BRBS Commentary March 2023

Avoiding the "Untenable Result": *Albonajim* and the Calculation of the Average Weekly Wage in PTSD-related Defense Base Act Claims.

By Eric Bergel, Esq.[1]

To ensure proper compensation for an injury arising under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act")–or its extension, the Defense Base Act ("DBA"[2])–it is important to arrive at the correct average weekly wage ("AWW").[3] The AWW is the amount a claimant could reasonably expect to earn per week, prior to any injury; or in other words, a claimant's pre-injury weekly wage-earning capacity ("WEC").[4] The Act provides three methods for determining a claimant's AWW.[5] The purpose of each method is to determine a claimant's AWW "at the time of the injury."[6] For a typical longshore injury, where a worker sustains a loss of wage-earning capacity on the same day as the injury, the phrase "at the time of injury" is relatively anodyne. The phrase becomes problematic, however, when applied to workers with delayed onset occupational injuries (like asbestosis), which feature

---

[1] Eric Bergel is an Attorney Advisor with the U.S. Department of Labor Office of Administrative Law Judges ("DOL" and "OALJ", respectively). This article represents work done in his personal capacity and in no way represents the stance or policy (official or unofficial) of the DOL or OALJ.

[2] The DBA is an extension of the Act. 42 U.S.C. § 1651.

[3] *See* 33 U.S.C. § 910(d)(1) (defining the AWW as "one fifty-second part of [a claimant's] average annual earnings.").

[4] 8 Larson's Workers' Compensation Law § 93.01,*8 ("The usual formulation [to calculate a AWW] speaks of a wage that fairly represents claimant's earning capacity.").

[5] *See* 33 U.S.C. §§ 910(a), (b), (c). § 10(c) provides:

> 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 of the employee if engaged in self-employment, **shall reasonably represent the annual earning capacity of the injured employee.**

[6] *Id.* (preamble paragraph).

sometimes decades-long latency periods.[7] Workers with such delayed onset injuries often earned more at the time they experienced the later loss of wage-earning capacity than "at the time of injury" (*i.e.*, the last exposure to injurious stimuli). Workers with delayed onset injuries often earned more at the time of expression due to increases in the workers' seniority and the natural increase in wages and earnings throughout the occupational disease's latency. An application of the Act, as written, led to denials of compensation for many such workers. After all, workers with occupational injuries often had higher AWWs when the loss in wage earning capacity occurred than at the time of injury (*i.e.*, the last exposure to injurious stimuli). This frequently led to findings of no disability under Section 902(10).

In 1984, Congress amended the Act, in part, to address this outcome.[8] It created Section 10(i), which reads:

> For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the **time of injury shall be deemed** to be **the date on which the employee or claimant becomes aware**, [or should have been aware], **of the relationship between the employment, the disease, and the death or disability.**[9]

In other words, specific to occupational diseases (that do not immediately result in disability or death), the "time of injury" for purposes of determining AWW is the date of a claimant's awareness between the employment, the disease and the death or disability, not the date of last exposure. In doing so, Congress used mandatory, rather than permissive, language.

Section 10(i) may have served the Act's "compensatory purpose"[10] concerning

---

[7] *See generally* Lawrence Postol, *The Federal Solution to Occupational Disease Claims – The Longshore Act and Proposed Federal Programs*, 21 TORT & INS. L.J. 199, *2 (Winter 1986).

[8] Notably, Congress's addressing of the wage-earning capacity of claimants asserting an occupational disease was a late addition to the Act. The Senate's initial version of the 1984 bill did not consider this issue. *See* S. Rep. No. 98-81, at 19–21 (1983); H.R. Rep. No. 98-570, at 10–12 (1983); H.R. Rep. No. 98-1027, at 29 (1984).

[9] 33 U.S.C. § 910(i) (emphasis added).

[10] *LaFaille v. Benefits Review Board,* 884 F.2d 54, 59 (2nd Cir. 1989); *LaFaille v. General Dynamics Corp.*, 18 BRBS 88, slip op. at 4 (BRB 1986) (stating that Act's purpose is "to compensate injured employees based on their actual wage losses"); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1289 (9th Cir. 1983) ("The paramount goal of the LHWCA is to compensate workers for the loss of wage-earning capacity resulting from occupational injuries and disease."); *Pavey v. Dyncorp Int'l*, 52 BRBS 275 (ALJ Nordby Feb. 28, 2018) ("Under the grand bargain of workers' compensation programs, injured workers trade off the right to sue in tort for damages in exchange for prompt and certain compensation and medical benefits for their injuries.").

delayed onset diseases occurring to longshoremen–but what of claimants with delayed onset Post Traumatic Stress Disorder ("PTSD") filing under the DBA? The DBA applies to workers who often have earned a premium for working in war zones; in many cases they earned much more in the war zone than they earned in their later stateside work, when the delayed onset PTSD first manifested. This represented a reversal of the wage-earning capacity issue which spurred Congress to amend the Act to require the use of Section 10(i) in occupational diseases. However, like asbestosis, PTSD is also often considered an occupational disease.[11] Applying Section 10(i) when determining the AWW in PTSD cases–as the amended Act requires–may lead to a result where a claimant could succeed on the merits of the claim but still receive no compensation for their injuries. Would this outcome also serve the compensatory purpose of the Act?

In September 2022, the Benefits Review Board ("the BRB" or "the Board") published *Albonajim v. AECOM*, BRB No. 21-0495 (Sept 30, 2022), a *per curiam* Decision and Order that provides the clearest holding to date that a rote application of Section 10(i) to such claims would produce an "untenable result"[12] and would countermand Congress's intention to provide compensation for all wage losses attributable to occupational diseases, like PTSD, acquired through covered employment.[13] In *Albonajim*, the Board reviewed an Administrative Law Judge's ("ALJ") finding that a contractor serving as a translator in Iraq–who was indisputably exposed to IED attacks, rocket attacks, and bombings–was permanently and partially disabled due to PTSD arising out of such employment. However, the ALJ concluded that the contractor was ultimately "not entitled to compensation," because the claimant was gainfully employed at "the time of injury" (*i.e.*, the date he became aware of the relationship between his employment and the disability); so his AWW "at the time of the injury" was "equal to" his current wage-earning capacity.[14] To determine the time of the occupational injury, the ALJ applied Section 10(i) of the Act, which, as discussed *supra*, specifically applies to occupational diseases like PTSD. Notably, the ALJ did not consider any of the claimant's overseas earnings; the ALJ only considered the claimant's lower-paying stateside employment.[15]

---

[11] *See Gindo v. Aecon Nat'l Sec. Programs, Inc.*, BRB No. 17-0418, slip op. at 6 (Oct. 10, 2018), *vacated on other grounds and remanded sub nom. Gindo v. Director, OWCP*, No. 4:19-CV-1745, 2022 WL 861415 (S.D. Tex. Mar. 23, 2022) ("Therefore, we find it useful [to] examine the characteristics of this claimant's psychological malady in view of how an 'occupational disease' has been defined by the Fifth Circuit."); *Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33, 2016 DOL BRB LEXIS 277, *18 (Aug. 11, 2016).

[12] Brief of the Director, Office of Workers' Compensation Programs at 8, *Albonajim v. AECOM*, BRB No. 21-0495 (Sept 30, 2022); *Albonajim v. AECOM*, BRB No. 21-0495, slip op. at 4 (quoting the Director's Brief).

[13] *Albonajim*, BRB No. 21-0495 at 7 n.8.

[14] *Id.* at 2.

[15] *Id.* at 4.

Ruling on the claimant's unopposed dispositive motion, the ALJ found that the claimant in *Albonajim*, "first became aware of the relationship between his employment, his psychological injury, and his disability," on July 30, 2020 (his doctor had diagnosed him with PTSD earlier that month). Following Section 10(i), the ALJ computed the AWW as of the claimant's wage-earning capacity "at the time of the injury."[16] Thus, the ALJ opined that the claimant's wages as of July 30, 2020–$52,000 per year or $1,000 per week–applied. The ALJ concluded that because this amount–not the $145,000 the claimant earned as an overseas translator–was "equal to his wage-earning capacity . . . [he] is not entitled to compensation." Essentially, although the ALJ found a significant reduction in the claimant's future wage-earning capacity due to the employment-induced disability–after all the claimant could not return to work overseas as a contractor–the law required a denial of any workers' compensation benefits whatsoever because an application of Section 10(i) showed no loss of wage earning capacity.[17]

The Board reversed. It found generally that "Section 10(i) does not apply because it does not capture the worker's loss of earning capacity from his inability to work overseas, the 52 weeks preceding the claimant's July 2020 knowledge of his injury, when the claimant did not work overseas, does not accurately or equitably compensate for his injury."[18] It first agreed with the Director and claimant that the ALJ erred in applying Section 10(i) to "define 'time of injury' for purposes of calculating the AWW."[19] The Director and claimant asserted that "Section 10(i) does not require use of an injured employee's wages at the time of his diagnosis in cases involving delayed onset PTSD and argue[d] the ALJ's decision is contrary to the Board's holding in *Robinson v. AC First, LLC*, 52 BRBS 47 (2018)."[20]

The Board concurred, explaining that, although Section 10(i) defines the term "time of injury" in occupational disease cases (not resulting in immediate disability or death), it does not provide an independent method of calculating AWW.[21] Citing to *Robinson*[22], the Board agreed with the claimant and Director that in cases involving

---

16 *Id.* at 3 n.2; *Albonajim v. AECOM*, OALJ No.: 2021-LDA-01516, slip op. at *5 (June 17, 2021) (emphasis in the original).

17 However, the ALJ awarded medical benefits. *See id.* at 3; *Albonajim,* OALJ No.: 2021-LDA-01516, slip op at *5.

18 *Albonajim*, BRB No. 21-0495, at 8 n.10.

19 *Id.* at 5.

20 *Id.*

21 *Id.*

22 In *Robinson*, the Board reversed an ALJ's finding that a decrease in WEC was not compensable when the claimant voluntarily left overseas employment before the manifestation of any PTSD. 52 BRBS 47 at 48–49. The Board held that when a claimant is unable to return

delayed onset PTSD, "Section 10(i) does not **require** the use of an injured employee's wages at the time of [the] diagnosis."[23] Rather, one should also consider the claimant's "depriv[ation] of economic choice to return to any work overseas" resulting from the work-related PTSD and the resulting deprivation of wage-earning capacity.[24] The Board found the ALJ's holding in *Albonajim* contrary to *Robinson*, because, like in *Robinson,* the claimant suffered work-related PTSD and was unable to return to his usual employment due to the disorder.[25] That the *Albonajim* claimant ceased working overseas prior to developing and becoming aware of his work-related PTSD was not a proper basis for a denial of compensation. Following *Robinson* as well as the Conference Report (which merged the final House-bill with the then-recently passed Senate-version of the amended Act), the Board found that the claimant was entitled to compensation for the loss of wage-earning capacity resulting from the work-related PTSD. The disorder deprived the claimant of the economic choice to work overseas.[26]

The Board vacated the ALJ's denial of disability benefits "[i]n light of the flexibility and discretion an ALJ has in applying Section 10(c), which incorporates the phrase 'other employment of such employee,**'** and for the reasons set forth in *Robinson.*"[27] Thus, the Board remanded *Albonajim* to the ALJ to apply Section 10(c) in the manner considered by the Conferees.[28] The Board observed that Section 10(c) would provide the ALJ with "flexibility and discretion" to ensure the claimant receives just compensation for his disability under the Act.[29] It further noted that "flexible calculation of AWW [under Section 10(c)] permits consideration of the wages Claimant earned

---

to former work for an employer, the claimant is entitled to compensation for any loss of WEC based on the "'deprivation of economic choice' due to his work-related PTSD." *Id.* (quoting *Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96, 99–100 (4th Cir. 2018)).

23 *Id.* at 5 (emphasis added).

24 *Id.* at 7.

25 *Id.*

26 *Id.*

27 *Id.* at 8.

28 HR 98-1027 at 30 (stating that when a claimant suffered a loss of wage-earning capacity due to an occupational disease prior to recognizing the relationship between the disease and the employment, Section 10(c)'s phrase "'other employment of such employee' shall be interpreted so that compensation shall be based upon the claimant' wages prior to any reduction attributable to the disability.").

29 *Albonajim*, BRB 21-0495 at 8; *see also id.* at 8 n. 10 ("Section 10(c), the catch-all section, is to be used where there is insufficient information to apply the other subsections, and its flexible calculation of AWW permits consideration of the wages Claimant earned overseas when his injurious exposure occurred.").

overseas when his injurious exposure occurred."[30]

The Board's holding seemingly limits the applicability of Section 10(i) when determining AWW in a subset of cases where a claimant's loss of WEC is based on a deprivation of economic choice, such as in delayed-onset PTSD cases. In so holding, the Board relied on a reading of Section 10(i) that would allow an ALJ to use their own discretion about whether that section applies given the exigencies of the individual case. However, the Act–which Congress amended in 1984 to specifically address occupational diseases like PTSD–does not superficially afford such discretion; indeed, Section 10(i) uses mandatory language.[31] Moreover, *Robinson* relied on the holding from *Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96, 91 (4th Cir. 2018) that voluntary retirement is not a form of total incapacity under Section 902(10), which concerns the definition of the term "disability" under the Act. Thus, the *Robinson* holding relied on a voluntary retirement case arising under Section 902(10); neither of which apply to *Albonajim*. How, then, did the Board justify its holding that the ALJ's decision is contrary to *Robinson*?

To extend the *Robinson* holding to the AWW issue, the Board relied on the Conferees' statement concerning Congress's intent when amending the Act. The Board reasoned, "[a]s in *Robinson*, the fact that [the claimant] stopped working overseas prior to developing and becoming aware of his work-related PTSD is not a basis for the denial of benefits."[32] It did so, not based on any textual analysis of that Act–the language of Section 10(i) is clear and applies specifically to occupational disease cases–but based on a reading of a Conference Report "accompanying the 1984 Amendments."[33] Notably, Section 10(i) was seemingly a late addition to the 1984

---

30 *Id.*

31 Section 10(i) ("For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease . . . the time of injury **shall be deemed** . . . .") (emphasis added); *see Diamond v. Diehr*, 450 U.S. 175, 182 (1981) ("In cases of statutory construction, we begin with the language of the statute. Unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.") (internal quotation omitted); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *Barnhill v. Johnson*, 503 U.S. 393, 401, 112 S. Ct. 1386, 1391, 118 L. Ed. 2d 39 (1992) ("To begin, we note that appeals to statutory history are well taken only to resolve statutory ambiguity.") (internal quotation omitted). *But see Simpson v. United States*, 435 U.S. 6, 17, 98 S. Ct. 909, 915 (1978) (C.J. Rehnquist dissenting) ("The report of a joint conference committee of both Houses of Congress, for example, or the report of a Senate or House committee, is accorded a good deal more weight than the remarks even of the sponsor of a particular portion of a bill on the floor of the chamber.").

32 *Albonajim*, BRB No. 21-0495 at 7.

33 *Id.*; *see* H.R. Rep. No. 98-570; S 98-81 (another House Committee Report and a separate Senate Committee Report concerning the 1984 amendments which do not even discuss Section 10(i)).

Amendments; the Senate never considered Section 10(i) before the House-Senate Conferees adopted the provision and it was enacted into law.[34] The Conference Report was not even a unanimous product, as one Conferee, Congressman John Erlenborn of Illinois, wrote separately to state his critique about the "[m]ajority's unstated intent . . to assure benefits for retirees who are voluntarily out of the workforce and do not experience any loss in wage-earning capacity."[35] Moreover, the Board seemed to elevate Section 10(c)'s "other employment of such employee" clause over clear statutory text that Section 10(i) applies to occupational disease claims, like the claimant in *Albonajim*. In doing so, the Board seemed to require the ALJ to consider the claimant's earnings at the last exposure to injurious stimuli (working overseas), which is the very issue that spurred Congress to amend the Act in 1984 to include Section 10(i). Finally, the Board's application of *Robinson* includes the assumption that the higher paying overseas work still exists; the Board may here be engaging in hypotheticals as American foreign policy has shifted away from the "forever wars" of recent history.[36] Despite such potential weaknesses in its analytical approach, the Board in *Albonajim* found the ALJ's denial "contrary to Congressional intent" and remanded the claim for an application of Section 10(c).[37]

In all, the Board's ruling likely served the purpose of avoiding, as the Director put it, the "untenable result" of awarding PTSD claims filed under the DBA without compensation for lost wages resulting from the occupational disease, as a mechanical application of Section 10(i) would otherwise require. However, because the Board

---

[34] Postol, 21 TORT & INS. L.J. at 4.

[35] H.R. Rep No. 98-570.

[36] Mark Mazetti, *Biden Declared the War Over. But Wars Go On*, N.Y. TIMES, Sept. 22, 2021 (accessible at https://www.nytimes.com/2021/09/22/us/politics/biden-war.html) ("Mr. Biden came to office vowing an end to the 'forever wars' — and has firmly defended his decision to pull American troops from Afghanistan in the face of withering criticism from lawmakers of both parties.").

[37] *Id.* at 7 n.8 ("Where application of Section 10(i) could result in a claimant not being compensated for a wage loss attributable to an occupational disease, the Committee stated the intent is to apply Section 10(c)'s 'other employment of such employee' so as to base compensation on wages prior to the disabling employment."). The Board also substantively discussed *LaFaille v. General Dynamics Corp.*,18 BRBS 88 (1986) for the purported premise that "certain occupational disease cases can result in unwarranted under-compensation." *Albonajim*, BRB No. 21-0495 at 5 n.5. In applying *LaFaille* to the *Albonajim* matter, the Board elided any discussion that the Second Circuit eventual reversed the BRB; the Second Circuit held instead that Section 10(i) would, indeed, apply in the particular case at issue. *See LaFaille*, 884 F.2d at 59. Rather, the Board seemed to employ *LaFaille* to support its application of the House Committee's mandate to apply a broad reading of the formula at Section 10(c) when determining the AWW for claimants who have suffered an occupational disease-related wage loss prior to recognizing the connection between the employment and the wage loss. *See Albonajim*, 21-0495 at 5 n.5.

extended *Robinson* and relied so heavily on the legislative history accompanying the 1984 Amendment to the Act–despite clear and unambiguous statutory language–the Board's reasoning in *Albonajim* may present as an open flank in any future appellate litigation. Be that as it may, *Albonajim* represents the clearest holding to date for the premise that a rote application of Section 10(i) may not compensate a claimant for the "deprivation of economic choice" resulting from delayed onset PTSD in DBA cases. In such cases, the Act requires application of Section 10(c), which permits consideration of the wages a claimant earned overseas, during the last exposure to injurious stimuli. The Board's interpretation is likely intended to promote the Act's "compensatory purpose" and to avoid an otherwise "untenable result."