BRB No. 10-0138

JAMES WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 03/29/2011
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2009-LDA-00271) of Administrative Law Judge C. Richard Avery 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, while working in Kuwait for employer on August 30, 2003, sustained numerous injuries, including fractures to his ribs, right tibia and fibula, left femur, and right hand, when the vehicle he was driving was in an accident. Following the accident, claimant was hospitalized first in Kuwait, then in Germany, and finally in Houston, Texas. Surgery was performed on claimant's left leg and a rod was inserted, but claimant's other fractures were allowed to heal naturally. Allegedly as a result of the rod insertion and subsequent removal of the femoral screw, claimant's left leg is 17 mm longer than his right leg, which causes claimant to walk with a limp. Claimant alleges that this awkward gait produced pain in his hips and right leg and foot which claimant seeks to relieve through surgery. Claimant testified that his treating physician, Dr. Lindsey, suggested correcting the condition by either lengthening claimant's right leg or by shortening the rod in his left leg. Employer voluntarily paid claimant temporary total disability benefits from August 31, 2003, to November 29, 2005, and permanent partial disability benefits thereafter until November 21, 2008, as well as medical benefits, but it refused to approve any additional surgery.

Claimant pursued additional benefits for injuries to his hips, right foot and right ankle, as well as for the surgical procedure recommended by Dr. Lindsey. Employer controverted the claim on the ground that claimant's hip and right foot injuries, and need for additional surgery, are not related to his August 30, 2003, work injury. Employer further argued that claimant's work-related injuries had reached maximum medical improvement.

In his decision, the administrative law judge found that claimant's hip pain and current right foot and right ankle injuries are related to his left leg discrepancy which occurred as a result of his August 30, 2003, work accident. He thus concluded that claimant's injuries are work-related. The administrative law judge found that claimant's condition has not yet reached maximum medical improvement, that claimant established an inability to return to his usual employment, and that employer established the availability of suitable alternate employment as of June 9, 2009. Calculating claimant's average weekly wage based only on his overseas earnings for employer, and his post-injury wage-earning capacity based on the suitable alternate employment position identified as a toll collector, the administrative law judge awarded claimant temporary total disability benefits from August 30, 2003, to June 9, 2009, and temporary partial disability benefits from June 9, 2009. Additionally, the administrative law judge found that claimant is entitled to reasonable and necessary medical benefits, including a surgical procedure to correct his leg length discrepancy.

On appeal, employer challenges the administrative law judge's findings that claimant's hip, right foot and right ankle injuries, as well as claimant's need for corrective leg surgery, are work-related. Employer also challenges the administrative law

judge's finding as to the date it established suitable alternate employment, as well as his calculation of claimant's average weekly wage and post-injury wage-earning capacity. Claimant responds, urging affirmance.

Causation

Employer contends the administrative law judge erred in finding that claimant's leg length discrepancy, hip, right foot and right ankle injuries are the natural result of his August 30, 2003, work injury.[1] Employer argues that no medical evidence establishes this connection and that the evidence from Drs. Sheth, Lindsey, and Kaldis indicates that claimant's problems with regard to these body parts relate to a 1988 non-work-related foot injury. Employer asserts that the only support for the administrative law judge's finding that claimant's leg length discrepancy, hip, right foot and right ankle injuries are related to his August 30, 2003, work accident is claimant's testimony. Employer maintains this testimony cannot be credited in light of record evidence that claimant's condition prior to the August 30, 2003, work accident was much worse than he stated and videos showing claimant engaged in activities he testified that he could not do.[2]

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[1]Employer also argues that claimant should be barred from recovering any benefits for his "secondary" hip pain because claimant did not provide employer with timely notice of, 33 U.S.C. §912(a), nor did he timely file a claim for benefits with regard to, that injury, 33 U.S.C. §913(a). A claimant need not file a new written notice under Section 12(a) or a new claim for purposes of Section 13 each time he develops an additional medical problem related to the work accident. *See generally Thompson v. Lockheed Shipbuilding & Construction Co*., 21 BRBS 94 (1988) (separate notice under Section 12 not required for a second condition which arises from the same work accident); *see also Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). Thus, claimant was not required to file a new written notice or new claim for his "secondary" hip pain since he alleged that it arose from the initial work accident. Additionally, the record contains sufficient evidence establishing that employer had sufficient notice that this issue would be raised at the formal hearing. EX 1; *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.7 (1982).

[2]Employer additionally maintains that, pursuant to the decision of the United States Court of Appeals for the Fifth Circuit in *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008), claimant is not entitled to the Section 20(a) presumption for his alleged secondary injuries of leg length discrepancy and hip pain. In this case, claimant is seeking benefits for injuries to his hips, right foot and right ankle. These injuries are, as alleged sequela of the initial work injuries, part of the actual claim for benefits made by claimant, unlike the claim presented by the claimant in

We reject employer's contentions. In addition to claimant's testimony that his leg length discrepancy occurred as a result of the femur surgery for the work injury, *see* EX 22, Dep. at 54, Dr. Barrash reported in December 2008 that after the femoral screw was removed the "left femur was 17 mm longer than the right femur when the left rod was removed." EX 18. In addition, Dr. Kaldis stated that claimant's prior right heel fracture was not the cause of the leg length discrepancy "subsequent to the Kuwait incident." EX 21, Dep. at 9. Dr. Kaldis stated that "according to the x-rays and the medical records, [claimant] had [a] discrepancy between his two thighbones and his two leg bones, the femur and the tibia," and that this difference accounted for the entire leg length discrepancy. EX 21, Dep. at 9-10. Dr. Kaldis, however, did not provide an opinion as to whether the femur surgery following the work accident could have caused the discrepancy. Thus, the medical report of Dr. Barrash, in addition to claimant's testimony, supports the administrative law judge's rational finding that claimant's leg length discrepancy occurred as a result of the left leg rod insertion following the work injury in August 2003.[3] *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944, 25 BRBS 78(CRT) (5th Cir. 1991).

Amerada Hess. Thus, the Section 20(a) presumption is applicable in establishing that these conditions are related to claimant's work for employer. *See, e.g., Seguro v. Universal Maritime Service*, 36 BRBS 28 (2002); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988). Moreover, the administrative law judge did not address these injuries in terms of the Section 20(a) presumption; his finding of a causal relationship is based on an overall weighing of the relevant evidence.

[3]Thus, contrary to employer's contentions, the administrative law judge's causation finding does not rest solely on claimant's testimony, even though the administrative law judge is entitled to rely on claimant's testimony. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge considered the videos offered by employer in addressing claimant's ability to return to work. Specifically, he found that the videos "make evident" that claimant is capable of some physical activities. Decision and Order at 19. Based on this, the administrative law judge rejected claimant's position that he was incapable of any work and thus found that employer established suitable alternate employment by virtue of the toll taker and dispatcher positions identified in the June 9, 2009, labor market survey.

The administrative law judge also rationally credited the opinions of Drs. Lindsey and Alladice which attributed claimant's right foot and ankle condition and bilateral hip pain to the consequences of his August 30, 2003, work injury over the contrary opinion of Dr. Kaldis.[4] EXs 6, 27. The administrative law judge found Dr. Kaldis's opinion, that claimant's altered gait, and right foot and ankle injuries, pre-existed claimant's work in Kuwait for employer, is entitled to diminished weight. The administrative law judge, within his discretion, relied on claimant's testimony that he did not have an altered gait until after the left leg rod insertion surgery which occurred as a direct result of the August 30, 2003, work accident.[5] In addition, Dr. Kaldis's testimony stated that the most common cause of hip pain following the left leg rod insertion surgery would be the hardware, when coupled with evidence that claimant underwent successive surgeries by Drs. Sheth and Lindsey to remove broken hardware, supports the administrative law judge's finding that claimant's left hip pain occurred as a result of the injuries claimant sustained in the August 30, 2003, work accident. The administrative law judge is entitled to weigh the evidence and to draw his own inferences and conclusions therefrom. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge rationally credited the opinions of Drs. Lindsey and Alladice over that of Dr. Kaldis. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's findings that claimant's leg length discrepancy, altered gait, and bilateral hip pain are related to his work accident and that the work accident aggravated his pre-existing right foot and ankle conditions.

[4]Specifically, Dr. Lindsey opined, on July 8, 2004, that claimant's old right calcaneus fracture "has been aggravated since he has had to put more weight on his right leg from his fracture on his left femur," EX 6, and Drs. Lindsey and Alladice respectively attributed claimant's left and right hip pain to the rod insertion and/or leg length difference which occurred as a consequence of the August 30, 2003, work accident. EXs 6, 27.

[5]The administrative law judge found that claimant's pre-deployment physical examination did not note an altered gait prior to the date of his work injury, EX 5, and moreover, that Dr. Barrash agreed that claimant's altered gait is due to the leg length discrepancy. EX 18.

Medical Benefits Relating to Leg Length Discrepancy

Employer contends that claimant's alleged need for surgery to correct his leg length discrepancy has not been prescribed by any physician and, thus, has not been shown to be necessary. Section 7(a) requires an employer to pay for all reasonable and necessary medical expenses arising from a work-related injury. 33 U.S.C. §907(a). A claimant establishes a *prima facie* case for compensable medical treatment where a physician indicates treatment is necessary for a work-related condition. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). In order for a medical expense to be assessed against employer, therefore, the expense must be both reasonable and necessary, and must be related to the work injury. *See Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402.

Our affirmance of the administrative law judge's finding that claimant's leg length discrepancy is related to his August 30, 2003, work accident satisfies the work-related element for establishing entitlement to medical benefits. Thus, we affirm the administrative law judge's finding that employer is generally liable for medical benefits relating to the hip and right foot and ankle pain caused by the leg length discrepancy. This case, however, raises the additional issue as to whether the surgical procedure in question is reasonable and necessary. As employer correctly states, there is no physician's opinion in the record recommending any surgical procedure to correct claimant's leg length discrepancy, only claimant's testimony that Dr. Lindsey stated surgery was necessary. On the present record, the administrative law judge cannot fully assess the reasonableness and necessity of any proposed procedure. Dr. Lindsey's general statement from 2005 that claimant would need additional surgeries in the future is too vague to assist the administrative law judge in determining whether a procedure to correct claimant's leg length discrepancy is reasonable and necessary.[6] As claimant bears the burden to establish that any surgical procedure is reasonable and necessary to treat his work-related condition, and as, in this case, there has been no specific recommendation by a physician as to claimant's need for such a procedure, we vacate the administrative law judge's finding that employer is liable for a surgical procedure to correct claimant's leg length discrepancy.[7]

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[6]Dr. Kaldis further indicated that a surgical procedure is probably not going to change anything with regard to claimant's orthotic problem and resulting pain. EX 21, Dep. at 33-34.

[7]On remand, the administrative law judge may elect to reopen the record to obtain additional evidence from the parties regarding any proposed surgical procedures and he should reconsider this issue in the event that new evidence is offered.

Maximum Medical Improvement

Employer contends that the administrative law judge's finding that claimant has not yet reached maximum medical improvement with regard to his work-related injuries cannot be affirmed as it is based solely on claimant's subjective testimony that he does not think he has reached permanency. Employer asserts, based on the impairment ratings issued by Drs. Kaldis and Lindsey,[8] that the administrative law judge should have found that claimant reached maximum medical improvement with regard to his work injuries as of July 25, 2006.

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). While an administrative law judge may rely on a physician's opinion to establish the date of maximum medical improvement, a specific statement regarding maximum improvement is not required; rather, the administrative law judge may use the date a doctor assigned claimant an impairment rating or permanent restrictions as such evidence may be sufficient to determine permanency. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 171, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212, 222 (1994) (Smith, J., dissenting on other grounds), *rev'd on other grounds sub nom. Sketoe v. Exxon Co., USA*, 188 F.3d 596, 33 BRBS 151(CRT) (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000). If a physician believes that further treatment is necessary, then a possibility of improvement may exist and, even if in retrospect the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). If surgery is anticipated, maximum medical improvement has not been reached. *Monta v. Navy Exchange Service Command*, 39 BRBS 104, 109 (2005). If, however, surgery is not anticipated or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. *Id.; McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9, 12-13 (2006); *see also Bunge Corp. v. Carlisle*, 227 F.3d 934,

[8]Dr. Kaldis's assessment included permanent restrictions of no kneeling, climbing, or running, while Dr. Lindsey indicated that claimant is limited from performing work involving lifting more than 25 pounds and that he would not be able to perform any work involving bending/stooping, pushing, pulling, squatting, kneeling, or climbing. EX 23. Dr. Lindsey added that these restrictions would apply until further testing is done.

34 BRBS 79(CRT) (7th Cir. 2000). Treatment that may temporarily improve claimant's symptoms does not preclude an earlier date of maximum medical improvement. *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

In finding that claimant has not yet reached maximum medical improvement with regard to his work-related injuries, the administrative law judge observed that Dr. Kaldis was the only physician to address the nature of claimant's disability. The administrative law judge accorded diminished weight to the July 15, 2006, date set by Dr. Kaldis since he stated he based this finding on a review of claimant's medical record and not his own physical examination of claimant. The administrative law judge instead relied on Dr. Lindsey's statement in 2005 that further surgery would be necessary to treat claimant's injuries to find that claimant had not yet reached maximum medical improvement. Decision and Order at 17.

The record in this case could support a finding that claimant's condition has continued for a lengthy period and appears to be of a lasting or indefinite duration. Claimant's last surgery occurred in 2005 (right tarsal tunnel release performed by Dr. Lindsey), and claimant's treatment of his conditions at this juncture consists of his taking prescription medications, as administered by Dr. Alladice, and orthotics to alleviate his pain. EX 27. Moreover, as noted above, there is no evidence that claimant is to undergo surgery to correct his leg length discrepancy and claimant has been given permanent restrictions. As the administrative law judge did not address the medical evidence in the context of the *Watson* test for permanency, we vacate his finding that claimant has not yet reached maximum medical improvement and we remand the case for reconsideration of this issue consistent with law. *See Methe*, 396 F.3d 601, 38 BRBS 99(CRT); *McCaskie*, 34 BRBS 9; *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS at 120 (1988).

Suitable Alternate Employment

Employer challenges the administrative law judge's finding that it did not establish suitable alternate employment prior to June 9, 2009. Employer maintains that the administrative law judge erroneously rejected ten jobs identified in labor market surveys dated December 2, 2005, and January 16, 2005, because they lacked information on the physical demands of those positions. Employer also argues that the record demonstrates that claimant did not undertake a diligent job search.

Where, as in this case, claimant has demonstrated his inability to perform his usual employment duties with employer, the burden shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1991); *see also Avondale Shipyards, Inc.*

v. Guidry, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). In order to meet this burden, employer must establish that job opportunities are available within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). As the fact-finder, the administrative law judge must compare claimant's restrictions to the physical requirements of the jobs relied upon by employer in order to determine their suitability for claimant. *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998).

The administrative law judge addressed each of the employment positions identified by employer. His findings that the labor market surveys dated December 2, 2005, and January 16, 2006,[9] did not provide sufficient information regarding the physical requirements of the identified jobs, and that five of the positions identified in the June 9, 2009, labor market survey required work beyond those restrictions,[10] are rational and supported by substantial evidence. We therefore affirm the administrative law judge's determination that employer did not demonstrate the availability of suitable alternate employment that claimant could realistically secure until it presented the toll

[9]In this regard, we note that while Mr. Hulett's December 2, 2005, labor market survey includes general descriptions, based on the Dictionary of Occupational Titles, as to the physical requirements of positions as a procurement clerk and an assembly stock supervisor, none of the ten jobs identified in that survey corresponds to those two positions, as the survey lists positions as a warehouse supervisor or manager (five jobs), a material coordinator (one job), assembly worker (three jobs) and a procurement/ production supervisor (one job). Similarly, none of the positions identified in Mr. Stanfill's January 16, 2006, labor market survey includes a description of what the work entails or the physical requirements of those jobs.

[10]As for the June 9, 2009, labor market survey, the administrative law judge rationally found that the gate tender and security guard positions were not suitable because they would require claimant to act quickly in an emergency, and thus, would violate his restriction of no running. Additionally, the administrative law judge found that three other jobs are unsuitable because they would require claimant to restock supplies and inventory which would likely call for him to perform physical movements restricted by Drs. Kaldis and Lindsey, *i.e.*, kneel, squat, and/or climb.

taker and dispatcher positions in the June 9, 2009, labor market survey.[11] *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Fortier v. Electric Boat Corp.,* 38 BRBS 75 (2004).

Wage-Earning Capacity

Employer contends that the administrative law judge erred in calculating claimant's wage-earning capacity by ignoring higher paying positions and instead focusing solely upon the lower-paying positions identified in the June 9, 2009, labor market survey. Employer thus contends that the administrative law judge's calculation of claimant's wage-earning capacity at $480 per week is in error. Moreover, employer argues that the administrative law judge's reduction in claimant's residual wage-earning capacity from $480 to $398.40 based on the percentage changes in the national average weekly wage since 2003 is unsupported by law and fact.

The administrative law judge found that claimant's wage-earning capacity is to be calculated by wages paid by the toll collector position. He thus multiplied the hourly rate of pay for that position, $12, by 40 hours to arrive at a wage-earning capacity of $480. In determining the compensation rate for payment of claimant's partial disability benefits, the administrative law judge found that claimant's post-injury wage-earning capacity of $480 per week is subject to a downward adjustment for inflation based on the percentage changes in the National Average Weekly Wage (NAWW) from 2003 to 2009. Accordingly, he reduced the $480 per week figure to $398.40. Contrary to employer's contention, the administrative law judge did not ignore the higher paying positions but rather found that they are not suitable given claimant's post-injury physical restrictions. He was therefore not required to consider the wages paid in these positions to calculate claimant's wage-earning capacity. *See generally Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). Additionally, in order to neutralize the effects of inflation, the administrative law judge must adjust post-injury wage levels to the level paid at the time of injury. *See generally Sestich v. Long Beach Container Terminal,* 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Johnston v. Director, OWCP,* 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). In this case, the administrative law judge properly applied the percentage change in the NAWW to adjust

[11] As employer did not establish the availability of suitable alternate employment in 2005-2006, claimant's diligence with respect to those jobs need not be considered. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Piunti v. ITO Corp. of Baltimore*, 23 BRBS 367 (1990); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

the post-injury wage rate downward in order to account for inflation. *See Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996). As it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that claimant's post-injury wage-earning capacity is, after accounting for inflation, $398.40.

Average Weekly Wage

Employer also argues that the administrative law judge erred in calculating claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c), by relying exclusively on claimant's overseas earnings without having first considered the factors outlined by the Board in *K.S.* [*Simons*] *v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009). Employer specifically argues that there is no evidence that claimant was "enticed to work in a dangerous environment in return for higher wages," as required by the Board's decision in *Simons*, such that a full analysis of claimant's earnings over the 52-week period prior to his injury represents the most appropriate means for calculating claimant's average weekly wage under Section 10(c).

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. *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). 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 calculated based 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 v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006).

The administrative law judge found that claimant's seven-day a week work for employer precluded the calculation of claimant's average weekly wage under Sections 10(a) and 10(b), and thus, required that the calculation be performed pursuant to Section 10(c). Citing the Board's *Simons* decision, the administrative law judge stated that "[w]hen Section 10(c) is used in a Defense Base Act case, the calculation must be based solely on the claimant's overseas earnings." Decision and Order at 20. "Taking into account the mandate of [*Simons*]," the administrative law judge divided claimant's overseas earnings for employer, $24,886.09, by the number of weeks that he performed this work, 14 weeks and 1 day, to arrive at an average weekly wage of $1,759.60. *Id.* The administrative law judge did not explicitly consider whether the facts in this case establish the requisite factors for exclusive use of claimant's overseas earnings to calculate his average weekly wage under Section 10(c). We therefore vacate the administrative law judge's calculation of claimant's average weekly wage and remand

the case for specific findings as to whether the facts in this case fall within the parameters for the exclusive use of overseas earnings as set out in *Simons*.

Accordingly, the administrative law judge's findings with regard to maximum medical improvement, claimant's entitlement to medical benefits relating to a surgical procedure to correct his leg length discrepancy, and average weekly wage are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge