



Issue Date: 26 September 2008

CASE NO.: 2008-LDA-8

OWCP NO.: 02-138190

IN THE MATTER OF:

A. H.<sup>1</sup>

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.

Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,  
c/o AIG WORLDSOURCE

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.  
For The Claimant

LIMOR BEN-MAIER, ESQ.  
For The Employer/Carrier

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

---

<sup>1</sup> Pursuant to a policy decision of the U.S. 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 Defense Base Act, 42 U.S.C. § 1651, et seq., an extension of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Claimant against Service Employees International, Inc. (Employer) and Insurance Company of the State of Pennsylvania, c/o AIG 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 January 10, 2008, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered eight exhibits, Employer/Carrier proffered 12 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.<sup>2</sup>

Post-hearing briefs were received from the Claimant and the Employer/Carrier on May 20, 2008.<sup>3</sup> Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

### I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on October 3, 2004.

---

<sup>2</sup> References to the transcript and exhibits are as follows: Transcript: Tr.\_\_\_\_; Claimant's Exhibits: CX-\_\_\_\_; Employer/Carrier's Exhibits: EX-\_\_\_\_; and Joint Exhibit: JX-\_\_\_\_.

<sup>3</sup> After the formal hearing, Employer/Carrier sought to develop wage data of similarly-situated employees at the direction of the undersigned. Several conferences were held with the parties concerning Employer/Carrier's efforts. Ultimately, Employer/Carrier suggested that the wage records received into evidence in S. K. v. Service Employees International, Inc., Case No. 2005-LDA-66, be used to compute Claimant's average weekly wage. Subsequent to my Decision and Order in S. K., on June 16, 2008, Employer/Carrier again sought an opportunity to explain or clarify the wage records considered in S. K. A deposition of a management representative was scheduled for September 2, 2008, but never submitted for consideration. I find that more than ample time has been extended to Employer/Carrier to provide clarifying evidence which they have failed to do.

2. That Claimant's injury occurred during the course and scope of her employment with Employer.
3. That there existed an employee-employer relationship at the time of the accident/injury.
4. That the Employer was notified of the accident/injury on October 3, 2004.
5. That Employer/Carrier did not file a Notice of Controversion.
6. That an informal conference before the District Director was held on September 4, 2007.
7. That Claimant received temporary total disability benefits from October 4, 2004 through present at a compensation rate of \$450.36. (Tr. 10; EX-3).
8. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.
9. That Claimant has not reached maximum medical improvement.

## **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**

### **The Testimonial Evidence**

#### **Claimant**

Claimant was 49 years old at the time of the formal hearing. She graduated from high school in 1977 and attended San Jacinto College for non-credit courses. (Tr. 12-13). Thereafter, she worked at various clerical jobs, including as a CRT operator at the Port of Houston. (Tr. 13-14). Prior to her employment with Employer, she worked as a part-time 911 dispatcher for the Polk County Sheriff's Department. (Tr. 16).

She testified that her husband is disabled with chronic seizures and due to steroid medications has developed many other health problems. (Tr. 15).

Claimant testified her intention was to work for Employer for four or five years, earning enough money to sustain her indefinitely into the future and to utilize their rural property for camper sites for hunters, fishermen and nature walkers. (Tr. 20).

Claimant deployed to Iraq on April 26, 2004, and worked for Employer for about five and one-half months before her accident. (Tr. 22). She worked as a "mediator" or liaison between the military and the contractors who performed the laundry functions for the military. She traveled from the green zone to the red zone to establish new laundry drop-off/pick-up points. (Tr. 23). While traveling she was required to wear a Kevlar helmet and vest. (Tr. 24). She stated mortar attacks occurred as did bullets being shot in the air and falling from the sky. She was "knocked out of a chair, rolled out the door from a car bomb that killed several soldiers and the Iraqi citizens." (Tr. 25).

She described an accident in which she was riding in a vehicle which flipped over several times after slamming on brakes to avoid a box in the middle of the road. (Tr. 28-29). She was knocked out, suffering a fractured pelvis, fractured hip, injuries to her back, ankle and knee. She stated she was extremely bruised and battered and "found out I had some pretty serious nerve damage." (Tr. 29).

On cross-examination, Claimant acknowledged being hired by Employer on April 26, 2004, and working until October 3, 2004, when she was injured. She signed a one-year contract. (Tr. 30). She stated she stopped working in 1999 to take care of her husband who needed home care. (Tr. 32-33). She affirmed that her husband's condition has worsened over the years due to the use of steroids. (Tr. 33). Her daughter-in-law helped care for her husband while she was in Iraq. (Tr. 34). She testified that her primary job was as a laundry attendant while working for Employer. (Tr. 41). She also worked in the safety department as a safety coordinator. (Tr. 44).

### **The Contentions of the Parties**

Claimant contends that her average weekly wage should be calculated under Section 10(c) based on the "previous earnings of other employees of the same or most similar class working in

the same or neighboring locality." She avers that post-injury earnings of similarly-situated workers can be considered to arrive at a realistic estimate of the annual amount the worker would have had the capacity and likely opportunity to earn in the absence of her injury.

Claimant also contends that because the evidence of similarly-situated workers' earnings is under the control of Employer, any "defects" in the evidence, such as the number of pay periods represented or the number of weeks in a pay period, are its responsibility for which an adverse inference should be invoked. She argues that the evidence proffered is not explained, other than notations by an unidentified person, and does not constitute a representative sample of wages of similarly-situated employees. Of the three earnings records produced, only one was for a laundry attendant and the other two were for workers employed in different jobs than Claimant. Thus, she asserts that her average weekly wage should be computed based on the earnings of the laundry attendant who had a starting date of "11/03/2005" and who "separated on 09/03/06," a period of 43 4/7 weeks or 305 days with earnings of \$74,416.97 or annualized as \$89,056.37 (365/305 x \$74,416.97) and an average weekly wage of \$1,712.62.

Employer/Carrier argue that Claimant has had a limited and sporadic work history and her average weekly wage should be calculated using a blended approach based of her pre- and post-Iraqi wages for a seven year period prior to her injury. Alternatively, Employer/Carrier aver that Claimant's earnings for the 52-week period before her injury, based on wages from the Polk County Sheriff's Department and Employer, would yield an average weekly wage of \$675.51 computed on total earnings of \$35,126.45.

#### 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, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

#### **A. The Compensable Injury**

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9<sup>th</sup> Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

Based on the stipulations of the parties, I find that Claimant has established a **prima facie** case that she suffered an "injury" under the Act, having established that she suffered a harm or pain on October 3, 2004, and that her working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

#### **B. 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 an "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 his regular or usual employment due to his 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).

Claimant's present medical restrictions must be compared with the specific requirements of her usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing her usual employment, she suffers no loss of wage earning capacity and is no longer disabled under the Act.

### **C. 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, the parties have stipulated, and I find, that Claimant has been temporarily totally disabled since October 3, 2004, and has not reached maximum medical improvement.

#### **D. Average Weekly Wage**

The parties agree that the primary unresolved issue in this matter is Claimant's 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 sum 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 preceding year, her average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 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). In Empire United, at 25 BRBS 29, the Court observed that Section 10(c) does not condition the average weekly wage determination on the actual earnings of the employee or of other employees in the same class, but merely requires that the judge give **regard** to the employee's actual prior wages in the employment in which she was working at the time of injury. Thus, the amount actually earned by the employee at the time of injury is a factor, but not the overriding concern under Section 10(c). *Cf. Mar-Con/Thunder Crane, Inc. v. Nelson*, 2008 WL 1709006 (5<sup>th</sup> Cir. Apr. 10, 2008).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a six-day worker and by 260 days for a five-day worker in order to determine average annual earnings. Since Claimant was a seven-day worker, I find neither Section 10(a) or 10(b) can be applied in this matter.

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) 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).

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 that 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 Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; 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. 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.

I conclude that because Sections 10(a) and 10(b) of the Act cannot be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

The record discloses that Claimant earned \$3,812.80 in gross wages as a 911 operator for the Polk County Sheriff's Department from October 2003 to April 8, 2004. (EX-7, p. 1). From April 26, 2004 to October 3, 2004, Claimant earned a total of \$31,313.65. (EX-7, p. 3). Claimant's earnings while working in Iraq for Employer averaged \$6,262.73 per month for five pay periods, "PP". (EX-7, p. 3).

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. Her work injury deprived her of the ability and opportunity to earn higher wages for at least the remainder of her contract term. Under these 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. In doing so, I reject a blended approach urged by Employer/Carrier since Claimant's earnings as a 911 operator, in part, do not realistically represent her wage earning capacity at the time of her injury in Iraq and would yield an artificially low average weekly wage.

I agree with Claimant's argument that post-injury earnings of similarly-situated employees can be considered in arriving at a realistic estimate of the annual earnings Claimant would have had the capacity and likely opportunity to earn absent her work injury. Thus, I find that an annualization of only Claimant's actual earnings in Iraq is not the most appropriate, fair and reasonable method of computing her annual earnings capacity or average weekly wage. Clearly, Section 10(c) requires that her **potential and opportunity to earn be considered**. In the absence of her work injury, Claimant would have realized a substantial increase in earnings, as reflected by other employees in comparable positions, and arguably the availability of overtime.

The wage data submitted by Employer/Carrier does not disclose hours worked or an overtime rate, but employee Deville, who worked as a laundry attendant under similar contract terms as Claimant, earned prospectively considerably more in wages than Claimant during her five-month employment. Arguably, Claimant would have had the potential and opportunity to earn similar wages in the absence of her work injury. I so find.

Employer/Carrier have not explained or clarified the contents of the wage records submitted. Claimant urges an adverse inference be invoked against Employer/Carrier since they were in the best position to clarify the meaning of the wage records and failed to do so. Claimant's argument that the "PP" reflected on the wage records arguably is a four-week period is just as reasonable as the Employer's assertion that it represents a monthly period. I so find since a four-week period is more unfavorable to Employer who failed to provide interpretive evidence.

In view of the foregoing, I find the wages of Deville earned after Claimant's injury, is more representative of the earnings Claimant likely would have earned but for her work injury.<sup>4</sup> Deville's wages of \$74,416.97 were earned during the period from "10/2005" through "9/03/06," a period of 48 weeks (four weeks each pay period, "PP").<sup>5</sup> Deville separated from employment on September 3, 2006. Contrary to Claimant's contention that Deville began working on November 3, 2005, I find that Deville who was hired on "8/03/04" worked in October 2005 in view of his substantial gross earnings of \$7,935.35 for "10/2005."<sup>6</sup> I find that Deville's wages, if annualized, would amount to \$80,839.86 ( $365 \div 336$  [48 weeks x 7 days] = 1.0863 x \$74,416.97) and a weekly wage of \$1,554.61. Thus, I find and conclude that Claimant's prospective annual earning capacity would have been \$80,839.86 yielding an average weekly wage of \$1,554.61 and a compensation rate of \$1,036.46.

---

<sup>4</sup> I find the earnings of a laundry foreman and a warehouseman are not representative of Claimant's work potential or opportunities as a laundry attendant.

<sup>5</sup> I have computed 48 weeks by including four weeks for each month commencing October 1, 2005, with the exception of five weeks for the months of December 2005, April 2006 and July 2006 and one week from August 27, 2006 to September 3, 2006.

<sup>6</sup> It is also noted that the "KBR LOGCAP III PAY STATEMENT TUTORIAL" describes a pay period numeric annotation such as "October = 10," as the month in which the employee is paid, **not the month in which you worked the hours.** (CX-4, p. 2).

**E. 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 work injury of October 3, 2004.

**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.<sup>7</sup> 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.

---

<sup>7</sup> 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 (1<sup>st</sup> Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **October 4, 2007**, the date this matter was referred from the District Director.

## 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 \$1,036.46, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from 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).

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 26th day of September, 2008, at Covington, Louisiana.

**A**

LEE J. ROMERO, JR.  
Administrative Law Judge