BRB Nos. 07-0341
and 07-0341A

D.O.	)	
	)	
Claimant-Respondent Cross-Petitioner	)	
	)	
v.	)	
	)	
McDONNELL DOUGLAS SERVICES	)	
	)	
and	)	
	)	
AIG CLAIMS SERVICES	)	DATE ISSUED: 12/21/2007
	)	
Employer/Carrier- Respondents Cross-Respondents	)	
	)	
ALSALAM AIRCRAFT COMPANY, LIMITED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier- Petitioners Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order on Remand Awarding Benefits and the Order Denying Claimant's Petition for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Scott C. Sands (Sands & Associates), Chicago, Illinois, for claimant.

Matthew H. Ammerman (Fitzhugh, Elliott, & Ammerman, P.C.), Houston, Texas, for McDonnell Douglas Services and AIG Claims Services.

Richard L. Garelick (Flicker, Garelick & Associates, LLP), New York, New York, for Alsalam Aircraft Company, Limited, and Insurance Company of the State of Pennsylvania.

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

PER CURIAM:

Alsalam Aircraft Company, Limited (Alsalam) appeals, and claimant cross-appeals, the Decision and Order on Remand Awarding Benefits and the Order Denying Claimant's Petition for Reconsideration (2003-LHC-2109, 2003-LHC-2125, 2004-LHC-1655) of Administrative Law Judge Richard D. Mills 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 Defense Base Act, 42 U.S.C. §1651 *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).

This case has previously been before the Board. In 1996, claimant commenced working for McDonnell Douglas Services (MDS). In April 1997, claimant commenced a training course for a new position with employer that would send him to Saudia Arabia. On July 6, 1997, claimant arrived in Saudia Arabia and began working as a crew chief.[1] Tr. at 59-61. On October 28, 1997, claimant injured his back and neck when the on-site bus in which he was riding was involved in an accident. Tr. at 71-74. MDS paid compensation to claimant from October 28 through November 3, 1997. Claimant then returned to his usual work; however, he testified he continued to suffer pain, headaches, spasms in his neck and back, and numbness in certain fingers, and he was treated with therapy and medications. Tr. at 87-89.

On January 13, 1998, claimant's employer, but not his job, changed when Alsalam bought MDS's operations. Claimant continued to work but sometimes missed days due to symptom flare-ups caused by the previous day's work activities, and he was subsequently diagnosed with disc herniations at C5-6 and C6-7 from the 1997 injury. On May 18, 1999, claimant injured his shoulder at work. He underwent surgery on his right shoulder on August 17, 1999, and by September 7, 1999, he was released to return to light duty. In March 2000, claimant returned to his usual employment after being released from care for his shoulder injury; claimant testified that he suffered pain in his neck when he performed certain aspects of his job. In April 2000, claimant learned that

[1] The position entailed repairing, maintaining, and cleaning aircraft, as well as performing pre- and post-flight inspections.

he needed surgery on his neck, and he spent the next few months working with pain until he was advised to be evaluated by doctors in the United States. On August 18, 2000, claimant arrived in the United States whereupon he received recommendations to undergo neck surgery with Dr. Gornet. He underwent a second surgery on his right shoulder on January 30, 2001, and on July 3, 2001, he underwent neck surgery at MDS's expense. Because claimant failed to return to work in Saudia Arabia, Alsalam ceased paying claimant's salary in February 2001, and terminated his employment on May 22, 2001. Claimant filed a claim for benefits under the Act for his 1999 shoulder injury, and Administrative Law Judge Roketenetz found Alsalam liable for temporary total disability benefits from February 8 through May 9, 2001, and permanent total disability benefits from May 10 through July 2, 2001.[2] Cl. Exs.(ii) 5, 47. After claimant underwent the neck surgery on July 3, 2001, MDS paid claimant disability compensation from July 3, 2001, through May 4, 2004, at varying rates. MDS Ex. 62. According to claimant, he experienced additional neck and back symptoms in the summer of 2003, and on September 29, 2003, he learned that his first neck surgery had been unsuccessful and that he needed revision surgery. After MDS denied authorization for this second neck surgery, claimant sought benefits against both MDS and Alsalam. MDS averred that Alsalam is liable for claimant's 2001 surgery and other benefits related to his neck condition because claimant's work with Alsalam aggravated his condition.

In his initial Decision and Order, Administrative Law Judge Mills (the administrative law judge) found that claimant's current neck disability is due solely to the natural progression resulting from his October 28, 1997, work injury because MDS failed to show there was a new injury or aggravation of this condition while claimant worked for Alsalam. Accordingly, the administrative law judge held MDS liable for temporary total disability benefits, beginning on July 3, 2001, and continuing, and for the costs of the revision surgery, as well as future medical expenses. In calculating claimant's average weekly wage as of October 28, 1997, the administrative law judge found that neither Section 10(a) nor Section 10(b) could be applied; accordingly, he used Section 10(c) to calculate claimant's average weekly wage. 33 U.S.C. §910(a)-(c). As he concluded that claimant had not been employed in his position for substantially the whole of the year preceding the 1997 injury, the administrative law judge calculated claimant's average weekly wage using the earnings claimant would be entitled to receive under his employment contract, and he found claimant's average weekly wage was $1,235.50.

[2] According to Judge Roketenetz, claimant sought permanent total disability benefits for the shoulder injury only through July 2, 2001, because of a previous agreement with MDS under which it would pay him compensation for the neck injury beginning on July 3, 2001, the date of the neck surgery. Cl. Ex.(ii) 47 at 3, 14.

On MDS's appeal, the Board determined that the administrative law judge misapplied the aggravation rule when considering the issue of which employer is responsible for the payment of claimant's benefits. The Board therefore vacated the administrative law judge's finding that MDS is the responsible employer and remanded the case for reconsideration of this issue. The administrative law judge's average weekly wage calculation was also vacated, as the Board determined that the administrative law judge did not discuss whether the incentive and home leave payments made to claimant constituted "dependent entitlements" to be excluded from that calculation; the administrative law judge was directed to fully address this argument on remand. Lastly, the Board held that the attorney's fee awarded to claimant's counsel must be reconsidered on remand consistent with the administrative law judge's findings regarding the responsible employer and the amount of benefits due claimant. *[D.O.] v. McDonnell Douglas Services*, BRB Nos. 05-0445/A (Feb. 15, 2006) (unpub.).

On remand, the administrative law judge determined that claimant's continuing employment with Alsalam aggravated his underlying neck condition, resulting in claimant's disabling symptoms and pain, and that this condition thereafter reached a point whereupon claimant could not continue gainful employment with Alsalam. Accordingly, pursuant to the aggravation rule, the administrative law judge concluded that Alsalam is the party responsible for the payment of benefits due claimant as a result of his neck condition. Next, the administrative law judge found that the payments received by claimant for incentive and home leave are fringe benefits and thus are not included in the calculation of claimant's average weekly wage, which the administrative subsequently determined to be $931.93. Lastly, the administrative law judge approved claimant's counsel's request for an attorney's fee and costs in the amount of $33,114.59. In a subsequent order, the administrative law judge, after correcting a mathematical error regarding claimant's average weekly wage, denied claimant's motion for reconsideration.

On appeal, Alsalam challenges the administrative law judge's finding that it is the employer responsible for the payment of claimant's awarded benefits. Claimant responds, urging affirmance. In his cross-appeal, claimant contends that the administrative law judge erred in calculating his average weekly wage and in failing to award him permanent total disability benefits as a consequence of his prior shoulder injury. Claimant additionally seeks an attorney's fee for services previously rendered before the Board in BRB Nos. 05-0445/A. Alsalam and MDS have responded to claimant's cross-appeal, and MDS has responded to claimant's fee request.

We will first address Alsalam's contention that the administrative law judge employed an improper standard on remand in addressing the issue of which employer is responsible for the payment of claimant's benefits under the Act. Specifically, Alsalam avers that the Board erred in directing the administrative law judge to reconsider this issue using the standard espoused by the United States Court of Appeals for the Third Circuit in *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 241, 35 BRBS 154, 160(CRT) (3d Cir. 2002). In this regard, Alsalam avers that the correct

standard to be used when adjudicating this issue is set forth in the opinion of the United States Court of Appeals for the Fifth Circuit in *Operators & Consulting Services, Inc. v. Director, OWCP*, 170 Fed. Appx. 931 (5th Cir. 2006),[3] and that the use of that standard mandates a finding that MDS, rather than Alsalam, is liable for claimant's benefits. For the reasons that follow, we reject Alsalam's allegations of error.

In allocating liability between successive employers and carriers in cases involving traumatic injury, the employer and carrier at the time of the original injury remain liable for the full disability resulting from the natural progression of that injury. If, however, the claimant sustains an aggravation of the original injury, the employer and carrier at the time of the aggravation are liable for the entire disability resulting therefrom. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005). Where claimant's work results in an aggravation of his symptoms, the employer and carrier at the time of the work events resulting in this aggravation are responsible for any resulting disability. *See Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). Each employer has the burden of persuading the administrative law judge that the disability is the result of either the natural progression of the original injury or is the result of a new injury or an aggravation of the pre-existing condition with a subsequent covered employer or carrier. *See Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 Fed. Appx. 547 (9th Cir. 2001).

We reject Alsalam's argument that the case law discussed in our prior decision, specifically the holding in *Delaware River Stevedores*, 279 F.3d at 241, 35 BRBS at 160(CRT), is inconsistent with the standard applied by the Fifth Circuit in *Operators & Consulting Services, Inc.*, 170 Fed. Appx. 931. As employer acknowledges, this decision follows the well-established aggravation rule, *see Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986), and it applies the natural progression/aggravation standard stated above, citing, *inter alia*, *Metropolitan Stevedore* and *Marinette Marine*. These cases are not at odds with *Delaware River Stevedores*, as all rely upon the same legal standard with the ultimate outcome turning on the administrative law judge's weighing of the evidence and whether substantial

[3] This decision was not designated for publication in the Federal Reporter. Pursuant to the Fifth Circuit's Rules of Procedure, unpublished opinions issued after January 1, 1996, are not precedent but may be cited. 5th Cir. R. 47.5.4.

evidence supports a finding of aggravation or natural progression.[4] *See Metropolitan Stevedore,* 339 F.2d 1102, 37 BRBS 89(CRT)(last employer prior to surgery held liable, even though surgery scheduled prior to that employment, based on evidence any work would aggravate knee). *Marinette Marine,* 431 F.3d 1032, 39 BRBS 82(CRT)(employer at time of aggravation of back liable based on credited medical opinions).

In the instant case, substantial evidence supports the administrative law judge's finding that claimant's neck surgeries and disability are related to an aggravation with Alsalam. It is undisputed that claimant returned to his usual employment duties following the initial October 28, 1997, vehicular incident, that claimant thereafter experienced the onset of symptoms related to his neck, and that claimant underwent surgery on his neck on July 3, 2001. In concluding on remand that claimant's subsequent employment with Alsalam aggravated his neck condition and symptoms, the administrative law judge found that claimant's testimony established that his neck complaints became much worse while working for Alsalam, *see* Tr. at 67-69, 87-89, 165, 168, 170-175, and that Dr. Gornet, claimant's treating physician, opined that claimant's employment activities with Alsalam aggravated his neck symptoms. *See* Alasalam Ex. 12 at 47. The administrative law judge also relied upon Dr. Mishkin's testimony that it was more likely than not that claimant's July 3, 2001, neck surgery was brought about in part by claimant's employment with Alsalam subsequent to January 1998, *see* MDS Ex. 21 at 16-18, and Dr. Ganet's concession that a patient with increased symptoms will more likely require surgery. *See* MDS Ex. 25 at 37-38.

[4] Under the aggravation rule, where the employment aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. *Strachan Shipping v. Nash,* 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986). It is immaterial whether an aggravation caused an attack of symptoms severe enough to disable claimant or altered the underlying disease process; in either event, the disability results from the aggravation. *Gardner v. Director, OWCP,* 640 F.2d 1385, 1389, 13 BRBS 101, 106 (1st Cir. 1981). It follows that the employer at the time of the aggravation is liable for the resulting disability. In *Delaware River Stevedores*, the credited medical evidence supported a finding that claimant's employment at a second employer caused a "flare-up" or *temporary* exacerbation of his back condition, and that employer was thus liable for claimant's *temporary* disability. In contrast, in *Operators & Consulting Services, Inc.*, 170 Fed. Appx. at 936, the credited medical evidence stated that claimant's flare-ups of pain were manifestations of his original injury and that while his employment with the later employer *might* have exacerbated it, claimant's ultimate condition was "wholly attributable to the natural progression of his initial injury." (emphasis in original). The first employer was thus liable for claimant's permanent disability. These decisions are not at odds; they simply turn on the different facts, evidence and type of disability in each case.

Lastly, the administrative law judge found that Dr. Khoury opined that claimant's work activities would have progressed his soft tissue injury and that claimant's present symptoms were the result of the aggravation of his underlying neck condition. *See* MDS Ex. 29 at 5-8.

The administrative law judge therefore rationally rejected Alsalam's position that claimant's neck symptoms and surgery were the natural result of his prior October 28, 1997, work injury when he credited claimant's testimony, as supported by the testimony of Drs. Mishkin, Garnet and Khoury. This evidence supports a conclusion that claimant's employment with Alsalam resulted in an aggravation of his underlying neck condition which resulted in claimant's need for surgery and his inability to continue his employment with Alsalam. As the Board is not empowered to reweigh the medical evidence, *see, e.g., Mijanjos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), we affirm the administrative law judge's finding that Alsalam is liable for the benefits due claimant under the Act as of July 2, 2001, as it is supported by substantial evidence and consistent with law. *See Marinette Marine*, 431 F.3d 1032, 39 BRBS 82(CRT); *Metropolitan Stevedore*, 339 F.3d 1102, 37 BRBS 87(CRT).

In his cross-appeal, claimant initially challenges the administrative law judge's decision to exclude the payments made to claimant for "home" and "incentive" leave from his calculation of claimant's average weekly wage. Specifically, citing *Custom Ship Interiors v. Roberts*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 520 U.S. 1188 (2003), claimant argues that these since payments were made directly to him, could be used in any way that he saw fit, and were included in his taxable income, they must be considered to be a part of his annual wage. In response, employers aver that these amounts were paid on behalf of and for the benefit of claimant's dependents and thus were excludible from claimant's average weekly wage calculation pursuant to Section 2(13) of the Act, 33 U.S.C. §902(13). For the reasons that follow, we conclude that the administrative law judge's determination on this issue must be vacated, and the case remanded for further findings.

In its initial decision, the Board determined that although MDS raised the issue of the exclusion of the "home" and "incentive" leave sums paid to claimant by employer from the calculation of claimant's average weekly wage, the administrative law judge did not discuss whether those specific payments are "dependent entitlements" to be excluded from claimant's average weekly wage calculation pursuant to Section 2(13). The case was therefore remanded for the administrative law judge to fully address this timely raised argument. *See [D.O.]*, slip op. at 10-12. On remand, the administrative law judge stated:

> In 1999 Claimant received $4,200.00 in incentive leave for dependents and $12,564.00 for home leave for dependents. I find that these payments should not be considered "wages" since they were paid on account of Claimant's dependents and were for the benefits [sic] of same. It is of no

> consequence that the payment was made to Claimant and not to the dependents. I thus find that these payments are fringe benefits under Section 2(13) and not includable in his average weekly wage.

Decision and Order on Remand at 4.

Our discussion of claimant's contentions regarding the administrative law judge's finding on this issue must commence with Section 2(13) of the Act, which provides:

> The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of title 26 (relating to employment taxes). The *term wages does not include fringe benefits*, *including* (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or *any other employee's dependent entitlement.*

33 U.S.C. §902(13) (emphasis added). "Wages" generally include monetary compensation plus taxable advantages. *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *Wausau Ins. Companies v. Director, OWCP [Guthrie]*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997); *see also Roberts*, 300 F.3d 510, 36 BRBS 51(CRT). The Board has held that post allowances, foreign service additives, incentive compensation, completion awards, foreign housing allowances, and cost-of-living adjustments, pursuant to a contract of hire, are properly included in determining an employee's average weekly wage. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988); *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6 (1984). Payments for rest and relaxation, social security, excess income tax reimbursements, and storage costs, however, are akin to fringe benefits and are excluded from the calculation. *See Denton*, 21 BRBS at 46. Fringe benefits have been defined as those advantages given to an employee in addition to salary whose value is too speculative to convert to a cash equivalent. *Universal Maritime Serv. Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998);[5] *see Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 15

[5] The Fourth Circuit therein held that holiday pay, container royalty pay and vacation pay are all to be included in considering average weekly wage because they are earned by working. *Wright*, 155 F.3d 311, 33 BRBS 15(CRT); *see also James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000) (container royalty payments included because they are taxable monetary compensation paid in exchange for services rendered); *Lopez v. Southern Stevedores*, 23 BRBS 295

BRBS 155(CRT) (1983). Regarding the issue addressed by the parties in this case, neither the Act, its implementing regulations, nor the legislative history addressing the 1984 Amendments to the Act define the term "dependent entitlement" added to Section 2(13) by those Amendments. The term "entitle," however, is defined as "to give a right or title . . . to qualify for . . . to furnish with proper grounds for seeking or claiming." *Black's* Law Dictionary (Fourth ed.).

Thus, resolving the issue raised in this case requires determining whether claimant's dependents were "entitled" to the home and incentive leave payments such that they, rather than claimant, had a right to the sums. In order to address this issue, claimant's employment contract must be examined. A review of that document reveals that MDS and Alsalam were required to pay claimant a salary, plus a foreign service additive and a cost-of-living differential. The contract further provides for the payment, at the end of six months and yearly thereafter, of incentive leave; furthermore, at the end of one year, employer would be responsible for the payment of home leave. Cl. Ex.(i) 2. Claimant's contract of hire specifically describes "Home Leave" as

> the employee and each authorized dependent listed on this contract who resides with the employee in Saudi Arabia will be authorized a lump sum payment equal to the direct full fare round trip economy class airfare . . . from his work location in Saudi Arabia to his home of record. . . .

See Cl. Ex.(i) 2 at 12-13. "Incentive Leave" is described in the contract as

> the employee and each authorized dependent listed on this contract who resides with the employee in Saudi Arabia, will be authorized a lump sum payment based on the following:
>
> | | |
> |---|---|
> | Per Adult | $2100 |
> | Per Child (ages 2-11) | $1050 |
> | Per Infant (under age 2) | $0225 |

See Cl. Ex.(i) 2 at 13.[6] Additionally, the record contains a copy of a page from employer's employee's handbook which states, regarding incentive leave, that "an *employee will be authorized* a lump-sum payment based on authorized in-country family size," and that "*the employee and authorized in-country dependents will be authorized* a lump sum payment" for home leave. *See* Cl. Ex.(i) 5 (emphasis added). A pre-

---

(1990) (container royalty payments are readily calculable, paid directly to the employee and are based on seniority and careers hours worked).

[6] There is no dispute in this case as to the dependent status of claimant's wife and two children, or that they were "in-country" for the requisite period of time required by the contract. *See* Cl. Ex.(i) 2 at 10.

employment employer checklist states that claimant would receive his "incentive" and "home" leave in a lump sum. *See* Cl. Ex.(ii) 52. In addition, as the administrative law judge acknowledged in his initial decision, Decision and Order at 32, claimant testified that these payments were made regardless of whether the family traveled or not, they were deposited by employer directly into claimant's bank account, and they were reported on his income tax returns. Tr. at 70. Claimant asserts that his tax returns in evidence support his testimony that the entire amounts were reported as income on his federal tax returns. Cl. Ex. 2 at 16; MDS Ex. 59 at 58. In addition, claimant asserts that the entire amounts were reported by employer as wage or salary payments on claimant's W-2 form. Cl. Ex. 2 at 15.

In adjudicating this issue on remand, the administrative law judge did not address the specific term "dependent entitlement" or discuss the evidence regarding claimant's employment contract and how the sums at issue were paid. Rather, the administrative law judge concluded that claimant's home and incentive leave receipts should not be included in his average weekly wage calculation after summarily stating that these amounts "were paid on account of Claimant's dependents and were for the benefit of same. It is of no consequence that the payment was made to Claimant and not to the dependents." Decision and Order on Remand at 4. We cannot affirm this conclusion. The Act does not refer to amounts paid "on account of" dependents; it excludes only their "entitlements." While the physical receipt of these specific amounts by claimant may not be determinative of the issue presented, it is certainly relevant to whether claimant or his dependents were "entitled" to the payments. The plain language of the Act requires consideration of whether the sums designated by the contract for hire as home and incentive leave payments created a right of entitlement by claimant's dependents, as only dependent's entitlements are excluded from claimant's wages as fringe benefits under Section 2(13). As the administrative law judge did not apply the statutory language and address the issue as to who is "entitled" to the sums delineated in claimant's contract, the case must again be remanded. As discussed above, the record contains relevant evidence including claimant's contract, his purported employee handbook, and employer's pre-employment employee checklist which describe these payments. Moreover, the administrative law judge must consider the tax records and other relevant evidence to address claimant's contention that the payments at issue were paid directly to him and could be used at his discretion and were thus part of his wages rather than payments to which his dependents were entitled. *See Roberts,* 300 F.3d 510, 36 BRBS 51(CRT) (claimant's food and housing allowance, paid to employee in cash, included in his wages since allowance need not be spent on those expenses). We therefore vacate the administrative law judge's decision excluding these payments from the calculation of claimant's average weekly wage and remand this case for further consideration.

Claimant next avers that the administrative law judge erred when, on remand, he declined to address claimant's claim for disability compensation resulting from his work-related shoulder condition. We agree.

Claimant filed three claims for benefits. Claimant filed a claim against MDS for the initial 1997 neck and back injury (2003-LHC-2109), a claim against Alsalam for the 1999 shoulder injury (2003-LHC-2125), and a claim against Alsalam for the subsequent aggravation of his neck/back condition (2004-LHC-1655). Administrative Law Judge Roketenetz initially awarded claimant permanent total disability benefits as a result of his shoulder condition through July 2, 2001, at which time claimant began receiving benefits for his neck disability. In his initial decision, Judge Mills stated that the dispute between claimant and Alsalam regarding the post-July 2, 2001, nature and extent of his shoulder injury was irrelevant since claimant was to receive total disability benefits as a result of his neck condition. January 18, 2005, Decision and Order at 29, footnote 8. On remand from the Board, however, the administrative law judge reduced claimant's average weekly wage, and consequently his weekly benefit award, to an amount lower than that claimant had been receiving as a result of his shoulder injury. Claimant then requested reconsideration, asserting that the administrative law judge should consider the extent of his disability resulting from his shoulder condition and award benefits at his average weekly wage at the time of the shoulder injury. In his order on reconsideration, the administrative law judge declined to address this issue, stating that it was not within the scope of the Board's remand. Order at 2. The scope of the Board's remand, however, does not preclude the administrative law judge from addressing such issues. As a result of the administrative law judge's findings pursuant to the remand, the compensation rate for claimant's neck/back injury was reduced, resulting in a possible higher compensation rate for disability due to the shoulder injury. As claimant's claim for compensation post-July 2, 2001, for his shoulder injury was before the administrative law judge initially, *see* January 18, 2005, Decision and Order at 2, this was not a new issue raised by claimant for the first time on remand. *See* 20 C.F.R. §702.336. Accordingly, as this issue was timely presented for adjudication before the administrative law judge, the administrative law judge must fully address claimant's claim for benefits arising post-July 2, 2001, as a result of his work-related shoulder condition should claimant pursue that claim on remand.

Lastly, claimant's counsel has filed a statement requesting a fee for services performed while this case was initially before the Board. *See [D.O.]*, BRB Nos. 05-0445/A. Counsel requests a fee of $2,300, representing 11.5 hours of legal services performed at a rate of $200 per hour. The Act provides that claimant's counsel is entitled to an attorney's fee for success in review proceedings before the Board. 33 U.S.C. §928(b); *see Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981). As this case is being remanded, the degree of claimant's success before the Board, if any, has yet to be determined. Thus, as the award of a fee for services performed while this case was previously before the Board is premature, claimant's counsel's fee request is denied at this time. *See generally Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997). Should claimant ultimately be successful, counsel may refile his fee petition with the Board. 20 C.F.R. §802.203(c).

Accordingly, the administrative law judge's determination of claimant's average weekly wage is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge