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Issue Date: 27 July 2012

Case No.: **2011-LDA-00487**

OWCP No.: **2-165501**

In the matter of

DAVID WILLIS,
Claimant,
v.

DYNCORP INTERNATIONAL FREE-ZONE, LLC. / CONTINENTAL INSURANCE COMPANY,
Employer / Carrier,
and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party In Interest.

DECISION AND ORDER

This proceeding involves a claim for benefits filed under the Defense Base Act ("the Act"), 42 U.S.C. § 1651, *et seq*. (2000), an extension of the Longshore and Harbor Workers' Compensation Act ("the Longshore Act"), as amended, 33 U.S.C. § 901, *et seq*. (2000). A formal hearing was held in Newport News, Virginia on February 23, 2012, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Defense Base Act and the applicable regulations. At the hearing, the parties submitted stipulations, which were received into evidence and have been made part of the record.[1] Also at the hearing, Claimant's Exhibits 1 through 33 and Employer's Exhibits 1 through 21 were admitted into the record. Post-hearing, both parties also each submitted a brief for consideration.

The findings and conclusions that follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

[1] The following abbreviations will be used as citations to the record: CX – Claimant's Exhibit; EX – Employer's Exhibit; ALJ – Administrative Law Judge's Exhibit; TR – Transcript of the hearing.

STIPULATIONS

The Claimant and the Employer have stipulated to the following:

1. Claimant was employed by DynCorp International Free-Zone, LLC as a Police Instructor, when on July 17, 2007 he suffered from perineal thrombosis;

2. Claimant was deemed unfit for duty and returned to the United States on or about August 15, 2007;

3. Claimant underwent a PPH stapled hemorrhoidopexy with removal of anal skin tags and hemorrhoids on August 24, 2007;

4. Claimant was released to full duty work without restrictions on September 7, 2007 and returned to Iraq;

5. Claimant was declared unfit for duty on January 4, 2008;

6. Claimant underwent a proctoplasty with re-do PPH hemorrhoidectomy on January 18, 2008;

7. Claimant returned to work in Iraq from February 15, 2008 to February 8, 2009;

8. Claimant underwent a proctoplasty for stenosis and external hemorrhoidectomy on March 11, 2009;

9. Claimant has been employed as a Nuclear Security Officer in Georgia from May 4, 2009 to the present and continuing;

10. Claimant earned a salary of $41,463.35 while employed as a Nuclear Security Officer in 2010. From May 4, 2009 to December 31, 2009 Claimant earned $24,637.09.

11. Claimant is within ten minutes of bathroom facilities during his employment as a Nuclear Security Officer;

12. Claimant was paid temporary total disability from August 16, 2006 to September 7, 2007; January 18, 2008 to February 15, 2008; and December 31, 2008 to May 10, 2009 at the maximum compensation rate;

13. Claimant was paid permanent partial disability at the maximum compensation rate from May 11, 2009 to March 2, 2011;

14. Claimant is capable of performing suitable alternative employment that makes bathroom facilities readily available;

15. Claimant was paid permanent partial disability at the weekly rate of $435.17 based on the Labor Market Survey from March 3, 2011 and continuing, with credit reduction for prior overpayment;

16. Claimant does not object to or dispute the propriety of payments made up to March 3, 2011 when benefits were reduced;

17. There are no outstanding/unpaid medical bills or costs in connection to the industrial injury;

18. The injuries sustained fall within the coverage of the Act, 33 U.S.C. § 901, *et seq.*, as extended by the Defense Base Act, 42 U.S.C. § 1651, *et seq*.

(ALJ 1)

ISSUES

1. Claimant's average weekly wage.

2. Claimant's post-injury wage-earning capacity.

SUMMARY OF THE EVIDENCE

I. Claimant's Testimony

Claimant testified he worked for Dyncorp about two years, but was injured after only about two months on the job. He stopped working for the Employer due to the injury, but said he would have continued with the company for as long as he could if he had not been injured. (TR 13). He was employed as a police advisor. (TR 14). His job was to instruct Iraqis on law enforcement procedures. (TR 16).

Prior to working for Dyncorp he worked for almost ten years as a deputy sheriff in Richmond County, Georgia. (TR 14-15). He also served four years in the National Guard in counterintelligence, although Claimant stated that he had never worked in counterintelligence, but had only undergone the training. (TR 15).

While in Iraq, Claimant testified he worked seven days a week, twelve or more hours per day. (TR 16). He wore between 80 and 120 pounds of equipment, including body armor and ammunition. (TR 16-17). To get around Claimant explained he would ride in the back of a Humvee. (TR 17). It took at least three hours to travel throughout Baghdad and the ride was bumpy. (TR 17-18).

Claimant explained that he developed severe hemorrhoids that then developed into a rectum problem causing him to lose control of his bowel movements. (TR 19). Those problems continue today. (TR 25).

After the Employer voided his contract because he had not returned to work due to getting medical treatment, Claimant immediately looked for work in Georgia. He began working for Southern Nuclear Operating Company on May 4, 2009 in Waynesboro, Georgia as a security officer. (TR 26).

At Southern Nuclear he wears a plastic safety helmet, t-shirt, gun belt, tennis shoes, and pants. Wearing a bullet proof vest is optional and weighs no more than five pounds. (TR 27). All total he estimated the weight of the gear he wears at 25 to 30 pounds. (TR 28). He works no more than 14 days per month, 12 hours per day. (TR 28). The schedule allows him to regroup on his days off. (TR 33).

Claimant said he always brings two extra changes of clothes with him to work in case he has an accident in which he loses his bowel control, which has happened at work. (TR 29). He said he has never told Dr. Hooks about accidents he has had at work because Dr. Hooks is generally aware he has accidents and he noted the fact is embarrassing. (TR 50-51). He estimated he has two such accidents a month. (TR 51). Claimant explained that at the majority of his posts he can walk to a bathroom and at some he has to call for another officer to relieve him so he can take a bathroom break. (TR 29-30). When he knows he won't have easy access to a bathroom, Claimant said he doesn't eat to avoid having an accident. (TR 30-31).

Claimant said Dr. Hooks recently recommended that he undergo surgery to implant electrodes and attach a battery pack that could help him regain control of his bowels. (TR 32). Claimant said he hasn't followed up because he believes it would cause him to lose his job at Southern Nuclear. (TR 33). He's also afraid it could interfere with his gun belt. (TR 53). He has never talked to the medical staff at Southern Nuclear about the possibility. (TR 52).

Claimant testified he did not believe he could return to his previous employment at Dyncorp because of the limited medical treatment available and because he can no longer wear the heavy equipment or ride for hours in a Humvee. (TR 31-32). Also, while riding in the field in Iraq, it isn't possibly to simply pull over and go to the bathroom. (TR 32). He also did not believe he could hold a similar overseas job where he had to wear heavy equipment or ride over rough terrain. (TR 45-47).

Claimant said he received a couple letters with job suggestions from a vocational rehabilitation expert hired by the Employer and that he had contacted each of the employers listed. (TR 33-34). If a suggested job was no longer available, Claimant said he searched for similar jobs and applied for those, even though he did not believe he was qualified for some of the jobs or have an interest in them. (TR 58). He said he did not follow up on applications he had submitted other than to look at his application status online when it was available. (TR 56).

He stated that he could not perform a job located far from his home in Augusta, Georgia because he would be unable to make the drive back and forth every weekend to see his family, who would not want to relocate. (TR 35-37). He explained that he had lived in Augusta most of his life. (TR 49). Also, he could not afford two residences. (TR 43). Even an hour and a half drive one-way to work would aggravate his medical condition. (TR 39). Further, he stated that he had never had any training in instructing counterintelligence or worked in counterintelligence

himself. (TR 38). Finally, Claimant said he had no experience helping people with their resumes or finding jobs. (TR 44-45).

II. Evidence

DynCorp Employment Records

Claimant was hired by DynCorp on June 5, 2007. He extended his contract twice. Claimant's last contract called for an annual salary of $67,608 for February 8, 2009 through August 8, 2009. (CX 7 6-15).

DynCorp contacted the Claimant on February 10, 2009 explaining that he was declared medically unfit for duty on February 7 and his contract ended on February 8. His new contract was voided because he was not fit for duty. (CX 9).

DynCorp Payment Records

A paycheck for the period of July 6, 2007 through August 2, 2007 shows earnings of $10,281.60 for the period and $25,239.36 for the year. (CX 7 at 4).

A payroll chart lists Claimant's earnings for his entire employment with Dyncorp, showing total earnings of $66,732.96 in 2007, $87,496.13 in 2008, and $6,702.48 in 2009.

Southern Nuclear Payment Records

Claimant's 2009 W-2 shows wages of $24,637.09 from Southern Nuclear Operating Company. (CX 8, 27). His 2010 W-2 shows wages of $41,463.35. (CX 27).

Vocational Rehabilitation Report

Carla Seyler, a licensed rehabilitation counselor with Seyler Favaloro, Ltd., completed a vocational rehabilitation evaluation report on March 2, 2011 after performing a rehabilitation interview and vocational testing on Claimant. (EX 20). She recounted that Claimant is a high school graduate who completed three years of college. (EX 20 at 18). Testing showed he had an ability to read and understand material written at an entry college level. (EX 20 at 20). Among the jobs identified in the report as being suitable alternate employment were:

- Senior instructor in Ft. Leonardwood, Missouri- "The individual will teach courses such as weaponry, protective services and military police operations. Prior teaching experience is required…. This employer indicated there would be no problem with having accessible bathrooms in the classroom. The worker can request a classroom assignment. The individual will alternately stand, sit and walk throughout the workday. There is no travel overseas. Mr. Willis' prior experience is acceptable. The earnings are $60,000-$70,000 annually."
- Transportation security inspector in Columbia, SC and across the U.S.- "The individual will be based on the airport floor area (not in the cargo areas or within the airplane) and

provides overt and covert presence to detect and reduce identified security threats and vulnerabilities…. Bathroom access is readily available to everyone….The worker must… complete a 5 week training course in Oklahoma City and … must have three years of experience demonstrating the ability to analyze problems, gather pertinent data, recognize solutions, plan and organize work, and communicate effectively, orally and in writing. This job pays $39,358-$60,982 annually."

- Security specialist in Fort Gordon, GA; Huntsville, AL; and various locations across the U.S.- "The individual applies and develops security procedures and advises a military group regarding implementation. The worker must have knowledge of the intelligence process, intelligence cycles and organizations as well as national security techniques and technologies. Prior military experience in security intelligence is preferred but not required. The worker must be able to obtain top security clearance. A high school diploma or GED is required. Courses in military intelligence are preferred. This is an office based position requiring sedentary physical exertion. No field work is involved. The worker will alternately sit, stand or walk as needed and lift up to 20 pounds at most….. It was available in October 2010 and paid $46,000 - $56,000 annually."

On September 21, 2011 Ms. Seyler suggested additional jobs, including:

- Recruiter- "In this job the worker will work from his home office in order to assist job seekers with locating employment. He will assist with resume development and employment contracts. The worker will mainly work with ex-military personnel locating civilian jobs. On the job training is provided for one who has verbal and written communication skills as well as customer service and sales abilities…. Earnings are $60,000-$80,000 per year."

DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), aff'g, 990 F.2d 730 (3d Cir. 1993).

In arriving at a decision in this matter, it is well settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 101 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT) (9th Cir. 1999); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91, 24 BRBS 46, 48 (CRT) (5th Cir. 1988); *Atl. Mar., Inc. & Hartford Accident & Indem. Co. v. Bruce*, 661 F.2d 898, 900, 14 BRBS 63 (CRT) (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).

There are two issues in dispute in this case. First, the parties disagree as to how Claimant's average weekly wage should be calculated under 10(c). Secondly, although the parties agree that Claimant has a post-injury wage-earning capacity, they disagree as to the amount.

Claimant contends his average weekly wage is $2,798.96, calculated based on his six weeks of earnings with DynCorp prior to his injury. He also argues his post-injury wage-earning capacity is $580.37 per week, his net earnings at Southern Nuclear Operating Company. Thus, Claimant concludes he has a loss of wage-earning capacity of $2,218.59.

Employer argues Claimant's average weekly wage should be calculated using his earnings in the 51 weeks prior to his last date of employment with DynCorp on February 8, 2009. That amounts to $1,847.03 per week. Alternatively, Employer suggests the Claimant's average weekly wage should be calculated using all of Claimant's earnings during his employment with DynCorp, factoring out the periods he did not work due to his injury. That amounts to $2,055.70 per week. With regards to Claimant's post-injury wage-earning capacity, Employer contends Claimant is capable of performing a higher paying job than his current position at Southern Nuclear. The Employer argues it has shown higher paying suitable alternate employment through its labor market survey and that the Claimant did not make a diligent attempt to obtain that employment. Thus, Employer states that Claimant's post-injury wage-earning capacity is $1,153.85 to $1,538.46 based on the salaries of the jobs identified in the labor market survey. The Employer concludes Claimant has a loss of wage-earning capacity of $462.12 to $205.71.

I. Pre-Injury Average Weekly Wage

Section 10 of the Longshore Act sets forth three methods for calculating a claimant's average annual earnings. 33 U.S.C. § 910(a)–(c) (2006). The computation methods are directed towards establishing a claimant's earning power at the time of injury. *Universal Mar. Services Corp. v. Wright*, 155 F.3d 311, 327, 33 BRBS 15, 28(CRT) (4th Cir. 1998); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 441, 30 BRBS 57, 59(CRT) (5th Cir. 1996); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823, 25 BRBS 26, 29(CRT) (5th Cir. 1991).

Sections 10(a) and 10(b) are the statutory provisions relevant to a determination of an employee's AWW where an injured employee's work is regular and continuous. Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual wages. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average wages of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). However, if neither of these two methods can be reasonably and fairly applied to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. *Wright*, 155 F.3d at 327, 33 BRBS at 28(CRT); *Gatlin*, 936 F.2d at 821, 25 BRBS at 28(CRT). Section 10(c) of the LHWCA provides:

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services off the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

The parties agree that Claimant's average weekly wage should be computed under Section 10(c) and I find that is the most appropriate method. Section 10(a) cannot be applied because the Claimant worked for the Employer for less than a year prior to his injury. There was no evidence submitted for consideration demonstrating the wages of similarly situated employees working the same or similar employment, so Section 10(b) cannot be applied.

The object of Section 10(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. v. Service Employees International, Inc*., 43 BRBS 18 (2009); *Proffit 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). An administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 105 (1991); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137, 139 (1990); *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290, 293 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979).

In circumstances involving 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. v. Service Employees International, Inc*., 43 BRBS 18, 21 (2009). *See also Simons v. Service Employees International, Inc.*, 43 BRBS 18 (2009). The Claimant in this case was injured six weeks into a one-year contract with the Employer. He in fact completed his contract and extended it to work for an additional six months overseas for the Employer. Therefore, I find his average weekly wage must be based only on his overseas earnings with the Employer.

Claimant contends his average weekly wage should be calculated using only the six weeks of earnings prior to his injury. The Employer argues that because Claimant returned to work after his injury, his wages can be more accurately calculated by considering his post-injury

earnings with the Employer. The Employer notes that Claimant's post-injury earnings take into account unpaid rest and relaxation time ("R&R") that his pre-injury earnings do not.

In some circumstances it is appropriate to look to a claimant's post-injury earnings when his pre-injury earnings do not fairly represent his earning capacity. *See L-3 Communications v. Dir., OWCP, et al.*, 2011 WL 6046440 (E.D.Va. 2011). In this case, Claimant's six weeks of pre-injury earnings are inflated compared to his regular earnings after his injury. In Claimant's first three days of work he had earnings of $4,676.16[2], for a daily rate of $1,558.72, significantly higher than the daily wage rate called for in his contract of $354.24[3]. Therefore I find his pre-injury earnings do not accurately reflect his earning capacity.

However, I also find that Claimant's post-injury wages may not accurately reflect his earning capacity. According to the Employer, the reason Claimant's average weekly earnings are lower over the course of his employment with the Employer is that he took unpaid R&R during that time.[4] Employer argues there is no evidence that Claimant would not have continued to take such breaks every couple months as he had shown a history of doing. However, I note that Claimant sought medical treatment while home on R&R and it is quite possible he was motivated to schedule R&R due to a need to recover from working in the conditions that were causing him pain. There is no way to know if and how frequently Claimant would have opted to take R&R had he not been injured.[5] There is no evidence Claimant was required to take R&R at any preset interval or in a certain amount during the course of his contract. Claimant did not testify as to his intention to take breaks at certain intervals or in a certain amount every year.

I find the best method for determining Claimant's annual earning capacity in this case is to look at the wages Claimant had contracted to earn. His contract called for a daily wage rate of $216, 35% hazard pay, 25% bonus, and 4% annual leave for a daily rate of $354.24[6], which is a weekly rate of $2,479.68. I find that amount best represents the Claimant's annual earning capacity at the time of the injury.

II. Post-Injury Wage-Earning Capacity

It is undisputed that Claimant is unable to return to his usual employment. Therefore, the Employer has the burden of demonstrating the availability of suitable alternate employment. The parties have stipulated and the evidence shows that Claimant has been employed as a nuclear security officer since May 4, 2009. The parties agree Claimant is capable of performing his security officer position and other suitable alternate employment that makes bathroom facilities readily available. The Employer argues that other suitable alternate employment that pays a

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[2] There is no explanation in evidence as to why his first paycheck was higher than subsequent checks, such as due to a signing bonus.

[3] The contract calls for a daily wage rate of $216 plus 35% hazard pay, 25% bonus, and 4% annual leave.

[4] It is also not entirely clear from the evidence how often and when Claimant took the R&R breaks he did take. Claimant testified he took two R&R breaks during the course of his employment. (TR 14). His wage records indicate approximately month long breaks in or around July 2008, in or around October 2008, and in or around January 2009. Reduced earnings in April 2008 also suggest he wasn't paid for approximately three weeks during that period. (EX 14).

[5] The Employer's brief suggests such breaks were entirely optional on the part of the Claimant.

[6] Claimant testified he worked seven days per week. (TR 16).

higher wage than Claimant's security officer position exists, as evidenced by the Employer's labor market survey. The Employer argues those positions best reflect the Claimant's earning power on the open labor market and are the best measure of his earning capacity, not his existing employment as a security officer.

Wage-earning capacity is "an injured employee's ability to command regular income as the result of her personal labor." *Seidel v. General Dynamics Corp.*, 22 BRBS 405 (1989). In deciding a claimant's wage-earning capacity, the judge may take "due regard to the nature of [claimant's] injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." 33 U.S.C. § 908(h).

Section 8(h) provides that a claimant's wage-earning capacity shall be his actual post-injury wages if they reasonably and fairly represent his wage-earning capacity. 33 U.S.C. § 908(h). The party that contends that the claimant's actual wages are not representative of his wage-earning capacity has the burden of establishing an alternative wage-earning capacity. *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), *aff'd*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990). If the actual wages are unrepresentative of the claimant's wage-earning capacity, the administrative law judge must determine a dollar amount that fairly and reasonably represents the claimant's wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 796-97, 16 BRBS 56, 64 (CRT) (D.C. Cir. 1984).

To show suitable alternate employment, an employer must demonstrate that specific job opportunities exist that the injured employee could perform considering his age, education, work experience, and physical restrictions. *Edwards v. Director, OWCP*, 99 F.2d 1374 (9th Cir. 1993); *cert. denied*, 511 U.S. 1031 (1994). Employer points to four job opportunities identified in its labor market surveys as demonstrating suitable alternate employment.

While the labor market survey does not name each of the employers for the four positions, other details are given demonstrating each represents a specific job opportunity. Further, a follow-up letter to Claimant's attorney from the vocational counselor gives the identity of each employer. The Employer argues the following jobs identified in its first labor market survey are suitable alternate employment:

- Senior Instructor; Analytic Services; Ft. Leonardwood, Missouri
- Transportation Security Inspector; Department of Homeland Security; Columbia, South Carolina
- Security Specialist; Department of Army; Fort Gordon, Georgia

From its second labor market survey Employer identifies a recruiter position in which the employee would work from home. The name of the employer is not identified in any of the documentation introduced into evidence.[7]

The first is a senior instructor position in Ft. Leonardwood, Missouri. Claimant lives in Augusta, Georgia. He testified he has lived there for most of his life, owns a home there, and his

[7] A clearance jobs.com printout shows a "recruiter" position listed for an "anonymous employer." (CX 31).

family lives there. Unlike the claimant in *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003), this Claimant has no history of working outside of Georgia prior to or after his employment with the Employer. Jobs 65 and 200 miles away have been found to not be within the relevant geographical area for employment. *Kilsby v. Diamond M. Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom. Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978). A job in Missouri is not within commuting distance of Claimant's home and would require him to relocate. I find the relevant labor market for the Claimant is the Augusta, Georgia area and therefore find the senior instructor position is not suitable alternate employment.

The second position is a transportation security inspector in Columbia, South Carolina and "across the U.S." Claimant testified Columbia is 75 miles, about an hour and a half drive, from his home in Augusta. I find this position is also too remote to qualify as suitable alternate employment. Employer argues that the position is also available in various locations across the U.S., however, I find such a statement is not sufficient to show the precise nature and terms of the position as required to find that the job is suitable alternate employment. Simply because a job might be available in other U.S. locations does not equate to a finding that it is available in the Augusta, Georgia area within commuting distance of the Claimant.

The third position is a security specialist in Fort Gordon, Georgia. The position is located within the relevant geographic community. However, Claimant contends he does not have the necessary experience for the position. The job requires that the employee apply and develop security procedures and advise a military group regarding implementation. It further requires that the employee "have knowledge of the intelligence process, intelligence cycles and organizations as well as national security techniques and technologies" with prior military experience in security intelligence preferred. Claimant testified that although he had served four years in the National Guard in counterintelligence, he had never actually worked in the field, only undergone the initial training. Although the description of Claimant's National Guard duties on his resume suggests he performed counterintelligence work and would meet the knowledge requirements of the security specialist position, Claimant testified he had none of the knowledge required by the position. I find Claimant's testimony credible and believe it is likely that his resume contains a description of the type of work a counterintelligence specialist would perform, rather than the actual work Claimant did perform. Claimant's uncontroverted testimony of his actual experience in counterintelligence is that he did not have the background required for the position. Therefore, I find this position cannot constitute suitable alternate employment. Further, Claimant stated that he applied for a similar position because the original position identified by the Employer was no longer available, but he did not get a response.

The final position the Employer identified as suitable alternate employment is an at-home recruiter position assisting with the development of resumes and employment contracts. The position description states that "on the job training is provided for one who has verbal and written communication skills as well as customer service and sales abilities." Claimant testified he has no experience helping others write resumes. His description of his prior employment supports that contention as well as shows no experience with customer service or sales. Therefore, I find this position also does not constitute suitable alternate employment because the Claimant is not qualified for the job.

Other positions identified in the Employer's labor market survey are also either not within the Claimant's geographic area or he is not qualified to perform the work. Even if any of the positions identified by the Employer constituted suitable alternate employment, I find Claimant conducted a diligent search for work. He testified he applied to every job the Employer's vocational counselor recommended and applied to similar positions when the recommended job was no longer available. He also applied to positions at his current employer on his own. Claimant is obviously willing to work, as he is in fact working in a position he located of his own accord. There is no indication Claimant would not have accepted employment at another job within his geographic area and qualifications that could accommodate his medical needs had he been offered such a position.

Based on the foregoing, I find Employer has not shown suitable alternate employment other than Claimant's current security officer job and Claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity. Claimant earned $24,637.09 in 2009[8] and $41,463.35 in gross wages in 2010. Claimant argues his net earnings after taxes and social security should be used, not his gross earnings, because he was paid tax-free overseas.[9] I disagree, and for purposes of calculating Claimant's benefits, use Claimant's gross earnings both overseas and stateside post-injury. Thus, I find Claimant's post-injury wage-earning capacity is $763.55 per week.[10]

III. Permanent Partial Disability

Section 8(c)(21) provides that an award for unscheduled permanent partial disability is 66 and 2/3 percent of the difference between Claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. I have found Claimant's pre-injury average weekly wage is $2,479.68. His post-injury wage-earning capacity is $763.55 per week. The difference is $1,716.13. Two thirds of that amount is $1,144.09. However, the maximum compensation rate in effect on Claimant's date of injury on July 17, 2007 was $1,114.44.

ORDER

It is hereby ORDERED that:

1. In accordance with the Act, Employer shall pay Claimant permanent partial disability compensation at a rate of $1,114.44 per week for the period from March 3, 2011 to the present and continuing.

2. Employer shall receive credit for any disability compensation benefits previously paid to Claimant for the applicable time period.

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[8] Earnings based on 35.57 weeks of work from May 5 to December 31.

[9] Claimant provides no support for the contention that his earnings truly are tax free and the accuracy of that assertion is questionable. The foreign earned income exclusion requires a citizen working overseas to meet a physical presence or residency requirement and caps the earnings that are eligible for the federal income tax exclusion, while state tax laws vary by state.

[10] Calculated based on $$66,100.44 in earnings in 2009 and 2010 for 86.57 weeks of work.

3. 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. All monetary computations made pursuant to this Order are subject to verification by the District Director.

5. 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.

SO ORDERED.

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Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/amc
Newport News, Virginia