BRB No. 01-0894

DOUGLAS J. PASCUAL, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v	)	
	)	
FIRST MARINE CONTRACTORS, INCORPORATED	)	DATE ISSUED: August 13, 2002
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

J. Paul Demarest and Seth H. Schaumburg (Favret, Demarest, Russo & Lutkwitte), New Orleans, Louisiana, for claimant.

Robert P. McCleskey, Jr. and Maurice E. Bostick (Phelps Dunbar L.L.P.), New Orleans, Louisiana for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (96-LHC-0282) of Administrative Law Judge James W. Kerr, 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). 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the third time this case is before the Board. Claimant, a casual holdman,

alleged that he injured his neck and back at work on August 16, 1995. Claimant, who was hospitalized for five days following his work injury and did not return to work thereafter, subsequently sought temporary total disability and medical benefits under the Act. In his initial decision, the administrative law judge denied claimant disability and medical benefits, finding that claimant's neck and back conditions are not work-related. On appeal, the Board held that Dr. Laborde's opinion cannot rebut the Section 20(a) presumption, 33 U.S.C. §920(a), because, *inter alia,* he did not address aggravation. The Board therefore vacated the administrative law judge's finding that claimant's neck and back injuries are not work-related, and remanded the case for reconsideration. *Pascual v. First Marine Contractors, Inc*., BRB No. 97-1283 (June 17, 1998)(unpublished)(*Pascual I*). The Board thereafter denied employer's motion for reconsideration. *Pascual v. First Marine Contractors, Inc*., 32 BRBS 289 (1999).

In his decision on remand, the administrative law judge found that claimant's neck and back injures are work-related. The administrative law judge further found that claimant established his *prima facie* case of total disability, that employer did not establish the availability of suitable alternate employment, that claimant's average weekly wage at the time of his injury was $360, and that claimant had not yet reached maximum medical improvement. Thus, the administrative law judge ordered employer to pay claimant temporary total disability benefits from August 16, 1995, and continuing, as well as reasonable and necessary medical expenses related to his work injury. The administrative law judge summarily denied employer's motion for reconsideration. Employer then appealed this decision to the Board, challenging the administrative law judge's award of disability and medical benefits to claimant.

In *Pascual v. First Marine Contractors, Inc*., BRB No. 00-0343 (Dec. 13, 2000)(unpublished)(*Pascual II*), the Board affirmed the administrative law judge's determinations that claimant's neck and back conditions are work-related, that claimant was entitled to medical expenses related to those medical conditions, and that claimant's average weekly wage at the time of injury was $360. The Board vacated, however, the administrative law judge's findings that claimant established a *prima facie* case of total disability and that employer did not establish the availability of suitable alternate employment, and remanded the case to the administrative law judge for further consideration of the issue of the extent of claimant's work-related disability.

In his second decision on remand, the administrative law judge determined that claimant was unable to return to his usual job duties and that employer established the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from August 16, 1995, to November 5, 1996, and temporary partial disability compensation thereafter based on a residual wage-earning capacity of $238 per week.

Employer, in the present appeal before us, argues that the administrative law judge's original decision was supported by substantial evidence and that, therefore, the Board erred in its initial decision when it vacated the administrative law judge's determination that claimant's back and neck conditions were not work-related. Alternatively, employer challenges the administrative law judge's award of disability compensation and medical benefits to claimant. Claimant responds, urging affirmance of the administrative law judge's award of benefits.

Employer initially contends that the claimant is not entitled to the benefit of the Section 20(a), 33 U.S.C. §920(a), presumption, that if the presumption is applicable it has produced substantial evidence to rebut it, that claimant is not entitled to medical benefits, and that claimant did not establish his average weekly wage at the time of his injury. The issues of causation, employer's liability for claimant's work-related medical benefits, and claimant's average weekly wage, however, were throughly considered and addressed by the Board in its previous decisions, and the prior determinations affirming the administrative law judge's invocation of the Section 20(a) presumption, his finding that claimant's neck and back injuries are work-related, his determination that claimant's average weekly wage at the time of his work injury was $360, and his award of reasonable and necessary work-related medical expenses constitute the law of the case.[1] *See Lewis v. Sunnen Crane Service, Inc.*, 34 BRBS 57 (2000); *Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000); *Ricks v. Temporary Employment Services*, 33 BRBS 81 (1999). Employer has raised no basis for the Board to depart from this doctrine, which holds that an appellate tribunal generally will adhere to its initial decision on an issue when a case is on appeal for a second, or in this case third, time unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first result was clearly erroneous and allowing it to stand would result in manifest injustice. *See Weber v. S.C. Loveland Co.*, 35 BRBS 75, *aff'd on recon.*, 35 BRBS 190 (2002); *Gladney v. Ingalls*

[1]In its initial decision, the Board held that the Section 20(a) presumption is applicable in the case at bar inasmuch as it is uncontested that claimant sustained a physical harm and that the accident at work could have caused the harm. *See Pascual I*, slip op. at 3. In its subsequent decision, the Board affirmed the administrative law judge's finding that claimant's neck and back injuries are work-related as it is supported by substantial evidence. *See Pascual II*, slip op. at 3-4. Additionally, as the administrative law judge's average weekly wage calculation was rational and supported by substantial evidence, the Board affirmed that finding. *See id.* at 5-6. Lastly, as the administrative law judge found that claimant's work injury aggravated his pre-existing neck and back injuries, the Board affirmed the administrative law judge's determination that employer is liable for all reasonable and necessary medical benefits related to his work injury. *See id.* at 6.

Shipbuilding, Inc., 33 BRBS 103 (1999). Employer's initial contentions are therefore rejected and, for the reasons set forth in our previous decisions, we affirm the administrative law judge's finding that claimant's neck and back injuries are work-related, that claimant's average weekly wage is $360, and that employer is liable for claimant's reasonable and necessary work-related medical expenses.

Lastly, employer's brief sets forth its contention that claimant is not disabled from performing his usual job, and that it has established the availability of suitable alternate employment.[2] Employer's presentation of these contentions, however, is a recitation of its previous pleadings before the administrative law judge and the Board; indeed, employer has included in its present brief its position on suitable alternate employment despite the fact that the administrative law judge decided this issue in its favor.

The Benefits Review Board is authorized to hear and determine appeals raising a substantial question of law or fact by any party in interest from decisions with respect to claims arising under the Longshore Act and its extensions. *See* 33 U.S.C. §921(b)(3). The findings of fact in the administrative law judge's decision "shall be conclusive if supported by substantial evidence in the record as a whole." The circumscribed scope of the Board's review authority necessarily requires a party challenging the decision below to address that decision with specificity and demonstrate that the result achieved is not supported by substantial evidence or in accordance with law. Moreover, the Board's Rules of Practice and Procedure provide that a party's petition for review to the Board shall list "the specific issues to be considered on appeal" and that "[e]ach petition for review shall be accompanied by a ...statement which: *Specifically* states the issues to be considered by the Board. . . ." *See* 20 C.F.R. §802.211(a), (b)(emphasis added). Where a party is represented by counsel, mere assignment of error is not sufficient to invoke Board review. *See Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986).

In the instant case, employer has failed to meet these threshold requirements when addressing the issue of the extent of claimant's disability. Specifically, employer's brief fails to address the administrative law judge's decision or identify any error committed by the administrative law judge below. Although providing the Board with a detailed account of the medical evidence, employer's failure to assert specific error in the administrative law judge's

[2]Employer's contention that claimant is not entitled to compensation during his periods of incarceration has already been addressed and decided. *See Livingston v. Jacksonville Shipyards Inc.*, 32 BRBS 123 (1998); *Pascual II* at 5 n.3.

findings requires the conclusion that it has not raised a substantial issue for the Board to review; accordingly, the decision of the administrative law judge regarding the extent of claimant's work-related disability must be affirmed. *See Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); *West v. Washington Metropolitan Area Transit Authority*, 21 BRBS 125 (1988).

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board. Specifically, claimant's counsel requests a total fee of $11,191.25, representing 63.95 hours at $175 per hour, for services performed on behalf of claimant while this claim has been before the Board.[3] Employer objects to counsel's fee petition, arguing that it is premature. Alternatively, employer challenges the 11.7 hours for legal research sought by counsel; moreover, employer avers that counsel's fee should be reduced by 50 percent as a result of the minimal benefits awarded to claimant. As claimant has successfully defended his award of benefits on appeal, he is entitled to a fee reasonably commensurate with the work performed before the Board. *See Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1996); 33 U.S.C. §928; 20 C.F.R. §802.203. We consider the hourly rate of $175 to be reasonable and customary for the geographic area in which this case arises. *See Doucet v. Avondale Industries, Inc.*, 34 BRBS 62 (2000). Moreover, the number of hours requested, including the 11.7 hours sought for legal research, are not unreasonable or excessive in light of the numerous issues raised in the first two appeals of this case to the Board. Moreover, we disagree with employer's contention that counsel's fee must be reduced as a result of the amount of benefits awarded by the administrative law judge, *i.e.*, $81.33 per week, as this amount is not insubstantial, the award will continue into the future, and claimant succeeded on the issues of causation, average weekly wage, and establishing his *prima facie* case of total disability. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983).

We reduce, however, the number of hours sought by 4.5, the amount of time requested by counsel for reviewing correspondence regarding claimant's medical reports, since that service cannot be deemed to have been related to counsel's work before the Board. Similarly, we decline to award counsel the 5.3 hours sought for communications between

[3]Claimant's counsel's fee petition documents the services rendered on behalf of claimant by counsel during the two previous appeals of this case to the Board, specifically June 11, 1997 through January 18, 1999, and January 11, 2000, through December 20, 2000. *See* Claimant's counsel's fee petition dated August 9, 2001.

himself and claimant regarding claimant's medical condition and receipt of compensation checks, as
these services are also unrelated to claimant's work before the Board. Accordingly, as claimant has succeeded in defending the administrative law judge's award of permanent partial disability compensation and related medical expenses, we award claimant's counsel a fee of $9,476.25, representing 54.15 hours of services performed before the Board in the first two appeals of this case at $175 per hour, payable directly to counsel by employer.

Accordingly, the Decision and Order on Remand Awarding Benefits of the administrative law judge is affirmed. Employer is liable for an attorney's fee for work performed before the Board in an amount of $9,476.25, payable directly to claimant's counsel.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge