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Issue Date: 10 March 2006

CASE NO.: 2005-LDA-00069

OWCP NO.: 02-133701

In the matter of

S (b)(6) T (b)(6)
Claimant

v.

TITAN CORPORATION
Employer

and

**INSURANCE COMPANY OF THE
STATE OF PA/AIG WORLD SOURCE**
Carrier

Appearances: Karl Bender, Esquire
On behalf of Claimant

Roger A. Levy, Esquire
On behalf of Employer/Carrier

Before: JANICE K. BULLARD
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("the LHWCA" or "the Act"), 33 U.S.C. § 901, et. seq., and its extension, the Defense Base Act ("DBA"), 42 U.S.C. § 1651 et. seq. The DBA extends the provisions of the LHWCA to cover civilians employed at overseas military bases, civilians working on overseas construction projects for the United States government or its allies, and protects employees fulfilling service contracts tied to such a construction project or to a national defense activity. This matter deals with an Iraqi national, S (b)(6) T (b)(6), who was employed near Baghdad as a translator by an American corporation contracted by the United States government. Mr. (b)(6) was severely injured in a bomb explosion that occurred on July 22, 2005. The Employer/Carrier in this matter conceded coverage and liability under the Act and assumed paying Mr. (b)(6) permanent total disability benefits at a compensation rate based upon an average weekly wage determined by his

actual salary of \$10 per day. Because Mr. (b)(6) now resides in the United States, he has initiated this claim in order to have his compensation award increased to a rate based upon an average weekly wage comparable to that of other translators in Iraq who were from the United States and who were paid at a higher wage rate by the same employer.

I. INTRODUCTION

A. Procedural Background

On July 11, 2005, (b)(6) (“Claimant”) filed a claim for benefits under the DBA against Titan Corporation (“Employer”). The matter was referred to the U.S. Department of Labor, Office of Administrative Law Judges (“OALJ”) for a formal hearing and subsequently was assigned to me. I scheduled a hearing for September 7, 2005, in Detroit, Michigan. The parties appeared at the scheduled hearing and Claimant testified.¹ Claimant submitted three exhibits² into the record and Employer/Carrier submitted seven exhibits.³ Subsequent to the hearing, each party submitted a post-hearing brief.⁴

B. Contentions of the Parties

It is undisputed that Claimant is permanently and totally disabled and that Employer/Carrier is liable under the Act. Employer/Carrier has paid Claimant benefits at a compensation rate of \$46.15. That compensation rate was derived from an average weekly wage of \$69.23, which Employer/Carrier asserts was determined pursuant to 33 U.S.C. § 910(c). It is clear that the only factor that Employer/Carrier took into account under that Section was Claimant’s actual wages at the time of injury of \$10 per day.

1. Claimant

Claimant contends that the compensation rate should be based upon the comparable pay of other translators who were employed by Employer Titan Corporation at the time of his injury. These translators were paid salaries of \$80,000 per year and although they were United States citizens, they worked in the same locality and performed the same work as Claimant. Claimant asserts that this conclusion is consistent with Section 10(c) of the Act, because the higher paid translators were “other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality.” 33 U.S.C. § 910(c).

Claimant further argues that, although his average weekly wage of \$69.23 may have been reasonable in Iraq, it is unreasonable to expect him to live off of that amount in the United States. Claimant alleges that this outcome is appropriate because the LHWCA is to be construed liberally as to avoid harsh results, and public interest requires that his compensation rate be increased to a suitable American standard.

¹ The citation “Tr. at -” denotes the hearing transcript of September 7, 2005.

² The citations “CX-1” through “CX-3” denote Claimant’s exhibits.

³ The citations “EX-1” through “EX-7” denote Employer/Carrier’s exhibits.

⁴ The citation “CB at -” denotes Claimant’s post-hearing brief dated January 10, 2006.

The citation “EB at -” denotes Employer/Carrier’s post-hearing brief dated January 24, 2006.

2. Employer/Carrier

Employer/Carrier contends that Claimant has been and continues to be paid all compensation due at the appropriate rate pursuant to Section 10(c) of the Act. Employer/Carrier contends that Claimant's circumstances are significantly distinguishable from the other translators for purposes of analysis under Section 10(c). Employer/Carrier further argues that Claimant's contentions are contrary to the plain language of Section 10 of the Act and the intent of Congress when drafting the DBA. It also cautions, as a policy consideration, that to give Section 10(c) the statutory construction urged by the Claimant in this case would impose an unfair and unexpected burden on the DBA employers and their workers' compensation carriers.

II. ISSUE

The sole issue presented for resolution in this case is:

Whether Claimant's average weekly wage, for the purposes of determining a compensation award, should be based upon his own actual salary or the salaries of other translators from the United States who worked in the same locality as he and performed the same work?

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

1. Claimant's Testimony (Tr. at 11-31)

(b)(6) ("Claimant") was born in Iraq on (b)(6). He moved to (b)(6) in (b)(6) and did not return to Iraq until 1990, after Iraq's invasion of Kuwait. Claimant has been married since (b)(6). His educational background consists of twelve years of schooling in (b)(6), and is the equivalent of an American high school education. He studied English as a second language for eight years, beginning in middle school and continuing throughout high school. Claimant did not receive specialized training of any kind after high school and is not certified or licensed to be a translator.

From approximately (b)(6) until (b)(6) (the year prior to his employment with (b)(6)) Claimant worked as a (b)(6) and (b)(6) for (b)(6) (b)(6). His income for that employment (b)(6) as approximately (b)(6) (b)(6) per month. Claimant testified that as of July of 2003, (b)(6) (b)(6).

Claimant was then hired as a translator by the United States Army on or around (b)(6) (b)(6). In June, 2003, he was employed by Employer as a translator. Claimant was compensated ten dollars (\$10) per day by both the Army and Employer.

While Claimant was working for Titan, Titan also employed other translators from the United States. The American translators worked in the same locality as Claimant (b)(6).

(b)(6)

) and performed the same work as him. However, the American translators \$80,000.00 (U.S.) per year.

Claimant suffered severe injuries, including bilateral lower extremity amputations, in a bomb blast that occurred on July 22, 2003. He first received treatment in an American military hospital in Iraq, and was later transferred to the Walter Reed Hospital in Washington, D.C.. Claimant's wife and son accompanied him to the Washington D.C. hospital and were provided lodging in that area at the expense of Employer. After forty days of treatment at Walter Reed, Claimant was transferred to the St. Joseph Mercy Hospital in Ann Arbor, Michigan. Claimant's wife and son moved from Washington and lived in a house owned by Claimant's cousin in the Detroit, Michigan, area. During that time, Employer paid Claimant workers' compensation in the amount of approximately forty dollars (\$40) per week. Employer no longer subsidized Claimant's family's rent or expenses after his arrival in (b)(6).

Claimant was discharged from St. Joseph's Mercy Hospital in April of 2004. He and his family moved to (b)(6) that was provided by the city's Housing Commission. Employer continues to pay Claimant \$46.15 each week in workers' compensation, and his wife is paid \$1,700.00 every two weeks for her work as his health care attendant.

2. Documentary Evidence

Claimant's Exhibits

CX-1 – Home Services Evaluation Report dated July 29, 2005 and performed by Ingersoll Consulting, Inc.

CX-2 – Home Services Evaluation dated July 1, 2005 and performed by Ingersoll Consulting, Inc.

CX-3 – Various Medical records dated August 31, 2005; August 23, 2005; and August 26, 2005.

Employer/Carrier's Exhibits

EX-1 – Employer's Form LS-202.

EX-2 – Employer's Form LS-206.

EX-3 – Employer's Personnel File and Employment Contract.

EX-4 – Employer's Form LS-18.

EX-5 – Various GENEX Medical Case Management Reports dated August 6, 2003 through August 10, 2005.

EX-6 – Various Medical Reports from St. Joseph Mercy Health System

3. Stipulations of the Parties

The parties entered into the following stipulations of fact at the formal hearing held on September 7, 2005, which were read into the record by counsel for the Employer/Carrier:

- 1) On or about June 22, 2003, Claimant was employed by Titan Corporation as a consultant or translator in connection with Operation Iraqi Freedom.
- 2) At that time, Claimant was involved in an explosion and suffered injuries to his left hand, head, and both legs.
- 3) The parties are covered by the Act.
- 4) Claimant's notice was timely filed.
- 5) Employer/Carrier timely filed all appropriate responsive documents.
- 6) The Employer/Carrier has provided all medical benefits to date (except for some items that were presented to counsel at the hearing and which were adjusted).
- 7) Home attendant care has been paid since Claimant's release from the hospital in the amount of \$1,792.00 biweekly.
- 8) Claimant's disability reached maximum medical improvement as of March 1, 2005.
- 9) Claimant's disability is permanent and total.
- 10) Employer stipulates to liability under Section (7) of the Act for the future.

Tr. at 5-8, 15.

B. Statutory Framework

Section 2 of the DBA provides that the compensation rates for aliens and non-nationals covered by the Act with permanent partial or permanent total disabilities shall be determined pursuant to Section 8(c)(21) of the LHWCA and shall be paid in the same amount as provided for residents of the United States. 42 U.S.C § 1652(b).⁵ In turn, Section 8(c)(21) of the LHWCA provides that "compensation shall be 66^{2/3} per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise..." 33 U.S.C. § 908(c)(21). An injured employee's average weekly wage is determined pursuant to Section 10 of the Act and is based upon the employee's

⁵ In addition, the minimum limit on weekly compensation for disability established by Section 6(b)(2) of the LHWCA shall not apply in computing compensation benefits under the DBA. 42 U.S.C § 1652(a).

“average annual earnings.” 33 U.S.C. § 910. Determining a claimant’s average weekly wage is a two-step process. First, the employee’s average annual earnings must be determined using one of three methods described in the Act at 33 U.S.C. § 910(a)-(c). Then, the average weekly wage is calculated by dividing the employee’s average annual earnings by fifty-two weeks. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant’s earning power at the time of injury. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp. of Baltimore, 24 BRBS 137 (1990).

C. **Discussion**

1. **Determination of Claimant’s Proper Average Weekly Wage**

A claimant’s “average annual earnings” are computed by determining which method of Section 10 should be utilized for determining Claimant’s “average annual earnings” and then determining Claimant’s average annual earnings under that proper section.

a) **Determination of Proper Method Under 33 U.S.C. § 910**

As a preliminary matter, I must first decide which of the three methods for determining Claimant’s average annual earnings under Section 10 is applicable herein.

Section 10(a) is applied only in cases where the injured employee was paid actual wages “during substantially the whole of the year immediately preceding” the injury. 33 U.S.C. § 910(a). This method is not applicable in this case because Claimant was working as a translator for Employer for less than a month before he was injured.

Where Section 10(a) is inapplicable, application of Section 10(b) must be explored before resorting to application of Section 10(c). Palacios v. Campbell Indus., 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), rev’g 8 BRBS 692 (1978). Section 10(b) provides in relevant part:

If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker,⁶ shall consist of three hundred times the average daily wage or salary...which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

33 U.S.C. 910(b) (emphasis added). Therefore, in order for Subsection 10(b) to be used to calculate Claimant’s average annual earnings, five statutory requirements must be met: The record must establish: (1) that the injured employee did not work in such employment during substantially the whole of such year; (2) that there are employees of the same class; (3) who worked substantially the whole of such immediately preceding year; (4) in the same or in similar

⁶ It is not disputed that Claimant worked six days a week. (See EB at 5 (“On June 28, 2003, Claimant was hired at the fixed daily rate of \$10.00 per day and was working full time six days a week)).

employment; (5) in the same or a neighboring place. See Bury v. Joseph Smith & Sons, 13 B.R.B.S. 694 (1981).

The first statutory requirement is met because, as previously stated, Claimant worked for Employer for about one month. The undisputed evidentiary record demonstrates that at the time of Claimant's injury, Titan employed other translators in Iraq who had arrived from the United States. (Tr. at 15). Claimant testified that these other translators performed the same work as him in the same locality ((b)(6)). (Tr. at 16). Further, Claimant testified that those other translators were paid \$80,000 per year, and his testimony has not been contradicted. Accordingly, I am satisfied that the fourth and fifth statutory requirements have been met, because there existed other translator-employees near Baghdad which worked "in the same or in a similar employment in the same or a neighboring place" as Claimant. 33 U.S.C. 910(b).

I am not satisfied, however, that the second statutory requirement is established by the evidentiary record in this matter. Claimant did not establish that Titan's translators from the United States were employed for "substantially the whole of [the] immediately preceding year" before his injury. Claimant's testimony constitutes the entire record regarding the employment of other translators. It would be mere speculation for me to conclude that the other translators were employed for "substantially the whole of such immediately preceding year" because Operation Iraqi Freedom began in early 2003. See Wikipedia: The Free Encyclopedia, found at http://en.wikipedia.org/wiki/Iraqi_Freedom. Claimant was injured on July 21, 2003. Although I acknowledge that it is possible that Titan could have employed translators in Baghdad prior to the commencement of Operation Iraqi Freedom, that proposition remains speculative, and is not established by the evidence. Accordingly, I find that Section 10(b) does not apply to the facts of this case.⁷ See Bury v. Joseph Smith & Sons, 13 B.R.B.S. at 697; Holmes v. Tampa Ship Repair & Dry Dock Co., 8 BRBS 455, BRB No. 77-520 (1978).

The computation of a claimant's average annual earnings must be determined pursuant to Section 10(c) in cases in which Sections 10(a) and 10(b) cannot reasonably or fairly be applied. See, Newpark Shipbuilding & Repair, Inc. v. Roundtree, 698 F.2d 743, 750-751 15 BRBS 94 (CRT) (5th Cir. 1983), rev'd en banc on other grounds, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir. 1984), cert. denied, 105 S. Ct. 88 (1984); Duncanson-Harrelson Co. v. Director, OWCP, 686 F.2d 1336, 1342 (9th Cir. 1982), vacated in part on other grounds, 426 U.S. 1101 (1983), decision on remand, 713 F.2d 462 (1983). It is proper to use Section 10(c) to determine an injured employee's average annual earnings when insufficient evidence is presented at the hearing to permit proper application of Section 10(a) or (b). Palacios v. Campbell Industries, 633 F.2d at 842 (citing National Steel and Shipbuilding Co. v. Bonner, 600 F.2d 1288, 1291 (9th Cir. 1979)); Sproull v. Stevedoring Servs. Of America, 25 BRBS 100, 104 (1991); Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981).

As I have concluded that I cannot rely upon either Section 10(a) or 10(b) to determine Claimant's average earnings, I find that application of Section 10(c) of the Act is proper in this matter. I note that both of the parties agree that application of Section 10(c) is proper. See, Briefs of EB at 5-6; CB at 2.

⁷ I save my analysis of the second statutory requirement ("of the same class") for the next section of my discussion.

b) Determination of Average Annual Earnings under Section 10(c)

Section 10(c) provides:

If either of the foregoing methods of arriving at the average annual earnings of the injured employee 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 in the employment in which he was working at the time of the 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) (emphasis added). Based upon the above-emphasized passage, Claimant contends that “in order to reasonably and fairly apply average annual earnings, the earnings of [the translators in Baghdad from the United States] should be taken into account...”. CB at 2. Claimant’s testimony, which is undisputed by Employer, has established that the translators from the United States were working in the same or similar employment in the same or neighboring locality. Claimant testified that the other translators did the same work as him (b)(6). (Tr. at 15-16). Thus, the central issue of whether Section 10(c) should be applied as

ted by Claimant is whether Claimant and the translators from the United States were “of the same or most similar class.” Employer asserts that the circumstances of Claimant’s residence and nationality at the time of his injury distinguish him from the class of translators from the United States. EB at 6; See also EB at 5, fn. 1. As neither the Act itself, nor the case law interpreting it, defines the phrase “of the same or most similar class”, I look to the purpose of Section 10(c) for instruction on its meaning.

The Benefits Review Board has declared that the primary objective of Section 10(c) is to reach a fair and reasonable approximation of the claimant’s annual wage-earning capacity at the time of injury. Empire United Stevedores v. Gatlin, 936 F.2d 819, 823, 25 BRBS 26 (CRT) (5th Cir. 1991); Wayland v. Moore Dry Dock, 25 BRBS 53, 59 (1991); Richardson v. Safeway Stores, 14 BRBS 855, 859 (1982). Thus, an ALJ must make a fair and accurate assessment of the injured employee's earning capacity, which is the amount that the employee would have had the potential and opportunity to earn absent the injury. Empire United, 936 F.2d at 823 (emphasis included in the original) (citing Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). The three major elements of “earning capacity” are (1) fitness to work, (2) willingness to work, and (3) opportunity to work. Jackson v. Potomac Temporaries, Inc., 12 BRBS 410, 413 (1980) (citing Johnson v. Britton, 290 F.2d 355, 358 (D.C. Cir. 1961)); Marshall v. Andrew F. Mahony Co., 56 F.2d 74 (9th Cir. 1932).

I find that Claimant cannot be considered “of the same class” as Titan’s translators from the United States because he did not have the same or similar earning capacity as them at the time he was injured. The case law makes it clear that the overriding consideration under Section 10(c) analysis is wage-earning capacity at the time of injury. Ergo, an employee “of the same class” as the injured employee must have a similar wage-earning capacity. I accept Employer’s

rationale that Claimant's nationality and nation of residence distinguish him from the other translators. Claimant's economic and social status in Iraq was completely different from the economic and social status of the translators from the United States. Claimant's "most similar class" of employees at the time of his injury would have been other translators that were Iraqi nationals, living in Iraq. Claimant's wage-earning capacity cannot be considered similar to the other translators because the evidence fails to establish the crucial element that Claimant had the "opportunity to work" at a similar level. Although the record establishes that there were translators from the United States paid \$80,000.00 a year to perform the same work as Claimant, the record does not establish that Iraqi nationals, such as Claimant, had the opportunity to earn that kind of money doing the same work. Claimant has not submitted evidence of the average annual wages of other Iraqi translators. There is no evidence demonstrating that Titan paid an Iraqi national the same wage rate as was paid to interpreters from the United States.

In summary, Claimant has not demonstrated that he had the opportunity to attain an employment position with the same earning capacity as the translators from the United States. It therefore cannot be said that he was "of the same or most similar class" as those other translators. Consequently, Claimant's wage rate should not be based upon the earnings of American translators.

Employer has argued that Claimant's wage rate of \$10 per day was fixed in relation "to prevailing wages in the local labor market." EB at 6. This contention is not contradicted in the record. Accordingly, I find that the most reasonable measurement of Claimant's wage earning capacity at the time of his injury was his actual wages of \$10 per day. These wages were higher than his previous jobs of chauffeuring and taxi driving. There is no evidence of record suggesting that, had Claimant not been injured, he would have had the opportunity of earning higher wages than his employment with Titan. Accordingly, I find that Employer's calculation of benefits based upon an average weekly wage of \$69.23 (\$3,600.00 in "average annual earnings" divided by fifty two weeks pursuant to Section 10(d)) was fair and reasonable under the Act.

2. Liberal Construction of the LHWCA

Claimant's alternative argument for raising his compensation rate is based upon the public interest enunciated by the United States Supreme Court of the United States in its remarks about workers' compensation laws in Baltimore & Philadelphia S.B. Co. v. Norton, 284 U.S. 408 (1932). In its opinion in that case, the Court stated that such laws "are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results." 908 F.2d at 414 (citing Jamison v. Encarnacion, 281 U.S. 635, 640, 50 S.Ct. 440, 74 L.Ed. 1082). Claimant argues that public interest demands that he be paid at a rate determined by an average weekly wage comparable to the pay of his American counterparts in Iraq in order to avoid the kind of "harsh result" to which the Court referred. Norton, supra. at 414. I agree with Claimant's contention that compensation based upon his actual wages produces a harsh result for him now that he is living in the United States. However, the DBA, like the LHWCA, is designed to compensate covered individuals on the basis of their lost wage earning capacity. The LHWCA specifically defines disability as the "incapacity because of injury 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). This statutory definition “demonstrates that the LHWCA is designed to compensate for lost wage-earning capacity.” Korineck v. General Dynamics Corp., 835 F.2d 42, 24 (2nd Cir. 1987). Although I am not without sympathy for Claimant’s plight, he has not established that his wage earning capacity at the time of his injury was any more than the actual wage of \$10 per day which Titan paid him.

Public interest notwithstanding, the purposes of the Act would not be furthered by compensating Claimant at a rate based upon circumstances that changed subsequent to his injury. Employer/Carrier directed my attention to the preamble to section 10 of the Act, which provides that “the average weekly wage of the injured employee at the time of injury shall be taken as the basis upon which to compute compensation” awards. 33 U.S.C. § 910 (preamble) (emphasis added). Accordingly, a claimant’s average weekly wage is determined at the time of injury, and any change in circumstances occurring subsequent to the injury is not relevant to the calculation of average weekly wage. As Employer correctly notes, Section 10 has never been applied in a manner as to allow an injured worker to prospectively increase his average weekly wage by relocating to a higher paying labor market at some time subsequent to his injury. EB at 6. Consequently, there is no legal basis for determining Claimant’s earnings on a higher rate because his actual earnings are unreasonable for a United States resident.

In consideration of the totality of the evidence, I find that Employer/Carrier’s determination of Claimant’s compensation award is appropriate.

III. CONCLUSION

I find that Employer’s computation of benefits based upon an average weekly wage of \$69.23 is fair and reasonable under the Act. Claimant’s average weekly wage must be determined under Section 10 of the Act by computing his average annual earnings at the time of his injury. Although other translators from the United States worked in the same locality and performed the same work as Claimant for significantly higher pay, their salaries cannot be taken into account under Section 10(c) of the Act because they are not “of the same or most similar class” as Claimant. Additionally, the record fails to demonstrate that Claimant had the opportunity to earn a higher wage earning capacity than he actually earned. Accordingly, I find that Claimant’s average weekly wage should be based upon his actual wages while employed by Titan.

ORDER

TITAN CORPORATION and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLD SOURCE are hereby ORDERED to pay (b)(6) permanent total disability benefits under the Defense Base Act pursuant to Section 8(c)(21) of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 908(c)(21), based upon an average weekly wage of \$69.23. This award must also include annual cost of living increases pursuant to 33 U.S.C. § 910(f).

TITAN CORPORATION and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLD SOURCE are further ORDERED to continue to compensate Claimant for all medical treatment and care, and other expenses related to his permanent total disability.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey