BRB No. 08-0755

J.P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KINDER MORGAN BULK TERMINALS	)	DATE ISSUED: 05/27/2009
	)	
and	)	
	)	
LUMBERMAN'S CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and the Order on Reconsideration and Re Supplemental Fees of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Mark K. Conley (Slagle Morgan LLP), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand and the Order on Reconsideration and Re Supplemental Fees (2004-LHC-02473) of Administrative Law Judge Steven B. Berlin 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case is before the Board for a second time. Claimant injured his back on April 3, 2002, during the course of his employment for employer as a mechanic. Employer voluntarily paid compensation for temporary total disability until September 21, 2002. On October 8, 2002, claimant filed a claim for permanent disability benefits. The administrative law judge found that employer reinstated temporary total disability payments some time between September 23 and October 8, 2002. Claimant returned to light-duty longshore employment on October 6, 2003. Employer stopped paying benefits at this time and controverted the claim on November 4, 2003. After a formal hearing, the parties agreed to settle the claim, and the administrative law judge issued a decision approving the settlement. *See* 33 U.S.C. §908(i).

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting a fee of $15,927.50, representing 54.25 hours of legal services at the hourly rate of $275, 7.25 hours of legal assistant services at the hourly rate of $110, and costs of $211.25. In his supplemental decision, the administrative law judge reduced the hourly rates for claimant's counsel to $235 and for the legal assistant to $100. The administrative law judge rejected employer's objection to its liability for any fees for time expended prior to its controverting the claim on November 4, 2003. The administrative law judge also rejected employer's objections to specific itemized entries. Accordingly, employer was held liable for an attorney's fee totaling $13,473.75, and costs of $211.25.

Employer appealed and claimant cross-appealed this decision. Employer challenged the administrative law judge's finding that it is liable for a fee for time expended by counsel during the period it voluntarily paid claimant compensation for temporary total disability. Claimant contended the administrative law judge erred in reducing his hourly rate to $235. The Board vacated the administrative law judge's finding, which he had made pursuant to *Liggett v. Crescent City Marine Ways & Dry Dock Co.*, 31 BRBS 135 (1997)(*en banc*)(Smith & Dolder, JJ. dissenting), that employer is liable for an attorney's fee for services performed prior to employer's November 4, 2003, notice of controversion, as that case had been overruled. The Board remanded the case for the administrative law judge to address employer's liability for these services pursuant to Section 28(a) and (b), 33 U.S.C. §928(a), (b). *[J.P.] v. Kinder Morgan Bulk Terminals*, BRB Nos. 06-0408/A (Dec. 20, 2006). However, the Board affirmed the awarded hourly rate of $235 as the administrative law judge addressed the relevant factors and claimant had not shown that the administrative law judge abused his discretion in reducing the hourly rate based on the regulatory criteria, specifically the lack of complexity of the case. *J.P.*, slip op at 5-6.

On remand, the administrative law judge found that employer is not liable for any attorney's fee pursuant to Section 28(a) as employer did not decline to pay any benefits

prior to November 4, 2003, with the possible exception of a period of time around October 2002, which lasted for less than 30 days. Decision and Order on Remand at 6. The administrative law judge also found that employer is not liable for claimant's fee prior to November 3, 2004, the date of the notice of controversion, as there was no dispute regarding the amount of additional compensation due until April 27, 2004, when claimant specified the amount of additional compensation he was seeking. *Id*. at 8. In an Order on Reconsideration and Re Supplemental Fees, the administrative law judge agreed with claimant's contention that the fee should be adjusted to account for a delay in payment and adjusted the hourly rate awarded to $275. However, the administrative law judge denied claimant's motion for reconsideration of the issue of whether counsel is entitled to fees for work performed before November 4, 2003. The administrative law judge granted claimant a supplemental attorney's fee for two hours of legal services performed on his motion for reconsideration.

On appeal, claimant contends that the Board erred in affirming the administrative law judge's reduction of the applicable hourly rate and thus that the enhanced hourly rate awarded on remand should be increased. In addition, claimant contends that the administrative law judge erred in finding that employer is not liable for an attorney's fee for work performed prior to November 4, 2003, the date of employer's notice of controversion. Employer responds, urging the Board to apply the "law of the case" doctrine to the issue of the applicable hourly rate and to affirm the administrative law judge's finding that employer is not liable for pre-controversion fees.

Claimant contends that the Board erred in affirming the administrative law judge's award of an attorney's fee based on the hourly rate of $235, rather than the hourly rate of $275 initially requested. Thus, claimant contends that the enhanced rate of $275 awarded on remand also should be adjusted upward. Based on intervening decisions, we agree that the Board's affirmance of the hourly rate awarded cannot stand.

The law of the case doctrine is a matter of judicial economy, and an intervening contrary decision offers a cogent reason for reexamining a previous holding. *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986). Subsequent to the issuance of the Board's decision in the present case and the administrative law judge's decision on remand, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the present case arises, held that an hourly rate determination is not limited to the rates awarded in longshore cases in a given geographic area and that a reduction of the hourly rate due to the lack of complexity of the case is improper. *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049 (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041 (9th Cir. 2009). *See H.S. v. Department of Army/NAF*, __ BRBS __, BRB Nos. 08-0533, 08-0596 (Apr. 10, 2009). Given the significant change in approach these cases represent, we will not apply the "law of the case" doctrine to the Board's

affirmance of the administrative law judge's hourly rate determination. We vacate the administrative law judge's award of an attorney's fee based on the hourly rate of $235 and an enhanced rate of $275, and we remand the case for a determination of a reasonable hourly rate for the relevant community consistent with these decisions, based on the evidence and argument presented by the parties. *Christensen*, 557 F.3d at 1054; *Van Skike*, 557 F.3d at 1047; *see also Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942 (9th Cir. 2007).

Claimant also contends that the administrative law judge erred in finding that employer is not liable for claimant's pre-controversion attorney's fee pursuant to either Section 28(a) or Section 28(b) of the Act. Upon further review of the record, we note that this case was not transferred to the Office of Administrative Law Judges (OALJ) for resolution of the claim on the merits until August 16, 2004. Emp. Ex. 2 at 36. The Board has held that the administrative law judge does not have the authority to award a fee for services at other levels of the proceedings, s*ee Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001)(*en banc*), and that the letter of referral from the district director to the OALJ provides the best indication of the date informal proceedings terminated. *See Fitzgerald v. RCA Int'l Corp.*, 15 BRBS 345 (1983); *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23 (1st Cir. 1982). Therefore, as the fee in dispute is for work performed prior to the transfer of the case to the OALJ, we affirm the administrative law judge's denial of a fee for work performed before November 4, 2003, although on alternate grounds. On remand, the administrative law judge also should disallow a fee for any services performed between November 4, 2003 and August 16, 2004.

Counsel may apply to the district director for a fee for services performed prior to referral. As it relates to employer's liability for pre-controversion fees, we note that the administrative law judge properly found that employer cannot be held liable for these fees pursuant to Section 28(a). Employer did not "decline to pay any compensation" in the 30 days after its receipt of a claim in October 2002. Rather, employer reinstituted payments in late September or early October 2002 and kept paying benefits until 2003. Under these circumstances, employer is not liable for <u>any</u> attorney's fee pursuant to Section 28(a). *Andrepont v. Murphy Exploration & Prod. Co.*, __ F.3d ___, 2009 WL 1124246 (5th Cir. March 17, 2009), *aff'g* 41 BRBS 1 (2007) (Hall, J., dissenting), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring); *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *A.M. v. Electric Boat Corp.*, 42 BRBS 30 (2008); *W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007). *Cf. Dyer v. Cenex Harvest States Cooperative*, ___ F.3d____, 2009 WL 1163871 (9th Cir. May 1, 2009) (pursuant to Section 28(a), once fee liability shifts to employer, employer is liable for pre-controversion fees). If counsel applies to the district director for services performed

before referral to the OALJ the district director must address employer's liability for the fee pursuant to Section 28(b) including pre-controversion fees. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *Nat'l Steel & Ship-building Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979).

Accordingly, the administrative law judge's hourly rate determinations and the Board's affirmance thereof are vacated, and the case is remanded for further findings consistent with this opinion. The administrative law judge's Decision and Order on Remand is otherwise 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