



**Issue Date: 23 July 2010**

***In the Matter of:***  
**KEVIN L. PRICE, SR.**  
**Claimant,**

v.

**Case No. 2009-LDA-00298**

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

**And**

**INSURANCE CO. OF THE STATE OF PENN.**  
**Carrier**

Appearances:

Gary Pitts, Esquire and Joel Mills, Esquire, Esq.  
For Claimant

Jerry R. McKenney, Esquire  
For Employer

Before: Daniel F. Solomon  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises from a claim for benefits under the Defense Base Act Extension to the Longshore and Harbor Workers' Compensation Act, as amended, 42 U.S.C. Section 1651, et seq., (the Defense Base Act) and 33 U.S.C. §§ 901, et seq., (the "Longshore Act" or "Act"), and the regulations promulgated thereunder. This case was heard in Oklahoma City, Oklahoma on April 13, 2010. At that time, I entered 19 Claimant's exhibits, "CX" 1- CX 19, and several Employer's exhibits, "EX" 1- EX8, EX 10- EX 13, EX 17- EX 17, EX 23- EX 25, EX 27- EX 36, and EX 36- EX 38. The Claimant and his wife, Sandra Price testified.

Post hearing, I left the record open. The Parties advised that they have reached stipulations to several issues. Both filed briefs.

The following stipulations are applicable:

- (1) Jurisdiction exists pursuant to LHWCA, as extended by DBA;
- (2) Date of injury/accident: on or about 11/28/05;
- (3) Employer/Employee relationship existed at the time of accident;
- (4) Notice of Controversion was timely filed;
- (5) Claimant has not returned to his usual employment;
- (6) Claimant is entitled to medical care.

I accept all of the stipulations. The parties both advise me that the sole issue before me is the computation of the average weekly wage (“AWW”).

Claimant seeks an AWW of \$1,701.80. Employer argues that it should be \$1,132.43.

#### NATURE OF THE DISPUTE

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. 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.

#### FINDINGS OF FACT

Claimant was born at Fort Benning, Georgia into a military family and raised in Europe and the eastern U.S, primarily eastern Tennessee. After graduating from high school, Claimant enlisted in the U.S. Army, working with missile systems. Following his honorable discharge, he moved to Ohio to work for sometime, then he reenlisted in the Army. He remained on active duty until the end of Desert Storm, receiving his discharge in March or April 1991.

Following his discharge in 1991, Claimant earned an insurance license from the State of Tennessee. After six months in the insurance business, he started driving trucks for a living. After a decade or so of truck driving, Claimant left the road and went back to construction work, which he had done prior to his second tour in the Army. He then worked for Martin Marietta in various positions, later working for America Online as a retention specialist prior to his work for the Employer. On May 28, 2005, he deployed to Iraq to work for the Employer in heavy equipment transportation (Transcript of the Formal Hearing of April 13, 2010, hereafter referred to as “Tr.,” pp. 17-24).

Claimant testified that he worked for America Online immediately prior to working for the Employer (Tr., pp. 21-22). As a customer retention specialist with America Online, Claimant earned \$9,777.53 from 01/01/05 through 02/28/05 and \$30,748.15 from 02/20/04 through

12/18/04 (CX-14). Prior to working for America Online, Claimant worked for Martin Marietta, assuming various roles (Tr., pp. 20-21; E/C EX-31, p. 5). His pay rate in 2003 was \$10.25 per hour while working as a truck driver for Martin Marietta (E/C EX-31, p. 3).

Claimant started working for the Employer on 05/28/05 under an agreement having an assignment duration of twelve months (Tr., p. 22; E/C EX-7, pp. 2, 13). Under the agreement, the Employer was to pay Claimant at the rate of \$3,000.00 base salary per month, with 55 % extra in foreign service bonus, area differential and danger pay (CX-12, p. 14). From 05/28/05 through 11/26/05, Claimant earned \$44,490.15, as noted by the pay end date on the 12/02/05 paycheck stub (CX-13; CX-15). Over this period of 183 days, or 26.143 weeks, his average weekly wage was \$1,701.80.

#### CONCLUSIONS OF LAW

The parties stipulated that Claimant's injuries arose in the course and scope of employment. These injuries occurred when an enemy bomb exploded near his truck while he was traveling between military camps in Iraq (Tr., p. 28).

Employer argues that Claimant's situation is not similar to that of an employee who had received an increase in pay shortly before injury, similar to an employee who begins temporary or cyclical employment where his wage rate will be higher than usual on a short term basis after which he would experience a reversion to his mean wage rate. "This job was an inherently temporary."

Claimant contends that the relevant facts in his case replicate the Benefits Review Board discussed in *K.S.* and related cases. *K.S. v. Service Employees Int'l, Inc.*, 43 BRBS 18 (2009); 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 the 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.

In reviewing the facts, I agree with Claimant. Here, Claimant's facts follow *Proffitt* and *K.S.*. The claimants in all three instances were injured while working under one-year contracts that paid each a higher wage than their stateside employment to compensate for the dangerous conditions in Iraq and Afghanistan. Claimants worked seven days per week for at least twelve hours per day. While on the job, they were subject to mortar, rocket and/or improvised explosive device (IED) attacks. All three claimants worked full-time under a twelve-month contract and intended to not only fulfill their contractual obligation, but to work beyond the contract period. Thus, the issue is whether using these earnings from the fifty-two week period immediately prior to the injury would fairly reflect Claimant's earning capacity at the time of his injury.

As the relevant facts are not distinguishable, Claimant contends that his average weekly wage must be calculated solely on the higher wages he was paid in his overseas employment, \$1,701.80 per week. I agree.

## ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and on the entire record, I issue the following compensation order:

1. The Claimant is entitled to a rate of compensation based upon a established average weekly wage of 1,701.80 per week.
2. The Claimant is entitled to payment for all past due benefits at that figure. Employer is provided credit for sums paid.
3. The District Director shall make all calculations necessary to carry out this Order.

Jurisdiction is reserved to entertain an attorney's fee petition from Claimant's attorney, who shall, within thirty (30) days of receipt of this Decision and Order, submit a fully supported and fully itemized fee petition. Respondents shall then have fourteen (14) days to comment.

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DANIEL F. SOLOMON  
Administrative Law Judge