BRB Nos. 06-0904
and 07-0118

D.V.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CENEX HARVEST STATES COOPERATIVE	)	DATE ISSUED: 07/30/2007
	)	
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE CORPORATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Supplemental Decision and Order Granting Attorney's Fees and Order Denying Reconsideration of Attorney's Fees of William Dorsey, Administrative Law Judge, United States Department of Labor and the Compensation Order Approval of Attorney Fee and Order Denying Reconsideration of Attorney's Fee of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Granting Attorney's Fees and Order Denying Reconsideration of Attorney's Fees (2005-LHC-1903) of Administrative Law Judge William Dorsey and the Compensation Order Approval of Attorney Fee and Order Denying Reconsideration of Attorney's Fee (Case No. 14-

141558) of District Director Karen Staats rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).[1] 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, an abuse of discretion or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant suffered a hearing loss during the course of his employment and was awarded compensation for a 28.4 percent binaural hearing loss. 33 U.S.C. §908(c)(13). Subsequent to this award, claimant's attorney filed fee petitions for work performed before the administrative law judge and district director, seeking $10,806.95 and $3,467.50 in fees and costs respectively.[2] The administrative law judge awarded counsel a fee of $7,831.95, representing 29.75 hours of legal services at $250 per hour plus $82.50 for legal assistant work and $311.95 in costs. The district director awarded a fee of $2,783.51, representing 9.75 hours of legal services at $235 per hour and $55 for work performed by the legal assistant. The administrative law judge and the district director denied claimant's motions for reconsideration.[3]

Claimant appeals, arguing that both the district director and administrative law judge erred in determining the hourly rate to be paid claimant's attorney. Employer responds, urging affirmance of the awarded hourly rates.

Claimant challenges the hourly rate awarded by the administrative law judge and the district director for attorney time. Claimant's counsel requested an hourly rate of $350 for his services performed before the administrative law judge and the district director. The administrative law judge found the requested hourly rate to be excessive, as claimant's counsel failed to establish that this was either his professional service rate for his non-contingent fee clients or the average market rate for similarly situated trial

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[1] By Order dated December 19, 2006, these appeals were consolidated for purposes of decision.

[2] In his fee petition before the administrative law judge, claimant's attorney requested a fee of $10,806.95, representing 29.75 hours of legal services at $350 per hour plus .75 hours of legal assistant services at $110 per hour plus costs of $311.95. Before the district director, claimant's attorney requested a fee of $3,467.50, representing 9.75 hours of legal services at $350 per hour and .50 hour of legal assistant services at $110 per hour.

[3] Claimant's request for an additional $350 for preparation of his motion for reconsideration was denied by the district director.

lawyers in the Portland, Oregon, area. The administrative law judge found that an hourly rate of $250 is commensurate with the necessary work performed in this case given the complexity of the issues and the good quality of counsel's representation. Supp. Decision and Order at 8. The district director discussed the administrative law judge's findings and addressed the regulation at 20 C.F.R. §702.132. She found that the issues presented were relatively straightforward and did not present a level of complexity meriting an hourly rate higher than $235.

The sole issue in these appeals is whether the factfinders' decisions in determining the relevant hourly rate for claimant's attorney are arbitrary and bear no reasonable relationship to an economic evaluation of the market rate in Portland, Oregon. It is claimant's contention that the administrative law judge and district director erred in failing to award a fee based on "current market rates." We reject claimant's contentions of error.

The regulation governing fee awards, 20 C.F.R. §702.132, states, *inter alia*, that "[a]ny fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded . . . ." Pursuant to this regulation, the attorney must state his "normal billing rate." 20 C.F.R. §702.132(a). In this case, both the administrative law judge and the district director appropriately considered the complexity of the case and the quality of representation in accordance with Section 702.132. *See* Supp. Decision and Order at 8; Order Denying Reconsideration 2; Compensation Order at 2-3; Order Denying Reconsideration of Attorney's Fees at 1; *see Moyer v. Director, OWCP*, 124 F.3d 1378, 34 BRBS 134 (CRT) (10th Cir. 1997); *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006).

Claimant contends, however, that Section 702.132 may not supersede the holdings in *Missouri v. Jenkins*, 491 U.S. 274 (1989), and *Blum v. Stenson*, 465 U.S. 886 (1984), requiring a fee in a fee-shifting statute to be based on prevailing market rates. Both *Jenkins* and *Blum* arose under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, under which reasonable fees are to be calculated according to the prevailing market rates in the relevant community. *Blum*, 465 U.S. at 896; *Jenkins*, 491 U.S. at 285. However, the Court noted the difficulty in determining an appropriate market rate given the nature of services rendered by attorneys and placed the burden on the fee applicant to produce such satisfactory evidence, in addition to his own affidavit. *Blum*, 465 U.S. at 896 n. 11. Contrary to claimant's contention that administrative law judges do not set market rates, the Fourth Circuit has recognized in a longshore case that "evidence of fee awards in *comparable cases* is generally sufficient to establish the "prevailing market

rates' in 'the relevant community.'"[4] *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 247, 38 BRBS 37, 41(CRT) (4th Cir. 2004), citing *Spell v. McDaniel*, 824 F.2d 1380, 1402 (4th Cir. 1987) (emphasis added).

In this case, the administrative law judge fully addressed the evidence of hourly rates provided by counsel to establish a customary, community market rate, and he provided a rational basis for finding such evidence insufficient to establish an hourly rate of $350. *See generally Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988). The administrative law judge found claimant's assertion that $350 was his normal billing rate unpersuasive since he has not billed paying clients at that rate. Supp. Decision and Order at 2-3. The administrative law judge also rejected, as not dispositive, evidence of rates awarded to attorneys in longshore cases in other cities, *see Brown*, 376 F.3d 245, 38 BRBS 37(CRT), as well as counsel's assertion that $350 is the market rate in Portland for a trial attorney with counsel's years of experience, as counsel's affidavit lacks information from which the administrative law judge could judge its accuracy. The administrative law judge declined to rely on the "*Laffey* Matrix," *see Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), finding that the matrix was created by a very small sampling of hourly rates used in complex, years-long litigation by "preeminent" counsel, and that such litigation bears no resemblance to the normal longshore case, such as the one before him. Indeed, the administrative law judge recognized that the Ninth Circuit, within whose jurisdiction this case arises, found the matrix inapplicable to determining an attorney's fee under fee-shifting statutes in cases within its jurisdiction, holding that a successful Title VII plaintiff could recover a fee based on a "reasonable community standard." *Maldonado v. Lehman*, 811 F.2d 1341 (9th Cir. 1987), *cert. denied*, 484 U.S. 990 (1987). In rejecting claimant's motion for reconsideration, the administrative law

[4] Thus, we reject counsel's reliance on *Student Public Research Group of New Jersey v. AT&T Bell Laboratories*, 842 F.2d 1436 (3d Cir. 1988) for the proposition that a "micro-market," such as the longshore claimants' bar, cannot set the prevailing community rate. The Third Circuit held that there is no independent market of *public interest* attorneys that generate fair market fees; the attorneys in the case before the court generally billed at $60-$80 per hour. Rather, the court noted, the market for such work is found in court-generated fee-shifting statutes, and thus fixing a market rate is a "tautological, self-referential" enterprise. *Id.* at 1446. The court therefore held that in a case of a "for-profit public interest law firm that has an artificially low billing rate, the community billing rate charged by attorneys of equivalent skill and experience performing work of similar complexity, is the appropriate hourly rate for computing the lodestar." *Id.* at 1450. There is no evidence that longshore attorneys bill at lower than a market rate, and the Third Circuit's use of a community billing standard is not different than that espoused in *Brown* or used by the administrative law judge.

judge declined to rely on the "Morones Survey" as evidence of the prevailing community rate as claimant did not establish his firm's comparability to the firms listed in the survey, which are commercial litigation firms.

Having rationally found that claimant failed to establish his entitlement to the claimed hourly rate of $350, the administrative law judge relied on recent awards to counsel by other administrative law judges and the Board to arrive at a reasonable hourly rate of $250, based on the complexity of the case. Counsel has failed to demonstrate either legal error or an abuse of discretion in this regard. *See generally Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121(CRT) (9th Cir. 1995); *see also Brown*, 376 F.3d 245, 38 BRBS 37(CRT); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Moyer*, 124 F.3d 1378, 31 BRBS 134(CRT). Thus, we affirm the administrative law judge's fee award based on an hourly rate of $250.

Counsel's contentions with regard to the fee award of the district director are similar to those rejected above. The district director acknowledged her agreement with the reasoning of the administrative law judge, and she independently based her award of $235 per hour on the regulatory criteria of Section 702.132(a). *See Moyer*, 69 F.3d 1039, 31 BRBS 134(CRT). Counsel did not seek an hourly rate enhanced for delay, and thus the district director did not err in not addressing this factor. Counsel has not established an abuse of discretion in the district director's fee award and therefore it is affirmed.[5]

[5] The district director did not rely on the holding in the unpublished decision in *Laird v. Sause Brothers, Inc.*, 2006 WL 1891786 (9th Cir. July 11, 2006), to establish that any particular hourly rate is appropriate for counsel's work, but for the proposition that a fee award is appropriately based on the regulatory criteria. This is a well-established principle, *see, e.g., Moyer*, 124 F.3d 1378, 31 BRBS 134(CRT), and thus citation to an unpublished case, contrary to the Ninth Circuit's rules, is harmless error. *See* Ct. App. 9th Cir. Rule 36-3.

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney's Fees and Order Denying Reconsideration of Attorney's Fees and the district director's Compensation Order Approval of Attorney Fee and Order Denying Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge