U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 March 2010

Case No.: 2009-LDA-00377

OWCP No.: 02-159354

In the Matter of:

STANLEY C. ODOM,

Claimant,

v.

SERVICE EMPLOYEES INTERNATIONAL/
INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA, c/o AIG WORLDSOURCE,

Employer/Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES: Joel S. Mills
Attorney for the Claimant

Limor Ben-Maier
Attorney for the Employer

BEFORE: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This claim is filed pursuant to the Defense Base Act (Act), as amended, U.S. Code, Title 42, Chapter 11, and is governed by the implementing Regulations found at Code of Federal Regulations, Title 20, Chapter VI, Subchapter A, Part 704 and Title 29, Part 18. The claim was forwarded to the Office of Administrative Law Judges on May 11, 2009, with indication of a March 19, 2007, injury date.

A formal hearing was scheduled to be held in Newport News, Virginia, on January 26, 2010. On January 19, 2010, the Parties filed a joint request for an on-the-record determination. Accordingly, the hearing was cancelled and dates set for the submission of documentary evidence and written briefs. Claimant's counsel submitted exhibits 1 through 11. Employer's counsel submitted a list of eleven stipulated facts and EX 1.[1] Both counsel submitted pre-hearing statements and written briefs which were also considered.

The findings of fact and conclusions which follow are based upon a complete review of the entire record, in light of argument of the parties, as well as applicable statutory provisions, regulations and pertinent precedent.

AGREED FACTS

Employer's counsel submitted the following as stipulations of fact in his written brief:

1. Jurisdiction and coverage is pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 USC §901 et. seq., and as extended by the Defense Base Act, 42 USC §1651 et. seq.
2. Claimant began working for Employer effective February 2, 2007.
3. The alleged injury occurred on March 19, 2007.
4. There was an Employer/Employee relationship at the time of the alleged injury.
5. The Claimant was injured in the course and scope of employment.
6. Employer/Carrier were timely notified of the injury.
7. Employer/Carrier timely controverted the claim.
8. An informal conference was held on November 18, 2008.
9. Claimant was paid temporary total disability benefits from March 30, 2007 through July 17, 2007, based on an average weekly wage of $1,133.34 and a correspondent compensation rate of $755.56.
10. On July 18, 2007, Employer/Carrier initiated permanent partial disability benefits based on a 15% scheduled injury to Claimant's right leg. Claimant received an additional 43.2 weeks of compensation for his scheduled injury to his right leg.
11. Medical benefits have been paid.

Claimant's counsel submitted the following as conceded facts in his prehearing statement and written brief:

1. The Claimant was injured in Iraq on March 18, 2007.
2. The Employer was notified of the injury on March 18, 2007.

[1] Johnston Ambulance Service, Inc., Payroll Summary for January 1 through June 12, 2009

3. The Longshore and Harbor Workers' Compensation Act applies to the claim.
4. At the time of the injury, an employer-employee relationship existed between the Claimant and Employer.
5. The injury arose out of and in the course of Claimant's employment.
6. The claim was timely noticed and timely filed.
7. The Claimant reached maximum medical improvement on July 17, 2007.
8. The Claimant has no outstanding medical bills.
9. The Claimant is now working.
10. The injury resulted in a scheduled injury which caused a 15% loss of use of the right leg.
11. The Claimant's period of temporary total disability was from March 30, 2007 to July 17, 2007.
12. The Claimant's period of permanent partial disability was from July 18, 2007 to May 15, 2008

Review of the LS-208 completed by the Employer and submitted by Claimant as CX 6 confirms payment of $11,873.10 in temporary total disability compensation benefits from March 30, 2007 through July 17, 2007 at the rate of $755.56, as well as the payment of $32,640.19 in permanent partial disability compensation benefits based on a 15% loss of use of the right leg for a period of 43.2 weeks at the rate of $755.56.

ISSUES

The sole issue to be resolved is:

> "What was the Claimant's average weekly wage at the time of injury?"

PARTY CONTENTIONS

Claimant's Contentions:

Claimant's counsel submits that the Claimant began work for the Employer as a paramedic at Forward Operating Base Q-West in Iraq in late January / early February 2007. He reports that the Claimant earned $14,738.80 for the period from February 2, 2007 through the date of injury, March 18, 2007. He submits that this represents a 45 day, or 6.429 week, period which equates to a weekly wage of $2,292.55. Claimant's counsel reports that the Claimant earned only $37,799.00 in the year 2006, before working in Iraq and that this equated to an average weekly wage of $726.90.

Claimant's counsel argues that under the guidance of *K.S. Service Employees, Intl., Inc.*, 43 BRBS 18 (2009) and *Proffitt v. Service Employees Intl., Inc.*, 40 BRBS 41 (2006), the Claimant is entitled to have his compensation rate based on the average weekly wage of $2,292.00 and not the $1,133.34 per week used by the Employer in paying temporary total disability compensation and the scheduled loss of us of the right leg. He submits that the correct compensation rate is $1,114.44, the maximum compensation rate payable for the date of injury.

Employer's Contentions:

Employer's counsel submits that the Claimant was injured while attempting to cross a ditch as a paramedic in Iraq and responding to a rollover motor vehicle accident. He reports that the Claimant earned $14,738.80 while working as a paramedic for the Employer from February 2, 2007 through March 30, 2007. Employer's counsel submits that since the Claimant worked seven days per week, "the Court could not use either Section 10(a) or 10(b) and Section 10(c) is the appropriate method of calculation" for determining the Claimant's average weekly wage.

Employer's counsel argues that "the main objective of Section 10(c) is to calculate an average weekly wage that is fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury." He submits that "the best approximation of the Claimant's earning capacity" is by using his overseas and stateside actual wages earned in a "blended" approach. Employer's counsel acknowledged the Benefits Review Board decision in *K.S. v. Service Employees International, Inc*., 43 BRBS 18 (2009) rejected the "blended approach" in Defense Base Act cases but argues "the decision is an absolute abuse of discretion on the part of the BRB, outside the mandated authority of the BRB, and just plain wrong. The Court should not feel bound by a BRB decision that violates the actual language and nature of the Act. … To rely upon the *K.S.* decision at this point is an obvious waste of judicial economy and only invites a certain Request for Modification when the decision is surely overturned by the 5th Circuit."

Employer's counsel argues that the Claimant earned a total of $42,518.39 in the 52 weeks prior to the March 18, 2007 injury from work in Iraq with the Employer and work in the United States with Johnson Ambulance Services, Inc. He submits that the average weekly wage in this case is $817.66. As an alternative, Employer's counsel submits that as an alternative, blending the average weekly wage in 2006 earned in the United States ($628.17) with the average weekly wage earned overseas in Iraq ($1,777.90) on a "50/50 approach" would result in an average weekly wage of $1,230.03 which "takes into account the temporary increase in his weekly wage earned in temporary employment."

SUMMARY OF RELEVANT EVIDENCE

Medical Records of Dr. H.M. Pedraza, M.D. (CX 1)

This exhibit indicates that the Claimant was seen by Dr. Pedraza for his right knee injury which occurred in Iraq and subsequently underwent arthroscopy of the right knee on April 26, 2007. The disclosed torn meniscus and chondromalacia of the lateral facet of the patella were surgical treated. The Claimant completed physical therapy. Dr. Pedraza assigned a 15% permanent partial impairment to the right leg based on the medical findings by arthroscopy, the partial medial meniscectomy and chondroplasty.

When seen on June 6, 2008, Dr. Pedraza reported good range of motion in the right knee, some pain on patellofemoral compression, no medial laxity, negative McMurray test and negative Lachman test. He advised the Claimant to avoid work requiring frequent kneeling, bending, stooping or lifting.

May 7, 2007, Employee's Claim for Compensation, LS-203 (CX 2)

In this exhibit the Claimant reports that he was injured at 7:30 AM, March 18, 2007, at the Forward Operating Base Q-West, Iraq, by twisting his right knee while doing his regular work. He reported that his usual occupation was paramedic and that he worked seven days per week. He did not indicate the date and hour his pay stopped.

Payroll records from Service Employees International (CX 4)

This exhibit indicates that the Claimant received wages for work with the Respondent commencing February 2, 2007. The February gross pay paid in March 2007 was $6,395.45. The March gross pay paid in April 2007 was $8,343.35. The total amount of gross pay reported to the U.S. Department of Treasury by Services Employees International, Inc., was $14,738.80.

Claimant's 2006 Income Reports (CX 5)

This exhibit indicates that the Claimant earned a gross pay of $19,262.90 from Johnston Ambulance Services, Inc. in 2006, and earned a gross pay of $17,040.28 from Lendir County in 2006. This is a total of $36,303.18 of gross pay earned in 2006. The records do not indicate the number of weeks actually worked or the type of work performed.

Employer submitted LS-208 (CX 6, 7)

These exhibits indicate that the Respondent paid the Claimant $11,873.10 in temporary total disability compensation payments from March 30, 2007 through July 17, 2007, inclusive, at the rate of $755.56 per week. The Respondent also paid the Claimant $32,640.19 in permanent partial disability compensation for a 15% scheduled loss of use of a knee at the rate of $755.56 per week for a period of 43.2 weeks. The weekly compensation rate was based on an average weekly wage of $1,133.34.

The records also indicate that the Claimant first loss pay as a result of a March 19, 2007 injury on March 30, 2007 and reached maximum medical improvement on June 17, 2007.

Report of Informal Conference (CX 8)

This exhibit may be considered only to the extent that an informal conference was held on November 18, 2008, a District Director's written recommendation was issued on April 2, 2009, and the Respondent did not accept the written recommendation.[2]

Johnston Ambulance Service, Inc., Payroll Summary (EX 1)

[2] The District Director referred to the case of *Zimmerman v. Service Employers International, Inc*., BRB No. 05-0580 (Feb. 22, 2006) *unpub*. That case was reviewed by this Administrative Law Judge for relevance.

This exhibit indicates that the Claimant worked 471.50 hours during the January 1, 2009 to June 12, 2009 period and earned a gross pay of $5,677.71. Of the time worked, 458.0 hours was straight- time at $9.50 per hour.

DISCUSSION

Under the Act, disability compensation is based upon the average weekly wage of the disabled employee at the time of the injury. If the injured employee has worked in the same employment for substantially the whole year preceding his injury, the average weekly wage is computed in the manner set forth in § 910(a) of the Act; see *Waters v. Farmers Export Co.*, 14 BRBS 102 (1981), *aff'd mem*. 710 F.2d 615 (9th Cir. 1999). If the injured employee did not work in the same employment for substantially the whole year preceding his injury and evidence is submitted for consideration demonstrating the wages of similar employees working the same or similar employment for substantially the whole year preceding the date of injury in the same or neighboring location, the average weekly wage is computed in the manner set forth in § 910(b) of the Act; see *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025 (5th Cir. 1998); *Harrison v Todd Pacific Shipyards Corp*., 21 BRBS 339 (1988). If neither sections can reasonably and fairly be applied, the average weekly wage is computed in the manner set forth in § 910(c) of the Act; see *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294 (5th Cir. 2000).

The evidence of record indicates that the Claimant worked for Johnston Ambulance Services, Inc., for a period of time in 2006 and earned $19,262.90 that year (CX 5) Applying the hourly rate earned from the same employer in 2009, $9.50 per hour for straight time (EX 1), yields a maximum employment period of 50 weeks. The period would be less is there was overtime involved as demonstrated in the 2009 payroll records. There is also an indication of earned income Landir County in 2006 (CX 5). The evidence of record fails to establish that the work performed by the Claimant in 2006 was the same type of paramedic work performed by the Claimant in Iraq for the Respondent Employer. Work at an ambulance service would necessarily include dispatchers, maintenance mechanics, drivers, medical attendants/technicians, and administrative support clerical, billing and supervisory staff.[3] There is no indication as to the work the Claimant performed for Landir County. Accordingly, the provisions of §910(a) cannot be applied in this case.

There was no evidence submitted for consideration demonstrating the wages of similarly situated employees working the same or similar employment in Iraq, or neighboring location, for substantially the whole year preceding March 19, 2007. Work within the United States is not considered "a neighboring location" in this case. Accordingly, §910(b) of the Act may not be used to compute the Claimant's average weekly wage.

The object of § 910(c) is to establish a sum that reasonably represents the injured employee's annual earning capacity at the time of the injury and the potential of the individual to earn such income. *K.S. v. Service Employees International, Inc*., 43 BRBS 18 (2009); *Proffit v. Service Employers International, Inc*., 40 BRBS 41 (2006); *Bath Iron Works Corp. Co. v. Preston*, 380

[3] See O'Net for list of jobs related to ambulance services. Link from http://www.doleta/programs/onet to http://online.onetcenter.org

F.3d 597 (1st Cir. 2004); *Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir. 1991). "In addition, post injury events, such as decreased work opportunities or wages, generally are irrelevant to the calculation of a claimant's average weekly wage" and should not inure to the benefit of the employer. *Proffitt*, infra, at page 45, and the cases cited therein. See also *Patton v. Brown & Root Services*, BRB No. 07-0615 (Nov. 28, 2006) *unpub* for examples of factors to be considered. Under appropriate circumstances of a one-year contract for work overseas in a hostile, dangerous environment in return for higher wages, a "claimant's average weekly wage must be based on the higher wages earned in the job in which he was injured … particularly since those wages were the primary reason for [a claimant] accepting employment under [existing] dangerous working conditions." *K.S. v. Service Employees International, Inc*., 43 BRBS 18, 21 (2009) see also *J.C. v. Service Employees International, Inc*., BRB No. 06-0401 (Jan. 29, 2008) *unpub*, rejecting the concept of "blending" stateside income with income earned in Iraq immediately prior to injury.

Here the Claimant was accepted for employment by Respondent as a paramedic for work in Iraq. He commenced work in Iraq on February 2, 2007, where he worked seven days per week. (CX 2, 4) The actual contract terms of employment between the Parties has not been submitted into evidence; however, judicial notice is taken from prior Defense Base Act cases involving the Respondent, that the Respondent usually provides terms in its employment contracts for a base salary for a 40-hour work week in Iraq and provides for additional wages due to routine contract foreign service bonus, area differential pay, danger pay, straight time rate for work in excess of 40-hours per week, and fringe benefits of local housing, meals and transportation while in Iraq. A "foreign service bonus" is an incentive to accept and remain at a foreign assignment. A "work area differential" recognizes the work area hardship, weather extremes and severe cultural or sociological differences involved with the work in Iraq.

The evidence of record establishes that the Claimant first lost pay, as a result of his injury, on March 30, 2007 (CX 6, 7). Since disability under the Act requires an economic loss, the Claimant cannot be considered disabled under the Act through March 29, 2007, the last day he received full compensation. See §902(10) of the Act

Here the gross pay reported by the Respondent to Claimant for the period February 2, 2007 through March 29, 2007, is in the total amount of $14,738.80 (CX 4). Since there is no breakdown on wage computations, this amount is considered to include all regular time pay, overtime pay earned, vacation time earned and all other additional pays earned. It is not considered to include in-kind payments of housing, meals, recreation and transportation while working in Iraq. The period February 2, 2007 through March 29, 2007, inclusive is a period of 8.0 weeks, since every week worked was a 7-day workweek. This results in the Claimant's reported wages from February 2, 2007 through March 29, 2007, being paid at the weekly rate of $1,842.35. This yields a weekly disability compensation rate of $1,228.23. This weekly disability compensation rate amount is more than the maximum compensation rate permitted under the act for the period October 1, 2006 through September 30, 2007[4].

[4] The maximum compensation rate payable on March 19, 2007 was $1,114.44 per week. See http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm#

After deliberation on the evidence of record and briefs of counsel, this Administrative Law Judge finds that the Claimant's average weekly wage at the time of the March 19, 2007, injury is $1,842.35 which yields a maximum weekly disability compensation rate of $1,114.44 under the Act.

CONCLUSION AND FINDINGS OF FACT

After deliberation on all the evidence of record, including written briefs of counsel, this Administrative Law judge finds that:

1. The Claimant suffered a right knee injury arising out of and in the course of his employment with Respondent Employer, as a paramedic at the Forward Operating Base Q-West, Iraq, on or about March 19, 2007.
2. The Claimant's average weekly wage at the time of injury on March 19, 2007 was $1,842.35, which yields a lawful disability compensation rate of $1,114.44 per week.
3. The Claimant has been underpaid by the Employer for temporary total disability benefits during the period of March 30, 2007 through July 17, 2007, inclusive, which were based on a weekly disability compensation rate of $755.56 per week.
4. The Claimant is entitled to payment of temporary total disability benefits from March 30, 2007 through July 17, 2007, inclusive, at the disability compensation rate of $1,114.44 per week.
5. The Claimant has been underpaid by the Employer for permanent partial disability benefits based on a 15% scheduled injury to Claimant's right leg for the period of 43.2 weeks commencing July 18, 2007, which were based on a weekly disability compensation rate of $755.56 per week.
6. The Claimant is entitled to permanent partial disability benefits based on a 15% scheduled injury to Claimant's right leg for the period of 43.2 weeks commencing July 18, 2007, at a disability compensation rate of $1,114.44 per week.

ORDER

It is hereby **ORDERED** that:

1. In accordance with the Act, Employer shall pay Claimant:

    a. temporary total disability compensation at a rate of $1,114.44 per week for the period from March 30, 2007 through July 17, 2008, inclusive; and,
    b. permanent partial disability compensation benefits based on a 15% scheduled injury to Claimant's right leg for the period of 43.2 weeks commencing July 18, 2007, at a disability compensation rate of $1,114.44 per week.

2. Employer shall receive credit for any related disability benefits previously paid to Claimant.

3. Interest at the rate specified in 28 USC § 1961 in effect when this Decision and Order is filed with the District Director shall be paid on all accrued benefits computed from the date on which each payment was originally due to be paid.

4. All monetary computations made pursuant to this Order are subject to verification by the District Director.

5. Employer shall provide such reasonable, appropriate, and necessary medical treatment as the nature of the Claimant's work-related right leg based disability requires pursuant to § 907 of the Act.

6. Within twenty (20) days of the receipt of this Decision and Order, Claimant's attorney shall file a fully itemized and supported fee petition with the Court, and send a copy of same to opposing counsel who shall then have fifteen (15) days to respond with objections thereto.

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ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia