BRB No. 10-0327

MICHEL SCHBOT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
L-3 COMMUNICATIONS	)	DATE ISSUED: 09/30/2010
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Denial of Motion to Reconsider & Errata Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order and the Denial of Motion to Reconsider & Errata Order (2009-LDA-00046) of Administrative Law Judge Daniel F. Solomon 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 worked as an interpreter in Fallujah, Iraq. He was injured on January 22, 2007, when he slipped on gravel and fell backwards against some pallets. Claimant testified that he reported the injury to his manager the next morning and was seen by a nurse. On the following day, claimant was sent on a week-long mission, which required extensive walking on uneven terrain while wearing 35-pound body armor and carrying a 15-pound backpack. After returning from the mission, claimant continued to suffer from pain in his back, legs, shoulder and hip. In Fallujah, he underwent treatment by a doctor who prescribed pain killers and muscle relaxers. Claimant continued to work, translating documents and assisting in the questioning of captured insurgents in the Fallujah jail, and he went on a second patrol mission. A physician subsequently restricted his participation in these missions, but claimant continued to work in the jail until he was sent to Baghdad for treatment. In Baghdad, claimant was seen by an Army physician, who x-rayed claimant's back. After two weeks in Baghdad, claimant was repatriated to the United States for treatment. The reviewing physicians accorded with the decision of his treating physician to restrict claimant's return to duty in Iraq due to his ongoing back pain. Claimant sought permanent disability benefits under the Act.

In his decision, the administrative law judge found that claimant had established invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), that he had sustained a work-related back injury in Fallujah, and that employer had not rebutted the presumption. The administrative law judge found that claimant reached maximum medical improvement on August 27, 2008, and that he is not able to return to his former duties in Iraq. However, the administrative law judge found that employer established the availability of suitable alternate employment with a labor market survey dated August 25, 2008. In determining claimant's average weekly wage, the administrative law judge found that Section 10(c), 33 U.S.C. §910(c), is applicable and that there is no evidence that claimant would not have fulfilled his obligation under the employment contract with employer absent his injury. Thus, the administrative law judge concluded that even though claimant worked only a short time overseas before being injured, his average weekly wage should be determined by considering exclusively the totality of his earnings overseas. Accordingly, the administrative law judge divided claimant's 2007 earnings with employer, $32,730.44, by the number of weeks he was paid, 15, to determine that claimant's average weekly wage was $2,182.03. The administrative law judge found that claimant retains a post-injury wage-earning capacity of $576.92 per week, based on the lowest salary for the jobs that constitute suitable alternate employment. Thus, the administrative law judge awarded claimant temporary total disability benefits from March 23, 2007 to August 24, 2008, temporary partial disability benefits on August 25-

26, 2008, and ongoing permanent partial disability benefits from August 27, 2008. 33 U.S.C. §908(b), (c)(21), (e).

In his Denial of Motion to Reconsider & Errata Order, the administrative law judge rejected employer's contention that he erred in using only claimant's earnings in Iraq to compute his average weekly wage, noting that the Board's decisions in *Proffit v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006), and *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009), are controlling precedent. The administrative law judge rejected employer's contention that it was improper to use any wages claimant earned after the January 22, 2007, date of injury to calculate average weekly wage. The administrative law judge found that the use of all of claimant's wages were relevant to claimant's annual earning capacity at the time of injury.

On appeal, employer contends the administrative law judge erred in not relying on claimant's wages for the 52 weeks prior to his injury to determine his average weekly wage under Section 10(c). Alternatively, employer contends the administrative law judge erred in relying on the wages claimant earned after the date of injury, contending that claimant's overseas wages for the 16 days prior to the accident yield an average weekly wage of $1,671.89. With regard to claimant's residual wage-earning capacity, employer contends that the administrative law judge erred in using the lowest wages of the positions identified as suitable alternate employment to determine claimant's post-injury wage-earning capacity, and that the administrative law judge should have relied in his calculation on the wages of the interpreter position, which had the highest salary, because there is no evidence that claimant diligently sought that specific position. Claimant responds, urging affirmance of the administrative law judge's decisions. Employer has submitted a reply brief.

Employer contends the administrative law judge erred in calculating claimant's average weekly wage. Section 10(c) is to be used in instances when neither Section 10(a) nor (b) can be reasonably and fairly applied to calculate claimant's average weekly wage, or where there is insufficient information for application of these subsections.[1] *See*

[1] The parties do not contest the administrative law judge's finding 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

Louisiana Ins. Guar. 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 his injury. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). This inquiry includes consideration of claimant's ability, willingness and opportunity to work and the earnings claimant had the potential to earn had he not been injured. *See 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 administrative law judge properly rejected employer's contention that the Board's decisions in *Proffit*, 40 BRBS 41, and *Simons*, 43 BRBS 18, are not applicable. The Board held in those cases 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. *Simons*, 43 BRBS at 21; *Proffit*, 40 BRBS at 45. It is irrelevant that claimant was an "at will" employee, as the administrative law judge found he had a one-year contract for employment in Iraq and there is no indication that his employment would not have continued after that year, absent cause for dismissal.[2] Emp. Ex. 4. Thus, we affirm the administrative law judge's use of claimant's wages during his employment in Iraq, without regard for any wages claimant earned in other employment prior to his deployment, as it is in accordance with law. *Simons*, 43 BRBS at 20; *Proffit*, 40 BRBS at 45.

Employer also contends that the administrative law judge erred in, effectively, using the date of onset of disability to determine claimant's average weekly wage rather than the date of injury. Claimant's injury occurred on January 22, 2007, but the administrative law judge included in the average weekly wage calculation all of

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> 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.

33 U.S.C. §910(c).

[2] Moreover, contrary to employer's contention that claimant was not placed in any dangerous working conditions, it is undisputed that claimant's duties included participation in the patrols of a Marine squad in Fallujah and translating the interrogations of potential insurgents. *See* Emp. Ex. 17 at 36-37

claimant's earnings with employer through the date claimant stopped working in March 2007. The administrative law judge accepted the parties' stipulation that claimant was injured on January 22, 2007. The administrative law judge stated that claimant continued working after his injury despite his complaints of pain and possibly aggravated his condition. He found that claimant did not suffer a loss of wages until March 2007, and he therefore concluded that all of claimant's earnings with employer should be the basis of his average weekly wage. Decision and Order at 25-26.

On reconsideration, employer contended that the administrative law judge erred in using claimant's post-injury wages to calculate average weekly wage. The administrative law judge rejected the contention that the Fifth Circuit's decision in *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 31 BRBS 195(CRT) (5th Cir. 1997) mandates the conclusion that only claimant's pre-injury wages can be used to calculate average weekly wage. The administrative law judge observed that in *LeBlanc*, the claimant was injured in 1987, when he was earning $92.87 per week, and he had missed a few months of work. The claimant then continued working until 1992, at which point he was earning an average weekly wage of $439.65. The Fifth Circuit held that the date of manifestation of the disability in 1992 was not the "time of injury" for average weekly wage purposes in a traumatic injury case. *Id.* The administrative law judge found *LeBlanc* distinguishable as that claimant's wages five years after the injury were not reflective of his earning capacity at the time of injury, whereas, in this case, the administrative law judge found that claimant's wages in the two months following the injury were generally consistent with his earnings at the time of injury. The administrative law judge further found that calculating an average weekly wage using all of claimant's wages with employer best demonstrates the earning capacity claimant lost because of his injury.

We reject employer's contention that the administrative law judge committed reversible error in this regard. Pursuant to Section 10(c), the administrative law judge has the discretion, in appropriate cases, to consider circumstances existing after the date of injury where previous earnings do not realistically reflect claimant's wage-earning potential. *See Tri-State Terminals Inc. v. Jesse*, 596 F.2d at 752, 10 BRBS 700 (7th Cir. 1979); *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); *S.K. [Khan] v. Service Employers Int'l, Inc.*, 41 BRBS 123 (2007). The wages claimant received following the injury in January 2007 were paid under the contract that was in effect at the time of injury. The administrative law judge's average weekly wage calculation is based on his national findings that claimant's post-injury contractual wages were consistent with his earnings for the three weeks preceding his injury and that all of claimant's earnings with employer best represent the wage-earning capacity lost due to the injury. Given the broad discretion afforded the administrative law judge pursuant to Section 10(c), we affirm the finding that claimant's average weekly wage is $2,182.03, as it is

supported by substantial evidence and in accordance with law. *See Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000).

Employer next contends that the administrative law judge erred in his calculation of claimant's post-injury wage-earning capacity. Where employer establishes the availability of suitable alternate employment, the earnings paid by the alternate positions may demonstrate claimant's post-injury earning capacity. *See, e.g., Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985); *see also* 33 U.S.C. §908(h).[3] In reviewing the evidence presented by employer to establish suitable alternate employment, the administrative law judge found that employer established the availability and suitability of three positions: a portrait photographer at J.C. Penney, an office pay clerk/cashier at Mercedes of Alexandria, and an interpreter at the Multi-Cultural Community Services. He found that these positions are within claimant's medical restrictions and appropriate, given claimant's educational and occupational background. The administrative law judge further found, however, that the wages of the interpreter position should not be used to determine claimant's post-injury wage-earning capacity because claimant credibly testified that this work was not available to him.

Claimant testified in his deposition that Dr. Wells, the vocational counselor, had informed him of two jobs leads for work as an interpreter.[4] Emp. Ex. 17 at 81-82. He

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[3] Section 8(h) states in relevant part:

> If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his 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.

[4] The specific position identified by Dr. Wells in the labor market survey was described as follows:

> Interpreter
> Multi-Cultural Community Services
> 2437 15th Street, N.W.
> Washington, D.C. 20009
> Pay Range: $35,000-56,000

stated he contacted the first lead, which was for translating for the courts; this job required certification which would cost claimant $1,400, but offered only one-half to one hour of work every few months. *Id.* at 82. Claimant also testified that he contacted another lead in Washington, D.C., but was that told the employer was seeking a Spanish translator rather than an Arabic translator. Claimant stated he called this employer back several times but received no answer or return calls.[5] *Id.* The administrative law judge found that claimant credibly testified that he diligently but unsuccessfully sought work as an interpreter. Decision and Order at 23. The administrative law judge, thus, rationally concluded that the interpreter position identified in the labor market survey was not available alternate employment and that the wages of the job identified by Dr. Wells could not be used to calculate claimant's wage-earning capacity. The administrative law judge's weighing of the evidence is rational and his finding on this issue is supported by substantial evidence. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004). Thus, we reject employer's contention of error.

Employer also contends that the administrative law judge erred in using the lowest paying job to establish claimant's post-injury wage-earning capacity. In determining claimant's post-injury wage-earning capacity, the administrative law judge addressed the range of salaries for the two remaining positions in the labor market survey--the portrait photographer which pays $31,841 to $45,368 annually and the pay clerk/cashier which pays $30,000 annually. He found that claimant has a wage-earning capacity of $30,000 annually, or $576.92 weekly. As employer has failed to demonstrate that the administrative law judge abused his discretion, and the administrative law judge's calculation of claimant's wage-earning capacity is reasonable and is based on substantial

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> This job has the flexibility of sitting and standing depending upon the needs of the interpreter. The Multi-Cultural Community Services provides interpreter services to groups, companies for conferences and training, courts, and court proceedings, and private individuals. Sitting is always an option. Rosa believes that she can use Michel immediately so we have contacted Mr. Schbot and given him Rosa's name. She feels that even if she cannot use him, she has other contacts who can use his abilities with languages in similar positions.

Emp. Ex. 5.

[5] Claimant did not specifically state that this was the job at Multi-Cultural Community Services.

evidence of record, it is affirmed. *See generally Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order and Denial of Motion to Reconsider & Errata Order are 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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REGINA C. McGRANERY
Administrative Appeals Judge