BRB Nos. 11-0326
and 11-0326A

KEITH SMITH	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	DATE ISSUED: 08/23/2011
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Michael D. Murphy (Henslee Schwartz LLP), Houston, Texas, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order on Remand (2009-LDA-0382) of Administrative Law Judge Lee J. Romero, Jr., 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), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the DBA). 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 is before the Board for the second time.

Claimant, as a result of a lower back injury sustained while working for employer as a truck driver in Kuwait and Iraq on November 18, 2003, filed a claim for benefits. Employer conceded that claimant sustained a work-related injury resulting in disability for which it voluntarily paid benefits. A dispute, however, arose regarding the calculation of claimant's average weekly wage. In a Decision and Order issued in July 2007, the administrative law judge found that claimant's average weekly wage at the time of his November 18, 2003, injury in Iraq was $818.22, based on a blend of claimant's stateside earnings and his earnings from 6.7 weeks of employment in Iraq.[1] Claimant did not appeal this decision, but subsequently filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, asserting, based on the Board's decision in *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18 (2009), *aff'd on recon. en banc*, 43 BRBS 136 (2009), that the administrative law judge committed a mistake in fact in the calculation of claimant's average weekly wage. Employer filed a motion for summary decision, asserting that claimant was not entitled to modification as his motion was based on a change in law. Claimant opposed employer's motion for summary decision.

[1]Claimant was awarded benefits for temporary total disability from November 22, 2003 to June 17, 2006, and for permanent partial disability thereafter. 33 U.S.C. §908(b), (c)(21).

The administrative law judge granted employer's motion for summary decision and denied claimant's petition for modification, stating that claimant's petition was based on a change in law and that the Board's decision in *Simons* is to be applied prospectively only and not to a decision that has become final. Claimant appealed the administrative law judge's August 4, 2009, Order Granting Motion for Summary Decision and Cancelling Formal Hearing, alleging that his petition for modification raised a mistake in fact as to the calculation of his average weekly wage. The Director, Office of Workers' Compensation Programs (the Director), responded in support of claimant's position and sought remand of the case for further consideration of the average weekly wage issue. Employer agreed that the calculation of claimant's average weekly wage was subject to modification and it, too, filed a motion to remand the case to the administrative law judge. The Board vacated the administrative law judge's grant of summary decision and remanded the case to the administrative law judge to address the parties' contentions regarding the calculation of claimant's average weekly wage. *Smith v. Service Employees Int'l, Inc.*, BRB No. 09-0786 (Mar. 25, 2010)(unpub. Order).

On remand, applying *Simons*, 43 BRBS 18, the administrative law judge calculated claimant's average weekly wage based exclusively on claimant's overseas earnings with employer, $13,190, divided by the 6.7 weeks he worked, to arrive at an average weekly wage of $1,968.66. In accordance with Section 6(b)(1) of the Act, 33 U.S.C. §906(b)(1), the administrative law judge found claimant's award of benefits limited by the maximum compensation rate of $1,030.78, *i.e.*, 200 percent of the applicable national average weekly wage in effect at the time of claimant's November 18, 2003, work injury. The administrative law judge modified his prior award to reflect his recalculation of claimant's average weekly wage. Employer appeals the administrative law judge's Decision and Order on Remand.

On appeal, employer challenges the administrative law judge's use of only claimant's overseas wages to calculate claimant's average weekly wage. BRB No. 11-0326. On cross-appeal, claimant challenges the administrative law judge's use of the maximum applicable compensation rate in effect on November 18, 2003, the date on which claimant's disability commenced, rather than the rate in effect on July 16, 2007, when the administrative law judge awarded benefits. BRB No. 11-0326A. The Director has filed a response to both appeals, urging affirmance of the administrative law judge's Decision and Order on Remand. Claimant's counsel have also filed attorney's fee petitions for work performed before the Board in the prior appeal, BRB No. 09-0786.

Employer contends that the administrative law judge's reliance on the Board's holding in *Simons,* 43 BRBS 18, to calculate claimant's average weekly wage based solely on his overseas earnings is, based on the facts of this case, arbitrary and not in

accordance with the law. Employer contends that, in light of the evidence in this case,[2] it is inappropriate for claimant to be awarded benefits based on a brief spike in his annual earning capacity to over $102,000 for performing the same work in which he had historically earned less than $32,000 a year, *i.e.*, work as a truck driver in the United States. Employer further argues that the result of the Board's holding in *Simons* is that a claimant's average weekly wage in all DBA cases will be based solely on those higher overseas wages, thus divesting the administrative law judge of the discretion afforded him in calculating average weekly wage pursuant to 33 U.S.C. §910(c).

Section 10(c), 33 U.S.C. §910(c), directs the administrative law judge to determine claimant's annual earning capacity "having regard to the previous earnings of the injured employee in the employment in which he was injured."[3] The goal of Section 10(c) is a sum that reflects the potential of claimant to earn absent injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). Average weekly wage calculations based solely on a claimant's new, higher wages are appropriate where they reflect the potential to earn at that level. *See, e.g., Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *see also Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981).

In *Simons*, 43 BRBS 18, the Board held that the claimant's average weekly wage had to be calculated based solely on his overseas earnings in Kuwait and Iraq in order to reflect his earning capacity in the employment in which he was injured. *Id.*, 43 BRBS at 20. The Board articulated that where the claimant is injured after being enticed to work in a dangerous environment in return for higher wages, it is disingenuous to suggest that his earning capacity should not be calculated based upon the full amount of the earnings lost due to the injury. *Id*. at 21. Similarly, in *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006), the Board held that the administrative law judge acted within his discretion in considering the extrinsic circumstances of claimant's employment, such as a dangerous environment, when discussing the comparability of claimant's overseas and

[2]In support of its contention, employer notes that claimant had worked only 46 days prior to his injury and that it submitted evidence as to the high rate of attrition for similarly situated employees (only 15 of the 105 workers originally hired around the time that claimant was hired remained after one year). Employer further notes that claimant testified that he was not sure how long he would have worked overseas. Tr. at 16.

[3]No party challenges the administrative law judge's use of Section 10(c) in calculating claimant's average weekly wage.

stateside employment as a basis for calculating average weekly wage solely on overseas earnings. *Id.* at 44.

Contrary to employer's contention, *Simons* does not mandate the use of only overseas earnings to calculate a claimant's average weekly wage in all DBA cases. The Board held in *Simons* that the hazardous conditions of a claimant's overseas employment rendered it significantly different from his previous employment. In *Simons*, the Board compared the duties and conditions of the claimant's overseas work to his domestic employment, considered his contractual agreement to work a full year in Iraq, and found noteworthy the fact that claimant was offered higher wages in return for work in a dangerous environment.[4] Under those circumstances, and in furtherance of the purpose of Section 10(c) to reflect a claimant's earning capacity at the time of injury, the Board stated that claimant's average weekly wage must be based exclusively on the higher wages earned in the job in which he was injured in Iraq. *See also Proffitt*, 40 BRBS at 44.

Moreover, employer's contention that the Board's prior holding usurped an administrative law judge's "broad discretion" under Section 10(c) to determine a worker's annual earning capacity was addressed and rejected by the Board in its order on reconsideration *en banc* in *Simons*. The Board stated that an administrative law judge's discretion is not unfettered and that his findings must be based on applicable law. *Simons*, 43 BRBS at 137. Thus, the Board concluded that the decision in *Simons* does not prohibit an administrative law judge's proper exercise of discretion when calculating a claimant's wage-earning capacity pursuant to Section 10(c).[5] *Id.*

In this case, the administrative law judge found that "claimant meets the specific requirements set forth [in *Simons*]," *i.e.*, that employer paid claimant substantially higher wages to work overseas than he had earned stateside, that claimant's employment entailed dangerous working conditions, and that claimant was hired to work full-time

[4]Not all DBA cases arise within war zones. As the Director notes, there is nothing in *Simons* to suggest that an administrative law judge could not blend higher overseas and lower stateside earnings in a case where the claimant initially drove a truck stateside and thereafter drove the same type of vehicle under similar working conditions in a relatively safe overseas locale.

[5]For example, the method of calculating the claimant's average weekly wage based on overseas wages is not controlled by any set formula pursuant to Section 10(c).

under a one-year contract.[6] Decision and Order on Remand at 3-4, 7. The administrative law judge concluded that claimant's average weekly wage should be determined solely by his overseas earnings. The administrative law judge, therefore, divided claimant's total earnings in his overseas work for employer by the 6.7 weeks of work he performed prior to his injury, to arrive at an average weekly wage of $1,968.66. Because the administrative law judge correctly analyzed the facts in light of the *Simons* decisions, we affirm the administrative law judge's finding that claimant's average weekly wage must be based solely on the higher wages he was paid in his overseas employment as it best reflects his annual wage-earning capacity at the time of injury. We therefore affirm the administrative law judge's finding that claimant's pre-injury average weekly wage is $1,968.66.

Claimant cross-appeals the administrative law judge's limiting claimant's compensation rate for temporary total and permanent partial disability under Section 6(b) to the maximum compensation rate of $1,030.78 that was in effect when claimant became disabled in November 2003. Claimant argues that, pursuant to *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997), the maximum compensation rate is the one in effect in July 2007 when the administrative law judge's award was entered. We reject claimant's contention of error. The Board thoroughly addressed this issue in *C.H [Heavin] v. Chevron, USA, Inc.*, 43 BRBS 9 (2009), which, like this case, arose within the jurisdiction of the Fifth Circuit. *See also Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006). Moreover, the Board's interpretation was recently approved by the United States Court of Appeals for the Ninth Circuit in *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir. 2010), *pet. for cert. filed*, 79 U.S.L.W. 3662 (May 11, 2011) (No. 10-1399). The *Roberts* court held that an employee is "newly awarded compensation" pursuant to Section 6(c) when he becomes disabled, and that such a holding is consistent with the Act's overall statutory scheme, which identifies the time of injury as the appropriate marker for other calculations

[6]In addressing this issue, the administrative law judge acknowledged employer's evidence of employee attrition but implicitly found that it did not prove that claimant would not have fulfilled his one-year contract, but for the injury. Moreover, as the Director notes, employer's attrition evidence does not explain why 86 percent of the truck drivers that employer hired in March 2003 to work in Kuwait and Iraq, and 80 percent of those hired in April 2003, did not work at least one year. In particular, employer's evidence does not distinguish those drivers who left voluntarily before their contractual year ended, from those, like claimant, who were unable to work the full year as a result of injury.

relating to compensation.[7] *Id.* The court stated that *Wilkerson* is not persuasive since the Fifth Circuit "did not engage in any analysis" of the Act's text, "nor did it explain how its interpretation accords with the overall statutory scheme." *Roberts,* 625 F.3d at 1207-1208, 44 BRBS at 75(CRT). Thus, for the reasons expressed in *Heavin,* 43 BRBS at 16-17, as bolstered by *Roberts,* we reject claimant's reliance on *Wilkerson.* Accordingly, as it is consistent with law, we affirm the administrative law judge's finding that claimant is entitled to compensation based on the maximum rate in effect in November 2003, when he first became disabled. The administrative law judge's Decision and Order on Remand is affirmed.

Claimant's counsel, Gary B. Pitts, and appellate counsel, Joshua Gillelan, have each filed a petition seeking an attorney's fee for work performed before the Board in the prior appeal of this case, BRB No. 09-0786. 20 C.F.R. §802.203. Specifically, Mr. Pitts seeks an attorney's fee totaling $4,359.38, representing 13.25 hours of attorney work at an hourly rate of $315, .625 hours of attorney work at an hourly rate of $240, and .375 hours of paralegal work at an hourly rate of $95, and Mr. Gillelan seeks an attorney's fee totaling $9,452.50, representing 19.9 hours at an hourly rate of $475. Employer has filed objections, arguing that the fee petitions are premature, that the extent of success remains unknown, and that counsels' requested hourly rates based upon a "so-called market rate" are not appropriate in this case arising under the DBA. We reject employer's objections. *See McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998) (fees may be awarded during pending appeal but are not enforceable until all appeals are exhausted); *see also Overseas African Constr. Corp. v. McMullen*, 500 F.2d 1291 (2d Cir. 1974) (successful prosecution can also include a successful appeal by claimant); *Lindsay v. Bethlehem Steel Corp.*, 22 BRBS 206 (1989) (where the Board affirmed claimant's entitlement to benefits on the second appeal, employer was liable for attorney's fees for work performed before the Board on the first appeal); *see generally Blum v. Stenson*, 465 U.S. 886, 895 (1984) (an attorney's reasonable hourly rate is "to be calculated according

[7]Section 6(c), 33 U.S.C. §906(c), states:

> Determinations under subsection (b)(3) of this section with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

to the prevailing market rates in the relevant community"); 20 C.F.R. §802.203(a).[8] Employer has not shown that the fee request of Mr. Pitts is unreasonable or that the services were unnecessary. Therefore, we award Mr. Pitts an attorney's fee totaling $4,359.38, representing 13.25 hours of attorney work at an hourly rate of $315, .625 hours of attorney work at an hourly rate of $240, and .375 hours of paralegal work at an hourly rate of $95, payable by employer, for work performed in claimant's successful appeal in *Smith*, BRB No. 09-0786.

Mr. Gillelan's services in this case consist of 15.9 hours of work performed from August 2009 through May 2010, and 4 hours of work performed from January 5 through February 17, 2011. In accordance with the Board's decision in *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009), we award Mr. Gillelan an hourly rate of $460 for the period through May 2010, and an hourly rate of $475 for work performed thereafter, as those figures are consistent with Mr. Gillelan's historical rates and are supported by the *Laffey* Matrix. *Id*. at 158. The number of hours requested is reasonable. 20 C.F.R. §802.203. Consequently, we award Mr. Gillelan an attorney's fee totaling $9,214, representing 15.9 hours at an hourly rate of $460, and 4 hours at an hourly rate of $475, payable by employer, for work performed in claimant's successful appeal in *Smith*, BRB No. 09-0786.

[8]A "reasonable attorney's fee" is calculated in the same manner in all federal fee shifting statutes, including the Longshore Act and, by extension, the DBA. *See City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 227 n.8, 43 BRBS 67, 70 n.8(CRT) (4th Cir. 2009); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1054, 43 BRBS 6, 8-9(CRT) (9th Cir. 2009); *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657, 662 (6th Cir. 2008); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 159 (2009).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed. BRB Nos. 11-0326/A. Mr. Pitts is awarded an attorney's fee of $4,359.38, and Mr. Gillelan is awarded an attorney's fee of $9,214, payable directly to counsel by employer. BRB No. 09-0786.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge