley*, No. 14-70990 (9th Cir. App. Comm'r Aug 22, 2017); 4) the Benefits Review Board's fee award in *Seachris v. Brady-Hamilton Stevedore Co.*, BRB No. 11-0104 (Oct. 17, 2016) (unpub.) ("*Seachris* BRB Award"); and 5) the 2014 Morones Survey rates for commercial litigators. Exhs. to Fee Pet.

Employer filed an Objection to the Application for Attorney Fees, arguing the fee petition was premature, challenging the hourly rates requested as excessive, and arguing the hours should be reduced. Claimant's counsel filed a reply to Employer's objections and included a request for an additional $2,513.25 in fees for time spent attempting to

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the injury occurred in Oregon. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[2] Although the ALJ initially identified this legal assistant as "June Gibson" (Fee Order at 2), he later referred to her as "June Glisson," which is supported by Claimant's original Fee Petition (at 19), and Claimant's Petition for Review (at 3). The fee requested, excluding costs, represents: 120.7 hours at $520 per hour ($62,764); 26.85 hours at $285 per hour ($7,652.25); 5.9 hours at $150 per hour ($885); and 2.6 hours at $175 per hour ($455).

resolve the fee dispute through settlement and replying to Employer's objections. In all, counsel sought $77,707.61 in fees and costs, plus a 6.7% enhancement of costs for delay. Claimant's Reply to Carrier's Objections (Fee Reply).

ALJ's Orders

Initial Order Awarding Fees

On June 20, 2019, the ALJ issued an Attorney Fee Order awarding Claimant's counsel $58,549.01 in fees and costs. Fee Order at 1-2. The ALJ accepted the parties' agreement that Portland, Oregon, was the relevant community for determining counsel's hourly rate. *Id*. at 4. He noted counsel had "extensively litigated his hourly rate before" the San Francisco Office of Administrative Law Judges and the Board, and the evidence counsel presented in this claim was "much the same" as that which had recently been considered by himself and other ALJs, most notably ALJs Jennifer Gee and Steven Berlin. *Id*. at 6-8 (citing *Wilson v. Mantech Int'l Corp.*, ALJ No. 2015-LDA-00587 (Aug. 29, 2018); *Serbinovich v. Gunderson*, ALJ No. 2013-LHC-01372 (Aug. 2, 2018); *Newcomer v. Dyncorp Int'l*, ALJ Nos. 2011-LDA-00658 & -00659 (ALJ Mar. 20. 2018), *aff'd*, BRB No. 18-0316 (BRB Jan. 25, 2019) (unpub.); *Wakeley v. Knutson Towboat Co.*, ALJ No. 2007-LHC-01749 (ALJ Jan. 26, 2018), *aff'd*, BRB No. 18-0238 (BRB Dec. 20, 2018) (unpub.); *Seachris v. Brady-Hamilton Stevedore Co.*, ALJ No. 2007-LHC-01747 (ALJ Jan. 19, 2017), *aff'd in relevant part*, BRB No. 17-0581 (BRB May 7, 2018) (unpub.) (*"Seachris* ALJ Order"); and *Ayers v. Jones Stevedoring Co.*, ALJ No. 2011-LHC-01875 (ALJ June 1, 2016), *aff'd in relevant part*, BRB No. 16-0420 (BRB Apr. 24, 2017) (unpub.), *recon. denied* (Aug. 5, 2017)).

The ALJ found he, ALJ Gee, and ALJ Berlin had previously considered and rejected the proffered affidavits of Mr. Goldsmith and Mr. Markowitz, as well as the 2014 Morones Survey, in *Serbinovich*, *Newcomer*, *Wakeley*, the *Seachris* ALJ Order, and *Ayers*. He thus saw "no need to revisit the reasoning rejecting" this evidence. *Id*. at 8. He further found both ALJs Gee and Berlin had rejected the evidence of fees awarded at the appellate level based on the differences between appellate and trial work, *id*. at 8 (citing *Serbinovich*, *Newcomer*, and *Wakeley*), and he also had previously explained how trial level work differs from appellate level work, *id*. (citing *Ayers*); he therefore rejected the evidence of fees awarded to counsel at the appellate level. *Id*.

Upon the rejection of these documents, the only remaining support for counsel's hourly rate was the 2017 OSB Economic Survey, which the ALJ noted ALJ Berlin had cited as supporting an hourly rate of $350 for Mr. Robinowitz, looking to the 75th percentile of rates for plaintiff civil litigation including personal injury and plaintiff personal injury civil litigation. Fee Order at 8 (citing *Serbinovich*). He further noted both he and ALJ Gee had previously determined counsel's "skill, reputation, and experience

place him in the 75th percentile rather than the 95th percentile." *Id*. at 9 (citing *Ayers*, the *Seachris* ALJ Order, *Wakeley*, and *Newcomer*). He therefore saw "no need to revisit the determination that [counsel] is appropriately compensated at the 75th percentile." *Id*. The ALJ determined, "[b]ased on the record…and the previous determinations of [his] rate, $350 is a reasonable rate for [counsel's] work in 2016." *Id*. However, he adjusted the $350 per hour to $352 per hour, based on Employer's calculation of the hourly rate using the 2017 OSB Economic Survey in this claim and ALJ Gee's methodology in *Newcomer* and *Wakeley*, which resulted in a rate of $352.38 per hour for 2016 work. *Id*. He then enhanced the rate for the 3-to-4-year delay in payment, adjusting the 2016 market rate of $352 per hour to 2019 levels,[3] resulting in an hourly rate award of $389 per hour. *Id*. at 10.

The ALJ next determined the hourly rates to be awarded counsel's associate and legal assistants. Fee Order at 11. Based on rates previously awarded to Ms. Stokes-Avery, *id*. (citing *Wilson*, *Wakeley*, and the *Seachris* ALJ Order), as well as the absence of information regarding her skill, reputation, and experience in Longshore matters, the ALJ concluded her market rate was $238 per hour, based on the 25th percentile for plaintiff personal injury civil litigation and plaintiff general civil litigation in 2016. *Id*. He then enhanced the fee to 2019 rates to account for the delay in payment, resulting in an awarded rate of $263 per hour.[4] *Id*. The ALJ awarded both Ms. Khan and Ms. Glisson a rate of $150 per hour, finding counsel had failed to establish Ms. Khan was entitled to the higher rate of $175 per hour, especially considering prior ALJ determinations that "'[a]wards for paralegals in the Portland relevant community have clustered about $150.00/hour' and that no evidence 'show[s] that the market has changed or that this rate requires updating.'" *Id*. at 12 (quoting *Wakeley*, ALJ D&O at 33, and citing *Wilson* and *Ayers*).

Having determined the hourly rates, the ALJ examined the hours billed. Fee Order at 12. He deducted 3.1 hours of time counsel spent traveling to and from doctors' offices for conferences and a deposition. *Id*. at 13. The ALJ deducted another 1.5 hours from time counsel billed for reviewing a settlement offer and sending a counteroffer, finding the time billed excessive. *Id*. at 17. The ALJ also reduced other time entries as either clerical or excessive. In all, the ALJ reduced counsel's billed time by 4.85 hours, Ms. Stokes-Avery's billed time by 0.65 hour, and Ms. Glisson's billed time by 0.75 hour. *Id*. at 15-17.

---

[3] The ALJ used the Consumer Price Index for all Urban Consumers (CPI-U) for the Portland-Salem area for 2016 through 2017. Because the CPI-U for Portland-Salem was discontinued in 2018, he used the CPI-U for the Western Region to make adjustments from 2017 through 2019. Fee Order at 10, n.16 & n.17.

[4] The ALJ calculated the enhancement using the same methodology he used to enhance Mr. Robinowitz's hourly rate. *See* footnote 3, *supra*.

Finally, the ALJ denied counsel's request for a 6.7% enhancement of costs as compensation for delay in payment, finding counsel failed to cite any authority justifying the request or provide evidence that he actually paid the costs in 2015. *Id*. at 18.

Order on Claimant's Motion for Reconsideration

On July 9, 2019, Claimant's counsel filed a motion for reconsideration of the hourly rates awarded and included additional evidence to support his requested hourly rates: a declaration from Mr. Robert Bonaparte and a fee award in an Oregon state court case dated November 28, 2018. Order Denying Reconsideration (Recon. Denial I) at 1-2. Employer opposed the motion as untimely and because it impermissibly provided new arguments and evidence without justification. *Id*. at 2.

On July 22, 2019, the ALJ denied counsel's motion for reconsideration as untimely. Recon. Denial I. Claimant's counsel appealed this order. On April 8, 2020, the Board issued a Decision and Order reversing the denial of counsel's motion for reconsideration, which it held had been timely filed in accordance with the mailing provision found in 20 C.F.R. §802.206(c). *Harper v. Temco, LLC*, 54 BRBS 1, 2-3 (2020). The Board remanded the claim for the ALJ to address the issues raised in counsel's motion. *Id*. at 3.

On September 30, 2021, the ALJ issued a second Order Denying Reconsideration (Recon. Denial II), this time on the merits. He refused to admit the new evidence Claimant's counsel submitted with his motion, finding counsel could have obtained and submitted it before the Fee Order was issued but failed to do so[5] and failed to present legal support or a compelling argument in favor of its late submission. Recon. Denial II at 4-5. However, the ALJ awarded counsel an additional $3,073.10 in fees (7.9 hours at $389 per hour) for work performed after the issuance of the Fee Order. *Id*. at 5.

Order on Employer's Motion for Reconsideration

Employer subsequently submitted a motion for reconsideration of Recon. Denial II, arguing the ALJ erred in awarding additional fees because they were incurred on counsel's unsuccessful motion for reconsideration. On December 28, 2021, the ALJ issued an Order Granting Respondents' Motion for Reconsideration and Denying Fees (Recon. Order). The ALJ agreed with Employer, acknowledging he failed to consider the extent of Claimant's success when awarding fees for work performed after issuance of the original Fee Order,

[5] The ALJ acknowledged the Oregon State Court fee award was issued about a month after counsel filed his brief and reply; however, he found counsel could have moved to re-open the record in accordance with 29 C.F.R. §18.90(b)(1) but failed to do so. Recon. Denial II at 4.

and therefore disallowed the additional $3,073.10 in fees he previously awarded counsel. Recon. Order at 3-4.

Current Appeal

Claimant appeals the three orders, raising the following issues: 1) whether the ALJ erred in his calculation of the hourly rates awarded counsel, associate attorney Ms. Stokes-Avery, and legal assistant Ms. Khan by rejecting all market rate evidence and basing his calculations on other ALJ-awarded rates; 2) whether the ALJ erred in disallowing time for review of settlement documents and for travel; and 3) whether the ALJ erred in refusing to award interest on costs to account for delay. Employer responds, urging affirmance, and Claimant filed a reply.

Market Rate

The Supreme Court of the United States has held the lodestar method, by 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 federal fee-shifting statutes 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). It is well-established an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see Perdue*, 559 U.S. at 551. As this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the determination as to an appropriate hourly rate is guided by the court's decision in *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1089, 49 BRBS 93, 96-97(CRT) (9th Cir. 2015), which reiterated, in awarding a fee under the Act, an ALJ must define the relevant community and consider market rate information tailored to that market. Once the ALJ accepted the parties' agreement that Portland, Oregon, was the relevant community for determining counsel's hourly rate, the burden was on Claimant's counsel to produce satisfactory evidence showing the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation. *Shirrod,* 809 F.3d 1082, 49 BRBS 93(CRT); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *see Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Blum*, 465 U.S. at 896 n.11.

Claimant's counsel contends the ALJ unreasonably rejected most of his market rate evidence in favor of hourly rate determinations from prior ALJ awards and thus awarded him a below-market rate. Counsel argues this contradicts Ninth Circuit precedent in *Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066, 1078, 55 BRBS 1, 6(CRT) (9th

Cir. 2021),[6] as well as Board precedent in *Hernandez v. National Steel and Shipbuilding Co.*, 54 BRBS 13 (2020). For the reasons set forth below, we vacate the hourly rate awarded to Mr. Robinowitz and remand the case to the ALJ for further consideration.

At the outset, the ALJ did not sufficiently explain his rejection of counsel's evidence and ultimate calculation of Mr. Robinowitz's market rate, repeatedly stating there was "no need to revisit" prior analyses by himself and two other ALJs. Fee Order at 8-9. While an ALJ may advert to prior fee awards under the Act if a claimant has failed to meet his burden of establishing a market rate, *see Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT) (citing *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 251, 38 BRBS 37, 41(CRT) (4th Cir. 2004)), the ALJ summarily relied on prior awards issued between 2016 and 2018 to both reject counsel's evidence and to set his market rate without further discussion. Attempts to "define a 'market' simply by looking to what other judges award" is inherently flawed as consideration of the "relevant community" is broader than prior fee awards under the Act and should include fees attorneys could obtain for similar services in other types of cases. *Christensen*, 557 F.3d at 1054, 43 BRBS at 9(CRT) (quoting *Student Pub. Interest Research Group of N.J. v. AT&T Bell Laboratories*, 842 F.2d 1436, 1446 (3d Cir. 1988)).

Moreover, while the ALJ has the discretion to determine the appropriate percentile at which counsel should be compensated, he must fully consider all relevant evidence, provide specific explanations for his findings, and not rely on improper factors. *Seachris*, 994 F.3d at 1080, 55 BRBS at 8(CRT). The ALJ failed to do so in this case, instead referencing only prior fee awards placing counsel in the 75th percentile of Portland attorneys as adequate to support his continued placement in the 75th percentile. Fee Order at 9. By summarily rejecting counsel's proffered evidence based on prior awards and adopting percentiles and market rates awarded by other ALJs, the ALJ erroneously "reverted to the 'tautological, self-referential enterprise' condemned" by the Ninth Circuit. *Hernandez*, 54 BRBS at 14 (quoting *Christensen*, 557 F.3d at 1054, 43 BRBS at 8(CRT)). Notably, the Ninth Circuit has subsequently vacated two of the fee awards the ALJ cited in support of his rejection of Claimant's counsel's proffered evidence. *Seachris*, 994 F.3d 1066, 55 BRBS 1(CRT); *see also Wakeley v. Knutson Towboat Co.*, No. 19-70399, 2021 WL 3702008 (9th Cir. Aug. 20, 2021).

[6] Although *Seachris* was issued after the ALJ's original Fee Order, it was issued prior to his Order Denying Reconsideration dated September 20, 2021. Regardless, where a court publishes a case that applies a rule of law, that rule becomes the controlling interpretation and must be applied in all cases still open on direct review. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993); *James B. Beam Distilling Co. v Georgia*, 501 U.S. 529 (1992); *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994).

The ALJ also erred in rejecting the affidavits and the 2014 Morones Survey as insufficient evidence of counsel's market rate because of ALJ Gee's and his own previous rejection of them in prior claims, including *Seachris*. Fee Order at 8. In *Seachris*, the Ninth Circuit held ALJ Gee erred in rejecting the very same evidence because it was "'too old to be very useful' and 'simply too dated to be convincing.'" *Seachris*, 994 F.3d at 1077, 55 BRBS at 6(CRT). Although acknowledging the importance of relying on current market conditions when determining the market rate, the court emphasized "[e]vidence of historical market conditions…is nevertheless relevant evidence of the current market conditions." *Id*., 994 F.3d at 1077-1078, 55 BRBS at 7(CRT). The Ninth Circuit held ALJ Gee further erred in rejecting the affidavits[7] and the Morones Survey because they involved rates charged by attorneys practicing commercial litigation. *Id*., 994 F.3d at 1078, 55 BRBS at 6-7(CRT). According to the court:

> The question is not whether [counsel] qualifies as a commercial litigator; it is whether the rates charged by commercial litigators are relevant comparators—i.e., whether the rates involve "similar services by lawyers of reasonably comparable skill, experience, and reputation."

Id. (quoting *Blum*, 465 U.S. at 896 n. 11). Therefore, the court held such evidence was sufficient to meet counsel's "initial burden of production" establishing the reasonableness of his requested fee. *Seachris*, 994 F.3d at 1077-1080, 55 BRBS at 6-8(CRT).

Likewise, the ALJ erred in rejecting counsel's evidence of market rates awarded at the appellate level. The ALJ justified excluding this evidence from his analysis because of the differences between appellate and trial work, but did not provide further explanation, instead referencing explanations previously provided by himself, ALJ Gee, and ALJ Berlin in prior fee awards. Fee Order at 8. Once again, the ALJ doubly erred, not only in basing his rejection of this evidence largely on prior fee awards, *Hernandez*, 54 BRBS at 14, but also in failing to provide a meaningful explanation justifying his differentiation between trial and appellate work. *Shirrod*, 809 F.3d at 1090, 49 BRBS at 98(CRT); *Van Skike*, 557 F.3d at 1048, 43 BRBS at 15(CRT); *see also, e.g.*, *Seachris*, 994 F.3d at 1083 n.8, 55 BRBS at 10 n.8(CRT) ("Nothing in the record suggests that the tasks delegated to a paralegal are so dissimilar in trial versus appellate work to justify different rates for paralegals in the trial and appellate phases of litigation."); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138, 141 (1986) (the Board held "a different billing standard need not be applied" to trial work and appellate work). For these reasons, the ALJ must reconsider

[7] The affidavits ALJ Gee erroneously rejected are the same ones rejected by the ALJ herein. *Seachris*, 994 F.3d at 1072, 55 BRBS at 2(CRT); Fee Order at 5.

counsel's market rate evidence to arrive at a fully explained hourly rate based on a market analysis.

Counsel also appeals the market rates awarded to associate attorney Ms. Stokes-Avery and legal assistant Ms. Khan. Cl. PR at 22-23. As for Ms. Stokes-Avery's market rate of $238 per hour,[8] counsel argues the ALJ erred by rejecting both the Morones Survey evidence of rates awarded in commercial litigation and the OSB evidence of rates based on years of experience. Cl. PR at 23. However, counsel never requested the ALJ use the Morones Survey's commercial litigation data in calculating Ms. Stokes-Avery's rate; rather, he based the requested $285 per hour solely on the OSB data relying on years of experience. Fee Pet. at 19. The ALJ considered but rejected this evidence, finding counsel "provided very little information regarding Ms. Stokes-Avery's skill, reputation, and experience with Longshore matters." Fee Order at 11. In fact, counsel's fee petition devotes only one paragraph to extoll Ms. Stokes-Avery's credentials which included only two sentences about her background and no reference to her experience with the Act. Fee Pet. at 18-19.

Per counsel's request, the ALJ calculated Ms. Stokes-Avery's hourly rate based on the 2017 OSB. He averaged the 25th percentile for plaintiff general civil litigation ($225 per hour) and the 25th percentile for plaintiff personal injury civil litigation ($250 per hour) to arrive at $238 per hour, then adjusted that rate to $263 to reflect the market rate as of 2019. Fee Order at 11. The ALJ, therefore, analyzed the market rate evidence counsel presented in support of the requested rate of $285 per hour and provided a rational basis for his proxy market rate determination. *See Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT); *Christensen*, 44 BRBS at 40. As his conclusion is reasonable, *see Shirrod*, 809 F.3d at 1092, 49 BRBS at 98-99(CRT), and *Christensen*, 44 BRBS at 40, Claimant's counsel has failed to establish the ALJ abused his discretion in finding $238 represents a reasonable market rate in 2016. *See* Fee Order at 11; *see generally Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Therefore, we affirm the ALJ's finding that the 2016 market rate for work performed by Ms. Stokes-Avery is $238 per hour, enhanced to a 2019 rate of $263 per hour to account for delay.

We likewise affirm the hourly rate of $150 awarded to legal assistant Ms. Khan. Claimant's counsel requested $150 per hour for legal assistant Ms. Glisson, but requested $175 per hour for Ms. Khan, based on years of experience and a prior fee award issued by the Ninth Circuit appellate commissioner, plus inflation. Fee Pet. at 19. The ALJ found

[8] The ALJ enhanced the awarded market rate of $238 per hour to $263 per hour to account for delay, as "the majority of her time on this case occurred three years ago." Fee Order at 11.

counsel failed to establish an elevated market rate of $175 for Ms. Khan, as he did not provide any information which would allow a comparison between Ms. Khan's skills and experience with other paralegals in the Portland community. Fee Order at 12. The ALJ, therefore, awarded $150 per hour to both Ms. Glisson and Ms. Khan. *Id*.

Counsel has not shown the ALJ abused his discretion in rejecting the rate requested for Ms. Khan. The burden was on Claimant's counsel to produce satisfactory evidence "that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *see Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994). The ALJ rationally found counsel failed to meet this burden. Given the ALJ's broad discretion in determining fee awards, Claimant's counsel has not established the ALJ erred in finding his conclusory statement regarding Ms. Khan's 20 years of experience and reference to one prior fee award insufficient to entitle Ms. Khan to a higher hourly rate than what is customarily charged by paralegals in the Portland community. *Seachris*, 994 F.3d at 1083, 55 BRBS at 9(CRT). As the ALJ's decision was reasonable, we affirm his hourly rate award of $150 for both legal assistants.

In sum, the ALJ erroneously rejected most of counsel's evidence of the prevailing market rates and improperly adopted the hourly rates of prior fee awards without sufficient explanation. *Seachris*, 994 F.3d 1066, 55 BRBS 1(CRT); *Hernandez*, 54 BRBS 13. Therefore, we vacate the ALJ's awarded hourly rate for Mr. Robinowitz and remand for reconsideration. Upon remand, the ALJ should fully consider and weigh counsel's evidence of market rates, including both affidavits, the 2014 Morones Survey, the OSB's rates based on years of experience, and the evidence of rates awarded for appellate work, as well as engage in a full market rate analysis, rather than simply adopting the rates applied in prior awards, in accordance with *Seachris*, 994 F.3d 1066, 55 BRBS 1(CRT), and *Hernandez*, 54 BRBS 13. However, we affirm the hourly rates awarded to both Ms. Stokes-Avery and Ms. Khan.

Hours Disallowed as Excessive

Claimant appeals the ALJ's reduction of 1.5 hours, from 2 hours to 0.5 hour, for time spent reviewing a settlement offer and sending a counteroffer. Claimant's counsel argues disallowing more than 75% of the time requested for the task was "nothing more than a knee-jerk reaction" and is an abuse of discretion in violation of *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (unexplained large reduction to the overall fee is improper). Claimant's Petition for Review (Cl. PR) at 28. However, the hourly reductions in *Moreno* amounted to an overall reduction of 33%, where the petitioner requested 269.3 total hours and was awarded only 180 hours. *Moreno*, 534 F.3d at 1113. Here, the ALJ's reduction of 1.5 hours amounted to 1.24% of the entirety of counsel's requested hours, well below the percentage reduction at issue in *Moreno*.

The ALJ also properly explained his reduction, stating the two hours counsel spent reviewing the settlement offer were excessive when compared to counsel's other entries for time spent reviewing settlement offers, which took between 0.1 and 0.5 hour. Fee Order at 17. The Board will affirm a reduction in the number of hours requested if it is adequately explained and reasonable. *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd on other grounds sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). As the ALJ provided adequate reasoning for this reduction, he did not abuse his discretion, and we affirm his reduction of 1.5 hours for time reviewing a settlement offer and sending a counteroffer. *Edwards*, 25 BRBS 49; *Welch*, 23 BRBS 395.

Travel Time

Counsel argues the ALJ erred in disallowing 3.1 hours of travel time incurred driving to the offices of Claimant's treating physicians for conferences and a deposition.[9] Relying on Board guidance placing the determination of the compensability of travel time within the ALJ's discretion, and gleaning from the Board's precedent a "trend…toward treating local travel as non-compensable," the ALJ found counsel's travel was local in nature, "not in excess of normal travel to support a claim, and not in excess of that normally considered overhead," and therefore denied the billed time. Fee Order at 14 (citing *Griffin v. Virginia Int'l Terminals, Inc.*, 29 BRBS 133, 135 (1995); *Ferguson v. Southern States Cooperative*, 27 BRBS 16, 23 (1993); and *Neeley*, 19 BRBS at 141). Counsel disputes this finding and urges the Board to re-evaluate and overrule precedent denying the compensability of local travel time as part of an attorney's general overhead expenses.

The ALJ expressed confusion about Board precedent, finding it "somewhat in conflict," and ultimately determined the compensability of travel hinges upon whether it is local or non-local – with non-local travel being compensable and local travel constituting non-compensable overhead. Fee Order at 13-14. Both Claimant and Employer similarly base their arguments on the local or non-local nature of the travel, tending to agree with the ALJ that Board precedent prohibits reimbursement for local travel. Claimant asserts his travel in this claim was non-local and thus compensable, or alternatively, even if it was local, the Board should overturn its line of cases treating local travel as non-compensable. Cl. PR at 24-27. Given the ALJ's and the parties' confusion on the state of the law, we

[9] Counsel traveled to Dr. Rahul Desai's office on July 2, 2015, for a conference (0.75 hour round-trip), to Dr. Trista Darling's office on May 5, 2016, for a conference (1.5 hours round-trip), and to Dr. Desai's office on May 10, 2016, for his deposition (0.85 hour round-trip). Fee Pet. at 1, 7.

shall examine case precedent and clarify the standard for compensability of attorney travel time under the Act.

