

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 19 February 2010**

**Case No.: 2009-LDA-00261**

**OWCP No.: 02-148813**

*In the Matter of:*

**JOSE L. MARQUEZ,**  
Claimant

v.

**SERVICE EMPLOYERS INTERNATIONAL, INC.,**  
Employer and,

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

Appearances: Gary Pitts, Esq.  
For the Claimant

James L. Azzarello, Esq.  
For Employer and Carrier

Before: Russell D. Pulver  
Administrative Law Judge

**DECISION AND ORDER AWARDING BENEFITS**

This case arises from a claim for compensation brought under the Defense Base Act, 42 U.S.C. § 1651, as an extension of the Longshore and Harbor Workers' Compensation Act ("the Act"). 33 U.S.C. § 901 *et seq.* The Act provides compensation to certain employees engaged in U.S. Department of Defense related employment for occupational diseases or unintentional work-related injuries, irrespective of fault, resulting in disability. Jose L. Marquez ("Claimant") brought this claim against his employer, Service Employers International, Inc. ("SEII") and its insurance carrier, Insurance Company of the State of Pennsylvania for knee injuries sustained on May 9, 2006, while he worked as a mechanic and truck-tire changer in Iraq.

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 March 11, 2009. On November

2, 2009, I convened a formal hearing in Houston, Texas. The parties had a full and fair opportunity to present evidence and arguments on the issues. The following exhibits were admitted into evidence: ALJ Exhibits (“AX”) 1-7; Claimant’s Exhibits (“CX”) 1-17; and SEII’s Exhibits (“RX”) 1-10 and 12.<sup>1</sup> Hearing Transcript (“TR”) at 3-7. No live testimony was presented at the hearing. TR at 4-5.

Claimant and Employer each submitted post-hearing briefs. Based upon the evidence introduced and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Decision and Order.

### **STIPULATIONS**

1. The Act applies to this claim. *See* AX 7.
2. At the time of the injury, an employer-employee relationship existed between Claimant and Employer. *Id.*
3. Claimant has suffered an injury to his right knee that arose out of and in the course of his employment. *Id.*
4. The claim was timely noticed, timely filed, and timely controverted. *Id.*
5. Claimant is entitled to compensation and medical benefits as a result of the injury. *Id.*
6. Claimant is entitled to compensation for a 12 percent permanent partial disability (“PPD”) to his right leg. *Id.*

### **ISSUES**

1. Average weekly wage and corresponding compensation rate. TR at 4; AX 7.
2. Claimant’s entitlement to interest on underpayments, if any. *Id.*
3. Claimant’s entitlement to attorney’s fees and costs. *Id.*

### **FINDINGS OF FACT**

#### ***Background***

The Claimant is a fifty-three year-old man from El Paso, Texas, with a certificate in mechanics from El Paso Technical School. RX 8 at 2-3. Claimant worked from 1991 through 2000 for Goodyear Tire Company as a mechanic for commercial vehicles. He thereafter started his own business which he operated from 2000 through the end of 2004, doing alignments and suspension work on commercial vehicles. *Id.* at 3. Claimant testified that his annual earnings while self-employed averaged between \$115,000 and \$125,000. *Id.* Claimant stated that he also worked for Circle J Tires as manager of its commercial tire store in El Paso while he still owned his own company and then solely for Circle J from about January through October, 2005. *Id.* at 4. Claimant testified that he left Circle J in October, 2005, when he was hired by SEII to work for twelve months in Iraq as a mechanic and tire specialist.<sup>2</sup> *Id.*; RX 4 at 6. He left for Balad Airfield, Camp Anaconda, Iraq, on November 3, 2005, after training for two weeks in Houston,

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<sup>1</sup> RX 12 was filed with the undersigned following the hearing by letter dated December 16, 2009. The parties contemplated the filing of RX 12 post-hearing and Claimant filed no objection to the admission of RX 12.

<sup>2</sup> SEII was under contract with the United States military to provide support services to the troops stationed in Iraq.

Texas. *Id.* Claimant testified that he was injured on May 9, 2006, but had returned to Houston for Employer's pre-deployment classes in October, 2006, after being released to return to work by his doctor on September 18, 2006. *Id.* Claimant stated that there was some confusion in his security clearance which was not straightened out until January, 2007, when he returned to work for Employer in Iraq as a mechanic. *Id.* at 5. Claimant testified that he currently earns \$85,000 annually and thought he had earned \$80,000 per year at the time of his injury on May 9, 2006. *Id.* His earnings from the time of his hiring to the accident totaled \$43,617.03. *Id.*; CX 9. He stated that he worked twelve hours per day, seven days per week and received hazard pay for working in Iraq. Claimant testified that he worked in the tire shop every day at Camp Anaconda. RX 8 at 5. Employer's Data Sheet dated November 3, 3005, set Claimant's base salary at \$2,583.00 monthly plus a five percent foreign service bonus, a twenty-five percent area differential and another twenty-five percent danger pay. RX 4 at 6; RX 5; CX 10.

Claimant testified that he was injured while on a tire repair mission within the base at Camp Anaconda, when a building that was being razed fell on him, striking his right knee, and pinned him. RX 8 at 7; CX 2. Claimant stated he was treated by medics, and eventually at the Balad military hospital, before being sent home for further medical treatment. RX 8 at 7; RX 3. Claimant worked on light duty about a month before he returned to El Paso, Texas, for medical treatment on June 11, 2006. RX 8 at 8. Claimant treated with Dr. Octavio Licon in El Paso commencing on June 23, 2006. RX 9 at 4; CX 1 at 10. Following a regimen of physical therapy, Dr. Licon told Claimant he could return to work in September, 2006. RX 8 at 8; RX 9; CX 1.

Claimant has returned to work for Employer in Iraq, but this time as a mechanic. He stated that he plans to work for Employer for as long as there is work available to him overseas. He testified that he still has pain in his knee, so tries to be careful, but has not missed any work since returning to Iraq. RX 8 at 9-10. Claimant testified that he occasionally has had to wear a bullet-proof vest and helmet when traveling on a military plane. He stated that, in his current job, he goes outside the base perimeter, though he did not do so prior to his injury. He testified that the base has been shelled by mortar or rocket fire, at which times he has had to seek shelter in bunkers. *Id.* at 11.

The compensation records show that Claimant was paid temporary total disability benefits from June 23, 2006 to October 12, 2006, at the rate of \$559.18 per week, based on an average weekly wage calculation of \$838.78. RX 1 at 3-4; CX 3 and 4. Claimant was also paid permanent partial disability benefits for a twelve percent knee disability, at a rate of \$55.18 per week for 34.56 weeks, based on the same compensation rate and average weekly wage. CX 5. Claimant's Itemized Statement of Earnings from the Social Security Administration indicates earnings from self-employment of \$13,551.00 in 1999; \$20,446.00 in 2000; \$21,488.00 in 2001; and \$16,141.00 in 2002. The Statement further reports earnings from Circle J Truck Tire Retreads of \$19,950.00 in 2003; \$39,638.39 in 2004; and \$30,571.74 in 2005; as well as earnings of \$1,423.26 from Rush Truck Centers in 2007 and \$28,595.73 from SEII in 2008. RX 12. Claimant's W-2 Statement for 2005 from SEII indicates earnings for the year of \$4,846.14. CX 7; RX 2 at 3.

## CONCLUSIONS OF LAW

The Act is construed liberally in favor of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953). A judge may evaluate credibility, weigh the evidence, draw inferences, and need not accept the opinion of any particular medical or other expert witness. *Atlantic Marine, Inc. & Hartford Accident & Indem. Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

### *Calculation of 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 fifty-two, 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*, 86 F.3d 438, 441 (5th Cir. 1996); *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). Under Section 10(a), when a claimant works "substantially the whole of the year" preceding the accident, those wages are used to calculate the average weekly wage ("AWW"). 33 U.S.C. § 910(a); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 609, 38 BRBS 60, 68 (CRT) (1st Cir. 2004). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. *Hole v. Miami Shipyards Corp.*, 12 BRBS 38, 43 (1980), *rev'd on other grounds*, 640 F.2d 769 (5th Cir. 1981). Where evidence indicates a claimant has not worked substantially all of the previous year, evidence may be utilized as to the wages earned by other employees in the same or similar employment. 33 U.S.C. § 910(b); *Bath Iron Works Corp.*, *supra* at 609. However, where the record lacks evidence of a claimant's wages from the prior work year, as well as evidence as to comparable wages, Section 10(c) of the Act applies. 33 U.S.C. § 910(c); *Bath Iron Works Corp.*, *supra* at 609. In that event, available earnings information regarding the claimant and similarly situated employees may be utilized to arrive at a sum that reasonably represents the annual earning capacity at the time of the injury. 33 U.S.C. § 910(c); *Bath Iron Works Corp.*, *supra* at 609-10.

In *Zimmerman v. Service Employers International, Inc.*, BRB No. 05-0580 Feb. 22, 2006) (unpublished), the Benefits Review Board affirmed calculation of average weekly wage under Section 10(c) since the claimant therein who worked in Kuwait was a seven-day-per-week worker, just as is Claimant in this case. The Board found that Section 10(a) was inapplicable since it refers only to five- and six-day-per-week workers. As the evidence clearly demonstrates that Claimant in this case was a seven-day-per-week worker, the undersigned finds that Sections 10(a) and (b) are inapplicable and the average weekly wage determination must be calculated using Section 10(c).

Section 10(c) is to be used in instances when neither Section 10(a) nor (b) can be reasonably and fairly applied to calculate claimant's average weekly wage, or when there is insufficient information to apply those subsections. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 2000); *Taylor v. Smith & Kelly*, 14 BRBS 489 (1981).

The object of Section 10(c) is to arrive at a sum that reasonably represents claimant's annual earning capacity at the time of his injury. *Bath Iron Works Corp.*, *supra* at 610; *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991). Although Section 10(c) permits the use of wages from a claimant's other prior employment in an average weekly wage calculation, it does not require such use; the administrative law judge is afforded wide discretion in arriving at a Section 10(c) calculation. *See generally Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44 (CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105 (CRT) (5th Cir. 2000); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 344-345 (1988). Moreover, the use of a claimant's earnings with his employer fully compensates the claimant for the earnings he lost due to his injury. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (CRT) (7th Cir. 1979). The goal of Section 10(c)—arriving at a reasonable “annual earning capacity”—is intended to reflect the *potential* of a claimant's ability to earn. *Id.* Here, Claimant's employment contract with employer was for a term of twelve months. Thus, while claimant's employment in Iraq was not necessarily intended to be long-term, Claimant's injury cost him the ability and opportunity to earn these higher wages for at least the rest of his contract term. *See Jesse, supra; Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981).

The Board has recently confirmed its position, on reconsideration of its earlier decision in *K.S. v. Service Employees Int'l, Inc.*, 43 BRBS 18 (2009), that average weekly wage calculations for workers earning substantially higher wages in dangerous overseas areas should be based solely on such overseas wages—rejecting the “blended rate” approach sought by Respondents in that case. *K.S. v. Service Employees Int'l, Inc.*, 43 BRB 136 (2009). This result is consistent with the Board's earlier decision in *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006), wherein the Board affirmed this administrative law judge's average weekly wage calculation based solely on the claimant's earnings in Iraq. In this case, Respondents urge that the undersigned apply the blended rate approach, either ignoring the ruling in *K.S.*, or relying on language in the Board's reconsideration decision suggesting that not every DBA case must be based solely on overseas earnings.

Respondents assert, to support their position, that Claimant differs from the *K.S.* and *Proffitt* claimant's in three respects: 1) Respondents assert that Claimant's prior work was virtually identical to the work which he performed overseas unlike Claimant's work in *Proffitt*, which reflected some elevation to a working foreman overseas compared to general laborer stateside. While it is certainly true that Claimant in this case performed virtually identical jobs both stateside and overseas, the undersigned finds this factor to be of little overall importance in applying the *Proffitt* and *K.S.* rationales. I thus do not find that this difference in circumstance should compel a different result. (2) Respondents next assert that Claimant was not “regularly exposed to dangerous working conditions.” *See Employer/Carrier's Post-Hearing Brief* at 9. Respondents point out that Claimant did not work outside the base camp as did the claimant in *K.S.*, who regularly drove in convoys outside the base camp and faced exposure to close-quarters attacks. While Claimant did not work outside of Camp Anaconda, he did testify that the base was subject to mortar and rocket attacks. RX 8 at 11. Claimant in *Proffitt* similarly was injured as a result of just such a mortar attack within the base camp as he scrambled for a bunker. Furthermore, Claimant in this case received a twenty-five percent danger pay under his

agreement with SEII. RX 5; CX 10. Thus, I find the argument that Claimant was not “regularly exposed to dangerous conditions” to be disingenuous. As the Board stated in *K.S.*: “... where, as here, claimant is injured after being enticed to work in a dangerous environment in return for higher wages, it is disingenuous to suggest that his earning capacity should not be calculated based upon the full amount of the earnings lost due to the injury.” *K.S.*, *supra* at 21. (3) Finally, Respondents urge that Claimant differs from the claimants in *Proffitt* and *K.S.* in that he had only a doubling of his pay by working overseas as opposed to Mr. Proffitt’s tripling of pay. Further, Respondents contend that Claimant had the capacity to earn similar wages to what he earned overseas, but had not chosen to work at his more lucrative self-employment for several years prior to his employment with SEII. However, the earnings records of Claimant belie this argument. Claimant’s annual earnings never exceeded \$20,000, about twenty-five percent of what he earned with SEII. RX 12. I further conclude that the doubling of Claimant’s earnings by going to work for SEII is not dissimilar to the tripling of earnings in *Proffitt*.

Accordingly, the facts of this case are strikingly similar to those in *Proffitt* and *K.S.* The *Proffitt* claimant was injured w approximately three-and-a-half months into a one-year contract. The *Proffitt* contract paid the claimant a higher wage than his stateside employment to compensate for working under the dangerous conditions in Iraq. In the present case, Employer similarly paid Claimant substantially higher wages for his work in Iraq, which entailed dangerous working conditions. Claimant accepted those dangerous conditions in return for higher wages. Claimant testified that he worked seven days per week for twelve hours each day, and that he was required to wear a flak jacket and helmet while transiting to the base via military aircraft. Moreover, Claimant had to seek shelter in bunkers during mortar attacks on the base. RX 8 at 11. As in *Proffitt*, Claimant was hired by Employer to work full-time under a contract with an expected duration of twelve months, and there is no evidence that claimant did not intend to fulfill his contractual obligation. RX 8 at 4; RX 4 at 6. In fact, Claimant has returned to work for SEII in Iraq under a new twelve-month contract, which currently has him working in Kuwait. RX 8 at 9-10.

I find this case indistinguishable from the *Proffitt* and *K.S.* decisions, as a result. Again, quoting the Board in its reconsideration decision in *K.S.*:

Specifically, employer paid claimant substantially higher wages to work overseas than he had earned stateside, claimant’s employment entailed dangerous working conditions, and claimant was hired to work full-time under a one-year contract. *Compare K.S.*, 43 BRBS at 20, *with Proffitt*, 40 BRBS at 42, 44-45. Under these circumstances, claimant’s earnings in Iraq are determinative of his annual earning capacity.

*K.S. v. Service Employees Int’l, Inc.*, 43 BRBS 136, (2009).

Therefore, the undersigned must calculate Claimant’s average weekly wage pursuant to Section 10(c). In making its determination, the Court notes that “[t]he essential purpose of the average weekly wage determination is to reflect ‘a claimant’s annual earning capacity *at the time of the injury.*’” *Hall v. Consolidated Employment Systems*, 139 F.3d 1025 (5th Cir. 1998) (citing

*Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991) (emphasis added)); see also *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991). The Court is not limited to considering Claimant's earnings in the year preceding the injury. *New Thoughts Finishing Company v. Travelers Insurance Company*, 118 F.3d 1028, 31 BRBS 51, 54 (CRT) (5th Cir. 1997). "Typically, a claimant's wages at the time of injury will best reflect [his] earning capacity at that time." *Hall, supra*.

The average weekly wage computation in Defense Base Act cases includes not just conventional wages, but also the special allowances attendant with working overseas: Foreign housing allowances, completion awards, and cost of living adjustments are included. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988); *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6 (1984). Therefore, Claimant's actual earnings while employed by SEII provide the most accurate basis for establishing Claimant's annual earning capacity at the time of his injury. Employer's wage records indicate that Claimant earned a total of \$43,617.03 from November 3, 2005, until he left Iraq on June 11, 2006. CX 8 and 9; RX 2. Claimant's check-stub, having a pay-end date of May 27, 2006, indicates earnings of \$6,020.48 for that pay-period. This appears to be the same pay-period noted on Employer's wage records as being the last pay-date included in the \$43,617.03 figure. CX 8 and 9; RX 2. Accordingly, this equates to a pay-date range from November 3, 2005, through May 27, 2006, yielding a total of 206 days or 29.429 weeks. Accordingly, I calculate Claimant's average weekly wage to be the sum of \$43,617.03 divided by 29.429 weeks, which yields an average weekly wage \$1,482.11, and a corresponding compensation rate of \$988.07 per week.

### ***Interest***

The Claimant is entitled to interest on any accrued, unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom.*, *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). Accordingly, interest on the unpaid compensation owed by the Employer should be included in the District Director's calculations of amounts due.

### ***Attorney's Fees***

Thirty days is hereby allowed to Claimant's counsel for the submission of an application for attorney's fees. See 20 C.F.R. § 702.132. A service sheet showing the service has been made upon all the parties, including the Claimant, must accompany this application. The parties have fifteen days following the receipt of any such application within which to file any objections.

## **ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law and on the entire record, I issue the compensation order that follows. The specific dollar computations may be administratively calculated by the District Director.

It is therefore **ORDERED**:

1. Employer shall pay Claimant compensation for temporary total disability from June 23, 2006 until December 29, 2006, based on his average weekly wage of \$1,482.11 and resultant compensation rate of \$988.07.
2. Employer shall pay Claimant permanent partial disability benefits for 34.56 weeks, commencing December 29, 2006, based on the twelve percent impairment to his knee.
3. Employer is entitled to credit for all disability and claims payments previously made.
4. Employer shall pay interest on Claimant's unpaid compensation benefits from the date the compensation became due until the date of actual payment at the rate prescribed under the provisions of 28 U.S.C. § 1961.
5. The District Director shall make all calculations necessary to carry out this Order.

**IT IS SO ORDERED.**

A

Russell D. Pulver  
Administrative Law Judge

*San Francisco, California*