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Issue Date: 02 June 2011

CASE NO.: 2010-LDA-430

OWCP NO.: 02-200704

IN THE MATTER OF

RICHARD P. JASMINE

Claimant

v.

CAN –AM PROTECTION GROUP, INC.

Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
c/o Chartis Property Casualty

Carrier

APPEARANCES:

JOEL MILLS, ESQ.
On behalf of Claimant

JASMINE GOROWARA, ESQ.
On behalf of Employer

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et. seq.*, as extended by the Defense Base Act, 42 U.S.C. § 1651, *et. seq.*, (the Act), brought by Richard Jasmine (Claimant) against Can-Am Protection Group, Inc. (Employer) and Insurance Company of the State of Pennsylvania (Carrier). A formal hearing was held on February 23, 2011, in Lake Charles, Louisiana. Each party was represented by counsel, and each presented documentary evidence, examined and cross-examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1; Claimant's Exhibits 2-9, 11-14; and Employer/Carrier's Exhibits 1-19. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into the following joint stipulations of facts:

1. Claimant was injured on February 1, 2010;

2. The injury occurred within the course and scope of Claimant's employment;

3. At the time of the injury, there was an employer/employee relationship between Employer and Claimant;

4. Employer was advised of the injury on February 1, 2010;

5. An Informal Conference was held on June 22, 2010; and

6. Claimant has been temporarily totally disabled from February 1, 2010, to the present, and has been receiving benefits at a rate of $686.33 per week. (JX-1)

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[1] The parties were granted time to file post-hearing briefs, as well as attempt mediation, which was unsuccessful, thus the delay in issuing this decision.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript (Tr. __); Joint Exhibits (JX-__, p. __); Claimant's Exhibits (CX-__, p. __); and Employer/Carrier's Exhibits (EX-__, p. __).

Issue

The sole issue presented for adjudication is Claimant's average weekly wage at the time of his injury. (JX-1).

Statement of Evidence

Claimant was born on May 25, 1974, in Lake Charles, Louisiana. (Tr. 12). He graduated high school and attended some college. (Tr. 13). Prior to taking a position overseas, Claimant worked as a radio disc jockey for four years, earning $5.50 per hour. (Tr. 17).

In 2005, Claimant signed a contract to work in Baghdad as a K-9 officer for Ronco Consulting. (Tr. 18). He earned $10,500.00 per month, and was told he was going to be deployed for a period of one year. (Tr. 19-20). During that time, he took two R & R breaks, and at the end of his contract, he returned to Lake Charles, Louisiana. (Tr. 20).

While in Lake Charles, Claimant worked as a security guard for Knight's Protective Services, earning $14.01 per hour. (Tr. 21). After six months, Claimant signed a new contract with Ronco Consulting, and returned to Iraq in November 2007. (Tr. 21-22). Although that contract was only for a six-month deployment, Claimant testified that he had been told he could extend the contract if he so desired. (Tr. 23). Claimant last worked for Ronco Consulting in November 2008. (Tr. 25).

Thereafter, Claimant returned to Lake Charles where he worked as a security guard for Vinson Security for four months, earning $12.73 per hour. (Tr. 25-26). Claimant then worked for Bessette Construction Company as a laborer, where he earned $11.00 per hour. (Tr. 26).

Claimant's earning records show that he earned a total of $99,707.64 from Ronco in 2008. (EX-9, p. 92). In his four months with Vinson Security, he earned $9,041.20, and he earned $8,026.68 from Bessette Construction. (CX-8, p. 20). He also worked for the Calcasieu School Board as a substitute teacher and earned $843.00. (EX-12, p. 15). In sum, his domestic earnings in 2009 totaled $17,910.88.

In December 2009, Claimant signed a six-month contract to work as a K-9 handler in Afghanistan for Employer. (Tr. 27). Claimant testified that it was his understanding that when the contract was over he could re-sign and be deployed somewhere

else. (Tr. 28). He also stated that his supervisors told him that they wanted him to remain past his initial six-month term. (Tr. 29). Further, Claimant indicated that, absent any injury, he had intended to stay with Employer past his initial six-month deployment. (Tr. 29). The rate of pay listed in Claimant's contract with Employer was $7,500.00 per month. (Tr. 29).

On February 1, 2010, while working for Employer, Claimant encountered an IED which exploded, causing multiple injuries to his right leg, as well as the loss of his left foot. (Tr. 43). Claimant has not worked since his injury. (Tr. 30).

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing, and upon an analysis of the entire record; arguments of the parties; and applicable regulations, statutes, and case law. My evaluation of the evidence has been guided by the principle that the proponent of a rule bears the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 277-78 (1994) (citing *Steadman v. SEC*, 450 U.S. 91, 95 (1981)).

As trier of fact, I may accept or reject any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962). The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act, and this has not been employed in my review of this claim. *Greenwich Collieries*, 512 U.S. at 281.

Average Weekly Wage

Section 10(a) of the Act sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). Each of these methods seeks to establish a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340, 343 (1992).

Section 10(a) applies when a claimant worked "substantially the whole of the year" for either the same or another employer. 33 U.S.C. § 910(a). When Section 10(a) is inapplicable, Section 10(b) uses the earnings of a substitute employee engaged in the same or similar employment to determine the earning power of the claimant. 33 U.S.C. § 910(b). Both Section 10(a) and Section 10(b) only apply to claimants who work five or six days per week. 33 U.S.C. § 910. Section 10(c) applies when neither Section 10(a) nor Section 10(b) would provide a fair and reasonable calculation of the claimant's earning power at the time of the injury. 33 U.S.C. § 910(c). In this case, because Claimant worked seven days per week, both parties agree that his average weekly wage should be calculated under Section 10(c).

Claimant argues his average weekly wage should be calculated using his contract hire rate of $7,500.00 per month. This would yield an average weekly wage of $1,750.00 ($7,500.00 per month /4.2857 weeks per month = $1,750.00 per week). Employer/Carrier, on the other hand, argue that a calculation based solely on Claimant's overseas earnings would be an inappropriate inflation of his true earning capacity, especially in light of the short-term nature of Claimant's contract with Employer and the amount of time Claimant actually worked on the contract prior to his injury.

In *K.S. v. Service Employees Int'l, Inc.*, the Benefits Review Board established three criteria that mandate the exclusive use of overseas wages in calculating a claimant's average weekly wage: (1) the employer paid the claimant substantially higher wages to work overseas than he had earned stateside; (2) the claimant's employment entailed dangerous working conditions; and (3) Claimant was hired to work full-time under a one-year contract." 43 BRBS 18, 20 (2009). The Board also stated that "if the record contained credible evidence that a claimant's employment overseas was in fact, or was intended to be short term…, the result herein would not necessarily control." *Id.* at n. 5. This case falls into the situation described in the Board's footnote quoted above. Claimant's contract with Employer was for a six-month term; thus, the exclusive use of his overseas wages is not mandated by *K.S.*

In cases such as this, ALJs have used various methods to calculate a claimant's average weekly wage. Some ALJs have continued to base the calculation solely upon the overseas wages. See, e.g., *Manning v. Service Employees Int'l, Inc.*, 40 BRBS 613, 627-28 (2006). Some have totaled all of the claimant's wages from the previous year and then divided by

fifty-two. See, e.g., *Purcella v. Service Employees Int'l, Inc.*, 40 BRBS 160, 169 (2006). Yet others have calculated average weekly wage by calculating separate average weekly wages for the claimant's overseas and pre-overseas employers, and then averaging these two figures. See, e.g., *E.S. v. Service Employees Int'l, Inc.*, 40 BRBS 1003 (2006).

In this case, Employer/Carrier have offered the following calculation of Claimant's average weekly wage:

> In 2009, Claimant reported total earnings of $17,067.88. (EX-2, p. 1). Under Claimant's contract with Employer, Claimant would have earned $7,500.00 per month for a six month period, or a total of $45,000.00. (EX-18, p. 2)…Employer/Carrier contend that Claimant's average weekly wage should be calculated by multiplying his monthly contract rate with Employer by six months, the period for which he would have been under contract in Afghanistan, then multiplying his prior year's earnings by one half to account for the remaining six months of the calculation and adding that figure to the six month total to arrive at Claimant's annual earning capacity. Dividing Claimant's annual earning capacity by 52 produces an average weekly wage of $1,029.50.

(See Employer/Carrier's Post-Hearing Brief, p. 16).

I agree that this calculation more adequately reflects Claimant's actual pre-injury earning capacity, especially in light of the short duration of Claimant's contract with Employer and Claimant's domestic employment history. Therefore, I find Claimant's pre-injury average weekly wage to be $1,029.50.

ORDER

It is hereby **ORDERED, ADJUDGED, and DECREED** that:

(1) Employer/Carrier shall pay to Claimant temporary total disability compensation benefits commencing on February 1, 2010, to the present and continuing, based on his pre-injury average weekly wage of $1,029.50;

(2) Employer/Carrier shall pay or reimburse to Claimant all reasonable and necessary past and future medical expenses resulting from Claimant's at-work injuries;

(3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(4) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this **ORDER** at a rate provided for in 28 U.S.C. § 1961;

(5) Claimant's counsel shall have twenty days from receipt of this **ORDER** in which to file a fully-supported attorney fee petition and simultaneously serve a copy on opposing counsel. Thereafter, Employer/Carrier shall have ten days from receipt of the fee petition in which to file a response; and

(6) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

ORDERED this 2nd day of June, 2011, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge