

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)



Issue Date: 20 October 2011

Case No: 2010-LDA-00404

OWCP No: 02-197273

In the Matter of:

SHELDON M. MEBANE,

Claimant,

v.

SERVICE EMPLOYEES INTERNATIONAL, INC. /
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
c/o CHARTIS, a division of AIU,

Employer/Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES: Joel S. Mills
Gary B. Pitts
Attorneys for the Claimant

Frank W. Gerold
Attorney for the Employer

BEFORE: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER -- GRANTING BENEFITS

This claim was 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. This case was forwarded to the Office of Administrative Law Judges on June 22, 2010, with notation of an injury on January 15, 2010 in Iraq (OWCP No: 02-197273).

A formal hearing was scheduled for Thursday, February 17, 2011, in Winston-Salem, North Carolina. On January 20, 2011, Employer's counsel filed an "Agreed Joint Motion to Cancel Formal Hearing and for Determination of Average Weekly Wage on the Submitted Record" for an on-record decision. On January 21, 2011 this Administrative Law Judge issued an "Order Cancelling Scheduled Hearing and Setting Dates for Submission of Exhibits and Post-Hearing Briefs."

Following the order, Claimant's Exhibits 1 through 3, and Employer's Exhibits 1 through 5¹ were received and admitted into evidence. Joint stipulations of the parties were also received and admitted. Additional closing written briefs filed by the respective counsel were also received and 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.

STIPULATIONS

The parties have stipulated, and this Administrative Law Judge finds after review of the evidence of record, the following as fact:

1. The Act applies to this claim.
2. This matter is in voluntary pay status.
3. Claimant was injured on January 15, 2010.²
4. The injury arose out of and in the course of the worker's employment with the Employer.
5. There was an Employer/Employee relationship at the time of the alleged injury.
6. The Employer was timely notified of the alleged injury(ies).
7. The claim was timely filed.
8. Notice(s) of Controversion were timely filed.

¹ Although the Employer's exhibit list indicated additional exhibits 6 through 8 as "pending," such exhibits were never submitted to the court to be considered.

² The joint stipulations signed by the Parties lists the date of injury as January 6, 2010. The post-hearing briefs submitted by each party, the Claimant's testimony, and the LS-203 and LS-206s submitted by the Employer, all list January 15, 2010 as the date of injury. Therefore this Administrative Law Judge finds the parties made an error in typing the joint stipulations and that January 15, 2010 is the actual date of injury.

9. The worker's average weekly wage at the time of the alleged injury is DISPUTED.
10. Claimant has been paid Temporary Total Disability benefits based on an Employer/Carrier calculated AWW of \$944.42, since January 25, 2010.

ISSUES

The sole issue remaining to be resolved is³:

1. 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 was employed by Employer as a heavy truck driver in Iraq. Claimant's employment agreement included "a term for foreign service bonus, a work area differential and an additional amount for hazard pay." The employment agreement was for a term of 12 months, with an option to extend. Claimant received a base salary of \$3,000.00 per month and additional "bonuses and differentials" added another 75%. Claimant was injured 35 days after leaving the United States. Claimant received a total compensation of \$10,408.56 while working for Employer for five weeks and four days. Counsel argues this yields an average weekly wage of \$1,868.20, or \$97,146.40 annually.

Counsel argues that under the BRB decision in *K.S. v Service Employees Int'l, Inc.* 43 BRBS 18 (2009), Claimant's average weekly wage should be calculated including only his higher overseas wages. The three prong test established in *K.S.*, 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, applies to the Claimant's case. Therefore, counsel argues the Claimant's average weekly wage should be found to be \$1,868.20.

Employer's Contentions:

Employer's counsel submits that the Claimant's date of injury was January 15, 2010, although the Employer continued to pay the Claimant until January 25, 2010. During his whole period of employment the Claimant received \$10,408.56 from Employer. Divided by the 44 days employed, this yields a daily compensation of \$236.56. Counsel argues the Claimant's applicable wages for determining AWW should only be through the Claimant's date of injury, 10 days before payment was ended, at a rate of \$236.56 per day. Therefore the Claimant received \$8,043.04 in compensation.

³ On December 23, 2009, Employer's counsel filed "Notice of Employer's Intention to Seek Section 8(f) Relief." No evidence was submitted to substantiate the application of §908(f) of the Act. Accordingly, this issue is deemed waived by the Employer.

Employer's counsel argues that in the year preceding the injury, Claimant earned \$49,404.00 exclusive of work for Employer. Therefore, the Claimant received \$55,306.53 in the 52 weeks preceding his work injury, including both wages from Employer and other wages received. This yields an average weekly wages of \$1,063.59. Counsel for Employer argues this method of calculating employment, which allows the Claimant to receive the benefit of his temporary receipt of higher wages, also reflects the historical wage rate the Claimant actually received. Furthermore, Counsel argues that the *K.S.* method of determining average weekly wage is contrary to the statutory language in 33 U.S.C. § 910(c). Therefore Counsel argues Claimant's average weekly wage should be \$1,063.59, yielding a weekly compensation rate of \$709.06.

SUMMARY OF RELEVANT EVIDENCE

Deposition Testimony of Claimant 6/28/10 (EX 5)

Claimant is 48 year old male who is legally separated from his wife and currently living with his girlfriend. He has two twin children who are 11 years old and two other children who are both older than 18. After high school Claimant went to college for two years and then joined the Army. After leaving the Army the Claimant worked as an electronic repair tech at Sears. Claimant next worked as an operator at GKN manufacturing plant. Claimant then worked for UPS, and for city government as a waste water treatment operator. While working this job Claimant injured his lower back, and his pain in this region continues until present. However, this pain does not prevent him from working. Claimant then worked as a self-employed trucker.

In December of 2009 the Claimant was hired by the Employer to be a heavy truck driver in Iraq. Claimant completed his employment agreement with Employer on December 9, 2009. The data sheet lists Claimant's base salary as \$3,000 a month with various bonuses to be included. Claimant arrived in Iraq on December 12, 2009. He worked seven days a week on the overnight shift, from 7:00pm until 7:00am.

Claimant was injured on January 15, 2010. On the night of the injury Claimant was wearing his seatbelt and his helmet. On that evening his vehicle began to overheat and had to be towed the rest of the way. Claimant was riding in the truck being towed when the truck went over a bump at a fast speed. Claimant described, "I was thrown up into the roof of the truck. My head struck the roof of the truck and kind of like drove my head down into my shoulders." Claimant saw the medic for the three days following his injury and was put on light work duty, so he was not performing his job duties as a heavy convoy driver. Claimant was then set to Dubai for medical treatment. Once there Claimant was sent to a neurosurgeon who diagnosed a bulging disc at two different levels of Claimant's neck.

Claimant was then sent back home to the United States and treated by Dr. Roy, who put him on total disability until the Claimant is able to have surgery on his neck. Claimant has not worked since his injury.

Various Department of Labor Form (EX 1)

LS-203 – Employee’s Claim for Compensation: The Claimant indicated he was injured at 7:00 p.m. on January 15, 2010 while in the course of performing his regular work as a heavy truck driver. Claimant indicated his average weekly wage when injured was \$2,000; his pay stopped on January 25, 2010; and his total earnings the year before his injury were \$110,000.

LS-202 – Employer’s First Report of Injury: The Employer indicated that the Claimant was injured on January 15, 2010 and that lost time due to injury began on January 25, 2010 at 7:30 PM. The Claimant was authorized medical attention on January 15, 2010.

LS-206 – Payment of Compensation Without Award: The March 9, 2010 form indicated that the Employer considered disability to have commenced January 25, 2010, and that the Employer would pay disability compensation to the Claimant at the rate of \$41.10 per week from January 25, 2010, with the first payment being made voluntarily on March 4, 2010.

LS-206 – Payment of Compensation Without Award: The April 9, 2010 form indicated that the Employer considered disability to have commenced January 25, 2010, and that the Employer would pay disability compensation to the Claimant at the rate of \$629.61 per week from January 25, 2010 with the first payment being made voluntarily on March 10, 2010.

Tax Forms (CX 1, EX 3)

On his tax return in 2008 Claimant listed a total income of \$57,557.00 all in the form of business income. In 2009 Claimant claimed \$49,404.00 in business income and \$3,206.0 in “wages, salaries, tips, etc” attributable to the Employer by the attached W-2 statement. In 2010 Claimant’s W-2 form reflected he earned \$7,202.16 in wages from the Employer.

Employment Agreement 12/9/2009 (CX 2, EX 4)

Claimant entered an employment agreement with Employer on December 9, 2009. Under the terms of the agreement Claimant was to receive a base salary of \$3,000.00 per month for the first 40 hours of weekly work performed with overtime being paid at straight time at the rate of \$17.31 per hour⁴; foreign service bonus of 5% of base salary (\$150.00 per month) as a financial incentive to accept a foreign assignment and remain at the foreign location; work area differential of 35% of base salary (\$1050.00 per month) to recognize work area hardship, weather extremes, or severe cultural or sociological differences; and hazard pay of 35% (\$1050.00 per month) based on assignment location. The employment agreement also provided the Claimant with necessary transportation, housing and meals. The effective date of the employment agreement was the date the Claimant “goes wheels up” enroute “to your first assignment in Theater.” The expected duration of the employment agreement was twelve months.

⁴ Base salary x 12 months / 2080 hours

Claimant's Pay Statement (CX 3, EX 2)

	Pay Period 13: 12/12/09 – 12/26/09	Pay Period 1: 12/27/09 – 1/30/10	Total
Area Differential	\$387.84	\$969.60	\$1,357.44
Overseas Allowance	\$76.56	\$139.20	\$215.76
Hazard Pay	\$387.84	\$969.60	\$1,357.44
Gross Regular Pay	\$2,077.20 (120 hours)	\$5,123.76 (296 hours)	\$7,200.96
Holiday Pay	\$276.96 (16 hours)	---	\$276.96
Total	\$3,206.40	\$7,202.16	\$10,408.56

DICUSSION

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).

Claimant was hired by the Employer on December 9, 2009, and arrived in Iraq for employment on December 12th. He was injured a mere five weeks later on January 15, 2010. Therefore the Claimant did not work for the Employer substantially the whole year preceding his injury. 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 January 15, 2010. 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. [Simons] v. Service Employees International, Inc.*, 43 BRBS 18 (2009), *aff'd on recon, en banc*, 43 BRBS 136 (2009); *Proffitt v. Service Employers International, Inc.*, 40 BRBS 41 (2006); *Bath Iron Works Corp. Co. v. Preston*, 380 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. [Simons]*; 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 and holding that “Claimant’s average weekly wage must be calculated based solely on his overseas earnings in order to reflect his earning capacity in the employment in which he was injured.”

In *K.S. [Simons]* the Benefits Review Board, on reconsideration, stated that a claimant’s average weekly wage under the Defense Base Act is not “in every DBA case ... derived solely from overseas earnings.”⁵ The Board endorsed the factors considered in *Proffitt* and stated that the relevant factors to consider in determining whether the average weekly wage should be based on the overseas earning to include payment by the employer to claimant of substantially higher wages to work overseas than he earned stateside, claimant’s employment entailed dangerous working conditions, and claimant is hired to work full-time under a one year contract. *K.S. [Simons]*; *Proffitt*; also *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011)

In this case the Parties entered into an employment contract which provided for a base salary of \$3,000.00 per month for the first 40 hours of weekly work performed with overtime being paid for additional hours of work at the straight time rate of \$17.31 per hour; a foreign service bonus of 5% of base salary (\$150.00 per month) as a financial incentive to accept a foreign assignment and remain at the foreign location; a work area differential of 35% of base salary (\$1050.00 per month) to recognize work area hardship, weather extremes, or severe cultural or sociological differences; and hazard pay of 35% (\$1050.00 per month) based on assignment location. The employment agreement also provided the Claimant with necessary transportation, housing and meals. The expressed expected duration of the employment agreement was twelve months. Under the circumstances of this case, the Claimant’s average weekly wage is determined solely on the compensation provided by the Employer under the existing employment contract for the Claimant’s services as a heavy truck driver in Iraq.

The Claimant’s paid employment with Respondent Employer began on December 12, 2009, when he “went wheels up” for his assignment as a heavy truck driver in Iraq. Claimant was injured on January 15, 2010, but remained in full-pay status until January 25, 2010. Since disability under the Act requires an economic loss, the Claimant cannot be considered disabled under the Act through January 24, 2010, the last day he received full compensation (EX 1, 2). See § 902(10) of the Act.

In this case, the Claimant received total work compensation for the 6-2/7 weeks of work from December 12, 2009 through January 24, 2010 in the amount of \$10,408.56. The Parties have

⁵ The Board indicated that the sole use of overseas earnings to establish average weekly wage may not be appropriate if the employment period is set or anticipated to be for less than one year.

provided no evidence which would permit calculation of the actual hours worked and compensation earned for the period ending on January 15, 2010, the date of injury. Accordingly, to determine the average weekly wage at the time of injury in Iraq, this Administrative Law Judge finds that the appropriate calculation is to divide the actual amount of compensation for work the Claimant received from the Employer (\$10,408.56) by the number weeks from December 12, 2009 through January 24, 2010 (6-2/7 weeks). This equates to an average weekly wage of \$1,655.91 per week, which yields a disability compensation rate of \$1,103.94.

After deliberations on the evidence of record, this Administrative Law Judge finds that the Claimant has established an average weekly wage of \$1,655.91 and is entitled to temporary total disability compensation commencing January 25, 2010 at the disability compensation rate of \$1,103.94 per week.

CONSLUSION AND FINDINGS OF FACT

After deliberation of all the evidence of the record, including post-hearing briefs of counsel, this Administrative Law Judge finds:

1. The Act applies to this claim.
2. This matter is in voluntary pay status.
3. The Claimant was injured on January 15, 2010 while riding in his assigned truck in convoy in Iraq.
4. The injury arose out of and in the course of the worker's employment with the Employer as a heavy truck driver in Iraq.
5. There was an Employer/Employee relationship at the time of the alleged injury.
6. The Employer was timely notified of the alleged neck injury.
7. The claim was timely filed.
8. The Notice of Controversion was timely filed.
9. The Employer voluntarily paid the Claimant temporary total disability benefits at the rate of \$629.61 per week from January 25, 2010, with the first payment being made voluntarily on March 10, 2010.
10. The Claimant's average weekly wage at time of injury was \$1,655.91 which yields a total disability compensation rate for \$1,103.94.

ORDER

It is hereby ORDERED:

1. That the Employer pay Claimant temporary total disability compensation at a rate of \$1,103.94 per week for the period commencing January 25, 2010 and continuing.
2. That the Employer receives credit for any related disability compensation benefits previously paid to Claimant.
3. That 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. That all monetary computations made pursuant to this Order are subject to verification by the District Director.
5. That the Employer provide such reasonable, appropriate, and necessary medical treatment as the nature of the Claimant's work-related injury based disability requires pursuant to § 907 of the Act.
6. That 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