BRB No. 07-0870

H.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 12/17/2007
	)	
	)	
Self-Insured Employer-Petitioner	)	ORDER

Employer appeals the Decision and Order on Remand and the Decision and Order Granting Employer's Motion for Reconsideration But Denying Relief Requested (2005-LHC-1052) of Administrative Law Judge Daniel A. Sarno, 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). Employer has filed a motion for summary affirmance of the administrative law judge's decisions, noting it appeals only the Board's ruling in its prior decision that employer did not rebut the Section 20(a) presumption, 33 U.S.C. §920(a).

Claimant alleged that he injured his back at work. In his initial decision, the administrative law judge found claimant entitled to invocation of the Section 20(a) presumption that his back injury is work-related. The administrative law judge found that employer rebutted the presumption and that claimant failed to carry his burden of establishing the work-relatedness of his condition based on the record as a whole. Thus, the administrative law judge denied claimant's claim for temporary total disability benefits. Claimant appealed the administrative law judge's decision.

In its decision, [*H.H.*] *v. Newport News Shipbuilding & Dry Dock Co.,* BRB No. 06-0345 (Oct. 31, 2006), the Board held that the non-medical evidence on which the administrative law judge based his rebuttal finding is legally insufficient to rebut because this evidence did not state that the work accident did not cause or aggravate claimant's back condition. *Id.*, slip op. at 4. The Board remanded the case for the administrative law judge to address rebuttal in terms of the medical evidence of record.

On remand, the administrative law judge found that none of the medical reports is sufficient to rebut the Section 20(a) presumption, as none states that claimant's back

condition was not aggravated by his employment. The administrative law judge awarded claimant ongoing temporary total disability benefits commencing February 26, 2004. Employer filed a motion for reconsideration, which the administrative law judge denied, explaining in more detail the basis for his findings on the causation and disability issues.

On appeal, employer does not challenge these findings. Rather, employer avers that its only contention is that the Board erred in finding in its prior decision that its evidence is legally insufficient to rebut the Section 20(a) presumption. Thus, as employer raises no issues with regard to the administrative law judge's award of benefits on remand, and as the Board's previous decision on the issue raised constitutes the law of the case, *see, e.g., Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002), we grant employer's motion for summary decision. The administrative law judge's Decision and Order on Remand and Decision and Order Denying Reconsideration are affirmed.[1]

Claimant's counsel has filed an itemized statement requesting an attorney's fee for services performed in the prior appeal, BRB No. 06-0345. Counsel requests $9,240 for 22 hours of attorney services at an hourly rate of $420. As claimant successfully prosecuted his appeal by virtue of the administrative law judge's award on remand, his attorney is entitled to an attorney's fee for work performed before the Board. *See, e.g., Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996); 20 C.F.R. §802.203. Employer objects to the requested hourly rate and to itemized entries after November 8, 2006.

We agree with employer that the hourly rate requested is excessive. The regulation at 20 C.F.R. §802.203(d)(4) states that a fee petition should state:

> The normal billing rate for each person who performed services on behalf of the claimant. The rate awarded by the Board shall be based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status.

Counsel states that his normal billing rate is $420 per hour, which is commensurate with his experience, and he contends that this rate is, in fact, below the market rate for the District of Columbia. Counsel contends that a "market" hourly rate cannot be based on a "micro-market" of rates paid only to longshore claimants' attorneys, but that an appropriate rate, such as that provided by the *Laffey* matrix, is one which takes into account rates applicable in an entire geographic region in all fee-shifting statutes.

[1] Thus, employer's motion for an enlargement of time in which to file its Petition for Review and brief is moot.

This case arises in the jurisdiction of the United States Court of Appeals for the Fourth Circuit. In *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004), the court stated,

> Evidence of fee awards in comparable cases is generally sufficient to establish the "prevailing market rates" in "the relevant community." *See Spell v. McDaniel*, 824 F.2d 1380, 1402 (4th Cir. 1987) ("prevailing market rate may be established through . . . information concerning recent fee awards . . . in comparable cases").

Id., 376 F.3d at 251, 38 BRBS at 41(CRT). The Board thus has rejected the proposition, based on *Student Public Research Group of New Jersey v. AT&T Bell Laboratories*, 842 F.2d 1436 (3d Cir. 1988), forwarded by counsel herein, that the longshore claimants' bar in a relevant community cannot set the prevailing market rate. *D.V. v. Cenex Harvest States Cooperative*, 41 BRBS 84 (2007); *see also B.C. v. Stevedoring Services of America*, --- BRBS ----, BRB No. 07-0162 (Oct. 17, 2007). As the prevailing hourly rate for claimants' attorneys in the geographic area where this case arose is $250, we award claimant's counsel his attorney's fee at this rate. *See generally Hargrove v. Strachan Shipping Co.*, 32 BRBS 224 (1998), *aff'g on recon.* 32 BRBS 11 (1998).

Employer also objects to all time billed after counsel's receipt, on November 8, 2006, of the Board's Decision and Order. We disallow .15 hour on November 24, 2006, .3 hour on November 27, 2006, .1 hour on February 7, 2007, .1 hour on April 25, 2007, and .4 hour on May 8, 2007. These services relate to counsel's communications with claimant's former counsel and or with the district director concerning the administrative law judge's decision on remand. The former services were not necessary for the prosecution of claimant's appeal, and, moreover, occurred after the Board's decision was issued. *See* 20 C.F.R. §802.203(d), (e). The latter service does not relate to the appeal before the Board. *See* 20 C.F.R. §802.203(d). Therefore, we disallow a total of 1.05 hours. The remaining hours are approved as reasonably commensurate with the necessary work performed before the Board. Counsel is awarded a fee of $5,237.50 for work performed before the Board.

Accordingly, employer's Motion for Summary Decision is granted, and the administrative law judge's Decision and Order on Remand and Decision and Order Denying Reconsideration are affirmed. BRB No. 07-0870. Counsel is awarded a fee in BRB No. 06-0345 of $5,237.50, payable directly to counsel by employer. 33 U.S.C. §928.

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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BETTY JEAN HALL
Administrative Appeals Judge