BRB No. 99-0844

EARL LAWRENCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	)
	)	
STEVENS SHIPPING COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Stephen E. Darling (Sinkler & Boyd, P.A.), Charleston, South Carolina, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (93-LHC-0213) of Administrative Law Judge John C. Holmes 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and 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 case is on appeal to the Board for the third time. Claimant injured his neck, back, shoulders, and knees at work on January 16, 1991, after being involved in a truck accident. Employer voluntarily paid claimant temporary total disability benefits from January 29, 1991, through April 4, 1991, and temporary partial disability benefits from April 4, 1991, through April 16, 1991. Claimant returned to work in May 1991 but stopped working in March 1992 due to pain. The administrative law judge initially awarded claimant temporary

total disability benefits from January 16, 1991, through September 18, 1992, and a scheduled award for a ten percent permanent impairment to his left lower extremity for his knee injury, but he denied claimant's back injury claim. Claimant filed a motion for modification, seeking benefits for a 17 percent impairment to his left lower extremity, and an award for a loss in wage-earning capacity due to his back injury. The administrative law judge denied claimant's motion for modification. Claimant appealed to the Board.

In *Lawrence v. Stevens Shipping Co.*, BRB No. 96-1574 (July 17, 1997)(unpub.), the Board vacated the administrative law judge's decision on modification and remanded for him to reconsider claimant's entitlement to an award for a 17 percent impairment to the left lower extremity based on Dr. Friedman's report, and to an unscheduled award for his back injury. On remand, the administrative law judge reinstated his temporary total disability award from January 16, 1991, through September 18, 1992, his 10 percent scheduled permanent partial disability award to the left lower extremity, and his denial of benefits for claimant's back injury. Claimant appealed this decision.

In *Lawrence v. Stevens Shipping Co.*, BRB No. 98-0678 (Feb. 2, 1999)(unpub.), the Board modified the administrative law judge's decision to award benefits for a 17 percent impairment to the left lower extremity and held that claimant established that his back injury is work-related as a matter of law. The Board remanded the case to the administrative law judge to consider the remaining issues with regard to claimant's work-related back injury. On remand, the administrative law judge did not consider the nature and extent of claimant's disability with regard to the back injury, but merely held employer liable for medical expenses for claimant's work-related back injury. Claimant again appeals.

In the instant appeal, claimant challenges the administrative law judge's denial of disability benefits for his back injury. Employer responds in support of the administrative law judge's decision.[1] Claimant's counsel also has filed a fee petition for work performed

[1]To the extent that employer's argument in its response brief that the administrative law judge, in his decision dated January 2, 1998, properly found rebuttal of the Section 20(a) presumption established is in support of the administrative law judge's decision, we will address it. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998), *modifying on recon.* 32 BRBS 118 (1998); Emp. Br. at 5-9. Nonetheless, we affirm the Board's holding that the Section 20(a) presumption is not rebutted as a matter of law. First, the Board's decision on this issue constitutes the law of the case. *See Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999). Moreover, assuming, *arguendo*, that the Board applied an incorrect "ruling out" standard, any error is harmless as the opinions of Drs. Tatum and Gilmore, Emp. Exs. 5, 9, do not support rebuttal but instead support a causal relationship between claimant's back

before the Board in BRB No. 98-678. Employer objects to the requested fee.

Claimant argues that the administrative law judge erred in denying his claim for disability benefits for his back injury. Specifically, claimant alleges error in the administrative law judge's failure to discuss the issues of whether he established his *prima facie* case of total disability, whether employer established the availability of suitable alternate employment, and whether he sustained a loss in wage-earning capacity and is entitled to an award of partial disability benefits. We agree that the administrative law judge's failure to address these issues requires that we again remand this case to the administrative law judge.

To establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual employment due to his work-related injury. *See Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170 (CRT)(4th Cir. 1999); *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). Where claimant is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See id.; Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). An award for partial disability compensation in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 6 (1988). If employer establishes the availability of suitable alternate employment, the wages which the alternate jobs would have paid at the time of the injury are compared to claimant's pre-injury wages to determine if claimant has sustained a loss in wage-earning capacity. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65 (CRT)(5th Cir. 1998); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). If the wages the post-injury jobs paid at the time of injury are unknown, the

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injury and his work. Dr. Thompson's opinion, Emp. Ex. 7, is relevant to the issue of the extent of claimant's back disability, but not to the causal relationship of that condition to the work accident. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997).

administrative law judge must determine claimant's loss in wage-earning capacity by applying the increase in the national average weekly wage downward. *See 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); *Richardson*, 23 BRBS at 327.

