BRB No. 07-0151

D.Q.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAVER TRANSPORTATION	)	DATE ISSUED: 08/28/2007
	)	
and	)	
	)	
SAIF	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order, the Order Denying Reconsideration, and the Supplemental Decision and Order Granting Attorney's Fees of William Dorsey, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, L.L.P.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order, the Order Denying Reconsideration, and the Supplemental Decision and Order Granting Attorney's Fees (2005-LHC-0322) of Administrative Law Judge William Dorsey 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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).

The facts of this case are not in dispute. Claimant worked for employer for 12 years prior to injuring his left knee on August 22, 2002. He underwent arthroscopic surgery on September 18, 2002, and he returned to light-duty work on October 7, 2002. On May 30, 2003, his condition reached maximum medical improvement, and he was assessed with a 20 percent permanent impairment of the left leg. Decision and Order at 2. The only issue on the merits disputed by the parties was how to calculate claimant's average weekly wage.

The administrative law judge found that claimant is a five-day-per-week worker who was on-call to work overtime one or two weekend days per month. The administrative law judge found that, during the 365 days preceding the injury, the following occurred:

Category	**Days**	**Gross Amount Paid**
Regular work or Regular + some other work	219	$39,425.83
Overtime only	24	$4,814.66
Vacation	17	$2,877.04
Sick	9	$1,521.12
Holiday	8	$1,349.68
Total	277	$49,988.33
Total minus holidays	269	
Total days actually at work	243	

Decision and Order at 2-3; Cl. Ex. 1; Tr. at 16.[1] Starting with the agreed-upon base of 243 days, the administrative law judge added the pay from the 26 days of sick and vacation leave that claimant could have worked for a total of 269 days "worked." Following the computation set forth in Section 10(a) of the Act, 33 U.S.C. §910(a), the administrative law judge found that claimant's average daily wage is $185.83, his average weekly wage is $929.15 ($49,988.23/269 x 260 / 52), and his compensation rate is $619.43. Decision and Order at 4. The administrative law judge rejected claimant's argument that *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir.

[1]The administrative law judge also noted that, pursuant to the collective bargaining agreement, claimant is entitled to six days of sick leave and 15 days of vacation. He was able to take nine and 17 days respectively because employer permitted him to carry days over either as a matter of general practice or due to the uncertainty of his wife's chronic health condition. Decision and Order at 3.

1998), requires that paid vacation and sick days be excluded from the calculation so as to fulfill the "fundamental policy" of allowing claimants to be overcompensated. Decision and Order at 6-7. The administrative law judge denied claimant's motion for reconsideration. Claimant appeals the average weekly wage calculation, and employer responds, urging affirmance.

Subsequent to the administrative law judge's decision, claimant's counsel filed an application for an attorney's fee for work performed before the administrative law judge. Counsel requested a fee for four hours of work for services at an hourly rate of $350 and .75 hour at an hourly rate of $110 for his legal assistant's time. Employer objected to the fee request, arguing that $350 was an excessive hourly rate and that $235 was more appropriate. Further, employer argued that claimant obtained only partial success and that counsel should be limited to 25 percent of his fee request, as claimant obtained neither the higher average weekly wage nor the permanent total disability benefits he sought. The administrative law judge found that the limited success reduction would apply to this case if counsel had not already sharply curbed his billing;[2] thus, the administrative law judge declined to reduce the fee further. He did, however, determine that a rate of $350 per hour is excessive, and he awarded a fee at the rate of $250 per hour, holding employer liable for a total fee in the amount of $1,082.50. Claimant appeals the fee award, and employer responds, urging affirmance.

Claimant first contends the administrative law judge erred in calculating his average weekly wage. Specifically, he argues that *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT), resolves this issue because the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, stated therein that the Section 10(a) formula requires the calculation to include only the number of "days actually worked." Thus, he asserts the administrative law judge may not count vacation and sick days for which claimant was paid but did not work as "days actually worked," and thereby make the divisor larger and the average weekly wage smaller. Claimant contends he actually worked 243 days, so his average weekly wage award should be based on this figure.[3]

[2]The administrative law judge found that counsel requested a fee for only four hours of work related to a conference, a deposition, and review of the settlement offer.

[3]Claimant states that his earnings in the 52 weeks before the injury were $49,090.41. He states that he arrived at this amount by adding his actual earnings to the amount he contractually received for 15 of the vacation days and six of the sick leave days. He then divided that amount by 243 to arrive at an average daily wage of $202.02. Completing the computations, he arrived at an average weekly wage of $1,010.09. Cl. Brief at 2. Thus, claimant asserts he can include the pay he received from the allotted vacation and sick days, but that those days themselves cannot be counted.

Employer asserts that: a) *Matulic* provides no guidance on this issue; b) the formula used by the administrative law judge is that stated in Section 10(a); c) there is no policy to "overcompensate" an injured employee; and d) claimant's argument is inconsistent because, if he had worked those days instead of taking vacation or sick leave, his average weekly wage would be the amount the administrative law judge calculated. We reject claimant's arguments and affirm the administrative law judge's finding on average weekly wage.

Section 10(a) of the Act provides:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a). In summarizing the Section 10(a) formula, the Ninth Circuit stated that average weekly wage is calculated by dividing the total earnings of the claimant during the 52 weeks preceding his injury by the "number of days actually worked[.]" *Matulic*, 154 F.3d at 1056, 32 BRBS at 150(CRT). The issue in *Matulic* involved whether the use of Section 10(a) is prohibited where its formula allows a claimant to receive benefits that exceed his actual earnings. The court acknowledged that there is some overcompensation built into the system because no one works every working day of every year, and it held that compensating a claimant for 18 percent more days than he actually worked "(including vacation, holiday, and sick days)" was not a sufficient reason for bypassing Section 10(a) and using Section 10(c), 33 U.S.C. §910(c). *Id.*, 154 F.3d at 1057, 32 BRBS at 151(CRT); *see Duncanson-Harrelson Co. v. Director, OWCP [Freer]*, 686 F.2d 1336 (9th Cir. 1982), *vacated on other grounds*, 462 U.S. 1101 (1983). Thus, the Ninth Circuit concluded that some overcompensation does not result in the use of Section 10(a) being unreasonable or unfair.

In the instant case, claimant contends the Ninth Circuit's use of the phrase "days actually worked" requires the administrative law judge to exclude vacation and sick days from the equation because those were not days "actually worked." He argues that by including those days, the administrative law judge violated a "fundamental policy" to overcompensate injured employees. Claimant has misread *Matulic*. The purpose of the Act is to compensate injured employees – not to *over*compensate them. Indeed, the Ninth Circuit stated that Congress intended through Section 10(a) to create an "efficient and beneficent, though not entirely accurate, method of estimating a claimant's earning

capacity[.]" *Matulic*, 154 F.3d at 1057, 32 BRBS at 151(CRT).[4] Yet, the Ninth Circuit surmised, Congress must have realized that there would be a degree of inaccuracy which would result in some overcompensation, as ordinary error would favor the employee. *Id.* While some overcompensation may occur in a given case, there surely can be no expectation that there always will be overcompensation. Moreover, although claimant argues that vacation and sick days should be excluded pursuant to *Matulic*, the court in *Matulic* noted parenthetically that the 18 percent overage *included* vacation, holiday and sick days. *Id.*

Finally, claimant's argument that the language in *Matulic* controls the outcome this case ignores the plain language of the Act. Specifically, Section 10(a) states that an employee's average weekly wage shall be "two hundred and sixty times the average daily wage or salary for a five-day worker, *which he shall have earned in such employment during the days when so employed*." 33 U.S.C. §910(a) (emphasis added). Provided that the employee was employed substantially the whole of the year, which *Matulic* sets at 75 percent of the year, 154 F.3d at 1058, 32 BRBS at 151(CRT), then his average weekly wage is based on his daily wage earned "during the days he was so employed."[5] *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997) (proper inquiry requires administrative law judge to determine claimant's income during year prior to injury and divide that amount by "the actual number of days for which the employee was paid"); *see also Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990) ("since average weekly wage included vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment"). The Act, therefore, does not limit the average weekly wage calculation to include only those days claimant was present at work. Indeed, if an administrative law judge computed a claimant's average weekly wage by including all of his earnings from the days he was paid, including vacation and sick days, but divided that

[4]Similarly, in *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990), the Board stated that Section 10(a) "aims at a theoretical approximation of what a claimant could ideally have been expected to earn" during the year preceding his injury. The Fifth Circuit has quoted this language. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000).

[5]In *General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1023 (2006), and *Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005), the administrative law judges found that the claimants "actually worked" 201.35 and 197 days, respectfully. There was no discussion of whether sick days or vacation days were included in the calculations.

amount by only the days he was present at work, the result could unreasonably inflate the claimant's average daily wage and the resulting average weekly wage. Therefore, because claimant was "so employed" and he received payment for each day worked as well as paid vacation and sick days, it was reasonable for the administrative law judge to include the vacation and sick days when claimant was employed and for which he was paid in the calculation of his earnings. *Id.*; *see also Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000) (no bright-line treatment of vacation days; administrative law judge to determine whether they count as "days worked").[6]

Claimant also argues that the vacation and sick days should not be included in his average weekly wage calculation because the money he received for those days was earned previously and he did not really earn any money on the days he did not work. To support this argument, claimant cites *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997), wherein the Ninth Circuit held that the vacation pay the claimant earned during the year prior to his injury, but received after his injury, was properly included in the average weekly wage calculation. Contrary to claimant's argument here, *Sproull* is not controlling because the collective bargaining agreement in *Sproull* provided that the employee was entitled to vacation pay regardless of whether he took his vacation days. *Id.*, 86 F.3d at 899, 30 BRBS at 51(CRT). In the instant case, based on testimony given by employer's controller at the hearing, Tr. at 76, the administrative law judge found that claimant could not have received vacation or sick pay on a day he worked, so in order to earn vacation or sick pay, he must have taken the day off.[7] Decision and Order at 3. Additionally, all earnings

[6]In *Wooley*, the Board held that where a claimant received vacation pay in lieu of taking the vacation days off, the determination of the number of days worked for purposes of calculating average daily wage does not include additional days derived from the hours for which the claimant received the vacation pay rather than the time off. *Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 88, 90 (1999), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000). The Fifth Circuit held that the inclusion of such "sold back" days in the calculation would have resulted in the claimant's working more days than a five-day-per-week worker can work. Thus, the court found it is appropriate to charge the administrative law judge with fact-finding regarding whether vacation compensation counts as a day "worked." *Wooley*, 204 F.3d at 618, 34 BRBS at 14(CRT).

[7]The administrative law judge excluded holiday pay, finding that claimant would have received it regardless of whether he worked that day (if he had worked he would have received overtime plus holiday pay). Because claimant had to take a day off in order to receive vacation or sick pay, the administrative law judge treated the holiday pay differently. Decision and Order at 3.

at issue herein were not only earned but also received prior to claimant's work injury.[8] We therefore reject claimant's contentions based on *Matulic* and *Sproull.* As the administrative law judge's calculation of claimant's average weekly wage is rational, supported by substantial evidence, and in accordance with law, it is affirmed. Therefore, we affirm the award of benefits.

Claimant also challenges the administrative law judge's attorney's fee award. Claimant's counsel requested a fee for four hours of services at hourly rate of $350 plus $82.50 for .75 hours of legal assistant time. The administrative law judge found that the attorney's hourly rate was excessive, rejecting claimant's evidence and arguments for the reasons set forth in his decision in *[D.V.] v. Cenex Harvest States Cooperative*, 2005-LHC-1903 (August 10, 2006).[9] Claimant argues that it was improper for the administrative law judge to ignore valid tools for assessing a reasonable hourly rate, such as the Morones survey, the *Laffey* matrix and geographically relevant expert testimony, and to arrive at his own hourly rate. Counsel also argues that Section 702.132 of the regulations, 20 C.F.R. §702.132, may not supersede the holdings of the Supreme Court in two fee-shifting cases, *Missouri v. Jenkins*, 491 U.S. 274 (1989), and *Blum v. Stenson*, 465 U.S. 886 (1984). Employer responds, urging affirmance of the awarded hourly rate. In supplemental briefs accepted by the Board, the parties dispute the applicability of a recent Ninth Circuit decision involving an attorney's hourly rate, *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942 (9th Cir. 2007).

With the exception of the *Welch* issue, the Board recently addressed and rejected counsel's contentions that the administrative law judge erred in reducing the requested hourly rate. *D.V. v. Cenex Harvest States Cooperative*, __ BRBS __, BRB Nos. 06-904, 07-118 (July 30, 2007). In *D.V.*, the Board cited *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004), for the purpose of demonstrating that an administrative law judge may rely on fee awards in "comparable cases" as a basis for setting a reasonable hourly rate in the geographic area. As the administrative law judge in *D.V.* rationally rejected the documentation submitted by counsel to establish a prevailing market rate of $350 for a longshore attorney in the Portland region, the Board affirmed the administrative law judge's determination that an hourly rate of $250 was reasonable based on the regulating criteria. *D.V.*, slip op. at 3-5.

[8]Contrary to claimant's assertion, there is no evidence that he worked 18 extra overtime days for which he was not compensated. The administrative law judge calculated that claimant was paid for a total of 277 days (not 278 as claimant states), and he excluded the days off for holidays. The overtime pay claimant received was included in the average weekly wage calculation.

[9]Claimant herein is represented by the same attorney as in the *D.V.* decision.

In this case, the administrative law judge provided the same valid rationale for awarding an hourly rate of $250. For the reasons set forth in *D.V.*, we reject counsel's contentions of error.

Next, counsel argues that the Ninth Circuit's decision in *Welch*, 480 F.3d 942, directly addresses the proper manner for arriving at a market hourly rate for an attorney's fee award and that this decision controls the issue herein. *Welch* involved an injured employee who sued her long-term disability insurance company, alleging it improperly denied her benefits. Six months after she filed suit, the insurance company agreed to honor her claim, and thereafter her attorney filed a petition for a fee for work performed. In support of her motion for a fee based on hourly rates of $375 and $400, Welch submitted declarations from four ERISA attorneys who stated they normally charge between $400 and $475 per hour and four district court orders awarding fees based on hourly rates between $300 and $375. MetLife argued that the hourly rate request was unreasonable, but it submitted as evidence documentation of only four fee requests, all based on the hourly rate of $375. *Welch*, 480 F.3d at 945. The Ninth Circuit stated that the district court erred in reducing the hourly rate to $250 because, among other things, the court failed to explain how the evidence in the record supported an award based on an hourly rate of $250, which was significantly less than the hourly rates established by the evidence submitted by both parties. The Ninth Circuit concluded that the requested rates of $375 and $400 per hour were in line with the prevailing community rates based on the evidence submitted, and it remanded the case for further consideration, stating that the district court must presume the requested rates are reasonable but he could reduce the rates based on a finding that Welch's attorney performed below standard or on evidence demonstrating that the rates requested were unreasonable. *Id.*, 480 F.3d at 946-948. Claimant contends that *Welch* makes clear that the market rate is that rate which a comparable attorney could charge private clients on comparable claims, citing *Blum*, 465 U.S 886 ("reasonable fees" in federal civil rights action are to be calculated according to prevailing market rates in relevant community), and it is not the rate the administrative law judge would set. *See generally Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

We reject this contention. Although claimant's counsel submitted evidence of higher hourly rates in various other cases, the administrative law judge rationally rejected them as being not comparable to a longshore case in Portland, Oregon. *See D.V.*, slip op. at 5. Employer, in its objections, cited a number of longshore cases wherein the claimants' attorneys received fees based on hourly rates between $200 and $250 for work performed on the West Coast. Thus, unlike the situation in *Welch* where the insurance company submitted evidence showing hourly rates on par with those requested by the employee's attorney, employer here submitted evidence that the requested rate was too high for work performed in a relatively straightforward longshore case in Oregon. As the Board stated in *D.V.*, slip op. at 4, the administrative law judge may find reasonable an

hourly rate that he and other administrative law judges, the Benefits Review Board, or the district director awarded in comparable cases. *See Brown*, 376 F.3d 245, 38 BRBS 37(CRT). Therefore, we reject counsel's argument that *Welch* mandates a higher hourly rate than that awarded, and we affirm the administrative law judge's award of an attorney's fee based on an hourly rate of $250. *D.V.*, slip op. at 5; *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006).

Accordingly, the administrative law judge's Decision and Order, the Order Denying Reconsideration, and the Supplemental Decision and Order Granting Attorney's Fees are affirmed.

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