The Board first addressed the compensability of travel time in *Lopes v. New Bedford Stevedoring*, 12 BRBS 170 (1979). The Board compared the Longshore Act, which does not specifically provide for attorney travel time, to the Black Lung Benefits Act, which does. Because both Acts emphasize reasonableness and necessity as the standard for the compensability of fees, the Board held the absence of a provision for travel time in the Longshore Act did not mean Congress intended to exclude it. *Lopes*, 12 BRBS at 175. The Board explained:

> Certainly, there is nothing within the Act or the regulations which prescribes the award of fees for travel time. We believe that there are situations in which attorney travel may be *reasonable and necessary* in order to pursue a client's interest. In those situations where attorney travel is justified, it would be appropriate to pay the attorney a reasonable fee for his time, as well as for his expenses. Certainly, attorney travel would be justified in a case where a claimant is too disabled to travel to an attorney's office, a face-to-face conference is necessary, and the attorney has to travel a distance substantially greater than that usually traveled in the course of his practice in order to confer with his client.
>
> We recognize that there may be other situations in which attorney travel would be reasonable and necessary and, therefore, compensable under the attorney fee provisions of the Act. We do not intend the example[s] postulated herein to be exclusive. On the other hand, we recognize that attorney travel time would be unreasonable in certain situations. For example, where competent counsel experienced with the Act was available in claimant's community yet an incapacitated claimant retained an attorney from outside the area, the time spent by this attorney travelling to consult with claimant would be unreasonable.

Lopes, 12 BRBS at 177 (emphasis added). In sum, *Lopes* held whether travel time is compensable is a factual determination, with the burden on the fee applicant to show the time spent traveling was both reasonable and necessary for the prosecution of his client's claim. Under this standard, the distance traveled, i.e., whether the travel is "local" or "non-local," is not a benchmark, but merely one factor to be considered.

Despite the clear standard of reasonableness and necessity enunciated in *Lopes*, the next published Board decision to address the compensability of attorney travel time, *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 592 (1981), did not discuss *Lopes* but, rather, applied the standard previously annunciated for the

compensability of travel expenses. Citing *Stillwell v. The Home Indemnity Co.*, 5 BRBS 436 (1977), *Harrod* held "attorney travel time is compensable … where the travel is necessary, reasonable, and in excess of … overhead." *Harrod*, 15 BRBS at 595. However, *Stillwell* involved the compensability of travel *costs*, relative to which "overhead," i.e., customary business expenses, makes more sense as a benchmark to reasonableness.[10] Thereafter, Board decisions addressing the compensability of attorney travel time invariably included this reference to "overhead," citing *Harrod* as precedent. *B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009); *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006); *O'Kelley v. Department of the Army/NAF*, 34 BRBS 39 (2000); *Griffin*, 29 BRBS 133; *Ferguson*, 27 BRBS 16; *Neeley*, 19 BRBS 138; *Swain v. Bath Iron Works*, 14 BRBS 657 (1982).

Nevertheless, despite the oft cited and somewhat confusing inclusion of "overhead" in the analysis of the compensability of fees for time incurred on travel, the underlying standard for the compensability of travel time, like any portion of a fee request, is reasonableness and necessity,[11] and it is a fact-based inquiry with the burden on the fee applicant. 33 U.S.C. §§928(a), (b); 20 C.F.R. §702.132(a); *Lopes*, 12 BRBS 170; *see also, e.g., O'Kelley*, 34 BRBS at 43; *Griffin*, 29 BRBS 133; *Ferguson*, 27 BRBS 16; *Neeley*, 19 BRBS 138. It is therefore possible, and perhaps unavoidable, that fee awards may result in seemingly disparate outcomes, despite similar types of travel. The standard of review is abuse of discretion; as long as the ALJ explains his reasoning, and his allowance or disallowance of travel time is not arbitrary, capricious, or an abuse of discretion, it will be upheld. *Tahara*, 511 F.3d 950, 41 BRBS 53(CRT); *Welch*, 23 BRBS 395.

This fact-based reasonableness standard for travel time is consistent with decisions issued by the United States Circuit Courts of Appeals pursuant to other federal fee-shifting statutes.[12] It is also consistent with controlling Ninth Circuit law. In *Davis v. City and*

[10] Although the term "overhead" is more often aligned with an attorney's costs, it is not a concept entirely distinct from an attorney's request for fees based on time, as an attorney's hourly rate is specifically meant to account for overhead in operating a law practice. *Beckwith v. Horizon Line, Inc.*, 43 BRBS 156 (2009); *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979).

[11] In *Lopes*, the Board's identification of the standard as "reasonable and necessary" stems from the regulation's requirement that "[a]ny fee approved shall be *reasonably* commensurate with the *necessary* work done…." 20 C.F.R. §702.132(a); *Lopes*, 12 BRBS at 174 n.1.

[12] *H.C. v. New York Dept. of Education*, 71 F.4th 120 (2d Cir. 2023) (district court abused its discretion in denying all travel-related fees and remanded with instructions to

County of San Francisco, 976 F.2d 1536 (9th Cir. 1992), the Ninth Circuit held the "touchstone in determining whether hours have been properly claimed is reasonableness," which is to be assessed by "reference to standards established in dealings between paying clients and the private bar." *Id*. at 1543. As the plaintiff's counsel submitted evidence showing local attorneys customarily billed clients for travel time to meet with co-counsel, the court affirmed the award of fees for travel time. *Id.* Likewise, in *Nadarajah v. Holder*, 569 F.3d 906 (9th Cir. 2009), the Ninth Circuit upheld a district court's award of fees for time spent travelling to and from the detention center where the plaintiff was being held,

---

award fees for travel at half the hourly rate); *Nichols v. Illinois Dept. of Transportation*, 4 F.4th 437, 443 n.6 (7th Cir. 2021) (affirming the district court's denial of fees for travel to and from the courthouse but award of fees for travel to and from depositions, noting the "key questions" are "whether the attorney has adequately supported their fee petition and whether their request is reasonable under the circumstances"); *Ludlow v. BNSF Ry. Co.*, 788 F.3d 794 (8th Cir. 2015) (affirming an award of travel fees at the full hourly rate, as defendants failed to show billing for travel time at the full hourly rate was unreasonable); *Priestly v. Astrue*, 651 F.3d 410 (4th Cir. 2011) (the court held the district judge did not abuse his broad discretion in reducing the hourly rate for travel time); *Hutchinson ex rel. Julien v. Patrick*, 636 F.3d 1 (1st Cir. 2011) (noting it was customary practice to bill for travel time at a lower hourly rate, the court held the district court did not abuse its discretion in awarding fees for travel time, which the applicant had requested at a reduced hourly rate); *Anchondo v. Anderson, Crenshaw & Associates, LLC*, 616 F.3d 1098, 1106 (10th Cir. 2010) (recognizing the compensability of necessary travel time but noting the trial court has discretion to reduce the hourly rate associated with that time if it is otherwise unproductive); *In re Babcock & Wilcox Co.*, 526 F.3d 824 (5th Cir. 2008) (affirming an award of fees for travel time at half the hourly rate); *Planned Parenthood of Central New Jersey v. Attorney General of the State of New Jersey*, 297 F.3d 253 (3d Cir. 2002) (affirming an award of fees for travel time, as it was customary to award fees for travel time in counsel's geographic location, but remanding for determination of the appropriate hourly rate, in line with the practices of the local community); *In re McKeeman*, 236 B.R. 667 (B.A.P. 8th Cir. 1999) (holding the fact-finder has broad discretion to award fees for travel at the full hourly rate, to award fees for travel at a reduced hourly rate, or to deny fees for travel in their entirety); *Perotti v. Seiter*, 935 F.2d 761, 764 (6th Cir. 1991) (affirming an award of fees for travel time at the full hourly rate as "matters of this sort are within the discretion given the district court, which has greater familiarity with local practice"); *Smith v. Freeman*, 921 F.2d 1120, 1122 (10th Cir. 1990) (affirming district court's reduction of the hourly rate as it appropriately assessed the compensability of "non-productive" driving time in accordance with the circuit's two-part inquiry: 1) Is the time normally billed to a private client in the locality of the practice? and 2) Is the amount billed reasonable?).

finding the time "reasonably expended" in light of the distant location of the detention center as well as its "cumbersome telephone visitation procedures." *Nadarajah*, 569 F.3d at 924 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433-434 (1983)). Comparatively, in *In re: Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291 (9th Cir. 1994), the Ninth Circuit affirmed a 50% reduction of all attorney travel time, holding the district court did not abuse its discretion in finding the "distractions associated with travel, especially after a full day of work, likely reduced attorneys' effectiveness while en route." *Washington Public Power*, 19 F.3d at 1299 (citing *In re "Agent Orange,"* 818 F.2d 226, 237-238 (2d Cir. 1987)).

Thus, the standard for evaluating the compensability of fees for travel time is a discretionary one of reasonableness and necessity, based on the ALJ's evaluation of the facts before him. *Lopes*, 12 BRBS 170.[13] Whether the travel is local or non-local does not, on its own, determine the compensability of the time spent travelling; rather, the distance travelled is merely one factor for the ALJ to consider.[14] *Davis*, 976 F.2d at 1543; *Nadarajah*, 569 F.3d at 924; *Washington Public Power*, 19 F.3d at 1299; *see also* n. 11, *supra*. As the ALJ erred in denying fees for travel time based on a perceived "trend in the BRB's cases…toward treating local travel as non-compensable," Fee Order at 14, we vacate the denial and remand the case to the ALJ for reconsideration of the reasonableness of counsel's requested fees for travel time, in accordance with the standard as clarified above.

Interest on Costs

[13] We note the compensability of travel time for an attorney hired by an injured worker outside of his or her geographic area is a separate and distinct area of the law subject to its own standard. *Holloway*, 43 BRBS 129; *Baumler*, 40 BRBS 5; *Swain*, 14 BRBS 657.

[14] Other factors to consider involve the local billing practices within an attorney's geographic area, including whether it is customary to charge paying clients for the same type of travel, to charge travel time at a reduced rate, and/or to include travel time in the calculation of market rates. *Hutchinson*, 636 F.3d 1; *Planned Parenthood of Central New Jersey*, 297 F.3d 253; *Davis*, 976 F.2d at 1543; *Perotti*, 935 F.2d at 764; *Smith*, 921 F.2d at 1122.

Lastly, Claimant's counsel contends the ALJ erred in denying his request for interest on costs. Counsel sought a 6.7% enhancement[15] on $3,438.11 in unpaid costs, arguing the time since the outlay of costs in 2015 is "exceptionally protracted." Cl. PR at 29 (quoting *Seachris*, 994 F.3d at 1084, 55 BRBS at 11(CRT)). The ALJ summarily denied counsel's request for interest on costs, finding "interest could not be awarded on a fee award" because "a fee awarded under the [Longshore Act] is not a final judgment entitled to interest under 28 U.S.C. §1961 and the Act does not otherwise provide for post-judgment interest." Fee Order at 18 (quoting *Anderson*, 91 F.3d at 1325 n.3, 30 BRBS at 69 n.3(CRT)). Noting the *Anderson* court held a delay enhancement is appropriate in some circumstances to compensate an attorney for a lengthy delay in payment of his fee, the ALJ nevertheless found counsel provided no legal support permitting an enhancement to the amount of costs to account for a delay in repaying them. *Id*. at 18.

However, the Ninth Circuit has since held the Act allows for an award of interest for a delay in payment of costs under certain circumstances. *Seachris*, 994 F.3d at 1084, 55 BRBS at 10(CRT). In *Seachris*, the Ninth Circuit explained an ALJ may award interest on costs to account for delay in payment under the Supreme Court's holding in *Perdue*, which states:

> [A]n enhancement may be appropriate if the attorney's performance includes extraordinary outlay of expenses and the litigation is exceptionally protracted. … [T]he amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses.

Seachris, 994 F.3d at 1084, 55 BRBS at 10(CRT) (quoting *Perdue*, 559 U.S. at 555). Therefore, to be entitled to interest on costs paid for the prosecution of the claim, the attorney must have made an "extraordinary outlay of expenses," and the time between payment and reimbursement must have been "exceptionally protracted," both of which are fact-specific questions that must be answered based on the circumstances of each case.[16] *Id*. As it falls to the ALJ to make findings on this enhancement request for work before him, we remand the case for the ALJ to determine whether the delay in this instance was "exceptionally protracted" and whether counsel's outlay of expenses was "extraordinary"

---

[15] The 6.7% enhancement is derived from the increase in the CPI-U for the Portland-Salem area between 2015, when the costs purportedly were incurred, and 2018, when counsel filed his original fee petition. Fee Order at 18.

[16] The Board held the same in an unpublished fee order. *Wakeley v. Knutson Towboat Co.*, BRB No. 18-0238, slip op. at 3 (Nov. 30, 2022).

such that interest on costs is warranted, consistent with the Supreme Court's reasoning in *Perdue* and the Ninth Circuit's decision in *Seachris*.[17]

Accordingly, we vacate the ALJ's Attorney Fee Order, Order Denying Reconsideration, and Order Granting Respondent's Motion for Reconsideration with respect to the ALJ's calculation of Mr. Robinowitz's hourly rate, reduction of 3.1 hours of

[17] If, on remand, the ALJ finds counsel entitled to interest on costs, he must also determine the appropriate method to calculate that interest. Counsel originally sought a 6.7% enhancement to costs to account for delay. Fee Pet. at 16. The ALJ did not address the means to calculate the requested enhancement, but instead denied the request outright. Fee Order at 18. In his Petition for Review, counsel eschews his request for a 6.7% enhancement, instead requesting interest, if granted, be calculated pursuant to 28 U.S.C. §1961, in accordance with *Seachris v. Brady-Hamilton Stevedore Co.*, BRB No. 17-0581 (May 16, 2022) (*Seachris* Order), slip op. at 7-8, *aff'd in pert. part on recon. Seachris v. Brady-Hamilton Stevedore Co.*, BRB No. 17-0581 (Sept. 30, 2022) (*Seachris* Recon.), slip op. at 8. Cl. PR at 30-31. We note, at least in the context of compensation payments, the Ninth Circuit has adopted the use of 28 U.S.C. §1961 to award interest under the Act. *Price v. Stevedoring Services of Am.*, 697 F.3d 820, 836-839 (9th Cir. 2012) (en banc) (Although "Congress has not expressed an intent on the matter," "the Director has expressed a preference for 1961," having consistently applied that rate for at least twenty years and incorporated it into the Longshore Act Procedure Manual.); *see also W. Pac. Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1984) (in a maritime case, holding 1961 applies "unless the trial judge finds, on substantial evidence, that the equities of the particular case require a different rate").

travel time, and denial of interest on costs, and remand the case for reconsideration of those issues in accordance with this opinion. In all other respects, we affirm the ALJ's Orders.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge