

**U.S. Department of Labor**

Office of Administrative Law Judges  
St. Tammany Courthouse Annex  
428 E. Boston Street, 1<sup>st</sup> Floor  
Covington, LA 70433-2846

(985) 809-5173  
(985) 893-7351 (Fax)



**Issue Date: 20 October 2008**

**CASE NO.: 2008-LDA-213**

**OWCP NO.: 02-143785**

**IN THE MATTER OF**

**J. B.,<sup>1</sup>**

**Claimant**

**v.**

**SERVICE EMPLOYEES INTERNATIONAL,  
Employer**

**and**

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

**APPEARANCES:**

**GARY B. PITTS, ESQ.**

**JOEL S. MILLS, ESQ.**

**On behalf of Claimant**

**JERRY R. MCKENNEY, ESQ.**

**JAMES L. AZZARELLO, JR., ESQ.**

**On behalf of Employer/Carrier**

**BEFORE: C. RICHARD AVERY**

**Administrative Law Judge**

---

<sup>1</sup> 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), brought by Claimant against Service Employees International (Employer), and Insurance Company of the State of Pennsylvania (Carrier). The formal hearing was conducted in Houston, Texas on July 29, 2008. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.<sup>2</sup> The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-9 and Employer's Exhibits 1-15. This decision is based on the entire record.<sup>3</sup>

### Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. Claimant was injured in the zone of special danger on July 11, 2005;
2. Claimant was an employee of Employer at the time of the injury;
3. Employer was advised of the injury on July 11, 2005;
4. An Informal Conference was held on January 9, 2008;
5. Employer/Carrier paid temporary total disability benefits to Claimant from September 27, 2005 through April 24, 2006;
6. Claimant reached maximum medical improvement on April 25, 2006 and has a twenty percent permanent disability in his left hand; and
7. Employer/Carrier has paid Claimant's Section 7 medical benefits;

---

<sup>2</sup> The parties were granted time post hearing to file briefs.

<sup>3</sup> 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.\_\_).

## Issues

This claim has but two issues: the correct average weekly wage (AWW) which should be applied to the compensation previously paid, and whether Claimant should be reimbursed for his having paid \$2,415.00 airfare to return to the United States for this hearing, plus lodging of \$142.00 and taxi fare of \$87.00.

## Statement of the Evidence

### **Claimant's Testimony**

Claimant is 61 years old and is retired military. (Tr. 13). Prior to going to Iraq to work for Employer, Claimant drove a truck in the United States for three years. (Tr. 19). Claimant worked in Iraq as a heavy truck driver from March 24, 2005<sup>4</sup> until July 11, 2005, when he injured his left wrist. (Tr. 14). He returned to the United States for medical treatment and surgery. (Tr. 16). After nine months, Claimant went back to Iraq, where he still remains employed, and he testified that he hoped to stay so employed as long as he can. (Tr. 16, 27; EX-15, p. 40).

When asked to compare the differences between driving a truck in the United States as opposed to in Iraq, Claimant explained in detail. In the United States, the roads are better, there are no enemy attacks, he only works eight-hour shifts, the trucks are lighter and the loads are different. (Tr. 24-27). In Iraq, Claimant testified he drives a fuel truck twelve hours a day, seven days a week in desert temperatures over bad roads. (Tr. 19, 23-24). Additionally, his convoy had been attacked by small arms fire and had encountered explosives. (Tr. 21-22). In other words, he said there was no comparison between the two jobs.

Claimant testified that he paid his own way to be present at the hearing. He paid \$2,415.00 for round-trip airline tickets from Iraq to Houston, Texas, \$87.00 for taxi cab fare, and \$142.00 for lodging. (Tr. 18; *See also* CX-9).

### **Claimant's Wage Records (EX-2)**

Employer's wage records show that in 2005, Claimant earned \$33,566.62 from March 24, 2005, the day he started working for Employer, until the date of his injury on July 11, 2005. (EX-2, p. 2).

---

<sup>4</sup> Claimant's starting date is confirmed by the Employment Agreement. (CX-3).

Prior to his employment with Employer, Claimant worked for JB Hunt Transport, Inc. His wage records from JB Hunt indicate that from July 11, 2004 until his resignation in February of 2005, Claimant earned \$15,879.44. (CX-5, p. 1; EX-2, p. 1).

### **Findings of Fact and Conclusions of Law**

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). The Supreme Court has held that the “true doubt” rule, which resolves conflicts in favor of the Claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

### **Average Weekly Wage**

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5<sup>th</sup> Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5<sup>th</sup> Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked “substantially the whole of the year” preceding the injury, which refers to the nature of the employment, not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent

and steady then Section 10(a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 weeks of work was “substantially the whole year,” where the work was characterized as “full time,” “steady” and “regular”). The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

In the present case, Section 10(a) cannot reasonably and fairly be applied to yield a wage that reflects Claimant’s actual earning capacity at the time of his injury because Claimant did not work in the same or similar employment for substantially the whole of the year preceding his injury. Claimant only worked for approximately fifteen weeks for Employer as a heavy truck driver in Iraq, and before that he was employed for about three years as a truck driver for JB Hunt. However, Claimant testified that his employment with Employer was nothing like his previous employment with JB Hunt. As a truck driver for Employer, he was driving seven days a week in desert temperatures over bad roads, and there was a possibility of coming under attack. (Tr. 19, 21-24). In the United States, Claimant only worked eight hour shifts and drove a lighter truck over better roads. (Tr. 24-27). Although he was employed as a truck driver for both Employer and JB Hunt, these jobs cannot be considered similar employment for purposes of Section 10(a). Based on the foregoing, I find that Section 10(a) is inapplicable in this case.

Because Section 10(a) is not applicable, I will next look to Section 10(b). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. See *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

In this instance, not only does Claimant fail to introduce evidence of the earning capacity of employees in the same class as himself, but also Section 10(b) requires comparison with a five or six day-per-week employee. Claimant testified that he worked seven days a week, and as such Section 10(b) is also inapplicable. (Tr. 23).

Section 10(c) is a catch-all to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under Longshore and Harbor Workers' Compensation Act (LHWCA) is determined by considering his previous earnings in employment in which he was working at the time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor Workers' Compensation Act, §§ 10(c), 33 U.S.C.A. §§ 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5<sup>th</sup> Cir. 1997).

In this case, I find that Section 910(c) applies because neither (a) nor (b) can be reasonably and fairly used to determine Claimant's average weekly wage. 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. *See Story v. Navy Exch. Serv. Center*, 33 BRBS 111(1999).

It is Claimant's position that the \$33,566.62 he earned in Iraq prior to his injury should be divided by the 15.57 weeks he worked for Employer to yield an AWW of \$2,155.85 and thus the maximum compensation rate.<sup>5</sup> Employer/Carrier, on the other hand, argues that the entire 52 weeks prior to Claimant's injury should be averaged to yield a correct AWW. In other words, the \$15,879.44 Claimant earned from JB Hunt beginning July 11, 2004 should be added to the \$33,566.62 Claimant earned from Employer and divided by 52 to yield an AWW of \$950.88. I agree with Claimant's argument.

While blending of the various salaries is sometimes done in these situations, here Claimant demonstrates a desire to make a career of the Iraq employment, and so I am inclined to find his earnings at the time of his injury to be the best 10(c) reflection of his AWW. *S.K. v. SEII*, 41 BRBS 293 (2006). There is no comparison between the job Claimant held in the states and that of driving trucks in a hostile environment in Iraq. Additionally, Claimant has demonstrated his desire to continue working in Iraq by his return there once he mended from his

---

<sup>5</sup> In his post-hearing brief, Claimant maintains that he worked for Employer for 18.29 weeks, and therefore his AWW at the time of his injury should be \$1,835.24. However, there were only 15.57 weeks between March 24, 2005 and July 11, 2005.

injury. (Tr. 16, 27; EX-15, p. 40). Had he not returned to Iraq, my decision might be different, but because of his return I am persuaded Claimant intended to continue working in Iraq. Therefore, I find his AWW at the time of his injury was \$2,155.85.

Turning to the remaining issue of expenses Claimant incurred in attending the formal trial in this matter, I do not find the same to be reimbursable. Claimant's deposition could have been taken orally as well as by video without the need for him to travel from Iraq to Texas for a hearing that lasted less than one hour. I was not influenced by his appearance or demeanor, but rather by facts in the case which could have been presented in written form. Therefore, I find the choice Claimant and his counsel made for Claimant to attend the hearing was of their own doing and not the responsibility of the Employer/Carrier.<sup>6</sup>

### **ORDER**

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

The periods for which Employer/Carrier have paid compensation in this claim shall be adjusted with interest to reflect an average weekly wage of \$2,155.85, which entitles Claimant to the maximum compensation rate. Claimant's request for reimbursement of his travel expenses is **DENIED**. As for attorneys' fees and costs, Claimant's counsel shall have twenty (20) 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. 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 20th day of October, 2008, at Covington, Louisiana.

**A**

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

---

<sup>6</sup> In the LS-18 filed by Claimant's counsel and dated April 14, 2008, "Houston, Texas" was indicated as the city of preference for a formal hearing. (EX-1, p. 5).