

**U.S. Department of Labor**

Administrative Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



**IN THE MATTER OF:**

**THE ESTATE OF DANIEL A. AYRES  
BY KIMBERLY AYRES,  
ADMINISTRATOR,**

**COMPLAINANT,**

**v.**

**WEATHERFORD U.S., L.P.,**

**RESPONDENT.**

**ARB CASE NOS. 2018-0006,  
2018-0074**

**ALJ CASE NO. 2015-STA-00022  
ALJ JOHN P. SELLERS, III**

**ON REMAND FROM SIXTH  
CIRCUIT COURT OF APPEALS  
CASE NOS. 20-4343, 21-3017  
AND 21-3282**

**DATE: January 11, 2024**

**Appearances:**

***For the Complainant:***

**Martin S. Hume, Esq.; *Martin S. Hume Co., L.P.A.*; Youngstown, Ohio**

***For the Respondent:***

**David A. Campbell, Esq., Donald G. Slezak, Esq.; *Lewis Brisbois  
Bisgaard & Smith, LLP*; Cleveland, Ohio**

**Before HARTHILL, Chief Administrative Appeals Judge, and ROLFE and  
WARREN, Administrative Appeals Judges**

**DECISION AND ORDER AWARDING ATTORNEY FEES AND COSTS**

**ROLFE, Administrative Appeals Judge:**

This case arises under the Surface Transportation Assistance Act (STAA) as amended, and is before the Administrative Review Board (ARB or Board) following the United States Court of Appeals for the Sixth Circuit's remand to determine the merits of a request by Complainant Daniel A. Ayres (Ayres or Estate) for an

additional award of attorney fees and costs for work performed before the Sixth Circuit.<sup>1</sup> For the reasons that follow, we deny the request for attorney fees Complainant generated in filing an unsuccessful petition to reinstate punitive damages and further deny the Estate's request for an interest enhancement on its attorney fees and costs. But we otherwise award all remaining attorney fees and costs at issue.<sup>2</sup>

## BACKGROUND

Complainant Daniel A. Ayres filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent Weatherford U.S., L.P. (Respondent or Weatherford) violated the STAA by reducing his hours of work and by terminating his employment in retaliation for raising safety concerns.<sup>3</sup> OSHA dismissed the complaint and Ayres requested a hearing before the Office of Administrative Law Judges (OALJ).<sup>4</sup>

Following that hearing, an ALJ concluded in September 2017 that Weatherford violated the STAA, and he awarded back pay, compensatory damages, and punitive damages.<sup>5</sup> The ALJ also issued an Attorney Fee Order awarding \$36,219.01 for fees incurred at a \$350 hourly rate in addition to the other costs generated before him.<sup>6</sup>

On appeal, the ARB affirmed the statutory violation and the resulting order for back pay, compensatory damages for emotional distress, and attorney fees and costs.<sup>7</sup> The Board, however, reversed the ALJ's award of punitive damages.<sup>8</sup> On January 22, 2021, the ARB issued an order awarding an additional \$12,670.00 for attorney fees incurred for work performed in the ARB proceeding, at the same hourly rate as applied by the ALJ, plus costs.<sup>9</sup>

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<sup>1</sup> 49 U.S.C. § 31105(a); *see also* 29 C.F.R. Part 1978 (2023) (the STAA's implementing regulations).

<sup>2</sup> Complainant regrettably passed away in 2016 during the pendency of this litigation and his estate has been pursuing the litigation on his behalf.

<sup>3</sup> ALJ Decision and Order (ALJ D. & O.) at 1 (ALJ Sept. 25, 2017).

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 82-91.

<sup>6</sup> ALJ Attorney Fee Order at 6 (ALJ Aug. 22, 2018).

<sup>7</sup> ARB Decision and Order (ARB D. & O.) at 12 (ARB Nov. 18, 2020).

<sup>8</sup> *Id.* at 11.

<sup>9</sup> ARB Order Awarding Attorney Fees at 3 (ARB Jan. 22, 2021).

Both parties appealed the ARB decision to the Sixth Circuit: Weatherford sought to overturn the ARB decision in its entirety (the Weatherford appeal); Ayres' Estate sought reinstatement of the ALJ's punitive damages award (the Ayres appeal).<sup>10</sup> The Sixth Circuit consolidated the appeals and, in May 2023, denied them both outright—wholly affirming the previous ALJ and Board attorney fee awards in the process.<sup>11</sup>

Following the Sixth Circuit's ruling, the Estate filed a motion to remand the case to the ARB to determine the attorney fees and costs incurred before the circuit, or in the alternative, for an award of attorney fees from the circuit itself as costs pursuant to Federal Rule of Appellate Procedure 39 and Sixth Circuit I.O.P. 39.<sup>12</sup> Weatherford did not contest the Estate's request to remand the matter to the ARB.<sup>13</sup> The Sixth Circuit denied the motion under the federal rule and its internal rule of procedure, opting instead to remand the case to the ARB to determine "the merits of the Estate's request for an additional award of attorney fees" incurred on appeal.<sup>14</sup>

On July 6, 2023, the Estate filed before the ARB a Supplemental Petition For an Award of Attorney Fees and Costs incurred before the Sixth Circuit requesting an additional fee award of \$53,637.50, plus additional costs in the amount of \$1,043.38, for the 153.25 additional hours spent at the circuit.<sup>15</sup> The Estate also requests a pre-judgment interest enhancement from the date of the fee petitions filed in this matter, and a post-judgment interest enhancement from the date of the Board's decisions, both at the statutory rate found at 26 U.S.C. § 6621(a)(2).<sup>16</sup>

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<sup>10</sup> *Weatherford U.S., L.P. v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 68 F.4th 1030, 1035 (6th Cir. 2023).

<sup>11</sup> *Id.* at 1034, 1042-43.

<sup>12</sup> Motion to Remand to the Administrative Review Board for the Determination of a Supplemental Award of Attorney Fees and Costs to the Estate of Daniel A. Ayres as the Prevailing Party in this STAA Whistleblower Case, or in the Alternative, Motion for an Award of Attorney Fees as Costs Pursuant to the Federal Rule of Appellate Procedure 39 and 6th Circuit I.O.P. 39.

<sup>13</sup> Weatherford U.S., L.P.'s Opposition to the Estate of Daniel A. Ayres' Motion for Attorney Fees and Costs.

<sup>14</sup> *Weatherford U.S., L.P. v. U.S. Dep't of Lab., Admin. Rev. Bd.*, Nos. 20-4342, 21-3017, 21-3282, at \*2 (6th Cir. July 3, 2023) (order remanding matter to ARB).

<sup>15</sup> Supplemental Petition for an Award of Attorney Fees and Costs at 2; *see also* Affidavit of Attorney Martin S. Hume Exhibit D.

<sup>16</sup> *Id.* at 3.

Weatherford filed an opposition on July 12, 2023, in which it solely argues fees should not be awarded for the Estate’s unsuccessful Ayres appeal and for an unsuccessful motion to dismiss, which the Estate filed in the Weatherford appeal.<sup>17</sup> Weatherford further takes issue with the sufficiency of documentation for some of the specific remaining time entries.<sup>18</sup> In its reply, the Estate argues it is entitled to fees incurred in litigating both the Ayres appeal and the motion to dismiss in the Weatherford appeal given its success on seven out of eight issues before the Sixth Circuit.<sup>19</sup>

## DISCUSSION

### **1. The Board Grants the Estate’s Request for Fees and Costs Related to Its Motion to Dismiss in the Weatherford Appeal and Denies Its Request Related to the Ayres Appeal**

The STAA provides that, when an order is issued in favor of a complainant, the Secretary may assess attorney fees and costs reasonably incurred by the complainant in bringing the complaint.<sup>20</sup> Under longstanding ARB precedent, the Board may award those fees even where the work was performed before a United States Court of Appeals, including in the Sixth Circuit.<sup>21</sup>

Significantly, by its plain language, the STAA does not adhere to the “prevailing party” standard for awarding fees, but instead, permits assessments of fees and costs “against the person against whom the order [of violation] is issued.”<sup>22</sup> Weatherford was found to have violated the STAA at both the ALJ and ARB levels, and thus the analysis turns to whether the Estate’s fees and costs were reasonably incurred defending the resulting agency order at the Sixth Circuit.<sup>23</sup>

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<sup>17</sup> Respondent’s Opposition to Complainant’s Supplemental Petition for an Award of Attorneys [sic] Fees and Costs at 4-5.

<sup>18</sup> *Id.* at 5-7.

<sup>19</sup> Reply Memorandum in Support of Ayres’ Supplemental Petition for an Award of Attorney Fees and Costs at 4-5.

<sup>20</sup> 49 U.S.C. § 31105(b)(3)(B).

<sup>21</sup> *Cefalu v. Roadway Express, Inc.*, ARB Nos. 2004-0103, -0161, ALJ No. 2003-STA-00055, slip op. at 3 n.4, 3-4 (ARB Jan. 6, 2010) (quoting 49 U.S.C. 31105(b)(3)(B)); *Tipton v. Ind. Mich. Power Co.*, ARB No. 2004-0147, ALJ No. 2002-ERA-00030, slip op. at 4 (ARB Dec. 18, 2008).

<sup>22</sup> 49 U.S.C. § 31105(b)(3)(B).

<sup>23</sup> *Id.*; see also *Cefalu*, ARB Nos. 2004-0103, -0161, slip op. at 3-4.

In reviewing attorney’s fees, the Board follows the fee-shifting precedents of the Supreme Court, which outline the lodestar analysis to be used when a complainant has succeeded on only some of his claims for relief.<sup>24</sup> To determine whether the requested compensable hours were reasonably incurred under this standard, courts consider the “degree of success obtained [by the complainant].”<sup>25</sup> Where a complainant “has obtained excellent results, his attorney should recover a fully compensatory fee,” consisting of “all hours reasonably expended on the litigation,” even if the complainant “failed to prevail on every contention raised in the lawsuit.”<sup>26</sup> Thus, where a complainant’s claims “involve a common core of facts . . . [a]ttorney’s fees may be awarded for unsuccessful claims as well as successful ones.”<sup>27</sup> Litigants in good faith unquestionably “may raise alternative legal grounds for a desired outcome, and the court’s rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.”<sup>28</sup> “The result is what matters.”<sup>29</sup>

And the result here dictates an award of all fees the Estate incurred defending the ARB decision in the Weatherford appeal, including litigating the motion to dismiss. While the Sixth Circuit denied the motion, the Estate undeniably filed it in good faith seeking the same outcome it eventually secured after merits briefing and oral argument. Indeed, despite the initial denial, the Estate ultimately received precisely the same relief it would have received had its initial motion been granted. The Estate’s motion to dismiss, in our view, thus is sufficiently intertwined with and shares “a common core of facts” with the other pleadings filed and actions taken in defending the ARB decision before the Sixth Circuit.<sup>30</sup> That defense was wholly successful. We therefore grant the fees and costs incurred in filing the motion to dismiss.

But the same cannot be said for the Ayres appeal, which sought to amend the ARB decision, reinstate the award of punitive damages, and enlarge the Estate’s rights.<sup>31</sup> It has been settled in the federal courts since at least the 1920s that a party, without filing a separate appeal, “may not attack the decree [below] with a view either to enlarging his own rights thereunder or of lessening the rights of his

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<sup>24</sup> *Pollock v. Cont’l Express*, ARB Nos. 2007-0073, 2008-0051, ALJ Case No. 2006-STA-00001, slip op. at 18 (ARB Apr. 7, 2010) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

<sup>25</sup> *Hensley*, 461 U.S. at 434-36.

<sup>26</sup> *Id.* at 435.

<sup>27</sup> *Id.*; see also *Green v. Torres*, 361 F.3d 96, 98 (2d Cir. 2004) (citation omitted).

<sup>28</sup> *Hensley*, 461 U.S. at 435.

<sup>29</sup> *Id.*

<sup>30</sup> See *id.* at 448.

<sup>31</sup> Supplemental Petition for an Award of Attorney Fees and Costs at 6.

adversary,” whether “to correct an error or to supplement the decree with respect to a matter not dealt with[.]”<sup>32</sup> On the other hand, the Court may consider arguments to support the judgment as entered without requiring a separate appeal.<sup>33</sup>

Unlike the motion to dismiss defending the ARB decision—which did not require a separate appeal to assert—the Estate’s attempt to reinstate punitive damages sought to enlarge the Estate’s rights under the order and lessen Weatherford’s, and it therefore required a separate action to commence. That action arguably did not share the same “common core” of facts as the Weatherford appeal given the ARB decision. Regardless, the separate petition was entirely unsuccessful. We therefore deny the fees and costs incurred in pursuing the Ayres appeal.

Being mindful of the Supreme Court’s admonition not to “become green-eyeshade accountants” and mandate to do “rough justice” rather than “achieve auditing perfection”<sup>34</sup> in calculating fees, we thus cut the following billing entries related to the Ayres petition: 2.5 hours on 1/5/21 to “Prepare and File Ayres Petition for Review”; 0.75 of the 1.5 hours billed on 1/6/21 to “Prepare and File Notice of Appearance and Motion to Consolidate”; 1.5 hours billed on 3/2/21 to “Draft and File Motion for Bond”; 1.0 hours billed on 7/11/21 for “Memo to USDOL re: Punitive Damages”; 2.0 hours billed on 6/17/22 for “Research Re: Survival Claims”; 5.2 hours of the 37.75 hours billed on various dates to “Draft Second Brief” (11 pages of the 79 page brief (13.9%) were devoted to the Estate’s punitive damages argument); and 1.5 hours of the 8.5 hours billed on 10/12/22 and 10/13/22 to “Draft Fourth Brief” and “Finalize and File Fourth Brief” (5 pages of the 27 page brief (18.1%) were devoted to punitive damages). In total, we cut 14.45 hours of the 153.25 hours requested leaving a total of 138.8 hours. In terms of costs associated with filing the Ayres appeal, we deny the request for the \$500.00 filing fee and \$38.30 incurred for postage for service of the petition, for a total reduction of \$538.30 in costs.

## **2. Counsel’s Entries for the Estate’s Invoices are Adequately Detailed**

The lodestar method further requires multiplying the number of hours reasonably expended by a reasonable hourly rate.<sup>35</sup> The parties do not dispute that

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<sup>32</sup> *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924); *see also Olympic Fastening Sys., Inc. v. Textron, Inc.*, 504 F.2d 609, 617 (6th Cir.1974) (“When an appellee seeks to have findings of a trial court revised, a cross appeal is required if such revision ‘carries with it as an incident a revision of the judgment.’”).

<sup>33</sup> *Am. Ry. Express Co.*, 265 U.S. t 435 (“[T]he appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record . . .”).

<sup>34</sup> *Fox v. Vice*, 563 U.S. 826, 838 (2011).

<sup>35</sup> *Roadway Express, Inc. v. U.S. Dep’t of Lab., Admin. Rev. Bd.*, 116 F. App’x 674, 681 (6th Cir. 2004).

counsel is entitled to \$350 per hour, a rate previously upheld by the ALJ and the ARB and affirmed by the Sixth Circuit. We find no reason to disturb that rate.

Weatherford argues, however, that the Estate’s counsel’s entries are insufficiently documented.<sup>36</sup> The ARB requires that an attorney’s time-and-task entries be sufficiently detailed to demonstrate their reasonableness.<sup>37</sup> Weatherford contends that the entries entitled “research re: jurisdictional Issues” and “Research re: jurisdiction” do not adequately describe the specific type of work performed because they do not describe the purpose of the research.<sup>38</sup> Weatherford also argues that the billing entries entitled “draft second brief,” “finalize and file second brief” and “draft fourth brief” are similarly vague.<sup>39</sup>

Upon review of the Estate’s counsel’s billing entries, however, the Board finds them contemporaneous with records of counsel’s time and work and concludes the entries correspond with the timeline of the litigation. In that context, the entries are sufficiently documented to support their reasonableness.

Weatherford also argues counsel’s billing entries impermissibly constitute block billing.<sup>40</sup> The ARB “disfavor[s] the use of block billing” which is “the practice of grouping multiple tasks into a single time entry.”<sup>41</sup> Where the billing descriptions do not provide sufficient documentation to determine the reasonableness of the hours claimed, a reviewing body need not engage in an item-by-item reduction of the hours, but may instead reduce the lodestar fee by a set percentage.<sup>42</sup> On the other hand, the Sixth Circuit has held that even some degree of block billing “can be sufficient” as long as the description of the work performed “is adequate.”<sup>43</sup>

Regardless, while Weatherford generally argues counsel improperly block billed, it fails to cite a single specific entry of the practice. Upon our independent review, we find that counsel has not submitted billing entries that impermissibly

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<sup>36</sup> Respondent’s Opposition to Complainant’s Supplemental Petition for an Award of Attorney’s Fees and Costs at 5-7.

<sup>37</sup> *Clemmons v. Ameristar Airways, Inc.*, ARB No. 2011-0061, ALJ No. 2004-AIR-00011, slip op. at 7 (ARB Apr. 27, 2012) (citations omitted).

<sup>38</sup> Respondent’s Opposition to Complainant’s Supplemental Petition for an Award of Attorney’s Fees and Costs at 6.

<sup>39</sup> *Id.* at 6-7.

<sup>40</sup> *Id.* at 7.

<sup>41</sup> *Cefalu*, ARB Nos. 2004-0103, -0161, slip op. at 4.

<sup>42</sup> *Yates v. Superior Air Charter LLC*, ARB No. 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 6 (ARB May 28, 2021) (citation omitted).

<sup>43</sup> *Smith v. Serv. Master Corp.*, 592 F. App’x 363, 371 (6th Cir. 2014).

include multiple tasks in one entry. We therefore reject Weatherford’s argument and award \$48,580.00 in attorney fees for work at the circuit (138.8 x 350 = \$48,580.00).

### 3. The Board Denies the Estate’s Request for Pre and Post-Judgment Interest Enhancement

Citing *Cefalu v. Roadway Express, Inc.*, the Estate summarily argues the ARB should order “Weatherford to pay pre-judgment interest from the date of the fee petitions filed in this matter, and post-judgment interest from the date of the Administrative Review Board Decisions[.]”<sup>44</sup>

Based on the facts of this case, however, we decline to do so. Although the applicable provision of the STAA provides for the Secretary’s discretionary assessment of fees and costs reasonably incurred by complainant in bringing the complaint, that provision does not provide for interest.<sup>45</sup> In contrast, in the preceding provision, Congress expressly provided for “back pay *with interest*.”<sup>46</sup>

Nevertheless, the United States Supreme Court has allowed for interest as an enhancement to the lodestar figure for a reasonable attorney fee under fee-shifting statutes in certain limited circumstances. But it has specifically reserved that allowance for cases with “exceptionally protracted” litigation or where “the attorney’s performance involves exceptional delay in the payment of fees.”<sup>47</sup> And because the attorneys who take on this type of work should generally recognize the inherent risks in payment, the Court has further held the enhancement is most appropriate in those cases “where the delay is unjustifiably caused by the defense.”<sup>48</sup>

In our view, this is not a case that warrants any further enhancement. The fees at issue on remand from the circuit were all incurred in roughly the last two and a half years—a time period that does not suggest any intrinsic delay—after the Sixth Circuit wholly affirmed the fees previously awarded by the ALJ and Board,

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<sup>44</sup> Without citing any authority, the ARB in *Cefalu* noted the “history of this case is now quite lengthy” and thus awarded interest simply “[b]ecause of the delay in the award and payment” without any further discussion. *See Cefalu*, ARB Nos. 2004-0103, -0161, slip op. at 2, 6-7.

<sup>45</sup> 49 U.S.C. § 31105(b)(3)(B).

<sup>46</sup> 49 U.S.C. § 31105(b)(3)(A)(iii) (emphasis added). This same provision authorizes attorney fees but does not similarly authorize interest on those fees.

<sup>47</sup> *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 555-56 (2010) (discussing enhancements to the lodestar figure under 42 U.S.C. Section 1988).

<sup>48</sup> *Perdue*, 559 U.S. at 556.



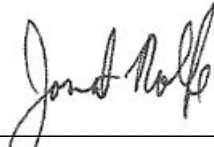
without contemplating an interest enhancement of them. Moreover, with regard to those previously affirmed fees, the Estate has not attempted to establish any exceptional delay in the litigation, other than to simply state in its Reply Brief that this case has been “pending for over ten (10) years.”<sup>49</sup> Nor has it attempted to tie any of Weatherford’s conduct to any alleged delay.

No matter. Regardless of any delay, we find counsel for the Estate has already been adequately compensated for the time value of his money for the length of time it has taken to litigate this case to completion: he has been awarded his current rate (as of 2023 when he filed his latest petition) of \$350 an hour at every level of the litigation.<sup>50</sup>

### CONCLUSION

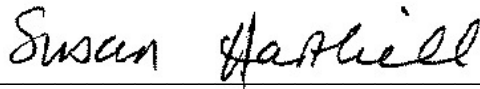
The Board thus awards the Estate \$48,580.00 in attorney fees and \$505.08 in costs for its appeal before the Sixth Circuit in accordance with this order. Accordingly, the Board orders Weatherford to pay \$49,085.08 directly to counsel for Ayres’ estate.

**SO ORDERED.**



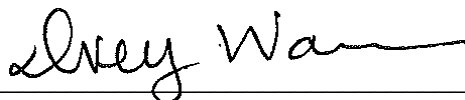

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**JONATHAN ROLFE**  
Administrative Appeals Judge




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**SUSAN HARTHILL**  
Chief Administrative Appeals Judge




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**IVEY S. WARREN**  
Administrative Appeals Judge

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<sup>49</sup> Reply Memorandum in Support of Ayres’ Supplemental Petition for an Award of Attorney Fees and Costs at 6.

<sup>50</sup> See *Perdue*, 559 U.S. at 556 (recognizing that compensation for delay may be made “by basing the award on current rates[.]”).