In his latest decision, the administrative law judge did not discuss the issue of whether claimant established his *prima facie* case of total disability with regard to his back injury, and there is contradictory evidence in the record as to whether claimant is unable to return to his usual work as a longshoreman. The opinion of Dr. DuBois and claimant's testimony support a finding that claimant is unable to return to his usual work due to his back injury, but Drs. Nicholson and Thompson stated claimant can return to his usual work without restrictions.[2] Thus, the administrative law judge's denial of benefits with regard to claimant's back injury is vacated, and the case is remanded to the administrative law judge to determine whether claimant has established his inability to return to his usual work due to his back injury.

If the administrative law judge finds that claimant is unable to return to his usual employment due to his back injury, he must determine whether employer established the availability of suitable alternate employment. In this regard, the administrative law judge should discuss the labor market survey of Ms. McCain, and determine whether claimant is physically and educationally qualified for these positions. *See generally Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999); Emp. Exs. A 10, 14; Tr. at 84-86. Contrary to claimant's contention, the administrative law judge may rely on the jobs identified by Ms. McCain even though no specific employers are identified other than the Job Service of

[2]Claimant testified that he no longer can perform the work of a longshoreman. Tr. at 39-41, 63. On January 29, 1993, Dr. DuBois stated that claimant was totally disabled from April 29, 1992. Cl. Ex. 17. Subsequently, on May 14, 1996, Dr. DuBois opined that claimant is unable to work as a longshoreman due to his back injury. Ex. 4 to Employee's Brief in Support of His Request for Modification. Dr. Thompson returned claimant to normal activities with no permanent impairment as of May 1991, Emp. Ex. A 7, and Dr. Nicholson recommended that claimant return to work on January 15, 1993, Cl. Ex. 13.

Charleston. *See Moore*, 126 F.3d at 256, 31 BRBS at 119 (CRT).

If the administrative law judge finds that employer established the availability of suitable alternate employment, he must determine claimant's post-injury wage-earning capacity. 33 U.S.C. §908(h). The administrative law judge also must determine if claimant sustained a loss in wage-earning capacity and thus is entitled to partial disability benefits. 33 U.S.C. §908(c)(21). Consequently, we vacate the administrative law judge's denial of benefits for claimant's back injury, and remand this case to the administrative law judge for consideration consistent with this decision.[3] If the administrative law judge finds that claimant is entitled to total or partial disability benefits, the administrative law judge must determine the nature of that disability, *i.e.*, whether it is temporary or permanent. Cl. Exs. 13, 17; Emp. Exs. A 7, 9.

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board in BRB No. 98-678. He requests a total fee of $1,675, representing 8.375 hours of work at an hourly rate of $200. Employer objects to the hourly rate, and asserts that the fee petition is premature and that the amount requested too high based on the limited success of the case on remand. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court held that the attorney's fee awarded in fee-shifting statutes should be commensurate with the degree of success obtained in a given case. This analysis applies to cases arising under the Act. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992).

We reject employer's objection to the hourly rate. We consider $200 per hour to be reasonable and customary for the geographic area in which this case arises. *See McKnight v. Carolina Shipping Co.*, 32 BRBS (1998)(decision on reconsideration *en banc*); *see also Moore v. Universal Maritime Corp.*, 33 BRBS 54, 62 n. 9 (1999); 20 C.F.R. §802.203(d)(4). Moreover, we reject employer's contention that the fee requested is excessive under the circumstances of this case, as counsel was successful in securing additional compensation in an amount in excess of $10,000 by virtue of the Board's decision. *See Hensley*, 461 U.S. at

[3]On remand, if the administrative law judge finds claimant entitled to partial disability benefits under Section 8(c)(2) and (c)(21), he may fashion concurrent partial disability benefits for claimant's back injury (an unscheduled award) and loss of use of claimant's left lower extremity (a scheduled award). These awards combined cannot exceed a weekly benefit in excess of what claimant would be entitled to receive if he were found permanently totally disabled. *See I.T.O. Corp. of Baltimore, Inc. v. Green*, 185 F.3d 239, 33 BRBS 139 (CRT)(4th Cir. 1999), *modifying* 32 BRBS 67 (1998).

424; *Baker*, 991 F.2d at 163, 27 BRBS at 14 (CRT); *Brooks*, 963 F.2d at 1532, 25 BRBS at 161 (CRT). In light of counsel's success, we approve the fee requested in its entirety, representing 8.375 hours at a rate of $200 per hour, for a total fee of $1,675 for work performed before the Board in BRB No. 98-678.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded to the administrative law judge for a determination of the nature and extent of disability with regard to claimant's back injury. Additionally, claimant's counsel is entitled to an attorney's fee of $1,675 for work performed before the Board in BRB No. 98-678, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge