BRB No. 10-0555

MICHAEL W. LUTTRELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ALUTIIQ GLOBAL SOLUTIONS	)	
	)	
and	)	
	)	
CHUBB INDEMNITY INSURANCE COMPANY	)	DATE ISSUED: 06/20/2011
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits and the Order on Reconsideration of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Brian E. White, Houston, Texas, for claimant.

Keith L. Flicker, Brendan E. McKeon, and Richard L. Garelick (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order-Awarding Benefits and the Order on Reconsideration (2009-LDA-00215) of Administrative Law Judge Kenneth A. Krantz rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his neck on May 1, 2008, during the course of his employment as a security officer with the Kwajalein Police Department on the United States Army Kwajalein Atoll in the South Pacific. Employer voluntarily paid claimant compensation for temporary total disability commencing June 30, 2008. Claimant has worked exclusively overseas since 1996, holding jobs with the United Nations Police Task Force in Bosnia, the Vannell Corporation in Saudi Arabia, and under the Department of Justice, International Criminal Investigative Training and Assistance Program (ICITAP) in Jordan and Iraq. Tr. at 14-17. Beginning in 2004, claimant worked under the ICITAP, training Iraqi police officers. *Id*. at 15. He was paid $8,500 per month, plus hazardous duty pay and a per diem. *Id*. at 16-17, 42-43. Claimant testified that he left Iraq and worked for Computer Science Corporation in the Bahamas, at an hourly rate of $10, for about three months prior to obtaining work with employer, because he wanted to take a break after working a number of years in hazardous areas, yet maintain his overseas residency for tax purposes. *Id*. at 18. Claimant further testified that he intended to return to the Middle East and work under the ICITAP in a less hazardous location, and that he actually was offered such employment in Bahrain, which he declined due to his recuperating from surgery for his work injury with employer. *Id*. at 19-20, 27, 41-42.

The parties stipulated that claimant has been temporary totally disabled since June 30, 2008. The only issue before the administrative law judge was average weekly wage.[1] In his decision, the administrative law judge found that the rate of pay claimant was earning at the time of his injury on the Atoll provides the appropriate basis for calculating

[1]Claimant contended that his average weekly wage should be calculated under Section 10(c), 33 U.S.C. §910(c), based on his earnings of $82,296.69 during the 52 weeks preceding his work injury. Cl. Post-Hearing Brief at 7. Employer contended that claimant's average weekly wage should be calculated under Section 10(c) based on his contract rate of pay with employer at the date of his injury of $638.88 per week. Emp. Post-Hearing Brief at 9.

his average weekly wage under Section 10(c), 33 U.S.C. §910(c). The administrative law judge thus ordered employer to pay claimant continuing temporary total disability compensation of $424.95 per week and to provide medical benefits.

Employer moved for reconsideration on the basis that the administrative law judge erred in ordering it to pay ongoing compensation and medical benefits, as only claimant's average weekly wage was at issue at the hearing. The administrative law judge granted employer's motion and modified his order to omit the award of continuing temporary total disability compensation and medical benefits. Order on Recon. at 3. Claimant's motion for reconsideration of the administrative law judge's average weekly wage finding was rejected. *Id*.

On appeal, claimant challenges the administrative law judge's average weekly wage finding and his decision on reconsideration vacating the award of ongoing compensation and medical benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds in agreement with claimant's argument that the administrative law judge erred in vacating the award of benefits.[2] Employer replied to the Director's response.

Claimant contends the administrative law judge erred in calculating his average weekly wage based solely on his wages with employer. Claimant argues that, as he was actually offered post-injury employment in Bahrain at a much higher average weekly wage than he earned at the date of injury, the administrative law judge's reliance only on his earnings for employer does not reasonably and fairly represent the earnings he lost because of the work injury.[3] The object of Section 10(c) is to arrive at a sum that

[2]The Director does not address the administrative law judge's average weekly wage finding.

[3]We reject employer's contention that claimant is barred from asserting that the administrative law judge erred by not considering his future wage-earning capacity in Bahrain. While claimant asserted in his post-hearing brief that his average weekly wage should be based on the sum of his earnings during the 52 weeks preceding the work injury, claimant also argued that the subsequent employment offer in Bahrain was evidence that his wages with employer did not represent his wage-earning capacity. Cl. Post-Hearing Brief at 6, 9. Thus, claimant is not raising this contention for the first time on appeal.

reasonably represents claimant's annual earning capacity at the time of his injury.[4] *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). The administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *Id.*

In this case, the administrative law judge found that claimant's rate of pay under his contract with employer is the appropriate basis for calculating his average weekly wage under Section 10(c). The administrative law judge rejected claimant's position that his earnings in the 52 weeks prior to the work injury, including those he received while working under the ICITAP in Iraq, should be used to calculate his average weekly wage, because claimant was injured while working under a one-year contract at a different type of job and "under drastically different conditions, than he had done earlier, or than he might have done later." Decision and Order at 5-6. Although this is the only reference to any potential future employment, the administrative law judge's average weekly wage finding is supported by substantial evidence and consistent with cases in which the Board has stated that the claimant's higher wages in a combat zone provide the framework within which the administrative law judge must calculate the average weekly wage under Section 10(c). In *K.S [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon.*, 43 BRBS 136 (2009), the Board stated that claimant's average weekly wage must be calculated based solely on his overseas earnings in Kuwait and Iraq in order to reflect his earning capacity in the employment in which he was injured. *Id.*, 43 BRBS at 20. The Board articulated that where the claimant is injured after being enticed to work in a dangerous environment in return for higher wages, it is disingenuous to suggest that his earning capacity should not be calculated based upon the full amount of the earnings lost due to the injury. *Id*. at 21. Similarly, in *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006), the Board stated that the administrative law judge acted within his discretion in considering the extrinsic circumstances of claimant's employment when discussing the comparability of claimant's overseas and stateside employment as a basis for calculating average weekly wage solely on overseas earnings. *Id.* at 44.

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[4]Section 10(c), 33 U.S.C. §910(c), states that:

> 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.

In this case, the administrative law judge properly found that the facts are "the mirror image" of the war zone cases. Claimant testified that he voluntarily chose to leave his higher-paying job in the Middle East and accept lower-paying work overseas, first in the Bahamas and then for employer in the South Pacific. Tr. at 18. Although claimant testified he received an offer to work in Bahrain, he had a one-year contract with employer which included a $2,500 completion bonus. EX 2 at 5. This employer was not paying claimant a premium for any hazardous duty. The administrative law judge thus rationally found that claimant's rate of pay for employer realistically reflected claimant's wage-earning potential at the time of his injury. His calculation of claimant's average weekly wage accounts for the extrinsic circumstances of claimant's employment on the Kwajalein Atoll in the South Pacific and the language of Section 10(c) in that he gave "regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury." 33 U.S.C. §910(c). As the administrative law judge's calculation of claimant's average weekly wage is rational, supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that the wages claimant earned in the South Pacific, a non-combat zone, are the best measure of claimant's earning capacity at the time of his injury. *See generally Simonds v. Pittman Mechanical Contractors*, 27 BRBS 120 (1993), *aff'd sub nom., Pittman Mechanical Contractors, Inc. v. Director, OWCP,* 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

Claimant next argues that if the administrative law judge's average weekly wage methodology is affirmed, then his compensation rate should be modified to accurately reflect two-thirds of claimant's average weekly wage of $638.88. We agree. The administrative law judge found that the rate of pay under claimant's contract with employer is the appropriate basis for calculating his average weekly wage under Section 10(c). Decision and Order at 6; Order on Reconsideration at 2. The administrative law judge, however, did not state this pay rate. Instead, he ordered that employer continue paying claimant compensation at the rate of its voluntary payments of $424.95. Claimant and employer agree that claimant's average weekly wage is $638.88 under the administrative law judge's methodology, *see* Cl. Post-Hearing Brief at 12; Emp. Post-Hearing Brief at 4, and employer acknowledges its miscalculation of claimant's compensation rate. Emp. Response Brief at 27 n.7. Two-thirds of $638.88 is $425.92, and we modify the administrative law judge's decision to reflect this compensation rate. 33 U.S.C. §908(b); *see generally Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83(CRT) (5th Cir. 1989), *vacated on other grounds*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (*en banc*).

Claimant further challenges the administrative law judge's decision on reconsideration to vacate the initial award of continuing temporary total disability and medical benefits. Claimant contends that once the case was referred to the administrative

law judge for a hearing to resolve the average weekly wage issue, the administrative law judge was obligated to issue a compensation order making an award or rejecting the claim. The Director, citing *Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010), responds in agreement with claimant that the administrative law judge erred by vacating the award of compensation.

In his first decision, the administrative law judge awarded claimant's ongoing compensation for temporary total disability and medical benefits. On reconsideration, employer noted that its payment of temporary total disability compensation and medical benefits was "voluntary" and that the issue of claimant's entitlement to benefits under the Act was not among the issues at the hearing, which was limited to resolving the contested issue of average weekly wage. Therefore, employer argued that the administrative law judge's order that it pay temporary total disability compensation and provide medical benefits was beyond the scope of the disputed issues raised at the hearing. The administrative law judge agreed, and he modified his decision to omit the order that employer pay claimant compensation and provide medical benefits.

Section 19(c) provides that an administrative law judge "shall" by "order" "make an award" or "reject the claim." 33 U.S.C. §919(c); *see also* 33 U.S.C. §919(e). The implementing regulation, Section 702.348, provides that: "the administrative law judge shall have prepared a final decision and order, in the form of a compensation order, with respect to the claim, making an award to the claimant or rejecting the claim. The compensation order shall contain appropriate findings of fact and conclusions of law with respect thereto, and shall be concluded with one or more paragraphs containing the order of the administrative law judge…." 20 C.F.R. §702.348. Pursuant to Section 19(c) and Section 702.348, the Board has noted that the administrative law judge's compensation order must include an "order" directing the payment of benefits. *Aitmbarek*, 44 BRBS at 120 n.8; *see also Hoodye v. Empire/United Stevedores*, 23 BRBS 341, 344 (1990). In *Davis v. Delaware River Stevedores, Inc.*, 39 BRBS 5 (2005), the Board similarly held that any agreements between the parties must be embodied in a formal order issued by the district director or an administrative law judge. *Dav*is, 39 BRBS at 6.

In this case, the administrative law judge's decision acknowledges that the parties stipulated that: temporary total disability compensation has been paid at the weekly compensation rate of $424.95 from June 30, 2008 to the present; claimant has been temporarily totally disabled from June 30, 2008 to the present; and, claimant has not returned to his usual job. Decision and Order at 2. These stipulations provide the basis for the administrative law judge's "order" in his initial decision that employer pay

continuing compensation for temporary total disability.[5] Moreover, it is proper for the administrative law judge to award ongoing temporary total disability compensation past the date of the hearing. *See Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). Given the parties' stipulation that claimant remained temporarily totally disabled as of the date of the hearing, once the administrative law judge determined the appropriate compensation rate, he had the duty under Section 19(c) to make an award to claimant of continuing temporary total disability compensation.[6] *Aitmbarek*, 44 BRBS 115; *Davis*, 39 BRBS 5. Accordingly, we vacate the administrative law judge's finding on reconsideration that he did not have the authority to award temporary total disability benefits in this case and we reinstate the order that employer pay continuing compensation for temporary total disability.[7] *Aitmbarek*, 44 BRBS 115; *Davis*, 39 BRBS 5; *see also Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28, 31 (2002).

[5]The parties also stipulated that medical benefits have been paid to claimant. Decision and Order at 2. Given this stipulation and the absence of evidence that claimant sought payment for unpaid medical expenses, there is no basis in the record to support an award of specific medical benefits. Nonetheless, we note that employer is liable for medical treatment for claimant's work injury, pursuant to Section 7 of the Act, 33 U.S.C. §907. Specific medical treatment may be sought by claimant, and challenged by employer, pursuant to this section.

[6]Employer responds that, under 29 C.F.R. §18.43, the administrative law judge may only decide issues that are raised by the parties, in this case average weekly wage. Assuming, *arguendo*, that this regulation should be interpreted as advocated by employer, it is superseded by the program-specific provisions in Section 19 and Section 702.348. *See* 29 C.F.R. §18.1(a).

[7]An award based on the parties' stipulations is subject to modification. *See Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999). Accordingly, either party may seek modification of the administrative law judge's award of temporary total disability benefits under Section 22 based on a mistake of fact or change of condition. 33 U.S.C. §922.

Accordingly, we modify the administrative law judge's decision to reflect that claimant's compensation rate is $425.92 per week, and we reinstate the administrative law judge's continuing award of temporary total disability benefits. In all other respects, the administrative law judge's decisions 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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BETTY JEAN HALL
Administrative Appeals Judge