

U.S. Department of Labor

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Issue Date: 07 March 2008

CASE NO.: 2007-LDA-325

OWCP NO.: 02-144480

IN THE MATTER OF

M. V.,¹

Claimant

v.

**KELLOGG-BROWN & ROOT,
Employer**

and

**INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Carrier**

APPEARANCES:

**GARY PITTS, ESQ.,
On Behalf of the Claimant**

**MICHAEL THOMAS, ESQ.,
On Behalf of the Employer**

**BEFORE: C. RICHARD AVERY
Administrative Law Judge**

¹ Pursuant to a policy decision of the Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, (The Act), as extended by the Defense Base Act (DBA) 42 U.S.C. §1651(c) brought by Claimant against Kellogg-Brown & Root (Employer), and Insurance Company of the State of Pennsylvania (Carrier). The formal hearing was conducted in Houston, Texas on January 31, 2008. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written argument.² The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-10 and Employer's Exhibits 1-17. This decision is based on the entire record.³

DISCUSSION AND FINDINGS

Claimant is 48 years old. He did not complete high school. He became a truck driver at a young age and that has basically been his career.

In February of 2004 Claimant went to Iraq as a truck driver, but ended up working as a labor foreman. After some fifteen months he was terminated in June of 2005, but within a month or so returned to Iraq as a truck driver. In both instances Claimant was employed by Employer.

Claimant testified he worked twelve hours a day, seven days a week, liked the work and had hoped to stay a minimum of six years; however, on September 12, 2005, two months after his return, Claimant was injured and returned home.

Supported by the evidence offered, the parties have agreed Claimant was injured in the course and scope of his employment on September 12, 2005, was temporarily totally disabled until he reached maximum medical improvement on December 11, 2006, and that since that time he has been permanently partially disabled with a residual earning capacity of \$850.00 per week. The Directors also accepted 8(f) liability. The only issue for my determination is Claimant's average weekly wage at the time he was injured on September 12, 2005.⁴

² The parties were granted time post hearing to file briefs.

³ The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- (Tr.____); Joint Exhibit-(JX____, pg.____); Employer's Exhibit- (EX____, pg.____); and Claimant's Exhibit- (CX____, pg.____).

⁴ See letter dated January 30, 2008, from the Office of the Solicitor announcing that the Director had no objection to Employer receiving 8(f) relief.)

Both parties agree that the average weekly wage issue should be resolved by applying Section 10(c) of the Act. Claimant maintains it was his earnings as a truck driver at the time of his injury which best reflects his average weekly wage. Employer, on the other hand, argues that an average of Claimant's earnings in the 52 weeks prior to his injury is the most reasonable assessment of Claimant's average weekly wage. In that regard, Employer argues that the reason Claimant did not receive a salary from June 9, 2005 until July 30, 2005, is because he was involuntarily terminated during that period and that while he was rehired by Employer these off weeks should be included in the divisor to accurately portray Claimant's average weekly wage during the 52 week period prior to his injury. I agree with Employer.

Regarding his break in service after sixteen months in Iraq, Claimant acknowledged he was briefly terminated, but said, "I needed a break anyway" and "my mom was really bad sick." In other words, as urged by Employer, the five or six weeks Claimant was off in June and July of 2005 was due to Claimant's own conduct whether it was termination for cause or voluntary for rest and care for his sick mother. Consequently, because Claimant worked consistently for the same Employer from February 2004 to September 2005 with the exception of those few weeks he was terminated, I find his overseas earnings over the 52 week span prior to his injury, when divided by 52, to be an accurate and reasonable measure of Claimant's average weekly wage at the time of his injury. The wage for both jobs reflect lucrative overseas earnings, and I find it fair to use the 52 weeks as the divisor of those earnings because the break in service was neither due to injury nor the fault of Employer.

\$71,054.85 reflect Claimant's gross earnings in the 52 weeks prior to his injury and when divided by 52 equals an average weekly wage at the time of his September 12, 2005, accident to be \$1,366.44.

ORDER

It is hereby **ORDERED, ADJUDGED and DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from October 24, 2005⁵ through December 11, 2006 (MMI) based on an average weekly wage of \$1,366.44;

⁵ Though injured September 12, 2005, Claimant was apparently paid his salary until October 24, 2005.

(2) Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits from December 11, 2006 (MMI), and continuing based on an average weekly wage of \$1,366.44, provided, however, after 104 weeks of such payments, the Special Fund shall become liable for this compensation as provided by Section 8(f) of the Act;

(3) Employer/Carrier shall pay for all reasonable and necessary past and future medical expenses resulting from Claimant's injuries of September 12, 2005;

(4) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(5) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this **ORDER** at a rate provided by in 28 U.S.C. §1961;

(6) Claimant's counsel shall have twenty days from receipt of this **ORDER** in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer/Carrier shall have ten (10) days from receipt of the fee petition in which to file a response;

(7) All computations of benefits and other calculations which may be provided for in this **ORDER** are subject to verification and adjustment by the District Director.

Entered this 7th day of March, 2008, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge