BRB No. 11-0253

PAMELA SORELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COMBAT SUPPORT ASSOCIATES, LIMITED	)	DATE ISSUED: 12/23/2011
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

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

Jerry R. McKenney (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (2007-LDA-00083, 2008-LDA-00138) of Administrative Law Judge Kenneth A. Krantz 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.

Claimant, while in her fourth week of work for employer in Kuwait on May 5, 2006, was injured when high winds dislodged a metal tent support beam, which struck and fractured her nose. She underwent surgery to repair the fracture and subsequently complained of headaches and neck pain, which radiated into her left arm and hand. Claimant received a medical convenience termination from employer, and returned to the United States for treatment, which employer eventually refused to authorize. Employer paid temporary total disability benefits from May 6, 2006 to March 27, 2007. Claimant sought additional medical treatment and continuing compensation for temporary total disability, 33 U.S.C. §908(b), at a higher average weekly wage than employer had utilized. Claimant also alleged that she developed depression related to her pain and employer's denial of necessary medical treatment for her alleged work-related neck injury.

In his initial decision, the administrative law judge found that claimant is not entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), because she did not establish that the accident in Kuwait could have caused the harms she alleges, except for the nasal fracture. The administrative law judge found that, after a motor vehicle accident on December 17, 2005, but before claimant went to work for employer in Kuwait, she had been treated at both an emergency room and a chiropractor's office for neck symptoms similar to those she complained of after the May 2006 work accident. The administrative law judge further found that, even if claimant invoked the Section 20(a) presumption, employer established rebuttal thereof and that claimant did not show by a preponderance of the evidence that her current medical problems arose from the work injury. Accordingly, the administrative law judge concluded that claimant is not entitled to further compensation under the Act.

Claimant sought modification of this decision pursuant to Section 22 of the Act, 33 U.S.C. §922, based on a mistake of fact regarding the work-relatedness of her neck, left arm and psychological conditions. On modification, the administrative law judge again found that claimant is not entitled to the Section 20(a) presumption, that employer nevertheless provided sufficient evidence to rebut the presumption, and moreover, that the evidence, based on the record as a whole, established that claimant's complaints are not related to the work accident. Accordingly, the administrative law judge denied claimant's petition for Section 22 modification.

Claimant appealed the administrative law judge's decisions, challenging his findings that her neck, left arm and psychological/cognitive conditions were not caused or aggravated by the May 2006 work injury. In its decision, the Board reversed the administrative law judge's finding that claimant's neck and left arm conditions are not related to the May 2006 work accident, and vacated his finding that claimant's psychological/cognitive condition is not related to the work accident and remanded the case for further consideration. *Sorell v. Combat Support Associates, Ltd.*, BRB Nos. 07-

1008, 09-0702 (May 25, 2010) (unpub.). The administrative law judge, on remand, was to apply Section 20(a) to presume that claimant's psychological/cognitive condition is related to the work injury, determine whether employer established rebuttal of the Section 20(a) presumption, and if so, address whether claimant established the work-relatedness of her psychological/cognitive condition based on the record as a whole. *Id.*

On remand, the administrative law judge initially found that employer did not rebut the Section 20(a) presumption with regard to claimant's psychological/cognitive condition and thus concluded that this condition is related to her employment injury. He found that claimant is incapable of returning to her prior employment, that employer did not establish the availability of suitable alternate employment, and thus, that claimant is totally disabled as a result of her work-related injuries. Applying the framework articulated in *K.S.* [*Simons*] *v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009), the administrative law judge calculated claimant's average weekly wage, pursuant to Section 10(c), 33 U.S.C. §910(c), by using only claimant's actual overseas earnings. Accordingly, the administrative law judge found claimant entitled to a continuing award of temporary total disability benefits from March 28, 2007, as well as medical benefits relating to her work injuries. 33 U.S.C. §§907, 908(b).

On appeal, employer challenges the administrative law judge's findings that claimant's physical and psychological conditions are work-related, that claimant is entitled to total disability benefits, and as to the calculation of claimant's average weekly wage. Claimant responds, urging affirmance. Claimant's counsel also has filed a fee petition seeking an attorney's fee totaling $6,562.50, representing 13.125 hours of work at an hourly rate of $500, for work performed before the Board in the prior appeals. Employer has filed objections to counsel's fee petition.

Employer contends the Board erred in holding, as a matter of law, that employer did not rebut the Section 20(a) presumption that claimant's neck and left arm conditions were aggravated by the May 5, 2006, work incident, and thus that claimant established that those injuries are compensable under the Act. Employer also challenges the Board's holding that claimant established her *prima facie* case entitling her to invocation of the Section 20(a) presumption that her psychological/cognitive condition was caused or aggravated by the work injury. The "law of the case" doctrine holds that the Board will not reconsider issues decided in its prior consideration of the case, 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 Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999).

The Board thoroughly addressed these issues in its previous decision and held: (1) that the record contains sufficient evidence to establish that claimant's work accident could have aggravated her neck condition and caused a psychological/neurological condition; (2) that claimant thus established her *prima facie* case with regard to those injuries; and (3) that employer did not, as a matter of law, establish rebuttal of the Section 20(a) presumption that claimant's neck and left arm conditions were caused or aggravated by the May 5, 2006, work injury. *Sorell*, slip op. at 3-7. As the Board fully addressed these issues in its previous decision, and there is no basis for finding that the law of the case doctrine should not apply, the Board's holdings constitute the law of the case. *See, e.g., Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Schaubert v. Omega*, 32 BRBS 233 (1998). Employer's contentions relating to these issues are therefore rejected.

Employer next contends that it produced substantial evidence that claimant does not suffer from a psychological/cognitive condition due to the work accident and thus, that it established rebuttal of the Section 20(a) presumption in this regard. Employer argues that the opinion of Dr. Mansheim, that claimant does not suffer from a psychiatric disorder due to the incident in Kuwait, in conjunction with the records of Dr. Partington, wherein claimant denied having anxiety and depression as of November 7, 2006, the reports of Dr. Sautter, which explicitly defer to Dr. Mainsheim's opinion, and evidence that claimant is not credible, sufficiently establish the lack of a causal nexus between claimant's psychological/cognitive condition and her work for employer. Employer also argues that the administrative law judge incorrectly found that claimant could establish a compensable psychiatric injury by providing expert testimony that she was suffering stress related to this litigation.

Upon invocation of the Section 20(a) presumption,[1] the burden of production shifts to employer to rebut the presumption with substantial evidence that the claimed conditions are not work-related. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). It is well established that an employment injury need not be the sole cause of a disability; rather, if the employment

[1]In holding that claimant established a *prima facie* case that her May 5, 2006, work accident could have "caused a psychological/neurological condition," the Board relied on the undisputed fact that claimant sustained a blow to the head sufficient to fracture her nose, and that Dr. Sautter "noted that claimant's work-related, closed head injury, employer's denial of medical services, and claimant's significant pain complaints are factors supporting his diagnosis of ruminative anxious depression with cognitive dysfunction." *Sorell*, slip op. at 5. The administrative law judge reiterated on remand that claimant "established a *prima facie* case by proving that she suffered a psychological harm and that a work accident occurred which could have caused, aggravated, or accelerated the condition." Decision and Order on Remand at 11.

injury aggravates, accelerates or combines with an underlying condition, the entire resultant condition is compensable. *Id.* Thus, claimant's psychological/cognitive injury need be due only in part to work-related conditions to be compensable under the Act. *See Peterson v. General Dynamics Corp.*, 25 BRBS 78 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor, OWCP*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *see also Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

On remand, the administrative law judge found that Drs. Sautter and Mansheim agree that claimant has a psychological condition resulting from the significant stress she is under as a result of her inability to obtain treatment and benefits for her work-related injury. The administrative law judge found that: claimant has lingering difficulty with pain; she is extremely focused on her pain; her emotional and physical conditions are interrelated; and that she suffers from ruminative and anxious depression associated with her pain. Decision and Order on Remand at 11. He further noted that Drs. Partington, Sautter and Mansheim stated that the pain caused by claimant's work-related accident and the frustration that her need for neck surgery and pharmaceutical needs have not been resolved are the two key sources of her psychological harm. Moreover, the administrative law judge found that employer did not submit any medical evidence establishing that claimant's psychological/cognitive condition is not related to her work injury other than Dr. Mansheim's narrow opinion that it is not the "specific result" of the accident.[2] Consequently, the administrative law judge found that employer did not rebut the Section 20(a) presumption and thus, that claimant's psychological/cognitive condition is related to the work injury.

We affirm the administrative law judge's finding that employer did not produce substantial evidence to rebut the Section 20(a) presumption. Dr. Mainsheim stated that the medical records "do not reveal psychiatric disorder" and that "there is no indication of psychiatric disorder as a specific result of a May 5, 2006, work-related injury." EX 33. He added, however, that "claimant's depression, tearfulness, and feelings of hopelessness," are related to employer's refusal to authorize her neck surgery. EX 33. Dr. Sautter opined that claimant "appears to have a significant ruminative anxious depression, which is contributing to her observed deficient cognitive test performance on tasks of attention and concentration, memory and executive function." CX 16. Dr.

[2]The administrative law judge cited with approval the Board's unpublished decision in *Atkins v. Braswell Services*, BRB No. 97-1211 (June 2, 1998), for the proposition that psychological harm resulting from physical pain from a work injury and from stress associated with the lack of medical care for work injuries constitutes a work-related psychological condition.

Sautter added that claimant's significant pain complaints have contributed to her psychological problems and that her inability to resolve her surgical needs has caused her additional stress and anxiety. EX 52. The administrative law judge properly found that the opinions of Drs. Mainsheim and Sautter do not establish that claimant's condition was not caused or aggravated by her employment. Rather, both physicians concede that some of claimant's psychological problems may be the result of her ongoing inability to obtain authorization for medical treatment from employer for her physical injuries. The administrative law judge found these opinions bolstered by that of Dr. Partington, who characterized claimant as depressed and "traumatized by this whole situation and how it's been dragged out." CX 13s, 14-16. Thus, as there is no medical evidence in the record that establishes that claimant's psychological condition is not related to her work-related neck and arm conditions, we affirm the administrative law judge's finding that employer has not established rebuttal of the Section 20(a) presumption. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT). Accordingly, the administrative law judge's finding that claimant's psychological/cognitive condition is work-related is affirmed as it is rational, in accordance with law, and supported by substantial evidence. *See generally Manship*, 30 BRBS 175.

Employer also asserts that the administrative law judge erred in finding that claimant cannot return to her usual work. In order to establish a *prima facie* case of total disability, claimant must prove that she is unable to perform her usual work due to the injury. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *see also Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001). The administrative law judge found that claimant established, through the opinions of Drs. Budorick, Partington and Bawcom, that claimant is not able to perform her usual work. Dr. Budorick stated, on July 28, 2006, that "[a]t this point I do not think that [claimant] can work." EX 25. Dr. Partington stated on December 12, 2006, that claimant "cannot return to Kuwait until after she has surgical correction of her problem [cervical herniated disc]."[3] CX 13 at 123. Dr. Bawcom opined on September 7, 2006, that claimant could not return to work due to her injuries. CX 13 at 103. The record contains no evidence to the contrary or any more recent evidence. We therefore affirm the administrative law judge's finding that claimant established her *prima facie* case of total disability. *Wheeler*, 39 BRBS 49.

[3]Dr. Partington subsequently added that "I would not have expected [claimant] to be working given her complaints, certainly, at the time that I saw her." CX 14, Dep. at 11.

Employer further contends the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment. Employer contends that claimant's post-work-injury employment with Blue Ridge General Contractors, Westin Hotel, Webster Repair, Creative Advertising Staffing, and Camelia Foods establishes that she is capable of, and in fact has performed, suitable alternate employment. Employer contends that the administrative law judge's rationale for rejecting this information as evidence of suitable alternate employment is flawed.

Once a claimant has established a *prima facie* case of total disability by showing that she cannot return to her usual work, as here, the burden shifts to the employer to establish the availability of suitable alternate employment. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Employer must demonstrate the realistic availability of a range of jobs which claimant is capable of performing given her age, physical restrictions, and educational and vocational background. *See Lentz*, 852 F.2d 129, 21 BRBS 109(CRT); *see also Tann*, 841 F.2d 540, 21 BRBS 10(CRT). Employer may fulfill its burden by showing that claimant is actually working within her work restrictions. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). In determining whether employer has met its burden of establishing the availability of suitable alternate employment, the administrative law judge must compare the requirements of the jobs identified with claimant's physical restrictions and other vocational factors. *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *see generally Fox v. West State Inc.*, 31 BRBS 118 (1997).

The administrative law judge stated that although employer presented evidence regarding claimant's job skills and post-injury work history, it did not provide any labor market surveys, vocational expert testimony, or discussion of realistically available job opportunities within claimant's restrictions and capabilities. The administrative law judge stated that "[a] listing of claimant's abilities and the fact that she has held positions is simply insufficient to meet the standards of specificity and data required by the law." Decision and Order on Remand at 15. With regard to the positions that claimant held after the 2007 hearing, the administrative law judge summarily stated that one job did not offer claimant enough hours to support herself, that in another she did not perform enough work to support her salary, and that claimant could perform the other two only "with difficulty and pain." *Id.*

We cannot affirm the administrative law judge's finding that employer did not establish suitable alternate employment, as he did not fully address the evidence regarding the positions claimant actually held post-injury. Claimant testified that she was, with some accommodations, capable of performing all of the jobs she held post-injury. HT at 43, 101-102; HT II at 29-31. At the time of the modification hearing, July

11, 2008, claimant was working for Camelia Foods. HT II at 31. The administrative law judge did not address whether employer established the suitability of any of these jobs or make detailed findings as to why claimant left her post-injury jobs. In addition, it is not reasonable to reject jobs that pay "too little" as a decrease in claimant's wage-earning capacity forms the basis for the compensation award. *See generally Neff v. Foss Maritime Co.*, 41 BRBS 46 (2007); *Berezin* v. *Cascade General, Inc.*, 34 BRBS 163 (2000). Employer's burden to establish suitable alternate employment is an evidentiary burden that does not require employer to extend an actual employment offer to, or find an actual job for, claimant. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *see generally Dove v. Southwest Marine of San Francisco*, 18 BRBS 139 (1986) (claimant not entitled to limit employment prospects by refusing any job that merely paid less than his former wage); *see also Hoffman v. Newport News Shipbuilding & Dry Dock, Co.*, 35 BRBS 148 (2001); *but see Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001); *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999) (if suitable alternate employment at employer's facility becomes unavailable to the claimant for reasons other than the claimant's misconduct, the employer is required to re-establish the availability of additional suitable alternate employment); *see also Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994) (claimant's short-lived, 11 weeks of post-injury employment was insufficient to establish that suitable alternate work was "realistically and regularly available to claimant on the open market").[4] We therefore vacate the administrative law judge's finding that employer did not establish the availability of suitable alternate employment and we remand this case for more complete findings on this issue consistent with law.[5]

Employer next contends that the administrative law judge erred by applying the Board's decision in *Simons*, 43 BRBS 18, to calculate claimant's average weekly wage based solely on her overseas earnings, because Kuwait is not a war zone and there is no evidence that claimant's work as a party planner otherwise entailed dangerous working conditions. Employer contends the administrative law judge should have utilized all of

[4]Claimant did not state that she was laid off from these jobs. Rather, she testified that she left because of a reduction in her hours and/or income from such work. HT II at 28-31.

[5]As employer correctly contends, claimant's credibility in describing her limitations as a result of her work injuries may be appropriately addressed at this juncture. *See generally Mendoza v. Marine Personnel Co.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

claimant's earnings in the 52 weeks prior to her injury to arrive at an average weekly wage of $680 (claimant's earnings of $31,668 in the 48.72 weeks prior to working for employer plus the $3,713.39 she earned in the 3.28 weeks she worked for employer divided by 52 weeks).

Section 10(c), 33 U.S.C. §910(c), directs the administrative law judge to determine claimant's annual earning capacity "having regard to the previous earnings of the injured employee in the employment in which he was injured."[6] The goal of Section 10(c) in this regard is a sum that reflects the potential of claimant to earn, absent injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *see also Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986). Average weekly wage calculations based solely on a claimant's new, higher wages are appropriate where they reflect the potential to earn at that level. *See, e.g., Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *see also 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); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981).

Employer contends the administrative law judge erred in failing to give notice of his intention to rely on documents not admitted into evidence to find Kuwait to be a "dangerous" environment, and for that reason, erred in holding *Simons* applicable in this case. In *Simons*, the Board held that where a claimant was enticed to work on a long-term basis in a dangerous, overseas environment in return for higher wages than he earned in the United States, his average weekly wage must be calculated based only on his overseas earnings. *Simons*, 43 BRBS at 20; *see also L-3 Communications v. Director, OWCP*, No. 2:10cv592, 2011 WL 6046440 (E.D. Va. Dec. 2, 2011); *Proffitt*, 40 BRBS 41. In *Simons*, the claimant worked in Kuwait and Iraq in 2003 and 2004. Claimant in this case was injured in 2006 in Kuwait. In finding Kuwait to be a "dangerous" environment for purposes of determining claimant's average weekly wage, the administrative law judge relied on a 1990 Department of Defense document naming Kuwait a "Designated Hostile Fire or Imminent Danger Pay Area" and a 1991 Executive Order designating Kuwait as a combat zone for purposes of wages for members of the Armed Forces. The administrative law judge found that these designations have not been rescinded. Employer contends it was error for the administrative law judge to take official notice of these documents without notifying the parties that he would do so and giving them an opportunity to respond. Employer further contends that the documents cited are out-of-date and do not reflect the current situation, *i.e.*, Kuwait is not a "dangerous" locale for purposes of the *Simons* decision.

[6]The parties concede that claimant's average weekly wage should be derived pursuant to Section 10(c).

Employer argues that the administrative law judge erred in failing to provide notice of his intention to rely upon two official government documents to find that claimant's work in Kuwait in 2006 involved dangerous working conditions, comparable to that of a combat zone and, as a result, the administrative law judge erred in applying *Simons*, 43 BRBS 18, to calculate claimant's average weekly wage. Employer asserts: "Had employer/carrier been given such notice, they would have taken the opportunity to present rebuttal evidence and argument on these issues." Employer's Brief at 46.

Review of the record reveals that the administrative law judge erred in failing to provide notice of his intention to take judicial notice of the official documents cited. That error, however, is harmless, because employer has failed to demonstrate prejudice. Pursuant to 33 U.S.C. §919(d),[7] the administrative law judge was obliged to conduct proceedings in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §§554-557, which directs in Section 556(e): "when an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." Although the administrative law judge failed to provide notice of his intent to take judicial notice of the official documents, in order to have the judgment vacated, the burden is on employer to show prejudice resulted. *Shinseki v. Sanders*, 556 U.S. 396, 129 S.Ct. 1696 (2009). In *Sanders*, the Department of Veterans Affairs (VA) notified the claimant of the nature of the additional information required to obtain Veterans benefits, but failed to specify what portion of the additional evidence the Secretary would provide, and what portion he would have to provide. The Veterans Court held that the VA's error was harmless. The Federal Circuit reversed, holding that a notice letter to a claimant which is deficient in any respect is presumed prejudicial unless the VA demonstrates otherwise. The Supreme Court reversed the Federal Circuit, holding that in civil cases, the party alleging prejudice must show it in the context of the case record. Review of the record in *Sanders* revealed that the notice error was harmless: the Supreme Court observed, "Sanders has not told the Veterans Court, the Federal Circuit, or this court, what specific additional evidence proper notice would have led him to obtain or seek." *Id.*, 129 S.Ct. at 1708.

The record in the case at bar reveals that, like the claimant in *Sanders*, employer has failed to substantiate its claim of prejudice. Before citing the official documents demonstrating that Kuwait is properly considered comparable to a combat area, the administrative law judge stated, "Employer argues that Kuwait is not a war zone like Iraq, but provides no support for its conclusion." Decision and Order at 16. Throughout these proceedings, employer has been aware that Kuwait's status as a combat zone has

[7]33 U.S.C. §919(d) provides in pertinent part: "Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of Section 554 of Title 5."

been at issue and employer has vigorously maintained Kuwait was not a combat zone, but employer has been unable to substantiate its argument. Employer now contends that it has been prejudiced by the administrative law judge's failure to give notice of the official documents he cited, showing that Kuwait is considered a combat zone. Like the claimant in *Sanders,* employer has not told the Board "what specific additional evidence proper notice would have led him to obtain or seek." *Sanders.* 129 S.Ct. at 1708. Since employer has failed to demonstrate prejudice, we hold the error to be harmless.

We likewise reject employer's argument that the documents cited by the administrative law judge do not reflect the current situation in Kuwait and, for that reason, cannot justify his application of *Simons.* The administrative law judge anticipated employer's objection and stated in his decision that the designations of Kuwait contained in the documents had not been rescinded or canceled. Decision and Order at 17. Employer has provided no contrary authority. Hence, the record supports the administrative law judge's determination to apply *Simons,* in calculating claimant's average weekly wage.

The administrative law judge explained that another consideration also compelled his determination to base his calculation exclusively on claimant's overseas earnings: to realize the primary objective of Section 10(c), which is to reasonably ascertain the claimant's earning capacity at the time of injury. *See Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT). The administrative law judge rationally found that there is nothing to show that claimant would not have continued in her new, higher paying job had she not been injured and that it is appropriate to reflect this increase in earning capacity in the calculation of her average weekly wage. *Healy Tibbitts Builders, Inc,* 444 F.3d 1095, 40 BRBS 13(CRT). Therefore, the administrative law judge's use of only claimant's overseas earnings to calculate her average weekly wage under Section 10(c) in this case is rational, supported by substantial evidence, and in accordance with law. The administrative law judge's finding that Kuwait is a dangerous environment in which to work is supported by the government's designation of it as such for certain wage purposes. Employer does not dispute the administrative law judge's findings that claimant's overseas employment paid her substantially higher wages or that claimant was hired to work full-time under the terms of a one-year contract. Nor did employer argue that claimant would not, absent her injury, have fulfilled the year contract. We, therefore, affirm the administrative law judge's calculation of claimant's average weekly wage at $1,083.07. *Simons*, 43 BRBS 18; *see also Healy Tibbitts Builders, Inc.*, 444 F.3d 1095, 40 BRBS 13(CRT); *L-3 Communications,* No. 2:10cv592, 2011 WL 6046440; *Proffitt*, 40 BRBS 41.

Claimant's counsel has submitted a fee petition for work performed before the Board in the prior appeals in this case, BRB Nos. 07-1008 and 09-0702, seeking a total fee of $6,562.50, representing 13.125 hours of attorney time at an hourly rate of $500.

Employer has filed objections, arguing that the fee petition is premature,[8] that the requested hourly rate is excessive, and that two time entries, totaling 1.75 hours of work, are not compensable.

Employer objects to the requested hourly rate of $500, suggesting that $250 is an appropriate rate for work in Savannah, Georgia. Claimant's counsel provides support for his hourly rate request in the form of his credentials, the 2009 Survey of Law Firm Economics, and affidavits of three attorneys familiar with counsel's practice. Counsel also provides the names of circuit court, Board, and administrative law judge decisions in which he was awarded $300 per hour. Employer avers that counsel has not demonstrated how his law practice fits with the data documented in the two surveys.

In view of counsel's years of experience and credentials, the affidavits of Mr. Withers and Mr. Gibson, the median rate from the Survey of Law Firm Economics, and other awards to claimant's counsel,[9] we award counsel a rate of $350 per hour as this is a reasonable rate for work in Savannah for an attorney of counsel's experience. 20 C.F.R. §802.203(d)(4); *see generally Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Jeffboat, L.L.C. v. Director, OWCP [Furrow]*, 553 F.3d 487, 42 BRBS 65(CRT) (7th Cir. 2009); *B&G Mining, Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008).

Employer also objects to a .75 hour entry dated September 23, 2009, alleging that it is vague as it does not reveal to whom the call was made or why the call was necessary. The fee petition indicates that counsel expended .75 hours for a "telephone conference re: case, appeal of same." As the basis for this time can be discerned, [10] we award this time as it was reasonable and necessary. 20 C.F.R. §802.203(e). We also reject employer's contention that the one hour requested by counsel for drafting his fee petition is not

[8]We reject employer's argument that the fee petition is premature. Based on the Board's decisions, claimant has been successful in that she has established work-related conditions, that she is unable to perform her usual work, and that her average weekly wage is properly calculated based solely on her overseas wages.

[9]*See Hill v. Service Employees Int'l, Inc.*, BRB No. 10-0446 (Feb. 28, 2011) (Order); *Schbot v. L-3 Communications*, BRB No. 10-0327 (Feb. 28, 2011) (Order).

[10]The record indicates that claimant's present counsel, Mr. Lorberbaum, replaced her prior counsel, Mr. Gronau, after he ceased representing claimant on August 4, 2009, to begin his judicial duties. The entry appears to relate to the communication between the two attorneys concerning employer's appeal in the case.

recoverable, as it is well-established that counsel is entitled to a reasonable amount of time for work preparing a fee petition. *See Bogden v. Consolidation Coal Co.*, 44 BRBS 121 (2011) (*en banc*). We therefore award claimant's counsel an attorney's fee totaling $4,593.75, representing 13.125 hours of work at an hourly rate of $350, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's finding that employer did not establish the availability of suitable alternate employment is vacated, and the case is remanded for further findings consistent with this opinion. In all other regards, the administrative law judge's Decision and Order on Remand is affirmed. Claimant's counsel is awarded an attorney's fee of $4,593.75, payable directly to counsel by employer for his work on the prior appeals in this matter. BRB Nos. 07-1008, 09-0702.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's average weekly wage calculation based on his taking official notice that Kuwait is a "dangerous environment" without giving the parties notice that he would do so. Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §556(e), which is applicable herein pursuant to 33 U.S.C. §919(d), "When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." *See also* 29 C.F.R. §18.45.[11] Because the administrative law judge first cited the Executive Order and the

[11] 29 C.F.R. §18.45 states:

> Official notice may be taken of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice: Provided, however, that the parties shall be given adequate notice, at the

Department of Defense document in his decision, employer timely raised on appeal the administrative law judge's failure to give notice of his intended reliance on these documents.

Therefore, in accordance with the APA and applicable regulation, I would remand the case for the administrative law judge to give notice to the parties of his intent to take official notice of these documents for purposes of calculating claimant's average weekly wage and to give employer the opportunity to show that Kuwait is not "dangerous." *See Jordan v. James G. Davis Constr. Co.,* 9 BRBS 528.9 (1978). I concur fully in the remainder of the majority's decision.

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ROY P. SMITH
Administrative Appeals Judge

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hearing or by reference in the administrative law judge's decision, of the matters so noticed, and shall be given adequate opportunity to show the contrary.