U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 February 2010

Case No.: 2009-LDA-00297

OWCP No.: 02-152520

In the Matter of:

FLINT D. WATSON,
Claimant

v.

SERVICE EMPLOYERS INTERNATIONAL, INC.,
Employer and,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Carrier.

Appearances: Gary Pitts, Esq.
For the Claimant

Monica Fekete Markovich, 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. Flint D. Watson ("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 October 6, 2006, while he worked as a truck driver 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 April 6, 2009. On November 4,

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: Administrative Law Judge ("ALJ") Exhibits ("AX") 1-6; Claimant's Exhibits ("CX") 1-21; and Employer/Carrier Exhibits ("RX") 1-16. Hearing Transcript ("TR") at 4-5; 13-15. The Claimant testified on his own behalf, and JoAnn Ondrovik, Ph. D., appeared as a witness for the Claimant.[1]

Claimant and Employer each submitted post-hearing briefs. Based upon the evidence introduced, my observations of the demeanor of the witnesses, 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 6.
2. At the time of the injury, an employer-employee relationship existed between Claimant and Employer. *Id.*
3. Claimant has suffered an injury that arose out of and in the course of his employment. *Id.*
4. The claim was timely noticed and timely filed and timely controverted. *Id.*
5. Claimant is entitled to compensation and medical benefits as a result of the injury. *Id.*

ISSUES

1. Average weekly wage and corresponding compensation rate. TR at 6; AX 6.
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 Idabel, Oklahoma, with a past work history consisting primarily of laborer, timber, or livestock worker. TR at 28 Claimant testified that he was hired by SEII to work in Afghanistan as a truck driver in August of 2003.[2] *Id.* at 28-29. He left for Afghanistan on August 22, 2003, after training for two weeks in Houston, Texas. *Id.* Claimant testified that he worked a little over two years for SEII in Kandahar, Afghanistan, hauling wastewater, dirt and rock, and fuel. *Id.* at 30, 34. After about a year in Afghanistan, Claimant testified that he wanted to transfer to work for SEII in Iraq because he would earn more base-pay; more hours and miles were available to drivers in Iraq. *Id.* at 30-31. Claimant did not

[1] Although Dr. Ondrovik testified at the hearing with regard to her treatment of Claimant, the parties advised that any issues relating to payment of Dr. Ondrovik's charges has been resolved and that the only remaining issue to be determined was average weekly wage. *See* Joint Letter from counsel dated January 19, 2010. Accordingly, there will be no discussion herein with regard to Dr. Ondrovik's testimony.

[2] SEII was under contract with the United States military to provide support services to the troops stationed in Afghanistan and Iraq.

know whether at the time there was more violence in Afghanistan or Iraq, although he understood there may have been more violence in Iraq. He rather candidly admitted that the level of violence changed and seemed to hinge on where the most troops were; more troops led to less violence. *Id.* at 69-70. Claimant stated that he was told first that he could transfer to Iraq after a year in Afghanistan, but then was told he would have to be requested by someone in Iraq. Then he determined that he could simply quit in Afghanistan and return home, at which point he could reapply with SEII to work in Iraq. Claimant testified that he thought he would be sent to Iraq within ninety days, but instead it took about four months and required that he retake the two-week orientation course in Houston. *Id.* at 32-33. Claimant eventually left for Balad, Camp Anaconda, Iraq on February 5, 2006. *Id.* at 34.

Claimant testified that he worked as a heavy-truck driver in Iraq, driving outside the base to all parts of Iraq. *Id.* He stated that his convoy had been attacked before the date of his accident although he did not know how many times. *Id.* at 35. Claimant was required to wear a Kevlar vest and helmet while performing his job. *Id.* at 36. Claimant testified that he had been within five feet of a rocket landing inside the base camp in Afghanistan. *Id.* at 56-57. He stated that the only difference between the truck driving that he did stateside and in Afghanistan was the type of trucks: The trucks in Afghanistan were of a different type and were right-hand drive. *Id.* at 57-58.

Claimant testified that he was injured on October 6, 2006, while out on a convoy outside the base when the lead truck which he was driving struck an anti-tank mine in the road, blowing-the right wheel off and the doors open, through which fire entered the cab. *See* photos at CX 17. He injured his knee and head from the concussion. TR at 36-37; CX 1 at 20; CX 2. Claimant stated he was sent home for further medical treatment. TR at 36-37; CX 1 at 23. Claimant testified that he continued to drive a truck in Iraq for several days following his accident as he had to return to his base. He did believe that SEII had paid him for those days of driving. TR at 66-67. Claimant has treated with Dr. Ondrovik since shortly after returning home in late 2006 for headaches, dizziness, sleep, and stress problems with a diagnosis of post traumatic stress disorder. TR at 38-41; CX 10 at 1.

Claimant stated that he worked seven days per week in both Afghanistan and Iraq and averaged more than twelve hours per day. TR at 43, 70. Claimant testified that he signed his first twelve-month contract to work for SEII as a heavy-truck driver in Afghanistan on August 14, 2003, and then signed another twelve-month contract to work in Afghanistan on January 6, 2004, because SEII wanted all the workers to sign new contracts at that time. *Id.* at 44-45. Claimant admitted that he chose to go to work in Iraq and stated that he could have stayed working in Afghanistan indefinitely had he wished. *Id.* Claimant understood that although he signed twelve-month contracts, he could have quit and returned stateside at any time if he wished. *Id.* at 47. Claimant testified that while driving in Afghanistan he had been exposed to rocket-fire. *Id.* at 48. Claimant stated that he worked for the same employer from 2003 through 2006 in both Afghanistan and Iraq, which he originally thought was KBR but, he later learned, was in fact called SEII. *Id.* at 49-50. Claimant did not recall any breaks in his work for SEII other than scheduled rest and relaxation breaks ("R&R") and one week when he returned stateside because his father had a heart attack. *Id.* at 51-52. Claimant did not work in 2006 while he was back stateside waiting for assignment to Iraq. He realized that he would not be paid while he was

stateside awaiting assignment to Iraq but did not anticipate that it would take so long. *Id.* at 53-54.

Claimant's employment contract for Iraq, signed on February 5, 2006, called for a twelve-month term but could be terminated by either party earlier. *Id.* at 61-64; CX 9 at 37; RX 8 at 139. His January, 2004, contract for Afghanistan contained a similar provision regarding early termination by either party. TR at 64; CX 9 at 23; RX 7 at 91. Claimant admitted that his employment application with SEII for work in Iraq listed as his reason for leaving his employment in Afghanistan as "break." *Id.* at 65-66; RX 8 at 150. Claimant testified that he would still be working in Iraq were it not for his accident. TR at 70.

Employer's Data Sheet dated January 6, 2004, set Claimant's base salary at $2,700.00 monthly plus a five percent foreign service uplift, a twenty-five percent area differential and another twenty-five percent hazard pay for Afghanistan. CX 9 at 23. Employer's Data Sheet dated February 5, 2006, set Claimant's base salary at $3,000.00 monthly plus a five percent foreign service uplift, a twenty-five percent area differential and another twenty-five percent hazard pay for Iraq. CX 9 at 37.

The compensation records show that Claimant has been paid temporary total disability benefits since October 19, 2006, at the rate of $830.58 per week, based on an average weekly wage calculation of $1,245.87. CX 6 and 8. Claimant's income tax returns indicate earnings from SEII of $81,162.27 in 2004; $58,175.77 in 2005; and $64,785.43 in 2006. CX 12; RX3. Claimant's W-2 Statement for 2005 from SEII indicates earnings for the year of $58,175.77. CX 12 at 8; RX 3 at 31.

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. 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.

Here, Claimant resembles the claimants in *Proffitt* and *K.S.* in this regard. 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 in each case 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. However, Claimant in the present case differs from those in *K.S.* and *Proffitt* in that he had actually worked overseas in Afghanistan under a similar contract for over two years prior to commencing his work in Iraq. Thus, there are earnings figures for an actual fifty-two weeks of overseas work prior to his injury, which occurred some thirty-five weeks into his Iraq contract. 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.

In this case, it is clear that the vast disparity in average weekly wage calculations offered by Claimant and Respondents is based primarily upon two factors: (1) the four-month stateside visit spent by Claimant upon returning from Afghanistan prior to reassignment to Iraq, and (2) an apparent increase in the actual earnings of Claimant in Iraq over what he had earned working in Afghanistan. With respect to the four-month delay in reassignment, Claimant testified that he was told that he should be able to achieve such reassignment in less than three months. TR at 32-33. He attributed the lengthy delay to overall delays in processing large numbers of workers being recruited and sent overseas by Employer. *Id.* at 32-33, 43. No evidence was presented by Respondents as to the delay in reassignment. Accordingly, I am not inclined to penalize Claimant for this delay by counting this four months in the average weekly wage calculation. Further, since Claimant testified he had previously worked overseas with no significant breaks other than for R&R and a brief visit to his ailing father, I am not inclined to factor this four-month delay into an average weekly wage calculation. Respondents urge that I use this figure in calculating his wage for the entirety of his overseas career with SEII. I find, however, no basis to conclude that such another four-month period without work would have occurred in Claimant's future had the injury not occurred. *Id.* at 50-52.

As for the second factor, an actual increase in Claimant's wages per week in Iraq is obvious from Employer's wage figures. During Claimant's only full calendar year working in Afghanistan, his average weekly wage for 2004 is $1,552.28 ($81,162.00 ÷ 52.286 weeks). RX 3 at 26. His average weekly wage for his time in Iraq is $1,814.01 ($64,785.43 ÷ 35.714 weeks). CX 12 at 16. This difference of $261.73 more in Iraq cannot be explained solely by the increase Claimant received in base salary from $2,700 per month in Afghanistan to $3,000 per month in Iraq. After calculating full base salaries with the fifty-five percent incentives and dividing the

annualized sums to arrive at average weekly figures, that results in an average base weekly salary in Afghanistan of $965.77 ($2,700 × 155% = $4185 × 12 = $50,220 ÷ 52 = $965.77); compared to an average base weekly salary in Iraq of $1,073.08 ($3,000 × 155% = $4,650 × 12 = $55,800 ÷ 52 = $1,073.08). Thus, the increase in Claimant's base salary from $2,700 to $3,000 per month in Iraq accounts for an increase of only $107.31 per week. Thus, the actual average weekly salary increase in Iraq of $261.73 reflects an increase of $154.42 ($261.73 - $107.31 = $154.42). Claimant's counsel sought to explain this increase in wages by insinuating that Claimant may have received more pay in Iraq as it was more violent than Afghanistan. However, not only did Claimant fail to verify this possibility in his testimony but the fact is that the hazard-pay differential for both countries was identical at twenty-five percent. TR at 31-32, 68-70; CX 9 at 23, 37.

Accordingly, it is clear that Claimant received a pay raise of at least eleven percent ($2,700 ÷ $300 increase) in moving from Afghanistan to Iraq, not including the concomitant increases in applying the fifty-five percent incentive-pay increases to base salary. However, as reflected in the figures above, his actual pay reflected an increase in earnings of an additional $154.42 above the pay increase to his base-salary. Claimant testified that he wanted to transfer from Afghanistan to Iraq to earn more money. He attributed the increase of earnings he expected in Iraq to being able to drive more miles and work more hours. TR at 31-32. Obviously, Claimant was correct as he did in fact make more money in Iraq. Further, Claimant indicated his intent to remain in Iraq making the higher wages indefinitely. TR at 70. Neither Section 10(a) nor (b) would fairly reflect Claimant's earning capacity, as a result.

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*.

Typically, a claimant's wages at the time of injury will best reflect [his] earning capacity. *Hall, supra*. "The Board and federal courts have stated that Section 10(c) is the proper provision for calculating average weekly wage when claimant has received an increase in salary shortly before his injury." *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175, 177 (1986); *see also Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 35 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981); *Eckstein v. General Dynamics Corp.*, 10 BRBS 664 (1979). In *Le*, the claimant received a fifty-cent per hour raise just five weeks before his work accident and the Board approved the ALJ's average weekly wage calculation under Section 10(c), based solely on his higher wage. 18 BRBS at 177. Similarly, in the present case, Claimant's average weekly wage should be based solely on his work for Employer in Iraq, calculated using the pay increase which he had received for the thirty-five weeks he worked in Iraq.

Therefore, Claimant's actual earnings while employed by SEII in Iraq provides 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 $64,785.43 from February 5, 2006, until he left Iraq on October 12, 2006. CX 12 at 16. Accordingly, this totals 250 days or 35.714 weeks. Thus, I calculate Claimant's average weekly wage to be the sum of $64,785.43 divided by 35.714 weeks, which yields an average weekly wage for Claimant of $1,814.01, entitling him to the corresponding maximum compensation rate of $1,114.44 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 October 19, 2006, based on his average weekly wage of $1,814.01 and resultant compensation rate of $1,114.44.

2. Employer is entitled to credit for all disability and claims payments previously made.

3. 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.

4. The District Director shall make all calculations necessary to carry out this Order.

IT IS SO ORDERED.

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Russell D. Pulver
Administrative Law Judge

San Francisco, California