BRB No. 10-0483

LETICIA L. ESPERICUETA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 02/11/2011
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Joel S. Mills (Pitts & Mills), Houston, Texas, for claimant.

Jerry R. McKenney and Billy J. Frey (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-LDA-00008) of Administrative Law Judge Larry W. Price rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*., as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured her right leg on August 26, 2006, in the course of her employment in Afghanistan. Employer voluntarily commenced payment of temporary total disability benefits. A dispute arose over claimant's pre-injury average weekly wage and the case was referred to the Office of Administrative Law Judges for resolution of this issue.

After the parties agreed to a decision based on written submissions, the administrative law judge found that claimant began working in Afghanistan on June 14, 2006, under a one-year contract. During the 10.57 weeks claimant was employed, she earned a total of $16,468.13 under her employment contract. The administrative law judge found that the Board's decisions in *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009), and *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006), are controlling, and thus claimant's average weekly wage must be calculated based solely on her overseas earnings, rather than on some combination of her stateside and overseas earnings. The administrative law judge calculated that claimant's pre-injury average weekly wage is $1,558.01 pursuant to Section 10(c), 33 U.S.C. §910(c).

On appeal, employer contends that the Board's decision in *Simons* was incorrectly decided. Employer contends that the Board improperly required the application of claimant's overseas earnings in all cases under the Defense Base Act, which unduly restricts an administrative law judge's discretion to calculate average weekly wage pursuant to Section 10(c). Employer also contends that claimant was employed under a contract that was not to exceed one year and could be terminated at any time for any cause. Thus, employer contends that *Simons* is distinguishable from this case. Claimant responds, urging affirmance of the administrative law judge's decision.

Section 10(c), 33 U.S.C. §910(c), is to be used to calculate average weekly wage in instances when neither Section 10(a) nor (b), 33 U.S.C. §910(a), (b), can be reasonably or fairly applied to calculate claimant's average weekly wage, or where there is insufficient information for application of these subsections.[1] *See Louisiana Ins. Guar.*

[1]The parties agreed that subsections (a) and (b) are inapplicable in the instant case. *See Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006). Section 10(c) states:

> 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 of most similar employment in the same of neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981). The object of Section 10(c) is to arrive at a sum that reasonably represents claimant's annual earning capacity at the time of her injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *see also Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). This inquiry includes consideration of claimant's ability, willingness and opportunity to work and of the earnings claimant had the potential to earn had he not been injured. *See, e.g., Healy Tibbits Builders v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Jackson v. Potomac Temporaries*, 12 BRBS 410 (1980).

The Board has held that where, as here, claimant is injured while working overseas in a dangerous environment in return for higher wages under a long-term contract, her annual earning capacity should be calculated based solely upon the earnings in that job as they reflect the full amount of the earnings lost due to the injury. *Simons*, 43 BRBS 18; *Proffitt*, 40 BRBS 41. Specifically, the Board stated that when a "claimant is injured after being enticed to work in a dangerous environment in return for higher wages, it is disingenuous to suggest that [her] earning capacity should not be calculated based upon the full amount of the earnings lost due to the injury." *Simons*, 43 BRBS at 20. In its order on reconsideration *en banc* in *Simons*, the Board rejected the employer's contention that the Board's initial decision in *Simons* did not afford proper deference to the administrative law judge's broad discretion under Section 10(c). The Board stated that an administrative law judge's discretion is not unfettered and that his findings must be based on applicable law. *Simons*, 43 BRBS at 137. Thus, the Board concluded that the decision in *Simons* provides a legal framework within which the administrative law judge may exercise his discretion.[2] In addition, the Board rejected the employer's contention, reiterated here, that Section 10(c) mandates consideration of all of the wages earned by the claimant in the year prior to injury. *Id.*

In this case, the administrative law judge found that claimant had a one-year contract for employment in Afghanistan and that there is no indication that her employment would not have continued, absent cause for dismissal. Moreover, employer does not contend that claimant's duties as a security officer did not place her in any dangerous working conditions or that her wages were not based on the nature of this overseas work assignment. Therefore, for the reasons stated in the two *Simons* decisions, we affirm the administrative law judge's finding that claimant's average weekly wage must be based solely on the higher wages she was paid in her overseas employment as it best reflects her annual wage-earning capacity at the time of injury. As employer has

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33 U.S.C. §910(c).

[2]For example, the method of calculating the claimant's average weekly wage based on overseas wages is not controlled by any set formula pursuant to Section 10(c).

raised no other assignments of error, we affirm the administrative law judge's finding that claimant's pre-injury average weekly wage is $1,558.01.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge