BRB No. 05-0580

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| JAMES BRIAN ZIMMERMAN | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| SERVICE EMPLOYERS INTERNATIONAL, INCORPORATED | ) | DATE ISSUED: 02/22/2006 |
| | ) | |
| and | ) | |
| | ) | |
| INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKRS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order – Awarding Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Richard L. Garelick (Flicker, Garelick & Associates. LLP), New York, New York, for employer/carrier.

Matthew W. Boyle (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2004-LHC-927) of Administrative Law Judge Richard D. Mills 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b); 20 C.F.R. §§802.211(e), 802.220.

The parties in this case waived their right to a hearing before an administrative law judge and submitted the following stipulations to the administrative law judge. During various periods of time between September 1998 and December 2002, claimant worked exclusively as a truck driver within the continental United States. While in the United States, claimant typically worked the maximum 70 hours during an eight day period, followed by a 24 hour rest period. In January 2003, claimant was contacted by a recruiter for employer regarding the availability of truck driving employment in Iraq. During mid-January, claimant accepted a job offer from employer and, after undergoing a pre-employment physical and job orientation program in Houston, Texas, claimant was sent by employer to Kuwait in late March 2003. Upon his arrival overseas, claimant was housed in a tent in Camp Arifjan, Kuwait, took his meals with military personnel, and he thereafter worked typically seven days a week as a truck driver transporting cargo for the military. On May 6, 2003, claimant sustained an unspecified work-related injury for which employer voluntarily paid claimant temporary total disability benefits. As employer did not dispute its liability for claimant's disability benefits, the sole issue briefed to the administrative law judge involved the applicable average weekly wage to be utilized in calculating claimant's compensation rate.

In his Decision and Order, the administrative law judge accepted the aforementioned stipulations and ordered employer to pay claimant past, present, and future compensation based upon his determination that, pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), claimant's average weekly wage at the time of his work-injury was $1,789.84.

On appeal, employer contends that the administrative law judge erred in applying Section 10(c), rather than Section 10(a), 33 U.S.C. §910(a), of the Act to calculate claimant's average weekly wage at the time of his injury. Alternatively, employer avers that a proper calculation under Section 10(c) results in an average weekly wage lower than that arrived at by the administrative law judge. Claimant has not filed a brief in response to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's determination of claimant's average weekly wage. The Director asserts, however, that the case must be remanded for the administrative law judge to enter an enforceable order.

Employer initially challenges the administrative law judge's use of Section 10(c) of the Act to calculate claimant's average weekly wage. Specifically, employer contends

that the use of Section 10(c) to calculate claimant's average weekly wage would be "entirely unfair" to employer given the fact that claimant's weekly wages during his tenure in Kuwait were higher than those which he had previously earned while employed state-side. *See* Emp's br. at 22. Rather, employer argues that as claimant worked substantially the whole of the year as a truck driver, albeit in both the United States and Kuwait, in the year preceding his work-injury, Section 10(a) can reasonably and fairly be utilized to calculate claimant's average weekly wage at the time of his injury.

The introduction to Section 10 of the Act provides: "Except as otherwise provided in this chapter, the average weekly wage of the injured employee at *the time of his injury* shall be taken as the basis upon which to compute compensation . . . ." 33 U.S.C. §910 (emphasis added). Thereafter, Section 10 sets forth three alternative methods for determining claimant's average weekly wage. Section 10(a) of the Act, 33 U.S.C. §910(a), looks to the actual wages of the injured worker who is employed for substantially the whole of the year prior to the injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. 33 U.S.C. §910(a); *Gilliam v. Addison Crane Co.,* 21 BRBS 91 (1988). This average daily wage is then multiplied by 260 if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[1] *See Hall v. Consolidated Employment Systems, Inc.,* 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). 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. *See 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).

The administrative law judge considered and rejected employer's contention that Section 10(a) of the Act should be utilized to calculate claimant's average weekly wage. Specifically, after finding that claimant worked as a truck driver for substantially the whole year prior to his work-injury, the administrative law judge determined that Section 10(a) was inapplicable since claimant's previous work as a truck driver in the United States prior to his employment in Kuwait failed to represent work of the same nature and type that claimant performed at the time of his injury while employed in Kuwait.[2] The administrative law judge consequently concluded that Section 10(a) could not be reasonably and fairly applied on the facts of this case, and he determined that the

[1] No party contends that Section 10(b) should be applied in the instant case.

[2] In addressing this issue, the administrative law judge noted claimant's contention that truck drivers in Kuwait experience the dual dangers of attack and kidnapping.

utilization of Section 10(c) to calculate claimant's average weekly wage would accomplish the task of reflecting claimant's earnings at the time of his injury. Decision and Order at 8-9.

We reject employer's contention that, on the facts of this case, the administrative law judge was required to calculate claimant's average weekly wage pursuant to Section 10(a) of the Act. No party challenges the administrative law judge acceptance of the parties' stipulations that claimant, while employed in the United States, typically worked eight consecutive days followed by a day of rest, and that claimant, while in Kuwait, typically worked seven days a week. Decision and Order at 3, stip. 5; 9, stip. 24. Thus, pursuant to the stipulations agreed to by the parties and accepted by the administrative law judge, Section 10(a) is inapplicable since claimant in the case at bar was neither a five- or six-day per week worker. We therefore affirm the administrative law judge's decision to utilize Section 10(c), rather than Section 10(a), of the Act to calculate claimant's average weekly wage at the time of his work-injury.[3]

Employer alternatively challenges the administrative law judge's calculation of claimant's average weekly wage pursuant to Section 10(c). Specifically, employer contends that the administrative law judge erred in utilizing only claimant's actual earnings at the time of his injury in determining claimant's average weekly wage. 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. *See Story v. Navy Exch. Serv. Center*, 33 BRBS 111 (1999); *Richardson*, 14 BRBS 855. It is well-established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c), *Fox v. West State Inc.*, 31 BRBS 118 (1997), and that the Board will affirm an administrative law judge's determination of claimant's average weekly wage under that subsection if the amount calculated represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Story*, 33 BRBS 111; *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981). In the instant case, the administrative law judge calculated claimant's average weekly wage by dividing claimant's total earnings while working for employer, $11,250.48, by the 44 days that claimant was employed by employer in Kuwait. Since the parties stipulated that claimant worked seven days a week, the resulting sum, which represented claimant's average daily wage, was multiplied by seven to arrive at claimant's average weekly wage at the time of his injury. *See* 33 U.S.C. §910(d). As the result reached by the administrative law judge is reasonable and is supported by substantial evidence, we

[3] As the administrative law judge's decision not to utilize Section 10(a) in calculating claimant's average weekly wage may be affirmed on this basis, we need not address employer's assertion that "a truck driver is a truck driver," that state-side truck drivers are also "subject to attack by hostile persons," and that, consequently, the administrative law judge erred in determining that claimant's work as a truck driver state-side was not of the same nature and type as that which he performed in Kuwait. *See* Emp.'s br. at 16-17.

affirm the administrative law judge's determination of claimant's average weekly wage. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Gilliam*, 21 BRBS 91.

Lastly, the Director correctly states that the administrative law judge's Decision and Order does not include findings regarding the nature, extent or period of claimant's disability and that, accordingly, that decision does not represent a final effective or enforceable order.[4] *See Keen v. Exxon Corp.*, 35 F.3d 226, 28 BRBS 110(CRT) (5th Cir. 1998). Claimant and employer stipulated that employer voluntarily paid ongoing temporary total disability benefits to claimant through the date of their stipulations, that claimant has not yet reached maximum medical improvement, and that no dispute exists regarding the nature and extent of any permanent disability sustained by claimant. Decision and Order at 6, stip. 35, 37, 38. In his brief to the administrative law judge, claimant averred that he is entitled to ongoing temporary total disability benefits. In his Decision and Order, the administrative law judge did not order employer to pay compensation benefits based upon a specific finding regarding the nature and extent of claimant's work-related disability. Rather, the administrative law judge ordered employer to pay claimant "past, present and future compensation" based upon the administrative law judge's determination of claimant's average weekly wage. *Id.* at 9. As the administrative law judge's order does not specify the type of benefits which claimant is to be paid by employer, the Director correctly contends that the case must be remanded for a definitive compensation award addressing claimant's entitlement to specific benefits payable by employer. We, therefore, remand the case for entry of an order regarding claimant's claim for benefits under the Act. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Davis v. Delaware River Stevedores, Inc.*, 39 BRBS 5 (2005).

Accordingly, the administrative law judge's calculation of claimant's average weekly wage is affirmed. The case is remanded for the entry of a formal order regarding claimant's compensation claim.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[4] While the Director additionally asserts that there exists an acknowledged dispute over medical benefits, *see* Decision and Order at 6, stip. 36, both parties in their respective briefs to the administrative law judge below stated that the only issue presented for adjudication involved the average weekly wage to be utilized in calculating claimant's compensation rate.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge