

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 August 2010

CASE NO.: 2009-LDA-396

OWCP NO.: 02-177988

IN THE MATTER OF:

JEFFREY LANDIS

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.

Employer

and

**INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
c/o AMERICAN INTERNATIONAL UNDERWRITERS**

Carrier

APPEARANCES:

JOEL S. MILLS, ESQ.

For The Claimant

RICHARD L. GARELICK, ESQ.

For The Employer/Carrier

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

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 LHWCA or the Act), brought by Claimant against Service Employees International, Inc. (Employer) and Insurance Company of the State of Pennsylvania, c/o American International Underwriters (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges (herein OALJ) for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on December 10, 2009 in Houston, Texas. Because of Claimant's inability to travel, all parties agreed via conference call to a stipulated record, and an Order Cancelling Hearing was issued by the undersigned on November 6, 2009. Additionally, on April 2, 2010, an Order Establishing Evidentiary Schedule and Setting Brief Schedule issued. On May 27, 2010, the undersigned issued an Order Extending Evidentiary and Briefing Schedule. Finally, on June 29, 2010, based on Employer/Carrier's unopposed Motion to Extend, the undersigned issued an additional Order Setting Evidentiary and Briefing Schedule.

Claimant timely filed his Brief, and offered seven exhibits. Employer/Carrier timely filed their Brief, and proffered three exhibits, all of which were admitted into evidence, along with a joint Stipulation of Facts. No Joint Exhibits were offered. The aforementioned submissions constitute the record in this matter. This decision is based upon a full consideration of the entire record.¹

Briefs in support of their respective positions were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

¹ References to the briefs and exhibits are as follows: Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Stipulation of Facts: SF.

I. STIPULATIONS

A. STIPULATED FACTS REGARDING THE BACKGROUND AND NATURE OF THIS CLAIM

The parties stipulated (See SF), and I find:

1. Jurisdiction is uncontested. The parties are subject to the LHWCA, as extended by the Defense Base Act, by virtue of the fact that at the time of the injury Claimant was working under a Defense Base Act contract in Iraq.
2. The date of the injury in this case is July 7, 2008.
3. The July 7, 2008 injury arose in the course and scope of employment.
4. There existed an employee-employer relationship at the time of the July 7, 2008 injury.
5. Employer was timely notified of the July 7, 2008 injury.
6. Claimant timely filed a claim for compensation with respect to the July 7, 2008 injury.
7. Claimant's average weekly wage at the time of the July 7, 2008 injury is contested by the parties, and it is the sole issue that is being presented for resolution.
8. Employer/Carrier properly and timely filed a Notice of Controversion regarding the disputed average weekly wage issue in this claim.
9. Carrier voluntarily paid temporary disability compensation benefits to Claimant at the rate of \$797.43 per week from July 8, 2008 through the present, and Carrier continues to voluntarily pay Claimant compensation benefits at this weekly rate of \$797.43.
10. Carrier has paid/provided Claimant's medical benefits relative to the July 7, 2008 injury.

B. STIPULATED FACTS REGARDING CLAIMANT'S EMPLOYMENT AND WAGE HISTORY/BACKGROUND

1. Claimant was born on July 10, 1959 in Indiana.
2. Claimant left school in 1976 in order to enlist in the Army.
3. Claimant was medically discharged from the Army in 1977 because of an issue with his knees.
4. Claimant ultimately obtained a general equivalency diploma.
5. From 1977 to 1988, Claimant worked in various jobs in his home state of Indiana.
6. From 1988 to 1989, Claimant went to school to become a truck driver.
7. From 1989 to early 2002, Claimant worked in at least two different over the road truck driver positions.
8. On February 13, 2002, Claimant commenced employment as an over the road truck driver with Interstate Distributor Co. (herein IDC), which is a trucking company based in Tacoma, Washington. Claimant worked for IDC until he started work as a truck driver for Employer in Iraq in March 2008.
9. Wage records from IDC reflect that during the 36-week period, from June 23, 2007 through March 1, 2008, Claimant was paid wages in the amount of \$29,309.99, which is an average weekly wage of \$814.55.
10. Claimant and Employer entered into a one-year contract of employment relative to Claimant's work as a truck driver in Iraq; Claimant worked seven days per week for Employer.
11. Claimant stated that he intended to work in Iraq for two to three years and then retire in the Philippines.

12. Claimant left the United States for the job in Iraq sometime in March 2008.²
13. Wage records for Claimant's work in Iraq reflect that during the 13-week period from April 1, 2008 through June 30, 2008, Claimant was paid wages in the amount of \$25,321.56, which is an average weekly wage of \$1,947.81.³
14. Claimant was injured at work in Iraq on July 7, 2008, and he has not worked since the time of such injury.

II. ISSUES

The unresolved issue presented by the parties is Claimant's average weekly wage.

² See EX-B, "Employment Agreement," pp. 13, 16. "The date of assignment/hire for purposes of this Agreement shall be the effective date of the Agreement. The effective date of the Agreement will be entered by the Human Resources Department and is the day employee goes 'wheels up' en route to your [sic] first assignment in the Theater. For purposes of calculating Interim Leave entitlements, the effective date of this Agreement is Day One." *Id.* at p. 13, ¶ 23. "Executed at Houston this 6th day of March 2008 and effective Mar 13 2008." *Id.* at p. 17, ¶ 36 (emphasis in original). As such, Claimant's Employment Agreement became effective March 13, 2008.

³ See CX-6; EX-C, "Printout of Claimant's Wages with Employer." Claimant was actually paid a total of \$29,521.65 between the dates of "04/2008 and 07/2008." *Id.* The "Printout of Claimant's Wages with Employer" does not precisely indicate the number of weeks Claimant worked for Employer. *Id.* Counsel for both parties have arrived at the \$25,321.56 figure by adding (\$8,076.33 (05/2008) + \$10,162.50 (06/2008) + \$7,082.73 (07/2008) = \$25,321.56). The parties then divided \$25,321.56 by 13 weeks to come to an average weekly wage of \$1,947.81.

The undersigned takes judicial notice of the following: (1) there are 91 days, or 13 weeks between 04/01/2008 and 06/30/2008; (2) there are 98 days, or 14 weeks between the dates of 04/01/2008 and 07/07/2008, the date of injury, and (3) there are 117 days, or 16 weeks (rounded down) between the dates of 03/13/2008—the effective date of Claimant's Employment Agreement—and 07/07/2008, the date of injury.

A thorough review of the record submitted by the parties reveals Claimant worked for Employer longer than the 13-week period to which the parties stipulated. However, the undersigned will not disturb the parties' stipulation of the average weekly wage of \$1,947.81, a figure derived by dividing \$25,321.56 by 13 weeks.

The Contentions of the Parties

Claimant contends the relevant facts in this case are not distinguishable from those of the Benefits Review Board (herein the Board) discussed in K.S. v. Service Employees, Int'l, Inc., 43 BRBS 18 (2009) and related cases. See also Proffitt v. Service Employees Int'l, Inc., 40 BRBS 41 (2006). In K.S., the Board established three criteria, as discussed in Proffitt, that mandate the exclusive use of overseas wages in calculating the average weekly wage at the time of injury: (1) Employer paid Claimant substantially higher wages to work overseas than he had earned stateside; (2) Claimant's employment entailed dangerous working conditions; and (3) Claimant was hired to work full-time under a one-year contract. K.S., 43 BRBS at 20. Because the relevant facts of his case are not distinguishable, Claimant contends his average weekly wage must be calculated solely on the higher wages that he was paid in his overseas employment, namely, \$1,947.81 per week.

Employer/Carrier argue that a blended calculation should be used in determining Claimant's average weekly wage. Employer/Carrier contend that Claimant's stateside earnings as a truck driver for nineteen years prior to working in Iraq should be used in the overall calculation; Claimant's inflated overseas wages, Employer/Carrier argue, should not be the sole basis for Claimant's average weekly wage. Moreover, Employer/Carrier assert that using Claimant's Iraq wages as the basis for the average weekly wage calculation would result in "unjust enrichment." Further, Employer/Carrier argue Claimant's "future earning capacity beyond Iraq was quite limited" because Claimant was planning to retire after two or three years in Iraq.⁴ Thus, Employer/Carrier argue, the blending in this case should be a 19-to-3 ratio as between stateside wages and overseas wages.

Additionally, Employer/Carrier argue that the holding in Raymond v. Blackwater Security Consulting, LLC, Case No. 2009-LDA-00293 (April 15, 2010) should be applied to the instant case. In Raymond, the ALJ awarded the claimant compensation benefits at the maximum rate of compensation, but only through the time when the claimant would have completed his tour of overseas employment, after which time the claimant would be limited to a *de minimis* permanent partial disability compensation award.

⁴ See SF.

Finally, Employer/Carrier contend that because the ruling in K.S. "is subject to reversal by the United States District Court or the United States Court of Appeals," the holding should not be binding precedent in the instant matter.

III. DISCUSSION

It has been consistently held that the LHWCA 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).

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, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a) (2006). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his 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) (2006). 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 Stevedores v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings. Claimant worked for Employer seven days a week. Therefore Sections 10(a) and 10(b) are inapplicable. See e.g., Zimmerman v. Services Employers International, Inc., BRB No. 05-0580 (February 22, 2006, unpublished) (Section 10(a) is not applicable to a seven day a week worker).

When neither Section 10(a) or 10(b) can be "reasonably and fairly applied," Section 10(c) requires a calculation which would "reasonably represent the annual earning capacity of the injured employee." 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) (2006).

The ALJ has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., 930 F.2d 424 (5th Cir. 1991); 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.

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.

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.

In K.S. v. Service Employees International, Incorporated, BRB No. 08-0583 (September 25, 2009), the Board, in its Order on Reconsideration En Banc, affirmed its Decision and Order that under the extant circumstances a claimant's average weekly wage calculation should be based on the claimant's earnings in Iraq. The Board noted that in K.S., which is factually identical to the instant case, the claimant was paid substantially higher wages to work overseas than he earned stateside, the claimant's employment entailed dangerous working conditions, and the claimant was hired to work full-time under a one-year contract. Under such circumstances, the Board concluded that the claimant's earnings in Iraq are determinative of his annual earning capacity.

Because Claimant meets the specific requirements set forth therein, I find that the Board's holding in K.S. applies to the instant case, and its holding is binding authority on the undersigned. Accordingly, I find Claimant's average weekly wage should be determined solely by his overseas earnings. As such, not only do I agree with, but also am required to follow the Board's holding in K.S. Accordingly, I shall calculate Claimant's average weekly wage consistent with the rationale of K.S.

Raymond v. Blackwater Security Consulting, LLC, Case No. 2009-LDA-00293 (April 15, 2010), a decision cited by Employer/Carrier—however interesting or innovative in its approach—is a decision rendered by a fellow ALJ, not the Board; as such, the holding in Raymond is not binding upon the undersigned. Moreover, the facts of Raymond are distinguishable from the instant case. First, Raymond involved a dispute regarding "whether Claimant is entitled to permanent partial disability compensation, and if so, what the extent of his loss of wage-earning capacity is," as well as a dispute regarding the proper average weekly wage. See Raymond v. Blackwater Security Consulting, LLC, supra at 2. Moreover, in Raymond, the parties stipulated: (1) claimant had reached MMI; (2) "Claimant has been and is now working; an alternative employment began on 01/07/2008;" (3) the claim is for temporary total disability

from 08/29/2007 through 11/28/2007; and (4) the claim is for permanent partial disability from 11/29/2007 "to the present." Id. The aforementioned stipulated factors, as well as testimony of the witnesses, all influenced the ALJ's ultimate decision. See Raymond v. Blackwater Security Consulting, LLC, supra at 20-27.

In the instant case there is only the dispute regarding average weekly wage; there is no issue of Claimant's MMI, of suitable alternative employment, nor is there any discussion in the submitted record or exhibits regarding the nature or extent of Claimant's disability. Finally, and perhaps most importantly, in Raymond, "[n]either Claimant nor Employer disputes the exclusive use of Claimant's overseas wages earned from Employer, a central point of dispute in both K.S. and Proffitt. Instead, the parties differ on the appropriate time span, and related earnings, before the injury." See Raymond v. Blackwater Security Consulting, LLC, supra at 23-24.

Here, however, the sole disputed issue is Claimant's average weekly wage. More specifically, the parties dispute whether overseas wages earned from Employer are the only wages to be used in the calculation. Unlike in Raymond, the parties in the instant case do dispute the exclusive use of Claimant's overseas wages earned from Employer for determining Claimant's average weekly wage.

In the present matter, Claimant worked at least three months of his one-year contract driving a truck in Iraq, and the evidence shows that he earned higher wages to do so. Employer/Carrier attempt to make Claimant's plan to retire after two or three years in Iraq a central issue in determining Claimant's average weekly wage, thereby attempting to make the holding in Raymond seem more pertinent. As aforementioned, I am neither bound by, nor do I find applicable to the instant facts, my colleague's decision in Raymond. Furthermore, I find whether Claimant was going to retire after two or three years in Iraq irrelevant to the fact that he was injured by an improvised explosive device while working for Employer in Iraq. Additionally, Claimant was injured before achieving his goal of working two or three years overseas, and may (or may not) have done so but for his injury.

The parties do not dispute, and the record evidence indicates, that Claimant worked for Employer for approximately thirteen weeks prior to his injury. Claimant's wage records indicate he was paid a total of \$29,521.65.⁵ The parties, however, have stipulated Claimant was paid wages in the amount of \$25,321.56 for "the 13-week period from April 1, 2008 through June 30, 2008."⁶

Consequently, I find and conclude that the calculation for deriving Claimant's average weekly wage (based upon the parties' stipulations) is as follows: Claimant's wages for 13 weeks prior to the injury, are \$25,321.56, divided by 13 weeks (Claimant worked seven days a week), yielding an average weekly wage of \$1,947.81 ($\$25,321.56 \div 13$ weeks). Accordingly, under K.S., and considering the foregoing, I find Claimant's average weekly wage at the time of the injury to be \$1,947.81.

IV. 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 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.

⁵ See CX-6; EX-C.

⁶ See supra note 4, SF.

V. 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.⁷ 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.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Claimant's average weekly wage is hereby determined to be: \$1,947.81.

2. Employer/Carrier shall receive credit for all compensation heretofore paid, if any, as and when paid.

3. Employer/Carrier shall provide all past, present, and future medical care which is reasonable and necessary for the treatment of Claimant's work-related injuries.

4. Employer/Carrier 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).

⁷ Counsel for Claimant should be aware that an attorney's fee award approved by an ALJ compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the ALJ'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 OALJ 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 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after June 5, 2009, the date this matter was referred from the District Director.

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 OALJ; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 13th day of August, 2010, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge