BRB Nos. 08-0533
and 08-0596

H.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF ARMY/NAF	)	DATE ISSUED: 04/10/2009
	)	
Self-Insured	)	
Employer-Respondent	)	

DECISION and ORDER

Appeals of the Attorney Fee Order of Gerald M. Etchingham, Administrative Law Judge, and the Compensation Order - Approval of Attorney's Fees and the Order Denying Request for Reconsideration of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Raymond H. Warns, Jr. (Holmes, Weddle & Barcott, P.C.), Seattle, Washington, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2007-LHC-0231) of Administrative Law Judge Gerald M. Etchingham, and the Compensation Order - Approval of Attorney's Fees and the Order Denying Request for Reconsideration Decision and Order (No. 14-134194) of District Director Karen P. 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the 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, an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured her head/neck on October 20, 2000, during the course of her employment. The administrative law judge awarded claimant medical benefits and various periods of disability benefits. Nearly $60,000 in medical bills remained unpaid after this order issued, and claimant requested another hearing. The parties agreed to a settlement, which was approved by the administrative law judge. The following attorney's fee dispute resulted from this proceeding.[1]

Claimant's attorney requested fees for work performed before both the district director and the administrative law judge. For work performed before the district director between July 25, 2006, and December 3, 2007, claimant's attorney requested 1.5 hours at a rate of $375 per hour, for a total of $562.50. Employer responded, challenging the hourly rate and making objections to specific entries. For work performed before the administrative law judge between November 20, 2006, and December 27, 2007, claimant's counsel requested 29.25 hours at a rate of $375 per hour, plus 4.25 hours at a rate of $120 per hour, for a total fee of $11,478.75. Employer responded, challenging the hourly rates and making specific objections. With his reply to employer's response, counsel requested an additional 4.75 hours of attorney time, for a total request of $13,260. With both fee petitions, counsel submitted his resumé, a copy of the Morones Survey,[2] and a copy of the affidavit and deposition of William B. Crow, an attorney and expert on attorney fees, all in support of his hourly rate requests. Employer objected to the hourly rate requests and submitted portions of a deposition of Mr. Crow to rebut Mr. Crow's opinion and establish his unfamiliarity with longshore work. Employer also submitted copies of the Board's decision in *D.V. v. Cenex Harvest States Cooperative*, 41 BRBS 84 (2007), to show that counsel's arguments had been rejected previously.

The district director found that the Board and the Office of Administrative Law Judges have consistently rejected use of the *Laffey* Matrix[3] and the Morones Survey as

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[1]The administrative law judge awarded claimant's counsel a fee of $49,348.75 for work performed while the case was initially before him. Attorney Fee Order at 1-2.

[2]The Morones Survey is a 2004 survey of commercial litigation fees in the Portland, Oregon, area taken by Serena Morones, a CPA. According to counsel, Ms. Morones received 281 responses from attorneys in 16 firms.

[3]The matrix is a chart derived from hourly rates allowed by the district court in *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983). The matrix is prepared annually by the Civil Division of the United States Attorney's Office for the District of Columbia for use in "fee-shifting" statutes where the prevailing party is entitled to a "reasonable" attorney's fee. www.usdoj.gov/usao/dc/divisions/Civil_ Division/ laffey_matrix_6.html.

evidence of the market rate under the Longshore Act. After quoting a recent case by an administrative law judge who also rejected such evidence, the district director found:

> The work billed in the fee affidavit consists of an email to claimant, two letters and completion of Form LS-18 (Pre-Hearing Statement). This does not constitute novel, complicated or difficult legal activity. An hourly rate of $235 is deemed to be appropriate.

Comp. Order at 2. The district director then discussed employer's remaining objections and, citing Section 28(a), 33 U.S.C. §928(a), and Section 702.132, 20 C.F.R. §702.132, approved 1.75 hours of time at a rate of $235 for a total fee of $411.25. Comp. Order at 2-3. Claimant's counsel filed a motion for reconsideration. The district director found that claimant's counsel did not provide any rationale for increasing the hourly rate from the awarded amount. Consequently, she denied the motion and the request for an additional fee. Claimant appeals, contending the district director erred in disregarding the evidence submitted to establish market hourly rates, in arbitrarily setting an hourly rate, and in awarding a rate different from the administrative law judge's rate. Employer responds, urging affirmance. BRB No. 08-0596.

With regard to the fee request before him, the administrative law judge cited the Act, the regulation, and the Board's decisions in *D.V.*, 41 BRBS 84, and *B.C. v. Stevedoring Services of America*, 41 BRBS 107 (2007), to reject the Morones Survey as being insufficient to establish a proxy rate for longshore work. He concluded it is a survey of hourly rates of "an elite sub-group of commercial litigators" and is limited to 16 law firms specializing in commercial litigation. He also rejected Mr. Crow's opinion as evidence of proxy longshore rates because he had "significant doubts regarding Mr. Crow's familiarity with Longshore litigation."[4] Attorney Fee Order at 5. Accordingly, the administrative law judge found that counsel failed to establish a normal billing rate or a suitable proxy rate, and he relied on his own experience and knowledge of rates in longshore cases to arrive at a rate of $275 per hour, declining to modify the hourly rate because of the overall lack of complexity of the case and the quality of representation. *Id.* at 6. Absent any evidence supporting the request for $120 per hour for the assistant's fee, the administrative law judge awarded an hourly rate of $110 for legal assistant work. The administrative law judge then addressed the necessity of the legal services and the specific objections of employer, and he reduced the legal assistant's requested time by

[4]Although the administrative law judge rejected its probative value, he found that the Morones Survey reported a 2004 average hourly rate of $344 for commercial litigators with 30 or more years of experience, and Mr. Crow opined that an attorney in the Portland, Oregon, area with counsel's experience, abilities, and reputation, should be earning between $350 and $400 per hour. Attorney Fee Order at 4.

1.25 hours. The administrative law judge awarded counsel a fee of $9,680, representing 34 hours of attorney time at a rate of $275 per hour, and three hours of legal assistant time at a rate of $110 per hour. *Id.* at 3, 10. Counsel appeals, contending the administrative law judge erred in disregarding the evidence submitted to show market hourly rates and in arbitrarily determining an hourly rate for attorney work. Employer responds, urging affirmance. BRB No. 08-0533.

The sole issue on appeal is counsel's contention of error regarding the hourly rates awarded by both the administrative law judge and the district director. He asserts that the administrative law judge improperly rejected the Morones survey and Mr. Crow's affidavit, as evidence of counsel's appropriate market-based hourly rate. Counsel asserts that the district director's awarded rate is similarly erroneous, as well as being incompatible with the administrative law judge's award, as there should be no distinction between the rates awarded for trial time and non-trial time. In light of recent opinions of the United States Court of Appeals for the Ninth Circuit, we vacate the fee awards and remand the case.

In *Christensen v. Stevedoring Services of America*, 557 F.3d 1049 (9th Cir. 2009), involving an appeal of fees awarded by the Board, the Ninth Circuit stated that the definition of a "reasonable attorney's fee" is the same for all federal fee-shifting statutes, *Christensen*, 557 F.3d at 1052, citing *City of Burlington v. Dague*, 505 U.S. 557 (1992), and that most fee-shifting awards are calculated using the lodestar method, which multiplies a reasonable hourly rate by the number of hours reasonably expended.[5] *Id.* at 1053. In *Blum v. Stenson*, 465 U.S. 886 (1984), the Supreme Court held that "reasonable fees" should be calculated according to the "prevailing market rates in the relevant community." The *Christensen* court stated that the relevant community is generally the forum where the district court sits. *Christensen*, 557 F.3d at 1053, citing *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973 (9th Cir. 2008).[6] The Ninth Circuit held that the

[5]Other factors which could affect the award of the fee include for example: novelty or difficulty of the issue; skill needed; customary fee; time limitations imposed on attorney; amount involved/results obtained; experience of attorney; and, undesirability of the case. *Christensen*, 557 F.3d at 1053.

[6]In *Camacho*, the Ninth Circuit addressed a fee under the Fair Debt Collection Practices Act and expressed the concern that defining "relevant community" under the FDCPA is problematic. As there is no private market for such cases, and "[i]n order to encourage able counsel to undertake FDCPA cases, as Congress intended, it is necessary that counsel be awarded fees commensurate with those which they could obtain by taking other types of cases." *Camacho*, 523 F.3d at 981 (quoting *Tolentino v. Friedman*, 46

Board erred in limiting the relevant community rates to those awarded in longshore cases in a geographic region. The Ninth Circuit stated that defining the "market" in this way merely "recast[s]" awards made by previous courts and calls it a "market," rather than independently examining an actual market. *Christensen*, 557 F.3d at 1054, citing *Student Pub. Interest Research Group of N.J. v. AT&T Bell Laboratories*, 842 F.2d 1436, 1446 (3d Cir. 1988); *see also Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008) (*de facto* policy of awarding flat rate improper); *but see Jeffboat, LLC v. Director, OWCP*, 553 F.3d 487 (7th Cir. 2009) (prior awards are useful in establishing a reasonable market rate for attorneys working under the Longshore Act). The court stated that the Board "must define the relevant community more broadly than simply [as] fee awards under the [Act.]" *Christensen*, 557 F.3d at 1055.

The court stated that on the evidence presented to it, the Board had not adequately justified the rates awarded by reference only to the regulation at 20 C.F.R. §802.203(d)(4).[7] The court declined to dictate either the "relevant community" or the "reasonable hourly rate" therefor; the court stated that the Board need not make new community and rate determinations in every case but should make these determinations "with sufficient frequency" such that both the Board and the court can be confident that the fee awards are based on current market conditions. *Christensen*, 557 F.3d at 1055. Additionally, the Ninth Circuit stated that the burden for producing relevant market evidence is on the fee applicant, and where he fails his burden, the Board may look to other Board and administrative law judge cases to determine a reasonable fee. *Id.*

In *Van Skike v. Director, OWCP*, 557 F.3d 1041 (9th Cir. 2009), the court addressed appeals of administrative law judge and district director fee awards affirmed by the Board. Counsel, the same as in *Christensen* and in the current case, requested an hourly rate of $350, but the administrative law judge awarded $250 per hour and the district director awarded $235 per hour. The administrative law judge considered and rejected each ground counsel urged to support an award of an hourly rate of $350. The administrative law judge stated that the best proxy for a normal billing rate was $250 based upon what other administrative law judges and the Board had awarded previously. On counsel's motion for reconsideration, the administrative law judge rejected the

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F.3d 645, 652 (7th Cir. 1995)); *see Christensen*, 557 F.3d at 1053-1054. This concern, the court stated, is equally present in cases under the Longshore Act. *Id.*

[7] Section 802.203(d)(4) states:

> The rate awarded by the Board shall be based on what is reasonable and customary in the area where the services were rendered by a person of that particular professional status.

Morones survey stating there was an absence of "meaningful" proof of what counsel can receive from paying clients. *Van Skike*, 557 F.3d at 1044-1045. Before the district director, counsel in *Van Skike* requested $350 per hour. Although she noted that $250 per hour was appropriate for work performed before the administrative law judge, the district director awarded counsel $235 per hour based on the lack of complexity of the work before her. Counsel appealed both awards to the Board, and the Board affirmed. *D.V.*, 41 BRBS at 87.

In its decision in *Van Skike*, the Ninth Circuit observed that the administrative law judge and the district director provided detailed analyses of the evidence proffered by counsel to establish a prevailing market rate. However, because the administrative law judge and district director exclusively relied on contemporaneous longshore cases to set the rate, the court vacated the awards and remanded for further consideration consistent with *Christensen*. *Van Skike*, 557 F.3d at 1047. Additionally, the court held that a reduction of the hourly rate due to the lack of complexity of the issues is improper. Rather, adjustments for the lack of complexity of a case should be made in considering the number of compensable hours worked and not in the hourly rate awarded. *Id.* at 1048. Therefore, the court also vacated that aspect of the district director's fee award.

For the reasons set forth in *Christensen* and *Van Skike*, we vacate both the district director's and the administrative law judge's fee awards. The case is remanded for determinations of a reasonable hourly rate, and thus a reasonable fee, consistent with these decisions. *See also Welch v Metropolitan Life Ins. Co.*, 480 F.3d 942 (9th Cir. 2007).

Accordingly, the fee awards of the administrative law judge and district director are vacated. The case is remanded for reconsideration consistent with this decision.

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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BETTY JEAN HALL
Administrative Appeals Judge