BRB No. 07-0164

R.D. Claimant-Petitioner v. CENEX HARVEST STATES COOPERATIVE and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents	))))))))))))))))	DATE ISSUED: 07/25/2007 DECISION and ORDER

Appeal of the Compensation Order Approval of Attorney Fee and Order Denying Reconsideration of Attorney's Fee and Approval 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 Compensation Order Approval of Attorney Fee and Order Denying Reconsideration of Attorney's Fee and Approval of Attorney's Fee (Case No. 14-143762) 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.* (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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant suffered a hearing loss during the course of his employment for which he received compensation under the Act after he filed a claim therefor. Subsequently, claimant's attorney filed a fee petition for work performed before the district director seeking $1,630, representing 4.5 hours of attorney time at $350 per hour, one half-hour expended by a legal assistant at $110 per hour, plus costs of $400. Employer filed objections to the fee petition. Thereafter, claimant's attorney filed a supplemental fee petition seeking $700, representing two hours of attorney services at $350 per hour for responding to employer's objections.

In her fee order, the district director found that employer is not responsible for payment of legal fees for services rendered before it controverted the claim on June 30, 2005, and she reduced the requested hourly rate of $350 to $235. The district director also determined that claimant's attorney is entitled to a fee for 25 percent of the time expended responding to employer's objections. The district director ordered employer to pay a fee of $525, representing two hours of attorney services at $235 per hour and $55 for work performed by the legal assistant, plus costs of $400. The district director denied claimant's motion for reconsideration; however, she approved a fee of $705 payable by claimant for services rendered before June 30, 2005, representing three hours of attorney time at $235 per hour. 33 U.S.C. §928(c).

On appeal, claimant contends that the district director erred in finding that employer is not liable for a fee for time expended by counsel prior to employer's controversion of the claim, and in reducing the hourly rate. Employer responds, urging affirmance.

Claimant first contends that the district director erred by finding that employer is not liable for legal services performed before June 30, 2005. Employer may be held liable for an attorney's fee pursuant to Section 28(a) if it declines to pay any compensation and claimant is thereafter successful in obtaining benefits. 33 U.S.C. §928(a); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). Employer's fee liability accrues only after: (1) employer declines to pay any compensation on or before the 30th day after receiving notice of the claim from the district director; and (2) thereafter, the claimant utilizes the services of an attorney in the successful prosecution of the claim. *Id.* In this case, claimant does not challenge the district director's finding that employer filed a notice of controversion on June 30, 2005.[1]

[1] The district director does not explicitly state the date on which employer received notice of the claim, but employer's pleadings below state that the date was June 23, 2005. Claimant does not contend otherwise.

We affirm the district director's finding that employer is not liable for an attorney's fee under Section 28 for services rendered before this date, as it is in accordance with law. Claimant's reliance on *Liggett v. Crescent City Marine Ways & Drydock, Inc.*, 31 BRBS 135 (1997) (*en banc*) (Smith & Dolder, JJ., dissenting), for the proposition that employer's liability accrues from an earlier date, is without merit as that case has been effectively overruled. *Childers v. Drummond Co., Inc.*, 22 BLR 1-148 (2002) (*en banc*) (McGranery and Hall, JJ., dissenting); *see also Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.,* 12 F.3d 209 (5th Cir. 1993) (table).

Claimant next challenges the awarded hourly rate, contending that the district director erred by basing her determination on the hourly rate awarded to comparable longshore attorneys in the Portland, Oregon area. Claimant's counsel requested $350 per hour for his services. The district director found the requested hourly rate excessive in view of the regulatory criteria of Section 702.132(a), 20 C.F.R. §702.132(a), and she rejected counsel's submissions intended to support a rate of $350 per hour. The district director found that most of the services rendered in this case were routine, and given the complexity of the case, the rates awarded to attorneys with similar experience, and the amount benefits awarded, claimant's counsel is entitled to a fee based on an hourly rate of $235.

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, the district director appropriately considered the complexity of the case, the quality of representation, and the amount of benefits obtained, in accordance with Section 702.132. *See Moyer v. Director, OWCP,* 124 F.3d 1378, 34 BRBS 134 (CRT) (10th Cir. 1997).

Claimant contends, however, that Section 702.132 may not supersede the holding in *Blum v. Stenson,* 465 U.S. 886 (1984), requiring a fee in a fee-shifting statute to be based on prevailing market rates. *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. 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 the fact-finder does 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.'"[2] *Newport News Shipbuilding & Dry Dock Co. v. Brown,* 376 F.3d 245, 251, 38 BRBS 37, 41(CRT) (4th Cir. 2004), citing *Spell v. McDaniel*, 824 F.2d 1380, 1402 (4th Cir. 1987) (emphasis added).

We reject claimant's assertion that the district director erred in rejecting the "Morones Survey" as evidence of a market rate. This survey of attorney hourly rates is not pertinent to deriving an hourly rate as this case, as counsel did not establish his firm's comparability to the firms listed in the survey, which are commercial litigation firms. Moreover, 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 of 20 C.F.R. §702.132(a). 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. The district director appropriately based her hourly rate determination on the regulatory criteria, as well on rates paid to comparable attorneys in the geographic area. 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 awarded hourly rate of $235.[3]

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[2] 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 founded 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 district director.

[3] In his brief, counsel asserts that if the case is remanded to the district director for consideration of a higher hourly rate, the district director would also have to consider claimant's ability to pay the fee assessed against him. Inasmuch as we affirm the district

Accordingly, the district director's Compensation Order Approval of Attorney Fee and Order Denying Reconsideration of Attorney's Fee and Approval of Attorney's Fee are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

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director's fee award, we need not address this contention, as counsel does not allege that the fee currently assessed against claimant is excessive.