BRB No. 10-0446

NORMAN HILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 02/28/2011
	)	
and	)	
	)	
CHARTIS INSURANCE	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

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

Frank J. Sioli and Kristina L. Alexander (Brown Sims, P.C.), Miami, Florida, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2009-LDA-00412) of Administrative Law Judge Daniel A. Sarno, Jr., 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).

In June 2006, claimant began working for employer as a mechanic/laborer in Afghanistan. On July 19, 2006, claimant injured his right knee when he fell to the ground while running to a bomb shelter during a rocket attack. As a result of his injury, claimant returned to the United States on July 21, 2006.

In his Decision and Order, the administrative law judge accepted the parties' stipulations that claimant's condition reached maximum medical improvement on March 8, 2007, and that claimant was entitled to temporary total disability benefits from July 26, 2006, through March 8, 2007, and scheduled permanent partial disability benefits for 25.92 weeks commencing March 8, 2007. The administrative law judge calculated claimant's average weekly wage pursuant to Section 10(c) as $1,198.29, based solely on the wages he earned while working in Afghanistan. Accordingly, claimant's awarded benefits were to be paid at a rate of $798.86 per week. 33 U.S.C. §908(b), (c)(2).

On appeal, employer challenges the administrative law judge's calculation of claimant's average weekly wage. Claimant responds, urging affirmance. Employer has filed a reply to claimant's response brief.

Employer contends that the administrative law judge erred by calculating claimant's average weekly wage under Section 10(c) of the Act, 33 U.S.C. §910(c), based solely on his earnings in Afghanistan. Specifically, employer asserts that a blended approach of state-side and overseas wages is both permissible and appropriate for the calculation of claimant's average weekly wage in this case.

The parties agree that Section 10(a) and (b), 33 U.S.C. §910(a), (b), are inapplicable to determine claimant's average weekly wage in this case. Section 10(c) states:

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, 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 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.

33 U.S.C. §910(c). Thus, Section 10(c) is to be used in instances when neither Section 10(a) nor Section 10(b) can be reasonably and fairly applied. *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998). The object

of Section 10(c) is to arrive at a sum that reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999). This inquiry includes consideration of claimant's ability, willingness and opportunity to work and of the earnings claimant had the potential to earn had he not been injured. *See, e.g., Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410 (1980).

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 solely 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 Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009). The goal of Section 10(c) in this regard is a sum that reflects the potential of claimant to earn absent injury. *See Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986).

The administrative law judge addressed and rejected employer's contention that claimant's state-side earnings must be utilized in conjunction with claimant's earnings while employed in Afghanistan when calculating average weekly wage. The administrative law judge found that the facts in this case are analogous to those in *Simons*, 43 BRBS 18, and *Proffitt*, 40 BRBS 41, and he concluded that the reasoning in those two cases is persuasive. Decision and Order at 6 - 7. Thus, the administrative law judge calculated claimant's average weekly wage based on his six weeks of earnings while in Afghanistan.[1]

[1] The administrative law judge calculated claimant's average weekly wage as $1,198.29 by dividing his total earnings in Afghanistan, $7,189.75, by 6 weeks, which is the period between claimant's first day of employment with employer, June 9, 2006, and the date on which he returned to the United States, July 21, 2006, at which time, pursuant to claimant's contract with employer, employer's obligations to claimant ceased. Decision and Order at 8. As this calculation is rational given the administrative law judge's finding that the record is silent as to the last day claimant actually worked for employer, we reject employer's contention that claimant's employment with it ended on July 26, 2006, such that the administrative law judge should have divided claimant's earnings by 6 weeks and 5 days. *See* Emp. Br. at 12 – 13.

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 the decisions in *Simons* and *Proffitt.* The higher wages were a primary reason for claimant's accepting employment under the dangerous working conditions existing in Afghanistan, 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 level lower than employer agreed to pay claimant to work under the conditions in Afghanistan. *Simons*, 43 BRBS at 20. We therefore affirm the administrative law judge's rational finding that claimant's compensation is to be based on an average weekly wage of $1,198.29. *Id.*; *Proffitt*, 40 BRBS 41.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge