

U.S. Department of Labor

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Issue Date: 29 April 2013

CASE NO.: 2010-LDA-00117

OWCP NO.: 02-144363

In the Matter of:

TERRY STEWARD,
Claimant,

v.

**SERVICE EMPLOYEES INTERNATIONAL,
INC./KELLOGG, BROWN & ROOT,**
Employer,
and

**INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA/AIG WORLDSOURCE,**
Carrier.

Appearances: Gary B. Pitts, Esq.
Joel S. Mills, Esq.
for Claimant

Jerry R. McKenney, Esq.,
for Employer/Carrier

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER

This is a claim for compensation and medical benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, as extended in the Defense Base Act, 42 U.S.C. §1651. SEII is a government contractor that employed Claimant and provided services in the war effort in Iraq. Claimant was ambushed in the Iraqi war zone on September 20, 2005, and sustained serious physical and psychological injuries. He has not recovered.

Introduction and Background

I held a duly-noticed hearing on March 31, 2011 in Boise, Idaho. The parties were represented by their respective counsel of record. Claimant testified on his own behalf and called as witnesses his wife Darlene M. Steward and his treating physician Robert F. Calhoun, M.D. Employer/Carrier called forensic psychiatrist Seth W. Silverman, M.D. I admitted numerous exhibits.¹ Each party submitted a closing brief.

With the matter under submission pending decision, there were two issues in dispute that had to be decided for a compensation order.² They were:

1. Has Claimant reached maximum medical improvement (such that his disability is permanent)?
2. What was Claimant's average weekly wage at the time of injury?

In particular, through Dr. Silverman, Employer/Carrier offered evidence that Claimant could benefit from a treatment program that Dr. Silverman specified in detail, and that this program more likely than not would allow him to perform suitable alternative employment at least part time. Claimant believed that he had received appropriate treatment, had attempted numerous treatment modalities, and was doubtful that any further treatment would allow him to return to the workplace, even part-time.

In addition, the parties recognized that, as Claimant was working in the war zone in Iraq on a one-year contract, the Board had held that his average weekly wage would be based on the wage rate Employer was paying, not a rate that blended his previous wages before working for Employer in a war zone. Employer/Carrier argued that the Board's holding in this regard was erroneous; Claimant argued that the Board's holding was legally correct. But there was no dispute that Claimant was on a one-year contract or about what wages Employer was paying him at the time of injury. Nor was there any dispute that Claimant was then and had been totally disabled since the day he was ambushed in Iraq.

After I had a series of telephone conferences with counsel for both parties, the parties stipulated to a process to resolve the issue of maximum medical improvement. The process was that I was to select a psychiatrist to do an independent medical examination at Carrier's expense. The parties would supply the psychiatrist with the relevant medical records and evidence of record, including Dr. Silverman's proposed treatment plan. I was to ask the expert if Dr. Silverman's treatment would be reasonably likely to yield an improvement in Claimant's condition such that

¹ I admitted Claimant's exhibits (C.Ex.) 1-25. Tr. 6-10, 14, 53-56. I admitted Employer/Carrier's exhibits (E.Ex.) 1 through 33 and 36 through 44. Tr. 14. I also admitted a statement of the parties' stipulations as ALJ Exhibit 1. Tr. 15. ("Tr." refers to the hearing transcript by page number.) As one of Claimant's medical experts was unavailable to testify at trial, I allowed a post-trial deposition. The parties submitted a transcript from the deposition, which I admitted as E.Ex. 45.

² A third order is attorney's fees and costs to which Claimant's counsel is entitled. That could be deferred until after a decision on the merits.

he would be able to perform at least some remunerative work in the competitive economy. The expert would then review the materials, examine Claimant, and provide a report.

The parties stipulated that, if the expert opined that Dr. Silverman's proposed treatment plan would likely allow Claimant to return to work at least part-time, Claimant's disability would remain in temporary status, Employer/Carrier would provide Dr. Silverman's recommended treatment, and Claimant would cooperate with the treatment. If, on the other hand, the expert opined that Employer/Carrier's proposed additional treatment was unlikely to improve Claimant's condition enough to allow him to work, it would be determined that Claimant's disability was permanent.

As to the second issue, average weekly wage, I stated that, given the facts, it appeared that *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009), would be controlling.³ Given Employer/Carrier's contention that *Simons* was wrongly decided, I stated that Employer/Carrier had preserved the issue in its closing argument.

Consistent with these stipulations and issue-narrowing decisions, I selected an Idaho psychiatrist from a list of mental health experts on whom the Office of Worker's Compensation Programs relies in the Boise area. The parties provided her with the relevant materials. She performed an extensive evaluation, which I will describe below, and she answered in the negative the parties' question about whether Dr. Silverman's treatment plan would likely lead to Claimant's again being able to work.

There were also developments on the average weekly wage issue. A district court in the Southern District of Texas vacated *Simon* on appeal. I invited the parties to submit supplemental briefs addressed to the law after the district court's decision. Both parties submitted supplemental briefs, which I have considered.

Discussion

I. The parties stipulated to the following:

- The Act applies as to status and situs;
- An employer-employee relationship existed at the time of injury;
- Claimant suffered an injury;
- The injury arose out of and in the course of employment;
- The claim was timely noticed, filed, and controverted;
- Claimant is entitled to compensation and medical benefits;
- Employer/Carrier has been paying compensation at \$705.61 per week since September 21, 2005, and has been providing medical benefits;
- There are no outstanding unpaid medical bills;
- Claimant cannot return to his prior work;
- Claimant is not working;

³ As in *Simons*, and unlike *Jasmine v Can-Am Protection Group, Inc.*, BRB No. 11-0610 (Apr. 19, 2012), Claimant had a one-year contract.

- Claimant cannot perform suitable alternative employment at this time;
- The injury is unscheduled;
- Claimant's was temporarily totally disabled from September 21, 2005 to February 17, 2009;
- Claimant has been totally disabled from February 18, 2009 and continuing;
- Average weekly wage should be calculated under section 10(c);
- No penalties are sought against Employer/Carrier; and
- Employer/Carrier does not seek relief under section 8(f).

Tr. 15-18.

II. Claimant Is and Has Been at Maximum Medical Improvement since February 18, 2009.

Dr. LaCroix is an eminently qualified, board-certified psychiatrist. She has significant familiarity with Posttraumatic Stress Disorder based on four years as a psychiatrist in the Navy, including work at a combat stress unit. She has specialized training in forensic psychiatry and is separately board-certified in that area.⁴

I have reviewed Dr. LaCroix's 36-page detailed report, which I admit as ALJ Exhibit 2. Dr. LaCroix reviewed the many medical records and other evidence that the parties supplied to her, including Dr. Silverman's report, a supplemental report from him, and his trial testimony. She interviewed Claimant's wife and his treating physician. She examined Claimant, performed psychological testing, and performed a thorough psychiatric interview.

Dr. LaCroix provided an analysis of her findings and the following diagnoses:

- Axis I: Post-traumatic Stress Disorder, Chronic
Major Depressive Episode, single, moderate
Pain Disorder Associated with Both Psychological Factors and a General Medical Condition, Chronic.
Adjustment Disorder with mixed anxiety and depression
- Axis II: Deferred
- Axis III: Chronic pain s/p multiple gunshot wounds in Iraq ambush
Hypertension
Tinnitus
Hypothyroidism
Impotence
Rule Out Obstructive Sleep Apnea
Rule Out Inguinal Hernia
- Axis IV: Problems with social support, legal system (disability proceedings), finances, occupational issues.

⁴ I have marked and admit Dr. LaCroix's *curriculum vitae* as ALJ Ex. 3.

Axis V: Current Global Assessment of Functioning (GAF) Score = 50, moderate symptoms and impairment in functioning.

ALJ Ex. 2 at 30. She explained her rationale for each diagnosis as well as for excluding certain diagnoses such as Conversion Disorder.

Dr. LaCroix then turned to the question I asked her:

To a reasonable medical certainty, would Employer/Carrier's proposed treatment plan be reasonably likely to enable Claimant to return to productive work in the competitive economy at least part-time?

Her answer was as follows: "It is my opinion with a reasonable degree of medical certainty that the proposed treatment plan will NOT be reasonably likely to enable Mr. Steward to return to productive work in the competitive economy." *Id.* at 32. She explains her opinion, specifying 18 separate specific findings and considerations that support it.

This in every way is a complete undertaking and conclusion of the process to which the parties stipulated as the manner in which the issue of maximum medical improvement would be resolved. Based on that stipulation and Dr. LaCroix's opinion, I conclude that Claimant reached maximum medical improvement on February 18, 2009, and has been permanently and totally disabled since that date.

III. Average Weekly Wage.

The parties agree that the average weekly wage must be determined under section 10(c) of the Act, and I agree.

Before working for Employer, Claimant earned \$65,838 in 2003, and \$61,084 in 2004, as a truck driver, and was working in that capacity into 2005. C.Ex. 9 at 1, 4. He began to work for Employer on March 22, 2005 on a one-year contract. C.Ex. 8 at 2. The contract set his wage at a base salary of \$3,000 per month, with a 5 percent foreign service bonus, a 25 percent area differential, and a 25 percent danger pay enhancement. *Id.* Through the date of injury, he earned \$48,433.66. C.Ex. 9 at 12. The time from Claimant's first day worked through his date injured amounts to 183 days, or 26.143 weeks.

Based on this, Claimant asserts that his average weekly wage was \$1,852.64 per week. He calculates this as gross wages of \$48,433.66 divided by 26.143 weeks. Initially, Claimant relied on *K.S. v. Service Employees Int'l, Inc.*, 43 BRBS 18 (2009), *aff'd on recon. en banc*, 43 BRBS 136 (2009); and *Proffitt v. Service Employees Int'l, Inc.*, 409 BRBS 41 (2006). Following the district court's vacating *K.S. in Service Employees Int'l, Inc. v. Director, OWCP*, 2013 WL 943840, Civil Action No. H-11-01065 (S.D. Tex. 2013), Claimant argued that controlling precedent in the present case (which was filed with the Director in Seattle) consists of Ninth Circuit and Board decisions, not an opinion of a district court in the Southern District of Texas;

that neither the Ninth Circuit nor the Board has rejected the holding stated in *K.S.*; and that that holding therefore remains controlling.

Employer/Carrier argues that Claimant's average weekly wage should be calculated by totaling his earnings in the 52 weeks preceding his injury and dividing by 52.⁵ If accepted, this would blend Claimant's wages in domestic U.S. employment with the wages Employer was paying him to work long hours overseas in a war zone. Following the district court's decision to vacate *K.S.*, Employer/Carrier asserts that its blended calculation remains the legally correct approach.

The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. Section 10(c) is used to calculate a claimant's average weekly wage when neither Section 10(a), 33 U.S.C. §910(a), nor Section 10(b), 33 U.S.C. §910(b), can reasonably or fairly be applied. 33 U.S.C. §910(c). This inquiry may include consideration of claimant's ability, willingness and opportunity to work and the earnings claimant *had the potential to earn had he not been injured*.

Jasmine v Can-Am Protection Group, Inc., 2012 WL 1655269 at *2, BRB No. 11-0610 (Apr. 19, 2012) (emphasis added). In *Jasmine*, the Board reconfirmed its prior holding in *K.S.* and *Proffitt*, stating:

The Board has held that where claimant is injured while working overseas in a dangerous environment in return for higher wages under a long-term contract, his annual earning capacity should be based upon the earnings in that job as they reflect the full amount of the annual earnings lost due to the injury.

Jasmine at *2. The Board distinguished short-term employment overseas on a six-month contract and for such employment affirmed the administrative law judge's decision to apply a blended rate such as Employer/Carrier advocates here.

This approach is consistent with generally accepted principles applicable to section 10(c). As the Seventh Circuit has observed:

The Board's interpretation of § 10(c) thus construes earning capacity of the injured workman to mean the amount of earnings the claimant would have the potential and opportunity *to earn absent injury*. We think they have done so correctly.

* * *

The fundamental issue is what period of time the Board may choose in determining the wage period for measuring earning capacity. Since the language

⁵ Employer/Carrier argues that Claimant's earnings in the 52 weeks prior to his injury amounted to \$55,037.32. For this it cites E.Ex. 2 at 1-2 and E.Ex. 4 at 1. These exhibits do not provide data from which Claimant's earnings from September 21, 2004 through March 21, 2005 can be determined. Those dates fall within the 52 weeks prior to Claimant's injury.

of § 10(c) is not self-limiting as is the language of §§ 10(a) and (b), and where the overall efficacy and fairness of the Act would be drastically diminished by considering only the minimal earnings of the prior year, we feel the Board did not go beyond the scope of its statutory authority in making its factual determination of earning capacity.

Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 757-59 (7th Cir. 1979) (fns. omitted and emphasis added); *see L-3 Communications, Inc. v. Director, Office of Worker's Compensation Programs*, 2012 WL 405059 (E.D. Va. Feb. 07, 2012).

I conclude that, confronted with the issue in a case outside the Southern District of Texas, the Board would continue to apply the rule it adopted *en banc* in *K.S. [Simons]*.⁶ As in that case, Claimant here was given a one-year contract and paid additional wages to work overseas in a war zone. His average weekly wage therefore is based on the wages Employer was paying him at the time of injury, and his average weekly wage was \$1,852.64. As Claimant's compensation rate at the time of injury would otherwise exceed the statutory maximum of twice the national average weekly wage at that time, he is limited to a compensation rate of \$1,047.16, adjusted at certain times (*see infra*). *See* 33 U.S.C. §§ 906(b)(1); 910(f).

Conclusion and Order

Claimant was injured in Employer's employ, and the injury resulted in disability for which Employer/Carrier is responsible. Claimant's disability, initially temporary, has become permanent, and Employer/Carrier must provide compensation and medical care. Accordingly, it is ordered that:

1. Employer/Carrier will pay Claimant compensation for temporary total disability from September 21, 2005 through February 17, 2009, at the rate of \$1,047.16 per week, together with compound interest from the date owed until the date paid. *See* 33 U.S.C. § 908; 28 U.S.C. § 1961.
2. Employer/Carrier will pay Claimant compensation for permanent total disability from February 18, 2009, and continuing, at the rate of \$1,047.16 per week, adjusted at October 1, 2009 and at October 1 each year after that, plus compound interest from the date owed until the date paid. *Id.*; 33 U.S.C. § 910(f).
3. Employer/Carrier will provide Claimant with necessary and reasonable medical care for his covered injury. This will include, without limitation, psychiatric care for medication management; psychotherapy; consultation with a pain medicine specialist;

⁶ The Board not only reconfirmed *K.S.* in *Jasmine*, but also in a number of unpublished decisions. *See Smith v. Services Employees, Int'l, Inc.*, 2011 WL 4455031 (Aug. 23, 2011); *Blackshear v. Service Employees Int'l, Inc.* 2011 WL 2513709 (May 16, 2011); *Espericueta v. Service Employees Int'l, Inc.*, 2011 WL 1089367 (Feb. 11, 2011); *Espericueta v. Service Employees Int'l, Inc.*, 2011 WL 1089367 (Feb. 11, 2011); *Coffey v. Service Employees Int'l, Inc.* 2010 WL 7124715 (Dec. 10, 2010); *Mallett v. Service Employees Int'l, Inc.*, 2010 WL 5015065 (Nov. 18, 2010).

neuropsychological testing once he is stable on psychiatric medication; and physical and occupational therapy with adaptive equipment.

4. Employer/Carrier is entitled to a credit for compensation that it can demonstrate to the Director's satisfaction it has already paid Claimant on account of this injury.
5. The Director will perform all calculations necessary to bring the parties into compliance with this Order.
6. Employer/Carrier will pay Claimant's reasonable attorney's fees. 33 U.S.C. §928. Within 14 days, Claimant's counsel will serve on defense counsel a detailed statement of time expended and hourly rates. Within an additional 14 days, the parties will meet and confer in a good faith effort to resolve the fee issue. If they are unable to do so, Claimant's counsel may file a fee petition within 14 days following the meet and confer, including the detailed statement of time expended and hourly rates. Counsel will include a memorandum of points and authorities and supporting documentation necessary to establish that his hourly rate is consistent with the applicable market for an attorney of similar experience, skill, and reputation. Employer/Carrier will file any objections or opposition to the fee petition within 21 days of service. If Employer/ Carrier includes any new material with its opposition, Claimant's counsel may file a reply within 10 days, limited to the new material.

SO ORDERED.

STEVEN BERLIN
Administrative Law Judge