BRB No. 04-0107

ROBERT J. BILLS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SCIENCE APPLICATIONS INTERNATIONAL CORPORATION	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE	)	DATE ISSUED:Sept. 28, 2004
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Dale W. Pedersen, Colorado Springs, Colorado, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2002-LHC-01658) of Administrative Law Judge Russell D. Pulver 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 findings of fact and conclusions of law of the administrative law judge 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)(3).

From May 27, 1998 through May 27, 1999, claimant, a twenty-three year veteran police officer and administrator, was employed as a police monitor by Dyncorp in Bosnia. Thereafter, on August 9, 1999, claimant commenced similar employment as a police instructor with employer in Kosovo. On January 31, 2000, claimant sustained multiple injuries when the van in which he was a passenger was involved in a vehicular accident. Claimant was flown back to the United States, where he was diagnosed with, *inter alia*, a right shoulder fracture dislocation, a right tibial fracture, right rotator cuff damage, a partial tear of the biceps tendon, a pressure ulcer and deep venous thrombosis in his right leg. Claimant subsequently underwent surgery for his shoulder and leg conditions and, following a period of treatment, he was released to return to work on October 23, 2000. Claimant returned to Kosovo, where he remained employed until November 2, 2001. Claimant then returned to the United States, where he obtained employment with a number of employers.

In his Decision and Order, the administrative law judge found claimant to be entitled to permanent partial disability compensation, commencing on March 22, 2001, for a 38 percent impairment to his right leg, based on an average weekly wage of $2,174.88, calculated under Section 10(a), 33 U.S.C. §910(a), but subject to the maximum compensation rate. 33 U.S.C. §906(b). Additionally, after calculating claimant's post-injury wage-earning capacity, the administrative law judge awarded claimant permanent partial disability compensation for his unscheduled shoulder injury in the amount of $898.63 per week. *See* 33 U.S.C. §908(c)(21), (h).

On appeal, employer contends that the administrative law judge erred in applying Section 10(a), rather than Section 10(c), 33 U.S.C. §910(c), 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(a) results in an average weekly wage lower than that arrived at by the administrative law judge. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer initially challenges the administrative law judge's use of Section 10(a) of the Act to calculate claimant's average weekly wage. Specifically, while acknowledging that claimant in the case at bar worked substantially the whole of the year preceding his injury on January 31, 2000, employer contends that the use of Section 10(a) is not reasonable or fair given the temporary nature of foreign contract work which results in a "spike" in an employee's income. Rather, employer posits that in cases of temporary overseas employment, the use of Section 10(c) to calculate an employee's history of earnings in the domestic United States and overseas labor markets would result in a more reasonable gauge of his realistic earning capacity. *See* Emp. br. at 5-8.

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 as the monetary base for the amount of compensation, and is premised on the injured employee's having worked substantially the entire year prior to the injury.[1] *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated and remanded on other grounds*, 462 U.S. 1101 (1983), *decision after remand*, 713 F.2d 462 (9th Cir. 1983); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). 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.[2] *See Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988).

In the instant case, the administrative law judge considered and specifically rejected employer's contention that Section 10(c) of the Act should be utilized to calculate claimant's average weekly wage since claimant's overseas work resulted in a temporary increase in his historical earnings. Rather, the administrative law judge found that Section 10(a) of the Act applies by its very terms, since claimant worked in the same type of employment, albeit for two different employers, substantially the entire year preceding his January 31, 2000, injury.[3] Decision and Order at 5.

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[1] Section 10(a) states:

If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two-hundred and sixty times the average daily wage for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a).

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

[3] The parties agreed that claimant worked 291 days in the year preceding his work injury: 116 days for Dyncorp, and 175 days for employer.

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(c) of the Act. Employer concedes that claimant worked substantially the whole of the year preceding his injury on January 31, 2000, in similar employment. Emp. br. at 8. In fact, the parties stipulated that claimant worked 291 days, or approximately 80 percent of the available workdays, in the year preceding his injury; claimant accordingly worked "substantially the whole of the year immediately preceding his injury" as required for the utilization of Section 10(a) to calculate his average weekly wage. *See Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *Duncanson-Harrelson Co.*, 686 F.2d 1336; *Castro v. General Constr. Co.*, 37 BRBS 65 (2003); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). Moreover, contrary to employer's contention that the administrative law judge's average weekly wage computation should account for claimant's life's earning history, Section 10 of the Act specifically provides that an employee's average weekly wage is to be determined as of "the time of the injury," and Section 10(a) aims at a theoretical approximation of what a claimant would ideally have been expected to earn. *See Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990).

In this regard, the United States Court of Appeals for the Ninth Circuit has held that under the statutory framework, Section 10(a) must be used in calculating average weekly wage unless to do so would be unreasonable or unfair. *Matulic*, 154 F.3d at 1057, 32 BRBS at 150-151(CRT). Based on this congressional mandate, the Ninth Circuit held that "mere" overpayment due to the application of Section 10(a) is not unreasonable or unfair but is built into the system. *Id.* Similarly, the United States Court of Appeals for the Fifth Circuit has stated that there is nothing in the statute to suggest that Section 10(a) may be deemed inapplicable solely on the basis of economic fluctuations in the claimant's field of employment subsequent to the time of the injury. *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). Accordingly, we reject employer's contention that the facts of the instant case mandate the use of Section 10(c), rather than Section 10(a), of the Act to calculate claimant's average weekly wage at the time of his work-related injury. *See Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1986).

Employer alternatively challenges the administrative law judge's calculation of claimant's average weekly wage pursuant to Section 10(a). Section 10(a) provides a formula by which the administrative law judge must calculate claimant's average annual earnings. Specifically, Section 10(a) requires that the administrative law judge determine the average daily wage claimant actually earned during the preceding twelve months. This average daily wage must then be 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 representing claimant's annual earning capacity 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. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *SGS Control Services*, 86 F.3d 438, 30 BRBS 57(CRT); 33 U.S.C. §910(a). In the instant case, the administrative law judge did not follow this formula. Rather, the administrative law judge initially calculated claimant's monthly wages while working for Dyncorp and employer respectively; these two figures were then used to calculate claimant's average weekly wage with these two employers. As the parties agreed that claimant worked 116 days for Dyncorp and 175 days for employer in the year preceding his injury, the administrative law judge added 40 percent of the Dyncorp average weekly wage weekly figure to 60 percent of the calculated average weekly wage figure for the period that claimant worked for employer, to arrive a composite average weekly wage of $2,174.88.[4] Section 10(a), however, does not sanction this method; the administrative law judge's calculation is not, therefore, a correct application of Section 10(a) which, as set forth *supra*, requires a calculation of claimant's average daily wage based on claimant's earnings and the actual days claimant worked in the year prior to his injury. Thus, as the administrative law judge's method of computing claimant's average weekly wage is not a correct application of Section 10(a), it cannot be affirmed. *See Duncan*, 24 BRBS at 136. We therefore vacate the administrative law judge's average weekly wage determination, and we remand the case for him to reconsider this issue.

[4] 116 days/291 days = 39.8 percent

175 days/291 days = 60.1 percent

Accordingly, the administrative law judge's calculation of claimant's average weekly wage is vacated, and the case is remanded for reconsideration of that issue. In all other respects, 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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JUDITH S. BOGGS
Administrative Appeals Judge