BRB No. 11-0610

RICHARD P. JASMINE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CAN-AM PROTECTION GROUP, INCORPORATED	)	DATE ISSUED: 04/19/2012
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/ CHARTIS PROPERTY CASUALTY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Patricia A. Krebs and Jasmine Gorowara (King, Krebs & Jurgens, P.L.L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2010-LDA-00430) of Administrative Law Judge Lee J. Romero, 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*. (the Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the DBA). 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).

In December 2009, claimant commenced employment for employer as a K-9 handler in Afghanistan pursuant to a six-month contract.[1] On February 1, 2010, claimant was present when an improvised explosive device detonated, resulting in the loss of his left foot and injuries to his right leg. Claimant returned to the United States and has not worked since the date of this incident.

The parties stipulated that claimant has been temporarily totally disabled since February 1, 2010, and that employer has voluntarily paid claimant temporary total disability benefits since February 6, 2010, at a rate of $686.33 per week. 33 U.S.C. §908(b). The only issue before the administrative law judge was claimant's average weekly wage.[2] In his Decision and Order, the administrative law judge found that claimant's average weekly wage at the time of his February 1, 2010, injury was $1,029.50, based on a blend of claimant's stateside earnings and his contract rate of pay with employer in the year prior to his injury.

On appeal, claimant challenges the administrative law judge's average weekly wage calculation. Employer responds, urging affirmance of the administrative law judge's decision.

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[1]Claimant previously had worked in Iraq as a K-9 officer for Ronco Consulting. Specifically, claimant initially worked for Ronco, pursuant to a one-year contract, in 2005–2006. Claimant returned to Louisiana upon the conclusion of this contract, whereupon he commenced working as a security guard. In November 2007, claimant returned to work for Ronco in Iraq pursuant to a six-month contract; claimant returned to a previously held position in Louisiana in May and June 2008; he returned to Iraq under an extension of the six-month contract from July to November 2008. Claimant subsequently returned to Louisiana in November 2008, where he worked as a security guard, construction laborer, and substitute school teacher, until he commenced employment with employer in December 2009.

[2]Claimant contended that his average weekly wage should be calculated under Section 10(c), 33 U.S.C. §910(c), based on his contract rate of pay with employer at the time of his injury, $7,500 per month. Employer, in response, argued that claimant's average weekly wage should be based on a combination of claimant's stateside and overseas earnings during the 52 weeks preceding his work injury, yielding an average weekly wage of $1,029.50.

Claimant contends that the administrative law judge erred in calculating his average weekly wage based on a combination of his stateside and overseas earnings. Claimant argues that his employment overseas was neither intended to be, nor was in fact, short-term, as evidenced by his hearing testimony that he intended to continue working for employer beyond the term of his employment contract. Tr. 28-29. Thus, claimant argues that the Board's decision in *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009), mandates that the administrative law judge calculate claimant's average weekly wage using solely his overseas wages.

The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. Section 10(c) is used to calculate a claimant's average weekly wage when neither Section 10(a), 33 U.S.C. §910(a), nor Section 10(b), 33 U.S.C. §910(b), can reasonably or fairly be applied.[3] 33 U.S.C. §910(c). *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). This inquiry may include 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 Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Tri-State Terminals, Inc. v. Jessee*, 595 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Jackson v. Potomac Temporaries*, 12 BRBS 410 (1980).

[3]Section 10(c) of the Act states that a claimant's average weekly wage shall be determined as follows:

> 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 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.

33 U.S.C. §910(c). In this case, the administrative law judge's use of Section 10(c) to calculate claimant's average weekly wage is not challenged on appeal.

The Board has held that where 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 based upon the earnings in that job as they reflect the full amount of the annual earnings lost due to the injury. *Simons*, 43 BRBS at 21; *see Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006). In *Simons*, the Board held that the claimant had accepted a full-time one-year job in the Middle East requiring exposure to difficult and dangerous conditions in exchange for premium wages. The Board held that under such circumstances the administrative law judge must use only the claimant's overseas wages to calculate his average weekly wage noting that the one-year contract term is consistent with the Act's focus on annual earning capacity. *Simons*, 43 BRBS at 21. The Board specifically rejected the employer's contention that the claimant's employment was "cyclical or intermittent," as it was not supported by the record. *Id.* The Board noted, however, that,

> if the record contained credible evidence that a claimant's employment overseas was in fact, or was intended to be, short-term, *i.e.*, for less than a one-year contractual term, the result here [exclusive use of overseas earnings] would not necessarily control.

Simons, 43 BRBS at 21 n.5. *See also Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011)(although prior to his injury while performing a one-year contract in the South Pacific, claimant had worked at a higher paying job in the Middle East and testified he was offered a job there after his injury, the Board affirmed the administrative law judge's finding that the wages claimant earned in the South Pacific at the time of his injury are the best measure of claimant's earning capacity at the time of his injury).

Based upon the facts of this case, we reject claimant's contention that the administrative law judge erred in calculating claimant's average weekly wage by combining claimant's stateside and overseas earnings in the year prior to his work-related injury. Contrary to claimant's contention, *Simons* does not mandate the use of only overseas earnings to calculate a claimant's average weekly wage in all DBA cases. *See Luttrell*, 45 BRBS 31. Rather, the Board held that, in cases arising under the DBA, a claimant's overseas earnings must be used exclusively to calculate his average weekly wage under Section 10(c) when he was enticed to work overseas in a dangerous environment in return for higher wages under a long-term contract. *See Simons*, 43 BRBS 18; *see also Proffitt*, 40 BRBS 41. In this case, the administrative law judge discussed the Board's decisions in *Simons*, noted the Board's specific reference that its holding may not necessarily apply to situations where a claimant's contract of employment is for less than a one-year period, and determined that the Board's decision in *Simons* did not require the exclusive use of claimant's overseas earnings to calculate his average weekly wage since claimant's contract of employment with employer was

for a six-month period. Decision and Order at 5. Rather, the administrative law judge concluded that, in light of the short-term duration of claimant's employment contract with employer and claimant's employment history, which documented claimant's rotation between stateside and overseas employment, a calculation of claimant's average weekly wage using both claimant's stateside and overseas earnings appropriately reflects claimant's actual earning capacity at the time of his injury. Decision and Order at 5-6.

We affirm this finding as it is rational and supported by substantial evidence. We reject claimant's contention that the administrative law judge erred in failing to discuss claimant's prior employment with Ronco as evidence of long-term employment in a dangerous environment.[4] *See* n.1, *supra.* Claimant's overseas employment was, on two occasions, followed by his return to stateside employment in Louisiana. *Id.;* Tr. at 27. Prior to his work with employer, claimant was employed for over one year in the United States. Claimant's employment overseas thus was not continuous and this factor was properly addressed by the administrative law judge.

Moreover, the administrative law judge rationally concluded that, on the facts of this case, the Board's decision in *Simons* does not mandate the use of only claimant's overseas earnings for calculating average weekly wage. Claimant's contract was not, on its face, of a long-term duration, and the administrative law judge discussed claimant's history of alternating stateside and overseas employment. Unlike *Simons*, this case does present facts where the claimant's employment overseas was cyclical. The administrative law judge's calculation thus took into consideration claimant's history of interspersing domestic employment in Louisiana with overseas employment, as well as claimant's earnings at the time of his injury. *See generally New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997). The administrative law judge's calculation rationally "had regard for the previous earnings of the injured employee in the employment in which he was working at the time of the injury," as well as "other employment" of the employee. 33 U.S.C. §910(c); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000). The administrative law judge therefore rationally found that claimant was employed by employer overseas pursuant to a short-term contract and that claimant's employment history indicates the lack of a long-term commitment to overseas employment. The administrative law judge's average weekly wage calculation under Section 10(c) consequently represents a

[4]The 2005 contract was for one year and the 2007 contract was for six months, which was renewed, after a two-month break during which time claimant returned to his former employment in Louisiana, for a subsequent four-month period. EX 9 at 5 – 9, 14 – 17; Tr. at 23 – 24.

reasonable estimate of claimant's annual earning capacity at the time of his injury. Accordingly, as the method the administrative law judge employed is within the discretion afforded him pursuant to law, the administrative law judge's calculation of claimant's average weekly wage is affirmed.

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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REGINA C. McGRANERY
Administrative Appeals Judge