

ERNEST R. McKNIGHT, JR.)
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 Claimant-Respondent) DATE ISSUED: _____
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 v.)
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 CAROLINA SHIPPING COMPANY)
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 and)
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 LIBERTY MUTUAL)
 INSURANCE COMPANY)
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 Employer/Carrier-)
 Petitioners)
)
 and)
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 CAROLINA SHIPPING COMPANY)
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 and)
)
 TRAVELERS INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER on
) MOTION for RECONSIDERATION
) *EN BANC*

Appeal of the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees of Edith Barnett, Administrative Law Judge, United States Department of Labor.

Harriet McBryde Johnson, Charleston, South Carolina, for claimant.

Stephen E. Darling (Sinkler & Boyd, P.A.), Charleston, South Carolina, for employer/Liberty Mutual Insurance Company.

Shari S. Miltiades, Savannah, Georgia, for employer/Travelers

Insurance Company.

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

PER CURIAM:

Claimant has filed a timely motion for reconsideration *en banc* of the Board's decision in this case, *McKnight v. Carolina Shipping Co.*, 32 BRBS 165 (1998). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer has not responded. Claimant's counsel also has filed a fee petition for work performed before the Board. Employer responds, objecting to the requested fee. We grant the motion for *en banc* reconsideration, but deny the relief requested.

In its decision addressing employer's appeal, the Board affirmed the administrative law judge's determinations that claimant's disability is related to his 1984 injury and that the claim was filed in a timely manner. Additionally, the Board vacated the awards of temporary partial and unscheduled permanent partial disability benefits and the finding of the date of maximum medical improvement, holding that the evidence of record does not support the administrative law judge's findings on these issues. The Board remanded the case to the administrative law judge for further consideration of the date of maximum medical improvement and held claimant limited to benefits under the schedule for the permanent partial disability due to his knee condition. Further, the Board held that all benefits should be based on claimant's 1984 average weekly wage rather than his 1989 average weekly wage. The Board also rejected employer's objections to the fee award but, nevertheless, stated that the administrative law judge may reconsider the fee award based on the benefits awarded on remand. *McKnight*, 32 BRBS at 168-174.

As claimant's arguments do not establish any error committed by the Board in its decision in this case, we reject his contentions and deny the motion for reconsideration. Initially, we reject claimant's contention that the Board's decision was not issued in a timely manner. Employer's appeal of the administrative law judge's decision was filed on January 27, 1997. On December 17, 1997, within one year of employer's appeal, the Board dismissed the appeal and remanded the case to the district director with instructions to reconstruct the record. Upon receiving the complete record from the district director on March 4, 1998, the Board reinstated the appeal, and the one-year period commenced on that date. Thus, the decision issued on July 10, 1998, comports with the requirements of Public Law 104-134, 110 Stat. 132. See *also* P.L. 105-78, 111 Stat. 1467.

Next, we reject claimant's assertion that his benefits should be based on his 1989 average weekly wage pursuant to *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). The Board thoroughly discussed the conflicting law in the circuits regarding the time period during which average weekly wage is to be calculated in the case of a latent disability due to a traumatic injury, and found that the law espoused by the United States Courts of Appeals for the Second and Fifth Circuits, *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195 (CRT) (5th Cir. 1997); *Director, OWCP v. General Dynamics Corp. [Morales]*, 769 F.2d 66, 17 BRBS 130 (CRT) (2d Cir. 1985), which states that in latent disability cases benefits are to be based on the average weekly wage at the time of the accident which caused the injury, better applies the language of Section 10 of Act, 33 U.S.C. §910. Inasmuch as this case does not arise in the Ninth Circuit, the Board is not bound by the holding in *Johnson*, and thus we affirm the Board's decision on this matter.

We reject claimant's argument concerning the award of unscheduled permanent partial disability benefits, as claimant's injury involved his knee. Therefore, his permanent partial disability award is limited to the benefits provided by the schedule at 33 U.S.C. §908(c)(2). *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). Moreover, in her order, the administrative law judge separately addressed claimant's entitlement to interest, and, contrary to claimant's contention, it would be irrational to relate claimant's entitlement to interest to an inappropriate award of unscheduled permanent partial disability benefits.

Finally, we reject claimant's allegation that the Board incorrectly vacated the administrative law judge's award of an attorney's fee. In light of the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and in light of the Board's decision on the merits, which will result in a reduction of claimant's benefits on remand, the Board's decision properly permits the administrative law judge to reconsider the attorney's fee award in light of the benefits awarded on remand.

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board. She requests a total fee of \$3,460, representing 17.3 hours of work at an hourly rate of \$200. Employer objects to both the hourly rate and the requested time.

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. However, we agree with employer that the time requested is excessive under the

circumstances of this case, as counsel was only partially successful in defending the award of benefits on appeal. In light of counsel's limited success before the Board, we approve 8.65 hours, at a rate of \$200 per hour, for a total fee for work performed before the Board of \$1,730. 33 U.S.C. §928; *Hensley*, 461 U.S. at 424; see generally *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); 20 C.F.R. §802.203.

Accordingly, the motion for *en banc* reconsideration is granted, but the relief requested is denied, and the Board's decision in this case is affirmed. 20 C.F.R. §802.409. Claimant's counsel is entitled to an attorney's fee of \$1,730 for work performed before the Board, 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

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge