BRB No. 07-0907

R.L. Claimant-Respondent v. SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Employer/Carrier-Petitioners	)	DATE ISSUED: 03/25/20082008 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Montstream & May, L.L.P.), Glastonbury, Connecticut, for claimant.

Robert N. Dengler (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2006-LDA-00076) of Administrative Law Judge Daniel F. Sutton 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 January 2004, claimant began working for employer as a truck driver in Iraq. On March 23, 2004, claimant, while driving a truck during the course of his employment duties, was involved in a pedestrian accident. Subsequent to this event, claimant underwent mandatory debriefing by the military and, following mental health counseling, it was determined that claimant was unable to return to his job. In April 2004, claimant returned home to the United States whereupon he was diagnosed with post-traumatic stress disorder. Claimant, who continues to be treated for this condition, is currently unable to return to his previous employment duties as a truck driver.

In his Decision and Order, the administrative law judge accepted the parties' stipulations that claimant remains temporarily totally disabled as a result of his work-related post-traumatic stress disorder, and that claimant is entitled to continuing medical treatment and medication for his condition. Next, the administrative law judge calculated claimant's average weekly wage as $1,473.58, based solely on the wages he earned while deployed in Iraq. Accordingly, claimant was awarded continuing compensation for temporary total disability commencing April 2, 2004, at a rate of $982.59 per week. 33 U.S.C. §908(b).

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

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 Iraq. In support of its contention, employer argues that the combination of claimant's stateside earnings in 2003 as a truck driver and his overseas earnings in Iraq in 2004 is most reflective of claimant's wage-earning capacity at the time of his injury since, it avers, claimant in April 2005 deposed that he would not have continued to work in Iraq following the completion of his contract in January 2005.

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). Employer does not challenge the administrative law judge's finding that Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are inapplicable to determine claimant's average weekly wage. Employer's Petition for Review at 10-11. 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 a catch-all provision 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 Sys., 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); *Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). It is well-established that an administrative law judge has broad discretion to arrive at a fair approximation of a claimant's annual earning capacity at the time of his injury, *Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT); *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410 (1980) (average weekly wage represents amount of potential to earn absent injury), and that the Board will affirm an administrative law judge's determination of claimant's average weekly wage 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 addressing this issue in his decision, the administrative law judge considered and rejected employer's contention that claimant's state-side earnings must be utilized in conjunction with claimant's earnings while employed in Iraq when calculating claimant's average weekly wage for compensation purposes. Specifically, the administrative law judge concluded that using only the wages that claimant earned while employed as a truck driver in Iraq provided a fair and accurate assessment of the claimant's potential earning capacity at the time of his injury. Decision and Order at 7 – 8. In arriving at this determination, the administrative law judge found that it is not surprising that claimant in April 2005, following the occurrence of the subject work-incident and the onset of claimant's medical condition, would express some doubt regarding whether or not he would have continued his employment in Iraq following the initial expiration of his

contract in January 2005.[1] The administrative law judge concluded that claimant's potential actions in January 2005, had he not been rendered disabled by a tragic accident, were speculative and that he was therefore unwilling based upon the record before him to conclude that claimant would not have continued his employment had he not in fact been injured. *Id.* Accordingly, the administrative law judge found that, under Section 10(c), claimant's earnings in Iraq over 10 weeks of $14,735.80 yielded an average weekly wage of $1,473.58.[2]

In this case, the administrative law judge rationally determined that claimant's earnings from his work in Iraq represented a fair and accurate assessment of claimant's earning potential at the time of his work injury. Moreover, the administrative law judge's reliance on these wages properly reflects the increase in pay claimant received when he commenced working for employer. *See Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986). Therefore, contrary to employer's contention, the administrative law judge did not err in using only claimant's wages from his employment in Iraq when calculating claimant's average weekly wage. We affirm the administrative law judge's rational finding that claimant's compensation is to be based on an average weekly wage of $1,473.58. *O'Hearne v. Maryland Casualty Co.*, 177 F.2d 979 (4th Cir. 1949); *Proffitt*, 40 BRBS 41; *Le*, 18 BRBS 175.

[1] During his April 8, 2005, deposition, claimant stated that, had he not been injured, he was committed to fulfilling his one-year contract of employment with employer and that his decision as to whether or not to extend his term of employment in January 2005 would have depended on the conditions in Iraq at that time. *See* EX 1 at 55 -56.

[2] The objective of Section 10(c) is to arrive at wages reflecting claimant's annual earning capacity which is then divided by 52 to arrive at his average weekly wage. 33 U.S.C. §910(c), (d). In this case, there is no need for this formal calculation, as extrapolating claimant's earnings over a year and dividing by 52 yields the same result. *See Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 25(CRT) (5th Cir. 2000).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits 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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BETTY JEAN HALL
Administrative Appeals Judge