

BRB No. 10-0382 BLA

KENNETH WELLS )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 SPURLOCK MINING COMPANY, )  
 INCORPORATED )  
 )  
 and )  
 )  
 AMERICAN BUSINESS & MERCANTILE ) DATE ISSUED: 03/07/2011  
 INSURANCE MUTUAL, INCORPORATED )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Attorney Fee Order and Order Denying Reconsideration of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.  
PER CURIAM:

Employer appeals the Attorney Fee Order and Order Denying Reconsideration (07-BLA-5196) of Administrative Law Judge Larry S. Merck with respect to a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). Following the administrative law judge's award of benefits on remand, Thomas W. Moak, claimant's counsel, submitted a fee petition to the administrative law judge requesting a fee of \$10,125.00, representing 33.75 hours of legal services by claimant's counsel at an hourly rate of \$300.00. Employer objected that claimant's counsel failed to support his fee petition with market evidence, and challenged the reasonableness of the hours claimed. After consideration of employer's objections to the fee petition, the administrative law judge determined that the requested hourly rate was reasonable, but reduced the number of hours to 27.25 hours. Accordingly, the administrative law judge awarded claimant's counsel a fee of \$8,175.00 for legal services performed while the case was before the Office of Administrative Law Judges.

Employer moved for reconsideration. In support of its motion, employer submitted affidavits, fee petitions from three claimants' attorneys in Kentucky, and a fee award by the district director, all of which, employer contended, established that the market rate for attorneys practicing in Eastern Kentucky was no greater than \$150.00 an hour. Employer also reiterated its challenges to the number of hours claimed. The administrative law judge determined that employer's evidence failed to establish that the market rate in claimant's counsel's geographic region is no greater than \$150.00 per hour. Further, the administrative law judge reviewed the hours billed by claimant's counsel, as well as employer's objections, and again found that 27.25 hours are compensable as reasonable and necessary. Accordingly, the administrative law judge denied reconsideration.

On appeal, employer contends that the administrative law judge erred in awarding an hourly rate that is not supported by evidence of a market rate. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a substantive response brief.<sup>1</sup>

The amount of an attorney's fee award by an administrative law judge is discretionary and will be upheld on appeal unless shown by the challenging party to be

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<sup>1</sup> As the Director, Office of Workers' Compensation Programs, accurately notes, the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not affect employer's appeal of the administrative law judge's attorney's fee award.

arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.<sup>2</sup> *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

Employer argues that the administrative law judge erred in determining the hourly rate for claimant's counsel in the absence of specific evidence from claimant's counsel of the prevailing market rate. Specifically, employer asserts that claimant's counsel did not justify the hourly rate he requested, and the administrative law judge failed to explain how the subjective factors that he considered, such as counsel's experience and performance at the hearing, established a market rate in counsel's geographic area. Employer's Brief at 5. Employer also asserts that the administrative law judge erred in discrediting the evidence of the prevailing market rate proffered by employer. Employer's Brief at 6-7. Lastly, employer contends that the administrative law judge erred in rejecting employer's challenge to the number of hours claimed.

We hold that employer's arguments regarding the attorney's fee award have merit, in part. When a claimant wins a contested case, the Act provides that the employer, its insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The regulation governing fees provides, in part, that:

Any fee approved . . . shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested.

20 C.F.R. §725.366(b).

In determining the amount of an attorney's fee to be awarded under a fee-shifting statute, the United States Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case, and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The Supreme Court has held that an attorney's reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community. *Blum v. Stenson*, 465

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<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

U.S. 886, 895 (1984); *see also B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (6th Cir. 2008) (defining “reasonable hourly rate” as “the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record”). The burden falls on the fee applicant to produce satisfactory evidence “that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation.” *Stenson*, 465 U.S. at 896 n.11.

In finding the requested hourly rate of \$300.00 to be reasonable, the administrative law judge stated that he relied on claimant’s counsel’s experience, his performance at the hearing, the extent of work required for this claim, and the rates recently awarded to other attorneys practicing in eastern Kentucky. Attorney Fee Order at 5; Order Denying Reconsideration at 3. As employer asserts, however, the administrative law judge did not explain how this evidence supported his determination that \$300.00 per hour is the applicable market rate for claimant’s counsel, in light of employer’s assertions that no basis exists for determining whether the awards that the administrative law judge referenced are market based because they are not in the record,<sup>3</sup> and that claimant’s counsel provided no market evidence to support the hourly rate he requested. Consequently, this aspect of the administrative law judge’s fee award does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

In this case, claimant’s counsel failed to provide specific evidence of the prevailing market rates that lawyers of comparable skill and experience can reasonably expect to command for similar work within the relevant community.<sup>4</sup> *See Stenson*, 465 U.S. at 896 n.11; *Bentley*, 522 F.3d at 663, 24 BLR at 2-121. Consequently, we vacate the administrative law judge’s attorney’s fee award and remand the case for the

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<sup>3</sup> Employer accurately notes that the prior fee order granting Joseph E. Wolfe \$300 an hour, which the administrative law judge also listed, on page three of his Order Denying Reconsideration of Attorney Fee Award, was the fee order that was vacated by the United States Court of Appeals for the Fourth Circuit in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010). Therefore, that order does not constitute evidence that the relevant market rate is \$300.00 an hour.

<sup>4</sup> We note that the fee petition is incomplete on its face, because it does not contain “the customary billing rate for each person” who performed services on behalf of the claimant. 20 C.F.R. §725.366(a). Although claimant’s counsel identifies the hourly rate that he seeks in this case, he has not identified his customary billing rate for cases similar to this one.

administrative law judge to determine a reasonable hourly rate in accordance with *Bentley*.<sup>5</sup> See *Bentley*, 522 F.3d at 663, 24 BLR at 2-121.

We reject, however, employer's assertion that the administrative law judge erred in discounting employer's evidence of the prevailing market rate. The administrative law judge correctly noted that employer submitted fee petitions from other attorneys representing claimants in black lung claims, and affidavits, in support of its assertion that experienced lawyers earn no more than \$150.00 per hour for litigating black lung claims in counsel's geographic area. Order Denying Reconsideration at 5. Contrary to employer's assertion, the administrative law judge acted within his discretion in finding that employer's proof was not more probative than the hourly rates awarded to counsel in prior cases and to other similarly experienced attorneys in Kentucky.<sup>6</sup> See *Bowman v. Bowman Coal Co.*, 24 BLR 1-167, 1-170 (2010); *Abbott*, 13 BLR at 1-16; see also *Jones*, 21 BLR at 1-108; Order Denying Reconsideration at 3. Thus, the administrative law judge permissibly concluded that employer's evidence did not establish that the prevailing market rate for counsel's region is, at most, \$150.00 per hour.

We additionally reject employer's assertion that the administrative law judge erred in finding that evidence of the hourly rates that employers pay their counsel is entitled to little probative weight. As the United States Court of Appeals for the Sixth Circuit explained in *Bentley*, the rates received by attorneys who represent employers "are undoubtedly affected by several factors, including volume of work and prompt payment.

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<sup>5</sup> Counsel may submit evidence of the fees he has received in the past, as well as affidavits of other lawyers who might not practice black lung law, but who are familiar both with the skills of the fee applicant and, more generally, with the type of work in the relevant community. Further, in determining a reasonable prevailing rate, the administrative law judge is not limited to consideration of fees granted in black lung cases; rather, consideration of the fees granted in other administrative proceedings for like work and like experience would also yield instructive information. See *B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664, 24 BLR 2-106, 2-122-23 (6th Cir. 2008); see also *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010).

<sup>6</sup> The administrative law judge noted that, in addition to a prior fee award to claimant's counsel, hourly rates of greater than \$150.00 had been approved in recent black lung cases brought by attorneys for claimants practicing in nearby Prestonburg, Pikeville, and Whitesburg, Kentucky. Attorney Fee Order at 4; Order Denying Reconsideration at 2-3. Employer does not challenge the administrative law judge's review of these prior fee awards for the purpose of assessing whether \$150.00 an hour is the maximum hourly rate charged for black lung work in counsel's geographic area.

Attorneys who represent claimants, on the other hand, likely do not benefit from the same high volume of work.” *Bentley*, 522 F.3d at 665, 24 BLR at 2-125. Contrary to employer’s assertion, therefore, the administrative law judge permissibly determined that the evidence of the hourly rates that employers pay their counsel is entitled to little probative weight. *Id.*

We also reject employer’s contention that the administrative law judge erred in approving claimant’s counsel’s use of quarter-hour billing. Quarter-hour billing is permissible, as long as the total amount of time is reasonable. *Bentley*, 552 F.3d at 666-67, 24 BLR at 2-127. The administrative law judge addressed employer’s objections to the number of hours billed and reduced the 33.75 hours of requested time by 6.5 hours, for a total of 27.25 hours of compensable time. The administrative law judge specifically found that “in light of the guidelines,” the remaining “number of hours expended on behalf of [c]laimant were reasonable and necessary.” Attorney Fee Order at 6; *see also* Order Denying Reconsideration at 3. Employer maintains that the Sixth Circuit in *Bentley* approved the use of a quarter-hour billing method only because the administrative law judge assessed the entries and explained why they were reasonable. Employer’s Brief at 9. Contrary to employer’s argument, in *Bentley*, the Sixth Circuit clarified that the use of quarter-hour billing was no more suspect than billing by tenth-hour increments, and that, “[a]s long as the total number of billable hours is reasonable in relation to the work performed, the work should be affirmed.” *Bentley*, 552 F.3d at 666-67, 24 BLR at 2-127. As the administrative law judge acted within his discretion in finding the total number of hours claimed to be reasonable in light of the services performed, we reject employer’s assertion that the administrative law judge erred in approving claimant’s counsel’s use of quarter-hour billing. *Bentley*, 552 F.3d at 666-67, 24 BLR at 2-127.

Accordingly, we vacate the administrative law judge's attorney's fee award, and remand this case for reconsideration. On remand, the administrative law judge must initially require claimant's counsel to provide evidence of a prevailing market rate. The administrative law judge must then reconsider counsel's fee petition in accordance with the criteria set forth at 20 C.F.R. §725.366.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge