



Issue Date: 16 April 2010

CASE NO.: 2010-LDA-00008

OWCP NO.: 02-151942

IN THE MATTER OF

**LETICIA L. ESPERICUETA,
Claimant**

v.

**SERVICE EMPLOYEES INTERNATIONAL
c/o KBR,
Employer**

and

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

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., as extended by the Defense Base Act, 42 U.S.C. § 1651, et seq., brought by Claimant against Service Employees International, Inc., (Employer) and Insurance Company of the State of Pennsylvania (Carrier).

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. The Court granted the Parties' Motion to Proceed on Written Submissions. The following exhibits are admitted into evidence:

1. Claimant's Exhibits [CX] 1 – 15;
2. Employer's Exhibits [EX] 1 – 8.

The only issue for the Court to decide is Claimant's average weekly wage (AWW).

FINDINGS OF FACT

Claimant began working for Employer in Afghanistan on June 14, 2006, under a one year contract. Claimant's contractual wages were \$3,000 per month or \$692.31 per week. Claimant was also entitled to a 55% uplift for foreign service bonus, area differential and danger pay. This totaled an additional \$380.77 per week.

Claimant suffered a scheduled injury to her right leg on August 26, 2006. She earned \$16,468.13 during the 10.57 week period from June 14, 2006, to August 26, 2006.

DISCUSSION

Section 10 of the Act sets forth three alternative methods for determining an injured employee's average annual earnings, which are then divided by 52 pursuant to Section 10(d) to arrive at an average weekly wage (AWW). 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing an employee's earning power at the time of the injury. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137, 139 (1990).

The Parties agree that Sections 10(a) and 10(b) are not applicable for Claimant's employment in Afghanistan. When Section 10(a) or Section 10(b) cannot "reasonably and fairly be applied," Section 10(c) will govern. 33 U.S.C. § 910(c). Section 10(c) is typically applied in situations where the injured employee's "work is 'inherently discontinuous or intermittent, . . . and when 'otherwise harsh results' would follow were an employee's wages invariably calculated simply by looking at the previous year's earnings.'" Hall v. Consol. Employment Sys., Inc., 139 F.3d 1025, 1030 (5th Cir. 1998) (quoting Empire United Stevedores v. Gatlin, 936 F.2d 819, 822 (5th Cir. 1991)). The administrative law judge has broad discretion in determining AWW under Section 10(c). Sproull v. Stevedoring Servs. of Am., 25 BRBS 100, 105 (1991). The objective is to reach a fair and reasonable approximation of the injured employee's earning capacity at the time of injury. Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986). Earning capacity is "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." Mijangos, 19 BRBS at 20 (quoting Jackson v. Potomac Temporaries, Inc., 12 BRBS 410 (1980)).

Citing K.S. v. Serv. Employees Int'l, Inc., BRB No. 08-0583 (March 13, 2009), Claimant urges the Court to calculate her AWW by using solely her earnings during her overseas employment. This would result in an AWW of \$1558.01. (\$16,468.13 / 52). Employer urges the Court to calculate Claimant's AWW using, in part, wages earned prior to working for Employer in Afghanistan, citing Meyer v. Serv. Employees Int'l, Inc., 40 BRBS 44 (A.L.J. 2006). As noted by Employer, during the 52 weeks prior to her injury, Claimant earned \$55,452.46 from Employer and three other employers. Using this blended approach, Employer argues Claimant's AWW would be \$1,068.12.

The Board has recently held that under certain fact situations, a claimant's AWW must be based solely on her overseas earnings in order to reflect her earning capacity in the employment

in which she was injured. K.S. v. Serv. Employees Int'l, Inc., BRB No. 08-0583 (March 13, 2009); see also Proffitt v. Serv. Employers Int'l, Inc., 40 BRBS 41 (2006).¹ Similar to the claimants in K.S. and Proffitt, Claimant was injured prior to the expiration of her one year contract with Employer, and there was no evidence presented to the Court that Claimant did not intend to fulfill her one year contractual obligation. I find there are no facts that would distinguish the facts here from those in K.S. and Proffitt.

Claimant's earning capacity should therefore be based upon the full amount of the earnings lost due to the injury. Like the Board found in K.S., if the Court followed the Employer/Carrier's AWW computation, Claimant would be compensated for her injury at a lesser rate than the wage paid by the job in which she was injured, which would distort her earning capacity by reducing it to a lower level than Employer agreed to pay Claimant to work under the conditions in Afghanistan. K.S. at 7. I therefore find that the calculation of Claimant's AWW must be based solely on her earnings in the weeks she worked in Afghanistan.

Employer further suggests that if only Claimant's overseas earnings are included in the AWW calculation, that the Court utilized the calculation used in Mallet v. SEIU, 2008 LDA 00397 (ALJ Dec. 23, 2009). Employer suggests the AWW be adjusted to reflect the contract provision that there was no guarantee of any overtime in the future. Claimant's AWW would be based on Claimant's actual earnings during her 10.57 weeks of employment and 41.43 weeks at the contract rate (\$3000 per month) with the 55% uplift for foreign service, area differential and danger pay. The calculation would not include any potential overtime earnings.

The Court finds the Mallet approach does not follow the mandates expressed in K.S. In K.S. the BRB stated "post-injury events, such as decreased work opportunities or wages, generally are irrelevant to the calculation of a claimant's average weekly wage . . . The United States Court of Appeals for the Fifth Circuit has held that such a change of circumstances post-injury should not inure to the benefit of employer . . . The goal of Section 10(c) in this regard is intended to result in a sum that reflects the *potential* of claimant to earn absent injury."

To speculate that Claimant would not have the opportunity to work overtime if she had not been injured does not reflect the *potential* of Claimant to earn absent injury. The Court finds the K.S. does not permit such a reduction in Claimant's AWW.

ORDER

Based upon the foregoing findings of fact, conclusions of law, and upon the entire record, I issue the following compensation order. The specific dollar computations for the compensation award shall be administratively performed by the District Director.

It is hereby ORDERED, JUDGED AND DECREED that:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability

¹ This Court would find it more appropriate to use a 50/50 average to determine Claimant's AWW. However, the Court is unable to distinguish the fact of this case from K.S., which the Court is obliged to follow.

benefits based on an average weekly wage of \$1558.01.

2. Employer/Carrier shall pay Claimant interest on any sums determined due and owing at the rate provided by 28 U.S.C. § 1961.
3. Employer/Carrier shall pay for all reasonable and necessary medical expenses that are a result of Claimant's employment-related injury as provided by 33 U.S.C. § 7.
4. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.
5. Counsel for Claimant, within twenty days of receipt of this Order, shall submit a fully supported fee application, a copy of which must be sent to all opposing counsel, who shall then have ten days to respond with objections thereto.

So ORDERED.

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**LARRY W. PRICE
ADMINISTRATIVE LAW JUDGE**