

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 April 2006

CASE NO.: 2005-LDA-66

OWCP NO.: 02-138189

IN THE MATTER OF:

S (b)(6) K (b)(6)

Claimant

v.

SERVICE EMPLOYERS INTERNATIONAL, INC.

Employer

and

INSURANCE CO. OF THE STATE OF PENNSYLVANIA,
c/o AIR WORLDSOURCE

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.

For The Claimant

JOHN L. SCHOUEST, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), as extended by the Defense Base Act, 42 U.S.C.

§ 1651, et seq., brought by (b)(6) (Claimant) against Service Employers International, Inc. (Employer) and Insurance Co. of the State of Pennsylvania c/o Air Worldsource (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on September 26, 2005 in Houston, Texas. Thereafter, the parties waived their right to a formal hearing and in lieu thereof entered into and agreed to joint stipulations of fact which are set forth below in their entirety.

Briefs were received from the Claimant and the Employer/Carrier. Claimant also filed a supplemental brief. Claimant offered Exhibit A with her brief, Section 10(b) wage records of three similarly situated employees. Employer/Carrier proffered eight exhibits with their brief. This decision is based upon a full consideration of the entire record.¹

Based upon the stipulations of Counsel, the evidence introduced, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

The parties stipulated to the following facts and I find:

1. (b)(6) was born on (b)(6). She is an American citizen, and a resident-domiciliary of Houston, Texas.
2. (b)(6) worked as a teacher of young preschool children at the (b)(6) before she began her work for Service Employers International, Inc. ("S.E.I.I.") in Iraq. (b)(6) has a Bachelor of Arts degree and had continuously worked as a kindergarten teacher since 1993. (b)(6) last day of work at the (b)(6) was (b)(6).

¹ The record consists of the parties' stipulations and the exhibits attached to their briefs, references to which are as follows: Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___.

She went to work for S.E.I.I. on (b)(6), and arrived in Iraq on (b)(6).

3. (b)(6) was employed by S.E.I.I. for approximately five weeks before her tragic accident which occurred within the zone of special danger in Baghdad, Iraq. At the time of her accident, (b)(6) was covered by the Defense Base Act, since she was working as an employee of S.E.I.I. pursuant to its contract with the U.S. Department of Defense in its work in Iraq as part of the War on Terror.
4. (b)(6) job in Baghdad, Iraq was as a laundry technician supporting the U.S. military and U.S. contractor forces in Iraq.
5. (b)(6) was paid \$4,776.12 by S.E.I.I. for her five weeks of work in Iraq.
6. (b)(6) was a passenger in a S.E.I.I. vehicle that was speeding in Baghdad, Iraq because the S.E.I.I. driver was trying to avoid enemy sniper or bomb attack. When the driver encountered an object in the road which he thought was a bomb, he swerved the vehicle and it flipped, paralyzing (b)(6). The trauma occurred at about 6:30 p.m., local time, on October 3, 2004.
7. As a direct result of the October 3, 2004 vehicle collision in the zone of special danger in Baghdad, Iraq, (b)(6) sustained serious injury to her spinal cord and body. In particular, (b)(6) is paralyzed from the mid-chest down through the rest of her body, and through-out both legs.
8. Employer/Carrier do not contend that (b)(6) incapacity that is the basis of her claim was caused by any injury, or disease either before or after the October 3, 2004 trauma.
9. Since October 3, 2004, (b)(6) has been unable to work. She has been receiving temporary total disability benefits from Employer/Carrier at the rate of \$208.88 a week since

October 3, 2004, and continuing. (b)(6) has not yet indisputably reached maximum medical improvement, so that issue is not being presented to the Court at this time.

10. (b)(6) employer, S.E.I.I., had actual notice of (b)(6) personal injuries the same day as the trauma, and (b)(6) claim for Defense Base Act workers' compensation benefits was timely filed with the U.S. Department of Labor within one year of the October 3, 2004 trauma.
11. (b)(6) 52-week wages before the trauma (10/3/03 - 10/3/04) would give an average weekly wage of \$313.19 under Section 10(a) of the LHWCA.

II. ISSUES

The unresolved issues presented by the parties are:

1. Claimant's average weekly wage.
2. Attorney's fees and interest.

III. STATEMENT OF THE CASE

Claimant began employment with Employer on (b)(6), and deployed to Iraq as a laundry technician, arriving on (b)(6). She entered into a 12-month contract with Employer as a laundry technician. Her base salary was \$2,583.00 per month for a 40-hour work week. She was also entitled to a 5% foreign service bonus, 25% area differential pay and 25% hazard/danger pay, which totaled \$4,003.65 per month. (EX-1; EX-4). Claimant supported the U.S. military and contractor forces in Iraq. Her total gross pay for the five and 3/7 weeks she was employed was \$4,776.12. (EX-2).

On October 3, 2004, Claimant was a passenger in a vehicle that was involved in a rollover accident from which she sustained serious spinal cord injuries and paralysis from the mid-chest down through the rest of her body and legs. Claimant has been unable to work since October 3, 2004.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 651 F.2d 898, 900, 14 BRBS 63 (CRT) (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable injury, however the burden of proving the nature and extent of her disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and her

inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968) (per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if she has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that she is unable to return to her regular or usual employment due to her work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

B. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the **medical** evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when her condition becomes stabilized. Cherry v. Newport News

Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Based on the stipulations of the parties, I find and conclude Claimant suffered a serious disabling injury which prevents her return to her former employment with Employer. Thus, she is totally disabled by her work-related paralysis and the residuals of her work accident. The parties further stipulated that she has not yet reached maximum medical improvement. There is no medical evidence of record to the contrary.

Although Claimant's disability appears to have continued for a lengthy period of time and may be of lasting or indefinite duration, the record is devoid of any medical evidence in support of a finding of permanency. Accordingly, I find that Claimant has not reached maximum medical improvement and is entitled to receive temporary total disability compensation benefits based on an average weekly wage of \$879.82, as discussed below.

C. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power **at the time of injury**. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sub nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the **same employment** for substantially the whole of the year immediately preceding the injury, her annual earnings are computed using her actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the year, her average annual earnings are based on the average daily wage of any employee of the same

class who has worked substantially the whole of such **immediately preceding** year in the same or in similar employment in the same or a neighboring place. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Claimant contends that Section 10(b) of the Act should apply as a reasonable and fair calculation of her average weekly wage based on the wages of similarly situated employees who worked the remainder of the contract year for which Claimant was hired. An average of those earnings would yield median annual earnings of \$83,433.89 or \$83,238.73 which equates to a weekly wage of \$1,604.50 or \$1,600.74, exceeding the maximum compensation rate under Section 6(b) of \$1,047.16 at the time of her injury. Alternatively, Claimant argues Section 10(c) applies to compute her realistic true earnings potential at the time of her injury based on her contractual rate for work with Employer in Iraq. Under Section 10(c), Claimant submits her average weekly wage would be \$955.22 based on her earnings of \$4,776.12 for five weeks of work.

Employer/Carrier contend Claimant's average weekly wage should be computed under Section 10(a) of the Act and that her earnings during the 52-week period before her injury should be considered. Thus, preceding her injury, Claimant's earnings at Linder Learning Land Kindergarten of \$11,509.96 and her earnings of \$4,776.12 from Employer total \$16,286.08, which yields an average weekly wage of \$313.19 for 52 weeks ($\$16,286.08 \div 52$). Alternatively, if Section 10(c) of the Act is considered the appropriate method to compute Claimant's average weekly wage, with which Employer/Carrier disagrees, Claimant's earnings under the contract (\$4,776.12) should be divided by 5 ³/₇ weeks yielding an average weekly wage of \$879.82 and a compensation rate of \$586.54.

Subsections 10(a) and 10(b) both require a determination of an average **daily** wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

Claimant worked as a laundry technician for only five weeks and three days for the Employer which is not "substantially all of the year," and as a pre-school teacher in the year prior to her injury which is not the same employment as required for a calculation under subsections 10(a) and 10(b). See Lozupone v.

Stephano Lozupone and Sons, 12 BRBS 148 (1979) (33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979) (36 weeks is not substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990) (34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

I find that neither Section 10(a) or 10(b) should be used to calculate Claimant's average weekly wage. A daily wage cannot be computed under either section based on the wage data of record. The wage records also reveal Claimant was not a five or six-day worker. Moreover, Section 10(b) is inappropriate since no wages of similarly situated employees who worked substantially the whole of the **immediately preceding** year are of record, only prospective wages earned after Claimant's injury.² Accordingly, I find and conclude that Section 10(c) is the appropriate standard under which to compute Claimant's average weekly wage in this matter.

Section 10(c) of the Act provides:

If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working **at the time of his injury**, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c).

² CX-A reveals the wages of three similarly situated employees for the following work periods: April 4, 2004 to April 30, 2005; July 3, 2004 to July 30, 2005; and August 3, 2004 to August 27, 2005. Arguably, the wages submitted by Employer are those of similar employees, however their employment contracts and terms are not of record.

Fox v. West State, Inc., 31 BRBS 118, 123-125 (1997); Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Story v. Navy Exchange Service Center, 33 BRBS 111, 118 (1999); Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held under Section 10(c) that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury. Section 10(c) focuses on earning capacity rather than actual earnings.

The Fifth Circuit Court of Appeals has observed that wages earned at the time of injury will best reflect a claimant's earning capacity at the time and it would be an "exceedingly rare case" where a claimant's earnings at the time of injury are wholly disregarded as irrelevant, unhelpful or unreliable. Hall v. Consolidated Equipment Systems, Inc., 139 F. 3d 1025, 1031, 32 BRBS 91 (CRT) (5th Cir. 1998).

The record discloses that Claimant earned \$15,301.00 in gross wages as a pre-school teacher in the year 2003 or \$294.25 per week ($\$15,301.00 \div 52$ weeks). From January 1, 2004 to August 6, 2004, she earned a total of \$7,710.76 or \$308.43 per week for 25 weeks ($\$7,710.76 \div 25$ weeks).³ (EX-3). Claimant's earnings while working in Iraq averaged \$879.82 per week ($\$4,776.12 \div 5 \frac{3}{7}$ weeks (5.42857) = $\$879.8118$).

Clearly, Claimant's employment with Employer resulted in an enhanced earning capacity under her employment contract. In the absence of injury, it is undeterminable how long Claimant would have worked in Iraq for Employer, but arguably it would have been more than five and 3/7 weeks. Nevertheless, Claimant could

³ Claimant was on unpaid personal leave for eight weeks from December 22, 2003 to February 11, 2004) and her normal gross quarterly pay of \$3,900.00 was unearned. (EX-3).

not have expected to work in Iraq for the remainder of her work life.

Under the circumstances, I find and conclude that the most appropriate, fair and reasonable method of computing Claimant's average weekly wage is to award an average weekly wage commensurate with her earning power and potential at the time of her injury. For reasons discussed above, I reject an averaging of prospective wages of other employees as representative of a reasonable wage for Claimant. I find Claimant's projected annual earnings with Employer were \$45,750.64 (\$879.82 x 52 weeks).

Accordingly, I find and conclude that \$45,750.64 reasonably represents Claimant's annual earning capacity at the time of her injury which yields an average weekly wage of \$879.82.

D. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

Since the parties have stipulated to the compensability of Claimant's injury, Employer/Carrier are responsible for all appropriate, reasonable and necessary medical expenses arising from and related to Claimant's injury of October 3, 2004, and its residuals.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills" Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District

Director to submit an application for attorney's fees.⁴ A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from October 3, 2004, to present and continuing based on Claimant's average weekly wage of \$879.82, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all appropriate, reasonable and necessary medical expenses arising from and related to Claimant's October 3, 2004 work injury, pursuant to the provisions of Section 7 of the Act.

3. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

4. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

⁴ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **July 1, 2005**, the date this matter was referred from the District Director.

5. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 18th day of April, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge