BRB Nos. 10-0576
and 10-0576A

KENNETH SIMONS	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	DATE ISSUED: 01/26/2011
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order on Remand and the Decision and Order Denying Claimant and Employer's Motions for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Ed W. Barton, Orange, Texas, for claimant.

Jerry R. McKenney and Billy J. Frey (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order on Remand and the Decision and Order Denying Claimant and Employer's Motions for Reconsideration (2007-LDA-00237) of Administrative Law Judge Clement J. Kennington 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).

This case is before the Board for the second time. To recapitulate, claimant began working for employer as a truck driver in Kuwait and Iraq on November 11, 2003. He injured his left hand on January 11, 2004, when his hand slipped off a ratchet and struck the underside of a truck. He returned to the United States on January 23, 2004, because his hand condition did not respond to treatment. Claimant was diagnosed with totally disabling reflex sympathetic dystrophy (RSD). Employer challenged this diagnosis, contending claimant does not have RSD nor does he require a prialt pain pump. The parties also disputed claimant's average weekly wage and his entitlement to mileage reimbursement for obtaining medical treatment. The parties agreed that claimant has been totally disabled since January 23, 2004.

In his decision, the administrative law judge credited claimant's treating physicians to find that claimant has RSD and that he requires a pain pump. The administrative law judge also found claimant entitled to mileage reimbursement for his medical treatment. The administrative law judge found that claimant's average weekly wage must be calculated pursuant to Section 10(c), as Sections 10(a) and (b) are inapplicable. 33 U.S.C. §910(a)-(c). The administrative law judge rejected claimant's contention that his average weekly wage should be based solely on his earnings in Kuwait and Iraq. Decision and Order at 10. The administrative law judge accepted employer's average weekly wage calculation of $972.03 based on the combination of claimant's earnings overseas and in the United States during the 52 weeks prior to his

injury. The administrative law judge awarded claimant ongoing temporary total disability compensation. 33 U.S.C. §908(b).

On appeal, claimant challenged the administrative law judge's average weekly wage finding, arguing that his average weekly wage should be based solely on his earnings with employer in Kuwait and Iraq.

In its decision, the Board held that claimant's average weekly wage must be calculated based solely on his overseas earnings in order to reflect his earning capacity in the employment in which he was injured. *K.S.* [*Simons I*] *v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc* [*Simons II*], 43 BRBS 136 (2009). On reconsideration *en banc*, the Board rejected employer's contentions that it "usurped" the administrative law judge's discretionary authority under Section 10(c) and required in every Defense Base Act (DBA) case that the claimant's average weekly wage must be derived solely from overseas earnings. *Simons II*, 43 BRBS at 137 The Board held that where, as here, employer paid claimant substantially higher wages to work overseas than he had earned stateside, claimant's employment entailed dangerous working conditions, and claimant was hired to work full-time under a one-year contract, claimant's earnings in Iraq are determinative of his annual earning capacity at the time of injury. *Id.* The case was remanded for the administrative law judge to re-calculate claimant's average weekly wage based solely on his earnings in Iraq.

On remand, the administrative law judge divided claimant's total overseas earnings by the number of days he worked in Iraq and Kuwait to derive an average weekly wage of $1,739.13. In his decision on reconsideration, the administrative law judge rejected claimant's contention that, pursuant to *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997), the applicable maximum compensation rate under Section 6(b)(1), 33 U.S.C. §906(b)(1), is the rate in effect when claimant was first awarded compensation in April 2008 rather than the maximum compensation rate in effect when claimant became disabled in January 2004.

Employer appeals the administrative law judge's average weekly wage finding, contending that the Board's prior holding and the administrative law judge's consequent finding on remand, that claimant's average weekly wage must be solely based on his earnings in Iraq and Kuwait, are in error. BRB No. 10-0576. Claimant responds, urging affirmance. Claimant, in his cross-appeal, contends that, pursuant to *Wilkerson*, the administrative law judge erred by finding that his award is limited under Section 6(b) to the maximum rate in effect when he became disabled in January 2004. BRB No. 10-0576A. Employer responds, urging affirmance. Claimant filed a reply brief. The Director, Office of Workers' Compensation Programs, filed a response to both appeals, urging affirmance of the administrative law judge's average weekly wage and Section 6

findings. Employer filed a Motion for Expedited Summary Decision with its Petition for Review. By Order issued on September 14, 2010, the Board granted employer's motion for an expedited decision.

Employer requests a summary affirmance of the administrative law judge's calculation on remand of claimant's average weekly wage so that it can appeal the Board's first decision to the United States Court of Appeals for the Fifth Circuit; employer alternatively argues that the Board's initial holding is incorrect. Employer thus asks the Board to reconsider and/or clarify its interpretation of the average weekly wage issue in DBA cases. In its prior decision, the Board held, under the facts of this case, that claimant's average weekly wage must be based solely on his overseas earnings. *Simons I*, 43 BRBS at 21; *see also Simons II*, 43 BRBS at 137. In reaching its conclusion, the Board rejected employer's contentions, reiterated here, that claimant's overseas earnings need not be used exclusively to calculate claimant's average weekly wage. *See Simons II*, 43 BRBS at 136-37; *Simons I*, 43 BRBS at 19-21. The Board's holding is the law of the case. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). 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 has already been addressed and rejected by the Board in this case. *Simons II*, 43 BRBS at 137. As employer raises no issues with regard to the administrative law judge's award of benefits on remand,[1] and as the Board's previous holding constitutes the law of the case, we grant employer's motion for summary affirmance and decline its request to reconsider the Board's prior decisions. Accordingly, the administrative law judge's average weekly wage finding on remand is affirmed.

Claimant cross-appeals the administrative law judge's limiting claimant's compensation rate under Section 6(b) to the maximum compensation rate of $1,030.78 that was in effect when claimant became disabled in January 2004. Claimant contends that the maximum compensation rate is the one in effect in April 2008 when the administrative law judge's award was entered. On reconsideration, the administrative law judge rejected claimant's contention that the applicable maximum compensation rate should be determined pursuant to *Wilkerson*, 125 F.3d 904, 31 BRBS 150(CRT), as the case at bar arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. Decision and Order Denying Claimant and Employer's Motion for Reconsideration at 1-2. In *Wilkerson*, the Fifth Circuit applied the maximum rate in effect at the time of the award in 1993 to a worker who retired in 1972, rather than the maximum rate in effect under the pre-1972 Act, because the court considered that the

[1] Employer's appeal does not raise any specific allegations of error in the administrative law judge's calculation of claimant's average weekly wage.

1984 Amendments to the Act reflected Congress's determination that the maximum benefit previously available to claimants was grossly inadequate. *Id.*, 125 F.3d at 906, 31 BRBS at 152(CRT). Following Board precedent in this case, the administrative law judge awarded claimant's temporary total disability benefits at the maximum rate in effect in January 2004 when claimant's disability commenced rather than the rate in effect when the award was entered in 2008. *See C.H [Heavin] v. Chevron, USA, Inc.*, 43 BRBS 9 (2009); *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006); *see also Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990).

We reject claimant's contention of error. The circumstances which gave rise to the court's holding in *Wilkerson* are absent from the present case. The Board thoroughly addressed this issue in *Heavin*, 43 BRBS 9, which also arose within the jurisdiction of the Fifth Circuit, as well as in *Reposky*, 40 BRBS 65.[2] 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 (9th Cir. 2010). 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 relating to compensation.[3] *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." *Id*. at 1207-1208. Thus, for the reasons expressed in *Heavin*, 43 BRBS at 16-17, as bolstered by *Roberts*, 625 F.3d 1204, we reject claimant's reliance on *Wilkerson*. *See also Reposky*, 40 BRBS 65. Accordingly, as it is consistent with law, we affirm the administrative law judge's finding that claimant is entitled to compensation based on the

[2] The Board explained that the issue in *Wilkerson* concerned the applicability of the pre-1972 cap on benefits of $70 per week to the award of benefits to a retiree who became entitled to benefits by virtue of the 1984 Amendments. *See Reposky*, 40 BRBS at 75.

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

> (c) 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.

maximum rate in effect in January 2004, when he first became disabled.[4] As the parties have not raised any other issues with respect to the administrative law judge's decisions on remand, they are affirmed.

Claimant's counsel, Ed Barton, has filed an attorney's fee petition for services performed before the Board, from March 16, 2009, to September 25, 2009, in the prior appeal. BRB No. 08-0583. The Board previously awarded counsel a fee of $2,631 for time expended before the Board prior to March 16, 2009. *Simons II*, 43 BRBS at 138. Counsel requests a fee of $2,752.50, representing 9.175 hours of attorney time at $300 per hour. Employer responds that any fee award should be held in abeyance pending the exhaustion of all appeals. Employer also contends that the hourly rate requested of $300 is excessive in light of the routine services performed on claimant's behalf during this period and the prevailing hourly rates in the Orange, Texas area where claimant's counsel practices. Employer asserts that an hourly rate of $225 is appropriate. Claimant filed a reply brief to which he appended an annual billing survey published by Texas Lawyer. Claimant filed a supplemental fee application with his reply brief, in which he requests $600, representing two hours for reviewing employer's objections and preparing a response at an hourly rate of $300. Employer filed a response to claimant's reply brief.

We reject employer's contention that the fee award should be held in abeyance. It is not inappropriate for claimant's attorney to file a fee petition during the pendency of an appeal, or for the Board to award an attorney's fee at the same time as it addresses the parties' substantive contentions. *See, e.g., Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). The fee award, however, is not enforceable until all appeals are exhausted. *Thompson v. Potashnik Constr. Co.*, 812 F.2d 574 (9th Cir. 1987). Regarding the hourly rate of $300, counsel submitted a Texas Lawyer-2008 Hourly Billing Rates summary, which provides that the average statewide hourly rate charged by partners ranged from $329 to $371 per hour; for firms with fewer the 30 attorneys the partner rates averaged from $329 to $339 per hour. Accordingly, counsel, a sole practitioner, has established that his requested hourly rate of $300 is reasonable in this case. *See* 20 C.F.R. §802.203(d)(4). As claimant successfully appealed the administrative law judge's average weekly wage finding, and as the hourly

[4] In this case, claimant's disability remains temporary. In *Roberts*, the court rejected the Board's holding that when a claimant reaches maximum medical improvement his permanent total disability rate does not change until the next October 1. The court held that the current maximum rate goes into effect immediately upon claimant's condition reaching permanency, as the claimant is "currently receiving" compensation for permanent total disability pursuant to Section 6(c). *See Roberts*, 625 F.3d at 1205-1206.

rate and number of hours requested are reasonable, we grant counsel the requested fee of $3,352.50. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand and the Decision and Order Denying Claimant and Employer's Motions for Reconsideration are affirmed. BRB Nos. 10-0576/A. Claimant's counsel is awarded an attorney's fee totaling $3,352.50, representing 11.175 hours of attorney time at $300 per hour, payable directly to claimant's counsel by employer. BRB No. 08-0583.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge