BRB Nos. 05-0445
and 05-0445A

DANIEL L. OBERTS	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
MCDONNELL DOUGLAS SERVICES	)	
	)	
and	)	
	)	
AIG CLAIMS SERVICES	)	DATE ISSUED: 02/15/2006
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
ALSALAM AIRCRAFT COMPANY, LIMITED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, the Decision and Order on Reconsideration, the Supplemental Decision and Order Awarding Attorney Fees, and the Supplemental Decision and Order Awarding Attorney Fees on 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, L.L.P.), New York, New York, for Alsalam Aircraft Company, Limited, and Insurance Company of Pennsylvania.

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

PER CURIAM:

McDonnell Douglas Services (MDS) appeals the Decision and Order Awarding Benefits, the Decision and Order on Reconsideration, the Supplemental Decision and Order Awarding Attorney Fees, and the Supplemental Decision and Order Awarding Attorney Fees on Reconsideration, and claimant appeals the Supplemental Decision and Order Awarding Attorney Fees and the Supplemental Decision and Order Awarding Attorney Fees on 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). 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).

In 1996, claimant began working for MDS, first as a riveter and then as a manufacturing engineer; his position was later eliminated. Tr. at 57-59. In April 1997, claimant began 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, the on-site bus in which claimant was riding was involved in a collision with a truck and another car. Tr. at 71-74. Claimant injured his back and neck. MDS paid compensation from October 28 through November 3, 1997. Claimant returned to his usual work thereafter; 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.

[1] The position entailed repairing, maintaining, and cleaning aircraft, as well as performing pre- and post-flight inspections. Decision and Order at 6.

On January 13, 1998, claimant's employer, but not his job, changed when Alsalam Aircraft (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. Tr. at 165, 169. After a doctor's visit instigated by increased symptoms, claimant learned that he had 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. Claimant testified that physical therapy for his shoulder condition bothered his neck. In March 2000, claimant was released from care for his shoulder injury to return to his usual work, though he testified he suffered pain in his neck when he performed certain aspects of his job. In April 2000, claimant learned that 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. He arrived in the U.S. on August 18, 2000, and received recommendations to undergo neck surgery with Dr. Gornet. He underwent a second surgery on his right shoulder on January 30, 2001. 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. Cl. Ex.(ii)-44.

Claimant filed a claim for benefits for the 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. On July 3, 2001, claimant underwent neck surgery, at MDS's expense, and 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 the first neck surgery was unsuccessful and he needed revision surgery. MDS denied authorization for this second neck surgery. Claimant sought benefits against both MDS and Alsalam, and MDS averred that Alsalam is liable for the 2001 surgery and other benefits related to the neck condition because claimant's work with Alsalam aggravated his condition.

Administrative Law Judge Mills (the administrative law judge) found that claimant's current neck disability is due solely to the natural progression resulting from the 1997 injury because MDS failed to show there was a new injury or aggravation of this condition while claimant worked for Alsalam. Decision and Order at 23-24. The

[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 he had made with MDS where 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.

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. Decision and Order at 26-29. 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. Decision and Order at 30-31. MDS appeals the administrative law judge's finding that it is the responsible employer. MDS also contends the administrative law judge erred in calculating claimant's average weekly wage. Claimant and Alsalam respond, urging affirmance. The administrative law judge subsequently awarded claimant's counsel an attorney's fee and that award has been appealed by MDS and claimant, *see infra*.

Responsible Employer/Aggravation

MDS contends the administrative law judge erred in finding that claimant's current disability is the result of the natural progression of his October 1997 injury and, therefore, in holding it liable for claimant's continuing benefits and medical expenses. It argues that the administrative law judge erred in applying the aggravation rule and that he did not address claimant's aggravation claim against Alsalam.

In allocating liability between successive employers and carriers in cases involving traumatic injury, the employer at the time of the original injury remains 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 at the time of the aggravation is 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*, 125 S.Ct. 309 (2004); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005). 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.[3] *Buchanan v. International*

[3] Contrary to MDS's argument that the Section 20(a), 33 U.S.C. §920(a), presumption should have been invoked against Alsalam on the aggravation claim, in a multiple-injury case where the issue is responsible employer, Section 20(a) is applied on

Transportation 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); *see also McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005).

To resolve the responsible employer issue, it is necessary to restate the law as to what constitutes an "aggravation." Contrary to the administrative law judge's statements, an employer need not establish any progression of an underlying condition; rather, an "aggravation" may occur where there is an increase in symptoms due to the claimant's employment. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom. Gardener v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). Thus, an injury has occurred if the employment aggravates the symptoms of the condition, *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986), and the onset of symptoms constitutes an injury within the meaning of the Act. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981).[4] That the symptoms could have developed anywhere does not negate the fact that the claimant's symptoms developed while he was working for his employer; if the work played any role in the manifestation of a symptom, any disability due to the symptom is compensable. *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). Moreover, the occurrence of an unusual event is unnecessary if the conditions of employment caused the claimant to become symptomatic. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 241, 35 BRBS 154, 160(CRT) (3d Cir. 2002); *Director, OWCP v. Vessel Repair, Inc.*, 168

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behalf of claimant and not against each employer. Once the presumption is invoked on a claimant's behalf, either employer could rebut it. Once a causal relationship between a claimant's injury and his employment is established, it is up to each employer to prove it is not the responsible employer. It is not claimant's burden to prove which employer is liable. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005).

[4] The United States Court of Appeals for the First Circuit stated, 640 F.2d at 1389, 13 BRBS at 106:

> Whether circumstances of [claimant's] employment combined with his disease so to induce an attack of symptoms severe enough to incapacitate him or whether they actually altered the underlying disease process is not significant. In either event his disability would result from the aggravation of his preexisting condition.

F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999);[5] *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Darnell v. Bell Helicopter International, Inc.*, 16 BRBS 98 (1984), *aff'd sub nom. Bell Helicopter International, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984).

The United States Court of Appeals for the Third Circuit has recently reaffirmed this precedent. In *Delaware River Stevedores*, the claimant injured his back and was out of work for a short period of time. He then returned to his usual work for over two years until he developed disabling back symptoms. The Third Circuit stated with approval the Board's recitation of the appropriate law that if the conditions of an employee's employment caused him to become symptomatic, even absent permanent results, there has been an injury within the meaning of the Act and the employer at the time of the work events leading to the exacerbation, even if only temporary, is liable for benefits. *Delaware River Stevedores*, 279 F.3d at 241, 35 BRBS at 160(CRT).[6] As the medical evidence supported a finding that the claimant suffered a "flare-up" of symptoms from his condition while working for Delaware River Stevedores, it was held liable for his temporary total disability benefits. *Id.*, 279 F.3d at 243-244, 35 BRBS at 162(CRT); *see also Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032 (7th Cir. 2005).[7]

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[5] The work event and/or conditions need not be the *sole* or primary cause of a disability; they need only be *a* cause. *Vessel Repair*, 168 F.3d at 193, 33 BRBS at 67(CRT).

[6] While the instant case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit, rather than the Third Circuit, the Second Circuit lacks precedent directly on point. As there is no significant factual distinction between this case and *Delaware River Stevedores* and its holding is consistent with the precedent of the other circuits, cited *supra*, we reject the assertions of claimant and Alsalam that *Delaware River Stevedores* does not apply to this case. Moreover, we reject claimant's reliance on *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2d Cir. 2003), to support his assertion that the last employer rule cannot be used as a defense by MDS. In *Lake*, the subsequent employer had settled with the claimant and, thereby, was relieved of further liability. Thus, the dispute in litigation was between claimant and the remaining employer. In that context, the court held that a subsequent aggravation is not a defense against claimant's entitlement, which is consistent with the principle that the responsible employer inquiry involves the allocation of liability rather than entitlement.

[7] We hereby grant MDS's motion to supplement the briefing by citation to this case.

In this case, the administrative law judge relied on the testimony of Dr. Gornet, the chronology of claimant's symptoms, and claimant's credible testimony to show "that Claimant's ultimate disability was caused by his injury at MDS and was not part of the trauma sustained at Alsalam" because Dr. Gornet repeatedly stated that claimant's underlying cervical disease did not progress due to claimant's work activities for Alsalam. That is, the administrative law judge found that the mechanical irritations claimant suffered did not cause a "new problem." Decision and Order at 24. However, Dr. Gornet explained that claimant's physical activities and "mechanical irritation" at work caused inflammation and the inflammation produced symptoms. He also stated that claimant's activities, which did not progress the cervical disease, "clearly" aggravated his symptoms. Cl. Ex.(i)-70 at 19, 21-22, 24; *see* Decision and Order at 13. Claimant testified that, as Alsalam acquired more aircraft, his work load increased and that he sometimes missed work if the previous day was straining, or he would seek lighter work or work around harder chores. He testified that he suffered pain after washing a plane or performing overhead work, that riding in a Coleman truck would aggravate his neck, and that the more work he did, the worse he felt. Tr. at 67-69, 87-89, 165, 168, 170-175. Claimant also testified about a particular incident where he snapped his neck down when a hose in his hand jerked short and that this caused pain, and he stated he often needed to seek rides home because he was unable to drive due to neck pain or spasms caused by his work load. Tr. at 89-99, 176-178; *see* Decision and Order at 6-7. Finally, claimant testified, he reached a point when he could no longer tolerate the neck pain caused by doing his job. Tr. at 109, 182-183.

The administrative law judge found that because claimant's job with Alsalam did not aggravate the *underlying condition*, there was no aggravation. The administrative law judge's finding is contrary to the established law, *Delaware River Stevedores*, 279 F.3d at 241, 35 BRBS at 160(CRT); *Gardner*, 640 F.2d 1385, 13 BRBS 101, and his misapplication of the aggravation rule affected his consideration of the responsible employer issue. Therefore, we vacate the administrative law judge's finding that MDS is the responsible employer, and we remand the case for reconsideration of the issue using the proper standard. *Delaware River Stevedores*, 279 F.3d at 241, 35 BRBS at 160(CRT); *Vessel Repair*, 168 F.3d 190, 33 BRBS 65(CRT); *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT); *Kelaita*, 799 F.2d 1308; *Gardner*; 640 F.2d 1385, 13 BRBS 101; *Pittman*, 18 BRBS 212; *Gardner*, 11 BRBS 556. On remand, the administrative law judge must determine whether claimant sustained any disabling aggravation of his neck condition or symptoms while working for Alsalam and whether any aggravation is related to the 2001 neck surgery and the proposed revision surgery.[8]

[8] MDS remains liable for the benefits awarded to claimant unless, and until, Alsalam is held liable for benefits. If Alsalam is held liable, then it must reimburse MDS

Average Weekly Wage

During the course of the year prior to his 1997 injury, claimant, a five-day per week worker, worked 50 weeks. He worked the first part of the year as a manufacturing engineer, earning $1,240 per week. When his position was eliminated, he trained to work as a crew chief for employer in Saudi Arabia. During three months of training, claimant earned $565 per week. Once he arrived in Saudi Arabia, he was paid pursuant to his contract with MDS, earning a salary, plus various incentives and expenses for foreign employment. The administrative law judge calculated claimant's average weekly wage under the contract to be $1,235.50.[9] Claimant worked for approximately 16 weeks in Saudi Arabia prior to the 1997 injury.

The administrative law judge first found that claimant's 16 weeks in Saudi Arabia prior to the injury did not amount to "substantially the whole of the year," pursuant to Section 10(a) of the Act. He also concluded that claimant did not work "substantially the whole of the year" in "similar" employment, as claimant's status and wages changed throughout the year. Decision and Order at 30. Therefore, the administrative law judge stated that he could not utilize Section 10(a) to calculate claimant's average weekly wage, nor rely on any wages claimant earned prior to his employment in Saudi Arabia. The administrative law judge utilized Section 10(c) and the terms claimant's contract of hiring, under which claimant was paid for the short time he worked in Saudi Arabia prior to the 1997 injury, to compute claimant's average weekly wage. MDS challenges the administrative law judge's average weekly wage finding on several grounds.[10]

Section 10(a) of the Act states:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times

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for the benefits paid. *See Schuchardt v. Dillingham Ship Repair*, ___ BRBS ___, BRB No. 05-0125 (Nov. 30, 2005)(order on recon.).

[9] $29,379.96 (salary) + $5,876.04 (foreign serv. add.) + $2,937.96 (COL diff.) + $3,000 (completion award) + $6,300 (incentive leave) + $16,245.96 (home leave) = $64,245.96. $64,245.96 ÷ 52 = $1,235.50. Decision and Order at 31.

[10] If the administrative law judge finds claimant's date of injury to be other than October 1997, he must recalculate in claimant's average weekly wage with reference to that date. 33 U.S.C. §910.

> the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

MDS first argues that Section 10(a) should be used to calculate claimant's average weekly wage because he worked "substantially the whole of the year" in his crew chief position. MDS avers that claimant worked for over 29 weeks as a crew chief if his training period and his work in Saudi Arabia prior to the 1997 injury are considered together and that this satisfies the "substantially the whole of the year" standard which has been held to be as few as 28 weeks. We reject this assertion. Twenty-eight weeks does not constitute "substantially the whole of the year."[11] *Castro v. General Constr. Co.*, 37 BRBS 65 (2003), *aff'd*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, ___ S.Ct. ___ (2006); *Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980), *rev'd and remanded on other grounds*, 640 F.2d 769, 12 BRBS 237 (5th Cir. 1981) (42 weeks is "substantially the whole of the year"); *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979) (33 weeks is not). Therefore, claimant's 29 weeks as a trainee and crew chief in this case do not constitute "substantially the whole of the year."[12]

MDS next argues that Section 10(a) should be used to calculate claimant's average weekly wage because claimant worked "substantially the whole of the year" by working 50 weeks of the year preceding his 1997 injury in similar employment. MDS contends that claimant's three positions during the year preceding his 1997 injury should be considered to be the same or similar positions because they required claimant to draw

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[11] MDS relies on, and the administrative law judge noted, the Board's decision in *Anderson v. Todd Shipyards*, 13 BRBS 593, 596 (1981), in support of its contention. *Anderson* does not hold that 28 weeks is substantially the whole of the year but, rather, it remanded the case for reconsideration of average weekly wage. In doing so, it cited to *Eleazer v. General Dynamics Corp.*, 7 BRBS 75, 78-79 (1977), stating that *Eleazer* held that 28 weeks was substantially the whole of the year. However, *Eleazer* did not hold that 28 weeks was substantially the whole of the year. *Eleazer* stated that the claimant had worked substantially the whole of the year, as he had worked five or six days per week from 1958 to 1975 for employer, but the record contained only 28 weeks of wage records. Consequently, there was not enough wage information for the application of Section 10(a). *See also Waters v. Farmers Export Co.*, 14 BRBS 102, 107 (1981), *aff'd*, 710 F.2d 836 (5th Cir. 1983). The Board's statement in *Anderson* was thus in error.

[12] Thus, we affirm the administrative law judge's finding that claimant's 16 weeks in Saudi Arabia as a crew chief do not amount to "substantially the whole of the year." *Story v. Navy Exchange Service Center*, 30 BRBS 225 (1997); *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979).

upon the same base of knowledge and skills. Consequently, it asserts that claimant worked substantially the whole of the year in the employment in which he was working at the time of the 1997 injury, requiring the use of Section 10(a). The Board has held that if a claimant works substantially the whole of the year in essentially the same job, even if the work is for different employers, then Section 10(a) applies because it is the nature of the claimant's jobs that is controlling and not the rate of pay the claimant earned. *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1986); *Waters v. Farmers Export Co.*, 14 BRBS 102, 107 (1981), *aff'd*, 710 F.2d 836 (5th Cir. 1983). Despite summarily stating that Section 10(a) could not apply because claimant did not work in similar employment, the administrative law judge did not address the facts of claimant's work at his different duty stations. Decision and Order at 30. Therefore, we vacate the administrative law judge's average weekly wage calculation, and we remand the case for findings of fact on this issue. If the administrative law judge again finds that claimant's date of injury was in October 1997, then he must reevaluate the applicability of Section 10(a) based on these findings of fact. *Mulcare*, 18 BRBS 158; *see generally Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

MDS next argues that the administrative law judge improperly included in claimant's average weekly wage payments allegedly designated for claimant's dependents. Specifically, MDS argues that the "home leave" and "incentive leave" payments claimant received from employer should not have been included as part of claimant's average weekly wage. Claimant responds, urging affirmance, stating that, throughout his employment, the payments were made to him pursuant to his contract of hire, in a lump sum, and only were calculated based upon the number and age of the dependents authorized to live with him in Saudi Arabia.

Claimant's employment contract required MDS, and later Alsalam, to pay claimant a salary, plus a foreign service additive and a cost of living differential. At the end of six months, and yearly thereafter, claimant would receive incentive leave, and at the end of one year, claimant would receive a completion award and home leave. Decision and Order at 31; Cl. Ex.(i)-2. The administrative law judge included all these elements in his average weekly wage calculation. Decision and Order at 31. Pursuant to claimant's hiring contract, "home leave" allows the employee to use accrued vacation to travel home: the "employee and each authorized dependent" will be given a lump sum payment equal to airfare home, but they are not required to travel. Cl. Ex.(i)-5. "Incentive" pay is a lump sum payment made to "the employee and each authorized dependent listed on this contract who resides with the employee in Saudi Arabia." Cl. Ex.(i)-2. The payment is made based on the age and number of dependents. In claimant's case, the contract authorized $2,100 per adult, $1,050 per child ages two to 11, and $225 per infant. *Id.* Taking all these elements into account as payments claimant would be entitled to receive under his contract, the administrative law judge arrived at an average weekly wage of $1,235.50.

MDS argues that $4,200 of the $6,300 incentive leave and $12,564 of the $16,245.96 home leave should be subtracted from the computation because that money was authorized for claimant's dependents and not for claimant. MDS argues that the money was not tied to claimant's job performance and is more like a fringe benefit which should be excluded.[13] Specifically, MDS contends the home and incentive leave authorized for claimant's dependents are "dependent entitlements" excluded by Section 2(13), 33 U.S.C. §902(13). Section 2(13) 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). The employment contract specifically provides that the lump sum payments for these leaves will be authorized to "the employee and each authorized dependent listed on the contract who resides with the employee in Saudi Arabia. . . ." Cl. Ex.(i)-2 at 13; *see also* Cl. Ex.(i)-5.

"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 Custom Ship Interiors v. Roberts*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002). The Board has held that post allowances, foreign service additives, incentive compensation, completion awards, foreign housing allowances, and cost-of-living

[13] MDS also argues that, as of the date of injury in 1997, claimant's entitlement to incentive and home leave and the completion award, had not vested and should not be included in the average weekly wage calculation. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992) (post-injury bonus excluded); *see also Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); Cl. Ex.(i)-2. If, on remand, the date of injury is found to be in 1997, then the administrative law judge must address this argument. If the date of injury is found to be a later date, then this argument may be moot because claimant's entitlement to the funds had unquestionably vested.

adjustments, pursuant to a contract of hire, are properly included in determining 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. *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 Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998);[14] *see Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155(CRT) (1983).

Although MDS raised the exclusion of the dependents' benefits, the administrative law judge did not discuss this aspect of the average weekly wage calculation. Rather, he concluded, in general, that the incentive and home leaves are to be included because they are ascertainable from the contract of hire and are comparable to holiday and vacation pay. Decision and Order at 32. He did not discuss whether the payments herein are "dependent entitlements" to be excluded from claimant's average weekly wage calculation pursuant to Section 2(13). On remand, he must address this argument fully.

Attorney's Fee

Subsequent to the award of benefits in this case, claimant's counsel, Mr. Sands, filed a fee petition for work performed. The administrative law judge found that Mr. Sands requested a total fee of $83,799 which represents $45,425 in fees and $9,431.74 in expenses for work performed by Mr. Sands's firm plus $28,150 in fees and $792.26 in expenses for work performed by claimant's previous attorney, Mr. Newman, and his firm.[15] Supp. Decision and Order at 1. Mr. Sands requested an hourly rate of $250. MDS objected to the fee, contending it is not liable for benefits and should not be liable

[14]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 (1990) (container royalty payments are readily calculable, paid directly to the employee and are based on seniority and careers hours worked).

[15] With the exception of approximately ten hours before the administrative law judge, Mr. Newman performed all his work before the district director. All of Mr. Sands's work was performed before the administrative law judge. The petition to the administrative law judge included all work performed by both attorneys.

for a fee, and it challenged the hourly rate and various itemized entries. The administrative law judge rejected MDS's objection to the hourly rate and awarded $250 per hour, Supp. Decision and Order at 4, but on reconsideration he accepted MDS's evidence of rates in cities comparable to Chicago and, based on this evidence, Mr. Sands's limited longshore experience, and the complicated nature of the issues, he awarded a fee based on $200 per hour. Supp. Decision and Order on Recon. at 3. The administrative law judge addressed MDS's specific objections and reduced various entries to arrive at a total fee due Mr. Sands of $24,810, representing 119.6 hours of work at $200 per hour, plus 17.8 hours of work at $50 per hour. Supp. Decision and Order on Recon. at 3;[16] Supp. Decision and Order at 4-17. The administrative law judge also denied a fee for all hours of work performed by Mr. Newman because the regulations provide that the person who performed the services must file the fee petition. 20 C.F.R. §702.132(a). The administrative law judge found that Mr. Newman did not file a fee petition and, despite any agreement between the two firms regarding how the petition would be filed, the administrative law judge stated that Mr. Newman's fee was not payable by MDS. Supp. Decision and Order at 18. The administrative law judge denied claimant's motion to reconsider, finding that the motion, which included an affidavit from Mr. Newman, was filed nearly one month after the fee award was filed and was untimely. Supp. Decision and Order on Recon. at 3.

MDS appeals the fee award, arguing that it is not liable for a fee because it is not liable for claimant's benefits. Alternatively, MDS contends the fee must be reduced, if the average weekly wage is modified and reduced, because in that event claimant has not been fully successful. Neither claimant nor Alsalam responds to this appeal. Claimant cross-appeals the fee award, arguing that the administrative law judge erred in reducing the hourly rate and in denying Mr. Newman an attorney's fee. MDS responds, urging the Board to reject claimant's arguments. In light of our decision to vacate the award of benefits and to remand the case to the administrative law judge for further consideration on the merits, we also shall vacate the fee award. Liability for the fee cannot be assigned until the responsible employer issue has been resolved.[17] 33 U.S.C. §928.

With regard to claimant's appeal, we reject his assertion that the hourly rate was reduced improperly. The administrative law judge fully explained that he would not

[16]On reconsideration, the administrative law judge reduced the expenses due Mr. Sands to $8,304.59 because he found that MDS showed that an airfare ticket was a duplicate expense. Supp. Decision and Order on Recon. at 3.

[17] Regardless of which employer is ultimately held liable, on remand, the administrative law judge must reconsider the amount of an appropriate fee award in the event that he finds a reduced average weekly wage.

reduce the rate based on evidence of hourly rates in Houston, Texas, because he did not consider that city to be comparable with Chicago. Supp. Decision and Order at 3-4. Similarly, he fully explained why, on reconsideration, he was willing to reduce the hourly rate awarded based on evidence of hourly rates in six other cities that he deemed comparable to Chicago. Supp. Decision and Order at 2. The administrative law judge considered counsel's lack of experience in longshore work, but also considered the quality of work and the complexity of the issues in rendering his decision. 20 C.F.R. §702.132. Based on these factors, the administrative law judge found that a rate of $200 per hour was reasonable. Supp. Decision and Order on Recon. at 2-3. Claimant has not established an abuse of discretion in the administrative law judge's awarded hourly rate, and we affirm it. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

Next, claimant asserts that the administrative law judge erred in denying Mr. Newman's fee. Mr. Sands states that he intended for the district director to consider this portion of the fee petition, and the district director would award a fee to Mr. Newman's firm for work performed before him by Mr. Newman. Mr. Sands asks the Board to order the district director to address the relevant portion of the petition. We deny counsel's request. As the administrative law judge stated, Section 702.132(a) of the regulations clearly states that "[a]ny person seeking a fee for services performed on behalf of a claimant . . . shall make application therefore to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed." 20 C.F.R. §702.132(a). Part II of Mr. Sands's fee petition failed to comply with the regulation on two counts. First, it was filed with the administrative law judge but concerned work performed before the district director, and, second, it was filed by one attorney for work performed by another attorney. Thus, the administrative law judge properly denied Mr. Newman's portion of the fee petition, and we affirm that conclusion. *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*); 20 C.F.R. §702.132(a). In order to be eligible to receive a fee for work performed before the district director, Mr. Newman must submit his own application for a fee to the district director. However, we affirm the denial of a fee for the ten hours of work Mr. Neuman performed before the administrative law judge because the administrative law judge rationally found claimant's motion for reconsideration, which was filed nearly one month after the fee award was filed and included Mr. Newman's request, was untimely. 20 C.F.R. §802.206(b)(1).

Accordingly, the administrative law judge's determinations regarding the responsible employer and claimant's average weekly wage are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration are affirmed. The Supplemental Decision and Order Awarding Attorney Fees and the Supplemental Decision and Order Awarding Attorney Fees on Reconsideration are vacated must be reconsidered on remand consistent with the administrative law judge's findings regarding the liable employer and the amount of benefits, but are also otherwise affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge