

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 July 2009

CASE NO.: 2008-LDA-336

OWCP NO.: 02-166356

IN THE MATTER OF

D. W.,¹

Claimant

v.

**SERVICE EMPLOYEES INTERNATIONAL,
Employer**

and

**INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA,
c/o American International Underwriters
Carrier**

APPEARANCES:

GARY PITTS, ESQ.

On Behalf of the Claimant

JOHN SCHOUEST, ESQ.

On Behalf of the Employer/Carrier

BEFORE: C. RICHARD AVERY

Administrative Law Judge

DECISION AND ORDER

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.

BACKGROUND

This claim was brought by Claimant under the Longshore and Harbor Workers' Compensation Act as extended by the Defense Base Act for injuries Claimant received in Iraq on August 22, 2007. The parties have stipulated Claimant suffered multiple facial fractures and a brain injury in the course and scope of his employment on August 22, 2007, when the truck he was driving was hit by a road side bomb. Claimant has not reached maximum medical improvement, his medical expenses are being paid and the only issue for resolution is his average weekly wage at the time of his injury. Aside from Claimant's testimony at trial, each party has submitted exhibits and filed post-hearing briefs.

Claimant's Testimony

Claimant is 65 years of age. He has been an over the road truck driver for forty years, and prior going to Iraq in July of 2007 Claimant had worked for over a year with Cruiser Transportation driving trucks throughout the United States.

Claimant testified he went to Iraq as a fuel hauler. His contract was for one year, but he said he hoped to stay at least three years. On August 22, 2007, while wearing protective gear and driving a truck in a military convoy, Claimant's vehicle was hit by an explosive device. He was flown to a hospital in Germany, but remembers nothing thereafter until weeks later. He has not worked since.

DISCUSSION AND FINDINGS

Claimant maintains he is entitled to have the average weekly wage he was making at the time of his injury used to determine his compensation rate. Employer/Carrier, on the other hand, urges all income Claimant made in the 52 weeks preceding his accident should be blended or averaged to arrive at a reasonable approximation of Claimant's average weekly wage on August 22, 2007. Based on the Benefits Review Board's recent decision in K.S. v. Services Employees International, Inc., et al., BRB No. 08-0583 (March 12, 2009), I agree with Claimant; and I find his average weekly wage to be \$1,653.72 at the time of his injury, entitling Claimant to the maximum compensation rate.

Employer/Carrier argues the facts in this case are distinguishable from the K.S. decision. I cannot see how. K.S. was in Iraq under a one year contract and injured his hand two months after arriving while working on a truck. Claimant was in Iraq under a one year contract and received his injuries five weeks after arriving while driving a truck in a military convoy. The reasoning of the Board regarding that employee's entitlement to have his average weekly wage calculated based solely on his earning in Iraq is just as applicable to this claim. The similarity is so great I would have to ignore the Board's ruling and precedent to arrive at any other conclusion, and I am unwilling to do so.

ORDER

1. Employer/Carrier shall pay to Claimant compensation for temporary total disability from August 22, 2007 and continuing at the maximum compensation rate;
2. Employer/Carrier shall pay for all reasonable and necessary Section 7 medical expenses proven to be related to Claimant's August 22, 2007 injury;
3. Employer 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;
4. 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 shall have ten (10) days from receipt of the fee petition in which to file a response;
5. 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.

So ORDERED this 21st day of July, 2009, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge