

**U.S. Department of Labor**

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**Issue Date: 15 January 2009**

**CASE NO.: 2008-LDA-00299**

**OWCP NO.: 02-166494**

**IN THE MATTER OF**

**D. G.,**

**Claimant**

**v.**

**SECURITY APPLICATION SYSTEMS  
INTERNATIONAL,  
Employer**

**and**

**FIDELITY & CASUALTY COMPANY OF THE  
NEW YORK/CAN INTERNATIONAL,  
Carrier**

Before: **LARRY W. PRICE**  
**Administrative Law Judge**

**DECISION AND ORDER AWARDING BENEFITS**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (The Act), 33 U.S.C. § 901, et seq., as extended by the Defense Base Act, 42 U.S.C. § 1651, et seq., brought by Claimant against Security Application Systems International (Employer) and Fidelity & Casualty Company of New York/CNA International (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. On November 13, 2008, the Court granted the parties' request for a decision on the record. The Court hereby admits the parties' offered documentary evidence and post-hearing briefs. The following exhibits were received into evidence: ALJ EX 1; CX 1 – 8; EX 1 – 12.

## Average Weekly Wage

The only issue before the Court is the proper calculation of Claimant's average weekly wage.

Claimant, a South African foreign national, worked for Employer as a security officer in Iraq for 20 days and was injured as a result of an enemy suicide bombing on January 28, 2004. (CX 2). Claimant had shrapnel in his brain as well as other severe injuries, including epilepsy, lung trauma, amputations and hearing problems. (CX 1).

Claimant signed an employment contract with Employer that was to last for a four month probationary period. If he made it through the probationary period, he could extend the employment contract. Claimant planned to stay in Iraq and work for one year. (EX 10, p 13). The subcontract agreement between Employer and the prime contractor reflects that the period of performance for the project in Iraq was January 4, 2004 to May 4, 2004. (EX 4). A co-worker's of Claimant's contract rate of pay was \$8,000.00 USD per month (EX 3) and Claimant did not receive any further money. The Court finds Claimant's contract rate of pay to be \$8,000.00 USD per month. (EX 10, p 12).

Claimant retired from the South African police force in 1997. After his retirement he did odd jobs, some small building work and ran a bed and breakfast. (EX 10, p 15). The bed and breakfast was sold in 2003. (EX 11, p 18). Claimant did not have enough income to file a tax return in 2003. (EX 11, p 21). No further evidence was offered concerning Claimant's earnings prior to going to Iraq.

Section 10 of the Act sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to subsection 10(d), to arrive at an average weekly wage ("AWW"). 33 U.S.C. § 910. The first method, subsection 10(a), applies to an employee who has worked "in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 9 10(a).

Claimant worked in Iraq for 20 days, which is not "substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 9 10(a); *see Matulic v. Dir., OWCP*, 154 F.3d 1052, 1058 (9th Cir. 1998). Furthermore, subsection 10(a) determines average annual earnings by multiplying the employee's average daily wage by 300 if a "six-day" worker, and by 260 if a "five-day" worker. Here, Claimant worked seven days per week. Therefore, subsection 10(a) is inapplicable.

Where subsection 10(a) is inapplicable, application of subsection 10(b) must be explored before resorting to application of subsection 10(c). *Palacios v. Campbell Industries*, 633 F.2d 840 (9th Cir. 1980). Subsection 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" prior to his injury. However, like subsection 10(a), subsection 10(b) can only be applied to employees that work five or six days per week. *See e.g. R.H v. SEll*, 40 BRBS 839, 845 (2006)(ALJ); *E.S. v. SEll*, 40 BRBS 1003 (2006)(ALJ).

When neither subsection 10(a) nor subsection 10(b) can be “reasonably and fairly applied,” subsection 10(c) mandates a calculation which would “reasonably represent the annual earning capacity of the injured employee.” 33 U.S.C. § 9 10(c); see *Todd Shipyards Corp. v. Dir., OWCP*, 545 F.2d 1176 (9th Cir. 1976). The objective of subsection 10(c) is to reach a fair and reasonable approximation of the claimant’s annual wage-earning capacity at the time of the injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991). The parties agree that Section 10(c) is applicable in this case. (CI Brief, p 6; Er Brief, p 4).

Claimant argues that his AWW should be calculated using his contract rate of hire of \$8,000.00 per month. This would yield an AWW of \$1,846.15. ( $\$8,000.00 \times 12 = \$96,000.00 / 52 \text{ weeks} = \$1846.15$ ). Employer argues that Claimant’s contract was for only four months and at most, Claimant never intended to stay in Iraq more than one year and that an AWW solely based on his Iraq wages would be an inappropriate inflation of his true earning capacity. Employer urges the Court to adopt the AWW of \$600.00 ( $\$7,800.00/\text{month} \times 4 \text{ months} / 52 \text{ weeks}$ ). In the alternative, Employer argues for an AWW based on a blend of Claimant’s Iraq and pre-Iraq wages.

Cases like this one, where claimants are injured performing short-term jobs in Iraq for much greater wages than they could earn back home, do not fit neatly into section 10. Section 10 only provides for the calculation of a single AWW. However, the reality for many of these claimants is that they have vastly different earning potentials at home and overseas. Typically, no one can accurately predict how long the claimant would have remained overseas if he were not injured. Moreover, the stresses and demands of the jobs are often vastly different.

Various methods have been utilized in these situations. Some ALJs have based AWW solely upon the Iraq wages. See e.g. *Manning v. Service Employers Int’l.*, 40 BRBS 613, 627-28 (2006)(ALJ). Some have totaled all of the claimant’s wages from the previous year and then divided by 52 (hereinafter the “Proportional Blend”). See e.g. *Purcella v. Service Employers Int’l.*, 40 BRBS 160, 169 (2006)(ALJ). Yet others have calculated AWW by calculating separate AWWs for the claimant’s Iraq wages and pre-Iraq wages, and then taking the average of the two (hereinafter the “50/50 Average”). See e.g. *E.S. v. Service Employers Int’l.*, 40 BRBS 1003 (ALJ 2006); *D.K. v. KBR/SEI*, 2007-LDA-00082 (ALJ 2008).

Subsection 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.

Thus, the text of subsection 10(c) permits the ALJ to consider, among other factors, the

claimant's earnings "at the time of injury," as well as "other employment" of the claimant.

However, earning capacity under subsection 10(c) includes not just the opportunity and ability, but also the willingness to work. *Jackson v. Potomac Temp's, Inc.*, 12 BRBS 410, 413 (1980); *Conatser v. Pittsburgh Testing Lab.*, 9 BRBS 541, 546 (1978)(willingness to travel critical in 10(c) determination). Performance of a job over time is good evidence of the willingness to continue doing so. However, when a claimant is injured soon after taking a new job that requires working long hours in hostile environs, the willingness to continue such work indefinitely is less clear.

This case is unusual because Claimant's employment contract was for only four months. And even if extended, Claimant testified that he was only going to work in Iraq for one year. It is fair to credit him with the willingness to work the Iraq job for Employer for at least four months but for no more than one year. Thus, Claimant's Iraq earning capacity is a temporary aberration. Therefore, I hold that an AWW based solely upon his Iraq wages would not fairly represent his opportunity, ability, and willingness to work. This subsection 10(c) analysis is tailored to these rather unusual facts.

In evaluating the alternative methods, I reject the "Proportional Blend" method—totaling all the wages from the previous year and then dividing by 52. If the Proportional Blend is applied, the result may vary wildly with the timing of the injury. A claimant injured soon after arriving will end up with an AWW almost entirely reflecting the pre-Iraq wages, and a claimant injured eight months after arriving will end up with the opposite result. The timing of the injury is usually random, and should not dominate a determination of AWW. Therefore, the Proportional Blend method should not be used here to determine AWW.

In contrast, the 50/50 Average method does not vary with the happenstance of the timing of the injury. It compensates a claimant for the willingness to work long hours overseas, yet reduces any windfall from being injured in a temporary position. Here, Claimant will likely be compensated for the wages he would have earned in Iraq but for his injury, but Employer will not be required to indefinitely multiple the salary of a former employee who intended to end his employment after one year or less. Accordingly, I will calculate Claimant's AWW under subsection 10(c) via the 50/50 Average method.

Claimant's "Iraq AWW" equals \$1,846.15. As to his "pre-Iraq AWW", although Claimant and his wife testified to temporary work and income since 1997, little evidence was offered as to how much Claimant earned. In response to Interrogatory 2, Claimant indicated his total income per month was \$3750.00 prior to his employment in Iraq but does not indicate the source of this income other than that \$1500.00 was interest on an investment. (EX 8). Claimant did not file yearly tax returns that were required if his earnings exceeded 60,000 rand or approximately \$8,000.00 USD. (EX 11, p 21). Further, the bed and breakfast was sold in 2003 and Claimant's work for the insurance company was sporadic and probably ended in 2002. (EX 10, p 17). In response to Interrogatory 3 Claimant stated "My guest house and insurance position was only part time and was not generating enough income for me to pay my debts. The guest house then became a huge financial liability." (EX 8). Despite Employer's request for documents supporting pre-Iraq earning, Claimant has produced none to Employer or to the

Court. Without any further evidence and because Claimant submitted so little information, the Court must find that Claimant pre-Iraq income was zero. Averaging Claimant's "Iraq" and "pre-Iraq" AWWs together, his AWW equals \$923.08.

**ORDER**

Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Employer shall pay Claimant permanent total disability compensation based on an average weekly wage of \$923.08 from January 28, 2004 and continuing.
2. Employer shall provide all past, present, and future medical care which is reasonable and necessary for the treatment of Claimant's work-related injuries.
3. Employer is entitled to a credit for any compensation and medical benefits previously paid to Claimant.
4. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the OWCP shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.
5. The District Director shall make all calculations necessary to carry out this Order.
6. Counsel for Claimant shall within 20 days after service of this Order submit a fully supported application for costs and fees to counsel for Employer and to the undersigned Administrative Law Judge. Within 20 days thereafter, counsel for Employer shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs.

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LARRY W. PRICE  
Administrative Law Judge