BRB No. 09-0799

ORVILLE WILKERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EG & G/LEAR SIEGLER SERVICES, INCORPORATED	)	DATE ISSUED: 05/18/2010
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/ WORLDSOURCE	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

George J. Wall, Portland, Oregon, for claimant.

Christopher M. Galichon (Galichon & Macinnes, APLC), San Diego, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2007-LDA-360) of Administrative Law Judge Gerald M. Etchingham 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On January 28, 2006, claimant commenced employment for employer as a vehicle mechanic and welder in Iraq, where he worked seven days a week, 12 hours per day, pursuant to a one-year contract.[1] On February 18, 2006, claimant reported to employer's clinic that, on the previous evening, he had been knocked to the ground during a mortar attack on employer's camp. On April 14, 2006, claimant sustained a work-related injury to his back while using a wrench to loosen a bolt; following this incident, claimant was prescribed pain medication, bed rest, and placed on light duty. When claimant did not improve within two weeks, he was returned to the United States, whereupon he commenced treatment with Dr. Noonan, an orthopedic specialist, on May 4, 2006. Claimant subsequently reported that he was feeling better, and Dr. Noonan released claimant to return to work on May 15, 2006. Claimant returned to Iraq where, on May 30, 2006, his back symptoms returned when he reached down to pick up a part. Claimant was returned to the United States where he commenced treatment and was prescribed multiple medications, including narcotics, for lumbar back and leg pain. He was also treated for depression and other mental health symptoms which allegedly arose as a result of his employment with employer.

In his Decision and Order, the administrative law judge determined that claimant sustained work-related injuries to his back while working for employer in Iraq and that he established that he presently suffers from a somatoform pain disorder and clinical depression. The administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, that employer established rebuttal of that presumption, and that the preponderance of the evidence established that claimant's present psychological conditions are, at least in part, related to his employment with employer. Next, the administrative law judge found that claimant's condition has not reached maximum medical improvement, that claimant is unable to resume his usual employment duties with employer, and that employer did not establish the availability of suitable alternate employment. Accordingly, after calculating claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c), the administrative law judge awarded claimant temporary total disability commencing April 27, 2006, and continuing, as well as medical benefits. 33 U.S.C. §§908(b), 907.

On appeal, employer argues that the administrative law judge erred in finding that claimant's present psychological condition is related to his employment. Employer additionally challenges the administrative law judge's findings regarding the nature and

[1] Claimant served in the United States Army from 1985 through 1993, and was stationed in Iraq during Operation Desert Storm. Claimant, who was honorably discharged, received treatment from the Veterans Administration for anxiety and other symptoms of post-traumatic stress disorder prior to commencing employment with employer.

extent of claimant's work-related disability and the calculation of claimant's average weekly wage. Claimant, responds, urging affirmance of the administrative law judge's decision.

CAUSATION

In order to establish a *prima facie* case, claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). Where, as in the instant case, claimant has established invocation of the Section 20(a) presumption, *see Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1998), and employer has rebutted the presumption with substantial evidence, *see Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore,* 216 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries,* 512 U.S. 257, 28 BRBS 43(CRT) (1994); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

Employer initially argues that the administrative law judge erred by invoking the "true doubt rule" when he stated that, once rebuttal of the Section 20(a) presumption had been established, employer bore the ultimate burden of persuasion that claimant's medical conditions are not work-related. *See* Decision and Order at 27. We agree with employer that the administrative law judge misstated the law on this point, since the principle that all doubtful issues of fact must be resolved in claimant's favor was specifically invalidated by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994). We reject employer's assertion, however, that this misstatement requires reversal of the administrative law judge's decision and remand of the case for further consideration, since a review of the administrative law judge's thirty-three page decision reveals that he did not actually apply the "true doubt rule" to the facts of this case. Rather, the administrative law judge set forth and addressed at length the testimony of claimant and the multiple physicians who rendered opinions regarding claimant's present medical conditions, *see* Decision and Order at 3 – 18, discussed the credibility of this testimony, *id.* at 18 – 25, and ultimately weighed the evidence when addressing the relevant issues disputed by the parties. *Id.* at 25 – 32. Accordingly, the administrative law judge's inclusion of a statement regarding the superceded "true doubt rule" in his decision constitutes harmless error.

Employer next assigns error to the administrative law judge's decision to rely upon the testimony of Dr. Turco over that of its experts, Drs. Davies and Glass, in determining that claimant established causation on the record as a whole.[2] Specifically, employer contends that Dr. Turco's opinion is based upon questionable methodology and an unbelievable evaluation of claimant,[3] while the opinions of Drs. Davies and Glass are based upon an accurate evaluation of claimant. Dr. Turco, a Board-certified psychiatrist, diagnosed claimant with a somatoform pain disorder and a major depressive disorder which he found to be causally related to claimant's employment with employer. *See* CX 28 at 455 – 456, 488 – 489. Dr. Davies, a clinical psychologist, diagnosed claimant with major depression, somatoform symptoms, and a psychological dependence on prescription narcotics. *See* EX 2 at 25. Dr. Davies opined that while the record was insufficient to accurately isolate the psychological conflicts resulting in claimant's somatoform disorder and the possibility existed that claimant's psychological

[2] Employer asserts that as none of these physicians treated claimant, the administrative law judge should have accorded claimant's treatment records from the Veterans' Administration (VA) determinative weight pursuant to *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144 (9th Cir.), *cert. denied*, 528 U.S. 809 (1999). Employer contends that since claimant was treated by the VA from 1990 through at least September 13, 2005, and those records establish that claimant suffers from post-traumatic stress disorder resulting from his service in the first Gulf War, application of the "Amos presumption" should result in the denial of the claim. *See* Employer's br. at 20 – 22. We reject this argument. Claimant does not seek benefits in this case for post-traumatic stress disorder; rather, he asserted entitlement based on a somatoform pain disorder and clinical depression, and the administrative law judge's findings are based on these conditions. Moreover, in light of the aggravation rule, the mere existence of a pre-existing condition does not affect a finding that a current condition is work-related. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, __ BRBS __(4th Cir. 2009). Lastly, there is no "Amos presumption" with regard to weighing contrary evidence. While *Amos* allows an administrative law judge to give special weight to a treating physician's opinion, *see Monta v Navy Exchange Service Command*, 39 BRBS 101 (2005), he is not required to do so where there is contrary probative evidence in the record. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Rather, as the fact-finder, the administrative law judge is entitled to determine the weight accorded to the medical evidence of record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003).

[3] Specifically, employer challenges the amount of information obtained from claimant by Dr. Turco during Dr. Turco's evaluation of claimant.

conditions could have been aggravated by his employment with employer in Iraq, it was his opinion that such an aggravation did not occur. *See id.* at 26; Tr. at 151 – 152. Dr. Glass, a Board-certified psychiatrist, found claimant to be suffering from a somatoform pain disorder and a dependence on narcotic medications, and stated that while claimant exhibited a number of features of depression he would not diagnosis claimant's condition as one of a major depressive disorder. *See* Tr. at 179 – 180, 199 – 200. Dr. Glass concluded that claimant did not demonstrate a psychiatric disorder or disability caused or worsened by his employment with employer in Iraq. *See* EX 28 at 393 - 394. Lastly, Dr. Glass opined that claimant's dependence on narcotic pain medication is likely a significant factor in maintaining his chronic subjective pain complaints, disability, and failure to improve. *Id*. at 394.

In his decision, the administrative law judge weighed the evidence of record and, relying on Dr. Turco's opinion and the chronological progression of claimant's symptoms, found that a preponderance of the evidence supports a finding of a causal relationship between claimant's employment in Iraq and his present medical conditions; specifically, the administrative law judge found that claimant's diagnosed somatoform pain disorder and clinical depression were, at a minimum, aggravated by his employment with employer. Decision and Order at 23, 27. In arriving at this conclusion, the administrative law judge found that claimant had a fairly stable work history prior to his work-injury, that claimant sustained a work-related physical injury to his back, that he presently experiences somatic pain that mimics the back pain that resulted from the work-injury, and that this pain was not present prior to claimant's work-injury. Additionally, the administrative law judge concluded that claimant is affected by the pain medication that he was initially prescribed as a result of his work-related back injury and that he continues to take for the pain that he continues to experience. *Id.*

We reject employer's assertion that the administrative law judge committed reversible error when he declined to rely upon the opinions of employer's witnesses. The administrative law judge did not err in finding Dr. Turco's opinion most credible based on the changes in claimant since his work-related injury and his somatic pain. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The weight to be accorded to the evidence of record is for the administrative law judge as the trier-of-fact, and the Board must respect his rational evaluation of the evidence. C*albeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Furthermore, it is solely within the administrative law judge's discretion to accept or reject all or any part of any evidence according to his judgment. *Perini Corp. v. Hyde*, 306 F.Supp. 1321 (D.R.I.. 1969). As the administrative law judge fully considered the evidence on this issue and provided a rational explanation for his findings, which are

supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant psychological problems are related to his employment with employer in Iraq.

MAXIMUM MEDICAL IMPROVEMENT

Employer contends that the administrative law judge erred in failing to find that claimant reached maximum medical improvement. Claimant is entitled to temporary disability benefits until he reaches maximum medical improvement, the date of which is determined by medical evidence. *See generally Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to 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*, 349 U.S. 976 (1969); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005). Moreover, a claimant may be found to have reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

Employer asserts that as claimant has experienced psychological symptoms since his service in the first Gulf War, a period of approximately nineteen years, claimant's condition must be considered permanent in nature. We disagree. Following his military service, claimant was diagnosed by the Veterans' Administration with a psychological condition, specifically post-traumatic stress disorder. Nonetheless, he returned to work for employer in 2006. It was not until after the work-injury that is the subject of this claim that claimant was diagnosed with a somatoform pain disorder and depression. In concluding that claimant has not yet reached maximum medical improvement, the administrative law judge found that Drs. Glass and Davies opined that claimant's present condition would improve upon the discontinuation of his medications, while Dr. Turco recommended that claimant undergo treatment including hospitalization. Decision and Order at 23 – 24. Additionally, the administrative law judge found that Dr. Hughley's reports indicated that therapy was helping claimant, but that employer subsequently discontinued funding claimant's medical treatment. *Id.* at 24. The testimony of these physicians supports the administrative law judge's conclusion that claimant was in need of additional medical treatment with a view to improving his condition. Substantial evidence thus supports the administrative law judge's finding that claimant has not reached maximum medical improvement. *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT). We therefore affirm the administrative law judge's finding on this issue. *See generally Leone v. Sealand Terminals Corp.*, 19 BRBS 100 (1986).

EXTENT OF CLAIMANT'S DISABILITY

Employer next challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment; specifically, employer contends that the administrative law judge erred in failing to rely upon the work restrictions placed on claimant by Drs. Davies and Glass when he addressed this issue. Where, as in the instant case, claimant has established a *prima facie* case of total disability by demonstrating his inability to return to his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must establish the existence of realistically available job opportunities 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. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82 (CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

Employer has failed to demonstrate error in the administrative law judge's determination that claimant remains temporarily totally disabled. In determining claimant's present restrictions, the administrative law judge found that claimant's ongoing somatoform pain disorder and use of prescription pain medications limits claimant to employment that is physically sedentary and cognitively undemanding; specifically, the administrative law judge concluded that claimant is limited to simple and repetitive tasks with no social contact. Decision and Order at 28. This finding is supported by the credited restrictions of Drs. Weller and Turco. While employer on appeal urges reliance upon the opinions of Drs. Davies and Glass in determining claimant's present work restrictions, we cannot reweigh the evidence. Moreover, each of these physicians opined that claimant's ongoing use of narcotic pain medication hinders his ability to work.[4] When asked whether claimant is capable of employment, Dr. Davies stated that

> I believe that [claimant's] capable of working if his medications are reduced. I think that he's capable of working not very well right now, because he has attention problems and some memory problems. . .

[4] Claimant, over the course of his treatment, has been prescribed medications including Cymbalta, Clonazepam, Gemfibrozil, Quetiapine, morphine, Vicodin, Naprosyn, Venafaxine, Mirtazapine, and Flexeril. EX 2 at 21; EX 28 at 380.

Tr. at 118. Dr. Glass, after acknowledging the numerous medications prescribed to claimant, opined that

> From a psychiatric standpoint, Mr. Wilkerson is able to pursue any occupation he chooses and is otherwise competent/qualified to perform. That said, he is using narcotics and addicting benzodiazepine tranquilizers; these agents can interfere with cognition, attention, learning, coordination and judgment and can represent safety risk factors with certain occupations. In addition he is using a other psychoactive drugs – an antipsychotic and two antidepressants – which would add to sedation, etc.

EX 28 at 393.

The administrative law judge accepted Dr. Weller's restriction of claimant to work that is not physically demanding and relied on Dr. Turco in finding that the work must also be cognitively undemanding. Dr. Turco opined that claimant is presently incapable of working; specifically, Dr. Turco testified that he found claimant to be highly distracted due to a combination of his pain and medication, suicidally depressed, and consequently in need of intensive psychiatric treatment. CX 28 at 459; CX 31 at 528 – 531. On this record, the administrative law judge reasonably concluded that claimant is not capable of complex or varied tasks. The credited evidence supports the administrative law judge's conclusion that claimant has significant restrictions and employer does not assert on appeal that it has established the availability of suitable alternate employment within these restrictions. We therefore affirm the administrative law judge's award of ongoing total disability benefits to claimant. *See Beumer*, 39 BRBS 98; *Wilson*, 30 BRBS 199; *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

AVERAGE WEEKLY WAGE

Employer initially contends that the administrative law judge erred in applying Section 10(c), 33 U.S.C. §910(c), rather than Section 10(a), 33 U.S.C. §910(a), of the Act to calculate claimant's average weekly wage at the time of his injury.[5] We reject this argument.

[5] While employer stipulated below to the use of Section 10(c) to calculate claimant's average weekly wage, *see* Tr. at 14 – 15, its post-hearing brief asserted that the evidence supports the use of either Section 10(a) or Section 10(c) for this calculation. Employer's post-hearing br. at 18. On appeal, employer concedes that the wage information contained in the record may not be suitable for the calculation required by Section 10(a). *See* Employer's br. at 29.

The introduction to Section 10 of the Act provides: "Except as otherwise provided in this chapter, the average weekly wage of the injured employee at *the time of his injury* shall be taken as the basis upon which to compute compensation . . . ." 33 U.S.C. §910 (emphasis added). Thereafter, Section 10 sets forth three alternative methods for determining claimant's average weekly wage. Section 10(a) of the Act, 33 U.S.C. §910(a), looks to the actual wages of the injured worker who is employed for substantially the whole of the year prior to the injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. 33 U.S.C. §910(a); *Gilliam v. Addison Crane Co.,* 21 BRBS 91 (1988). This average daily wage is then multiplied by 260 if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catchall provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[6] *See Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 48(CRT) (9th Cir. 1998); *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988).

In his decision, the administrative law judge considered and rejected employer's contention that Section 10(a) of the Act applies in calculating claimant's average weekly wage. Specifically, the administrative law judge determined that Section 10(a) was inapplicable since claimant's previous work as a welder in the United States prior to his employment in Iraq differed in duties, living conditions and hazards when compared to the work that claimant performed at the time of his injury while employed in Iraq. Moreover, the administrative law judge found that claimant worked seven days a week while in Iraq, while Section 10(a) addresses "five-day" and "six-day" workers. The administrative law judge consequently concluded that Section 10(a) could not be applied on the facts of this case, and he determined that Section 10(c) was the appropriate subsection to calculate claimant's average weekly wage. Decision and Order at 30. No party challenges the administrative law judge finding that claimant, while employed in Iraq, worked seven days a week. *Id.* at 30; *see* Tr. at 28. Thus, pursuant to this undisputed fact, Section 10(a) is inapplicable since claimant was not a five- or six-day per week worker. We therefore affirm the administrative law judge's decision to utilize Section 10(c), rather than Section 10(a), in his average weekly wage calculation.

Employer alternatively asserts that a proper calculation under Section 10(c) results in an average weekly wage lower than that arrived at by the administrative law judge. Employer contends that the administrative law judge erred in utilizing only claimant's actual earnings at the time of his injury in determining claimant's average weekly wage;

[6] No party contends that Section 10(b) should be applied in the instant case.

rather, employer avers that a blended approach in the instant case is both permissible and appropriate for the calculation of claimant's average weekly wage.[7]

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, 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. *K.S. [Simons] v. Service Employees International, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009). Section 10(c) directs the administrative law judge to determine claimant's annual earning capacity "having regard to the previous earnings of the injured employee in the employment in which he was injured." The goal of Section 10(c) in this regard is a sum that reflects the potential of claimant to earn absent injury. *See Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). Average weekly wage calculations based solely on a claimant's new, higher wages have been affirmed where they reflect the potential to earn at that level. *Healy Tibbitts Builders, Inc.*, 444 F.3d 1095, 40 BRBS 13(CRT); *Bonner*, 600 F.2d 1288; *see also Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981).

The administrative law judge considered and rejected employer's contention that claimant's state-side earnings must be utilized in conjunction with claimant's earnings while employed in Iraq when calculating claimant's average weekly wage. The administrative law judge found that the facts in this case are analogous to those in *Simons*, 43 BRBS 18, in all relevant aspects. Decision and Order at 31. Accordingly, the administrative law judge calculated claimant's average weekly wage based on his earnings in Iraq during the 14 weeks prior to his injury.[8]

[7] Employer concedes that its argument on this issue is inconsistent with the Board's decision in *K.S. [Simons] v. Service Employees International, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009).

[8] The administrative law judge calculated claimant's average weekly wage of $1,585.77 by dividing his total earnings in Iraq, $22,200.84, by the 14 weeks worked. While this figure should technically be extrapolated over the entire year by multiplying it by 52 to achieve an annual earnings figure to be divided by 52 under Section 10(d), this step is unnecessary as the same result is achieved. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

We affirm the administrative law judge's finding that claimant's average weekly wage is properly based exclusively on the wages earned in his overseas work for employer as it is supported by substantial evidence and is consistent with our decision in *Simons.* The higher wages were a primary reason for claimant's accepting employment under the dangerous working conditions existing in Iraq, and claimant's employment was to be full-time on a one-year contract. To compensate claimant for his injury at a lesser rate than that paid by the job in which he was injured would distort his earning capacity by reducing it to a lower level than employer agreed to pay claimant to work under the conditions in Iraq. *Simons,* 43 BRBS 18. We therefore affirm the administrative law judge's rational finding that claimant's compensation is to be based on an average weekly wage of $1,585.77. *Id.*; *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986).

Lastly, employer asserts that it is entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). As we have affirmed the administrative law judge's determination that claimant's disability is presently temporary in nature, we need not address employer's arguments on this issue.

Accordingly, 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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge