BRB No. 13-0312

NAZER A. HAMIDZADA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MISSION ESSENTIAL PERSONNEL	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	DATE ISSUED: Mar. 21, 2014
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Claimant Temporary Total Disability and Medical Benefits of William Dorsey, Administrative Law Judge, United States Department of Labor.

Stephanie Weaver (The Turley Law Firm, APLC), San Diego, California, for claimant.

Maryann C. Shirvell and Lisa G. Wilson (Laughlin, Falbo, Levy & Moresi), San Diego, California, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Claimant Temporary Total Disability and Medical Benefits (2012-LDA-00010) of Administrative Law Judge William Dorsey 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 suffered a severe head injury from an IED explosion on October 30, 2010, during the course of his employment for employer as an interpreter in Afghanistan. He currently is under full-time care at a residential facility in California. The parties stipulated that claimant is temporarily totally disabled due to his work-related injury. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from November 1, 2010 to January 2, 2012, and the parties resolved all issues except claimant's average weekly wage.

In his decision, the administrative law judge determined that claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), is $2,778.86, based solely on the wages claimant earned in his employment for employer in Afghanistan, which were comprised of his base pay, plus hardship and hazardous duty supplements. Decision and Order at 5-7, 9-11. The administrative law judge rejected employer's contention that claimant's average weekly wage should not be based solely on his wages in Afghanistan because his longstanding back problems rendered him unfit for the job and he would not have completed his one-year term. *Id.* at 7. Since a calculation of two-thirds of claimant's average weekly wage resulted in a compensation rate of $1,852.57, which is in excess of 200 percent of the national average weekly wage, claimant was awarded compensation based on the maximum rate of $1,256.84 that was in effect at the time of claimant's injury.[1] *Id.* at 11; *see* 33 U.S.C. §906(b).

On appeal, employer challenges the administrative law judge's average weekly wage finding. Employer contends that, in view of the district court's order vacating the

[1] The administrative law judge also awarded claimant medical expenses not covered by the parties' stipulations and the future treatment recommended by claimant's treating physician. Decision and Order at 7, 11-12. Employer was granted a Section 14(j) credit, 33 U.S.C. §914(j), for disability benefits it paid claimant from October 30 to November 12, 2010, when it also paid claimant's salary. *Id.* at 11.

Board's decision in *K.S.* [*Simons*] *v. Serv. Employees Int'l, Inc.*, 43 BRBS 136 (2009) (*en banc*), *aff'g on recon.* 43 BRBS 18 (2009), *vacated and remanded sub nom. Serv. Employees Int'l, Inc. v. Director, OWCP* [*Simons*], Civ. Act. No. H-11-01065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013), the administrative law judge erred in calculating claimant's average weekly wage with reference only to claimant's overseas earnings. Claimant and the Director, Office of Workers' Compensation Programs, respond in support of the administrative law judge's average weekly wage calculation, averring that it is based on a proper exercise of the administrative law judge's discretion, as described by the district court in *Simons.*

Section 10(c) of the Act states:

> If either of the foregoing methods [Section 10(a), (b)] 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).[2] Citing *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006),[3] the Board in *Simons* reversed the administrative law judge's use of the claimant's

[2] It is uncontested that Sections 10(a) and (b) are not applicable, such that claimant's average weekly wage must be calculated pursuant to Section 10(c). 33 U.S.C. §910(a), (b).

[3] In *Proffitt*, the administrative law judge had based the claimant's average weekly wage calculation solely on his overseas earnings because the claimant's stateside employment was not similar to his overseas work, in that claimant had different duties and the job was inherently more dangerous. The Board affirmed the calculation as rational and supported by substantial evidence because use of the overseas earnings reflected claimant's recent wage increase and demonstrated the loss of earnings he sustained as a result of the injury. *Proffitt*, 40 BRBS at 45. In *Simons*, the Board held that as the case was not distinguishable from *Proffitt*, the same result should obtain – higher wages for more dangerous work under at least a one-year contract requires the use of only overseas wages. Thus, the Board reversed the administrative law judge's use of a blended approach in favor of a calculation based only on overseas wages. *Simons*, 43 BRBS at 20-21; 43 BRBS at 137; *cf. Jasmine v. Can-Am Protection Group, Inc.*, 46

combined overseas and stateside earnings during the year preceding his injury to calculate his average weekly wage under Section 10(c). The Board held that the claimant's average weekly wage must be calculated based solely on his overseas earnings as the claimant had been enticed by higher wages to work in a dangerous environment in Iraq and Kuwait. The claimant's potential to maintain his higher level of earnings afforded by his one-year contract to work overseas was cut short by his injury. Therefore, the Board held that claimant's earnings under this contract provided the best evidence of claimant's capacity to earn absent this injury and that a calculation based on the overseas earnings properly had "regard for the previous earnings of the injured employee in the employment in which he was working at the time of injury." *Simons*, 43 BRBS at 20-21; 43 BRBS at 137 (quoting Section 10(c)).

On appeal, the district court held that the Board engaged in de novo review of the evidence and usurped the wide discretion afforded administrative law judges in calculating average weekly wage under Section 10(c). *Simons*, 2013 WL 943840 at *3-4. The court stated that substantial evidence supported the administrative law judge's finding that a blended approach, using both the claimant's stateside and overseas earnings, better reflected the claimant's true earning capacity pursuant to Section 10(c), taking into account claimant's one-year contract and the conditions of overseas employment. The court held that the Board did not provide any support for the proposition that the decision in *Proffitt*, 40 BRBS 41, should be applied to all cases with similar facts, as such a conclusion abrogated the wide discretion afforded administrative law judges pursuant to Section 10(c). *Id*. at 3. The court stated that the administrative law judge had reasonably determined that the facts in *Simons* were sufficiently different from those in *Proffitt* to merit a different outcome, and he identified these facts:

> Simons was employed in the same type of work as he was previously employed, was injured in manner that could have occurred stateside, and his work overseas did not provide him with new skills that might be used to increase his salary once he returned home. Dkt. 1, Ex. D at 8. Proffitt was working in a different field than he had worked stateside, he had learned new skills that would increase his salary stateside, and was injured running from a mortar attack, an event that would not have occurred had he been working in the United States. *Id.*

BRBS 17 (2012) (affirming administrative law judge's use of blended approach of stateside and overseas earnings in a Defense Base Act case involving employment in Afghanistan where the claimant had a short-term contract and a documented work history of rotating between stateside and overseas employment).

Simons, 2013 WL 943840 at *4 n.4. The district court thus remanded the case, and a companion case, for further proceedings consistent with its opinion.[4]

The district court's unpublished decision in *Simons* was issued 16 days prior to the administrative law judge's decision in this case, and the administrative law judge likely was unaware of its issuance.[5] In his decision, the administrative law judge stated:

> The controlling decisions on this issue are *K.S. v. Serv. Employees Int'l* and *Proffitt v. Serv. Employers Int'l*. In *K.S.* the Benefits Review Board held that the average weekly wage is calculated using overseas wages at the time of the injury, for three reasons:
>
> 1. the employer paid the claimant substantially higher wages to work overseas than he earned in the United States;
> 2. the work involved dangerous working conditions; and
> 3. he was hired under a full-time, one-year contact.
>
> The Employer would distinguish *K.S.* and *Proffitt* on their facts.

Decision and Order at 5-6 (emphasis added) (footnotes omitted). The administrative law judge proceeded to reject employer's attempt to distinguish the cases. He found that claimant was paid wages 41 percent higher than his stateside wages for a car dealership to work overseas in dangerous conditions; claimant also received hazard and hardship pay. The administrative law judge found that claimant's initial assignment was "expected to last approximately one year" and that claimant's terms of employment used similar language to the contracts in *Simons* and *Proffitt*. The administrative law judge also rejected employer's contention that claimant would not have been able to fulfill his one-year job because of his pre-existing physical conditions. Thus, the administrative law judge found this case was not factually distinguishable from *Simons* and *Proffitt*, and that "[T]he Claimant's average weekly wage must be based on what he earned in Afghanistan." Decision and Order at 7 (emphasis added).

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[4] In the companion case, the Board had held the administrative law judge was bound to apply *Simons* and to calculate the claimant's average weekly wage with reference to only the claimant's overseas earnings.

[5] The district court's decision is not binding precedent in this case, which arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. *See McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011). Nonetheless, the overturning of *Simons* leaves the Board without any published precedent on the issue in the present case.

We agree with employer that the administrative law judge believed that he was compelled to apply *Simons*, based on his statements about "controlling" law and that claimant's average weekly wage "must be based on what [claimant] earned in Afghanistan" given his findings of fact. Given the district court's order vacating *Simons*, we vacate the administrative law judge's average weekly wage finding, and we remand this case for findings of fact under Section 10(c). *See generally Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979) (noting administrative law judge's discretion under Section 10(c)). In its decision, the district court based its holding on the administrative law judge's "wide discretion," specifically noting, "[I]t is within the administrative law judge's discretion to determine whether or not the facts of the two cases [*Simons* and *Proffitt*] are similar enough to merit similar outcomes." *Simons*, 2013 WL 943840 at *4. On remand, the administrative law judge must determine the facts pertinent to the average weekly wage calculation,[6] apply relevant case precedent, and calculate an average weekly wage that represents claimant's wage-earning capacity at the time of injury.

[6] Accordingly, we will not address employer's challenge to the administrative law judge's factual findings: that claimant's overseas salary was not "substantially higher" than his stateside earnings, that claimant was not hired under a one-year contract, and that claimant's pre-existing physical conditions would have precluded his continuing to work overseas.

Accordingly, the administrative law judge's average weekly wage calculation is vacated and the case is remanded for further proceedings in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Claimant Temporary Total Disability and Medical Benefits is affirmed. The administrative law judge's compensation award based on the maximum compensation rate for 2011 remains in effect unless the administrative law judge determines a lower average weekly wage on remand; under such circumstances, employer will be entitled to a credit for any overpayments. 33 U.S.C. §914(j).

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