

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 12-72034**

SERVICE EMPLOYEES INTERNATIONAL, INC. and
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
and MICHAEL HUTCHINS,

Respondents

On Petition for Review of a Final Order of the Benefits
Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

M. PATRICIA SMITH
Solicitor of Labor
RAE ELLEN JAMES
Associate Solicitor
MARK REINHALTER
Counsel for Longshore
GARY K. STEARMAN
Counsel for Appellate Litigation
JONATHAN P. ROLFE
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director,
Office of Workers'
Compensation Programs

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

Service Employees International, Inc., and its insurance carrier, the Insurance Company of the State of Pennsylvania (collectively "SEII"), petition this Court for review of a Benefits Review Board order awarding Claimant Michael Hutchins benefits under the Longshore and Harbor Workers' Compensation Act (Longshore Act or the Act), 33 U.S.C. §§ 901-950, as extended by the Defense Base Act (DBA), 42 U.S.C. §§ 1651-1654.

Although correct, SEII's Jurisdictional Statement omits the fact that, in this circuit, DBA appeals of Board decisions are properly directed to the courts of appeals rather than the district courts. *Pearce v. Director, OWCP*, 603 F.2d 763, 766-70 (9th Cir. 1979). Moreover, among the circuits, this Court has jurisdiction over SEII's appeal because the office of the district director that issued the initial compensation order herein is located in the State of Washington. 42 U.S.C. § 1653(b).¹

STATEMENT OF THE ISSUES

1. When an injury results in an employee's disability, the employer pays benefits based on the employee's average weekly wage (AWW) at the time of the injury. Hutchins was working as a truck driver in Iraq under a one-year contract with SEII and was receiving a significantly higher wage than his previous stateside work when an injury on the job forced him to stop working and return to the United States. The first issue presented is whether

¹ Notably, the district director filed the compensation order in this case pursuant to 33 U.S.C. § 919(e) on May 5, 2011. Although SEII mailed its Notice of Appeal to the Benefits Review Board on June 3, 2011, it was not received by the Board until June 10, 2011. While the Board generally considers a Notice of Appeal to be filed "only as of the day it is received," an exception is made in cases like this in which the date of delivery "would result in the loss or impairment of appeal rights." 20 C.F.R. § 802.207. In such cases, the appeal is considered "to have been filed as of the date of mailing." *Id.* Accordingly, SEII's appeal to the Board, although received outside of the thirty-day window of 33 U.S.C. § 921(a) was considered timely by the Board.

Hutchins's contract salary when he was injured reasonably represents Hutchins's AWW at the time of injury.

2. Section 8(f) of the Act limits an employer's liability to pay benefits when the employer proves that an employee had a preexisting permanent partial disability, that the employer knew of the preexisting disability before the current injury, and that the current workplace disability is materially and substantially greater because of the preexisting disability (the "contribution" element). The ALJ ruled that SEII failed to establish each of these required elements. SEII waited until its reply brief before the Board to challenge the ALJ findings regarding the second and third elements and the Board consequently affirmed those findings as unchallenged on appeal. The second issue is whether the Board erred in finding that SEII waived its Section 8(f) claim by failing to fully present it in a timely manner.

3. The final issue (if not waived) is whether substantial evidence supports the ALJ finding, affirmed by the Board, that SEII failed to establish the contribution element of an 8(f) claim where there is no record evidence whatsoever demonstrating that any preexisting disability contributed in any way to Hutchins's current disability.

STATEMENT OF THE CASE

Hutchins was injured on March 28, 2006, while driving a truck for SEII in Iraq. SEII voluntarily paid Hutchins temporary total disability benefits and his medical expenses. ER 2. After SEII terminated those benefits, Hutchins filed this claim for additional compensation and benefits. *Id.*

Administrative Law Judge Russell D. Pulver issued a Decision and Order Awarding Benefits on May 3, 2011. ER 10-42. On April 27, 2012, the Benefits Review Board affirmed the ALJ's decision, finding, among other things: that it was within the ALJ's broad discretion to use Hutchins's overseas contract wage to calculate his AWW, *id.* at 4-5; that SEII waived any arguments regarding the second and third elements of its Section 8(f) claim, *id.* at 6; and that, even if it had not, SEII cannot establish the contribution element under the facts of this case. *Id.* at 6-7. This appeal followed.

STATEMENT OF THE FACTS

A. Statutory framework

1. Calculating compensation for disability

The Longshore Act provides compensation for disability to certain injured employees and death benefits to their survivors for injuries sustained during their employment. 33 U.S.C. §§ 902(2), 903(a), 908, 909. The DBA extends the Longshore Act to contractors like Hutchins working on military bases or

on U.S. government contracts outside the continental United States. 42

U.S.C. § 1651.

The Longshore Act compensates injured employees for “disability,” which the Act defines in terms of the employee’s lost wage-earning capacity due to injury: “‘Disability’ means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” 33 U.S.C. § 902(10). The Act establishes four classes of disabilities that direct both the amount and duration of compensation payable: permanent total disability; temporary total disability; permanent partial disability; and temporary partial disability. 33 U.S.C. § 908(a)-(c), (e).

Section 8(c) of the Act delineates the methods for determining compensation when the injured worker has lost some, but not all, of his wage-earning capacity, *i.e.*, has a permanent partial disability. *Johnson v. Director, OWCP*, 280 F.3d 1272, 1274 (9th Cir. 2002). Where the injury falls within a specified list of injuries, known as scheduled injuries (such as loss of a limb), Section 8(c) provides a predetermined number of weeks to be compensated at the rate of two-thirds the claimant’s AWW prior to the injury. 33 U.S.C. § 908(c)(1)-(20). For injuries involving non-scheduled permanent partial disabilities not specifically listed, compensation awards are governed by § 8(c)(21). 33 U.S.C. § 908(c)(21).

Section 8(c)(21) prescribes a straightforward formula for determining both the amount and the duration of an injured worker's weekly permanent partial disability compensation award for non-scheduled injuries:

In all other cases in the class of [permanent partial] disability, the compensation shall be $66 \frac{2}{3}$ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

33 U.S.C. § 908(c)(21).² Thus, once the AWW and post-injury earning capacity have been determined, computing a partial disability award is a matter of simple math under the formula: wage-earning capacity is subtracted from AWW, and the claimant is entitled to two-thirds of the difference. 33 U.S.C. § 908(c)(21); 33 U.S.C. § 908(e).³

AWW is determined under one of three alternative methods. 33 U.S.C. § 910. Under each, the administrative law judge first arrives at the employee's average annual earnings, 33 U.S.C. § 910(a)-(c), and then divides by 52

² Section 8(e) uses the same formula as § 8(c)(21) for periods of *temporary* partial disability, except it limits payments to a period of five years. 33 U.S.C. § 908(e).

³ Section 6, however, establishes minimum and maximum amounts of compensation. The maximum is recalculated each fiscal year at "200 per centum of the applicable national average weekly wage[.]" 33 U.S.C. § 906(b)(1). Section 6 then describes the methodology for applying and calculating the national average weekly wage and determining the applicable maximum.

weeks to determine AWW. 33 U.S.C. § 910(d)(1). Under Section 10(c), the statutory provision applicable in this case,⁴ the injured employee's average annual earnings must "reasonably represent [his] annual earning capacity" at the time of his injury. 33 U.S.C. § 910(c).⁵ The ALJ ascertains this sum "having regard" to (1) the employee's actual wages "at the time of injury," (2) the wages of similarly situated employees, "or" (3) the "other employment of such employee." *Id.*

Post-injury wage-earning capacity is determined under § 8(h), 33 U.S.C. § 908(h). That section mandates the use of the claimant's "actual earnings if such earnings fairly and reasonably represent his wage-earning capacity." 33 U.S.C. § 908(h).

⁴ All parties agree that Hutchins was a seven-day a week worker and that Section 10(c) therefore provides the correct method to determine AWW under 33 U.S.C. §910. Sections 10(a) and 10(b) deal with five and six day a week workers. *Id.*

⁵ Section 10(c) provides:

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) (emphasis added).

2. Limiting employer liability under Section 8(f)

In order to promote the hiring of employees with pre-existing disabilities, the Act shifts an employer's compensation liability after 104 weeks of permanent disability to an industry-financed, but DOL-administered, Special Fund. 33 U.S.C. § 908(f).⁶ To be entitled to this relief, the employer must prove (1) that "the claimant had an existing permanent partial disability prior to the employment injury, (2) that "the disability was manifest to the employer prior to the employment injury", and (3) that "the current disability is not due solely to the most recent injury." *Marine Power & Equip. v. Dep't of Labor (Quan)*, 203 F.3d 664, 668 (9th Cir. 2000). The employer bears the burden of persuasion to prove all three elements. *Id.*; *see also Quan*, 203 F.3d at 668.

B. Hutchins's pre-Iraq work and medical history

Hutchins worked at various jobs involving manual labor before becoming a licensed aircraft mechanic, and then a production illustrator for Boeing. ER

⁶ Section 8(f) provides, in pertinent part:

(f) Injury increasing disability: (1) . . . In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide . . . compensation for one hundred and four weeks only.

33 U.S.C. § 908(f).

12, 87-88, 285. After Boeing laid him off, he became a truck driver and drove trucks domestically with various employers for approximately five years, ending in 2005. ER 12.

Hutchins suffered from two medical issues prior to working for SEII. In 1986, he injured his back unloading a sofa while working for a furniture company. ER 6. Although he testified that he was off work for about a year after the accident, the record contains no medical evidence regarding the injury. Hutchins also missed one week of work in 1997 and one day in 1998 due to back spasms while at Boeing. He returned to work at Boeing after both incidents with no restrictions. ER 6.

In addition to back problems, Hutchins injured his right knee in 1992 and received a 30% impairment rating. ER 6. Notably, the knee injury is the only injury for which Hutchins ever received an impairment rating. Hutchins did not receive any rating for his back or neck at any time prior to his current back and neck injuries, which are the basis for his award at issue here. Indeed, when Hutchins was hired by SEII in 2005, he had no problem passing the pre-employment physical. ER 3. SEII found Hutchins qualified to perform any work consistent with his skills and training and it placed no physical limitations on him whatsoever. ER 42.

C. Hutchins's employment and injury with SEII

Hutchins testified that he decided to go to Iraq “to help with the military effort and to make additional revenue.” ER 12. He expected to work in Iraq until the end of the war and then possibly work in Afghanistan. ER 17. On December 1, 2005, he signed a one-year employment agreement with SEII to drive there. ER 317-330. The contract was terminable at will by either party, with a base salary of \$3,000 per month, in addition to overtime pay, a foreign service bonus (5%), area differential (25%), and danger pay (25%). ER 330. SEII also paid for Hutchins's housing. ER 330. Given these additional sums, the contract wage was significantly higher than the wage Hutchins made driving domestically.⁷

Hutchins's work in Iraq was extremely dangerous. He drove heavy trucks in hostile environments north of Baghdad. ER 12. The trucks were old army-issue, with essentially no safety equipment, seat belts or shock absorbers. ER 12, 13. He testified that while driving he came under attack from roadside bombs, automatic weapons, and mortar fire about 80% of the time he was sent out on a convoy. ER 12. He was required to wear Kevlar body armor and a helmet, which collectively weighed 70 pounds. ER 12. In addition to the

⁷ Hutchins's W2s indicate that he made \$11,314.94 driving domestically in 2004 and \$39,712.86 in 2005. ER 26. By contrast, he made \$39,354.02 in slightly over 5 months driving in Iraq for SEII. ER 35.

intrinsic dangers of driving in a war zone, the working conditions themselves were grueling: he routinely drove for 12-hour shifts in searing heat over terrible roads on a seven-day a week schedule. ER 12.

On March 28, 2006, Hutchins was driving in a convoy when an Iraqi vehicle infiltrated the line. ER 13. The truck in front of him stopped suddenly. Hutchins was unable to stop; his truck violently slammed into the truck in front of him. *Id.* The force threw him into the steering column, injuring his back and neck. *Id.* SEII initially provided medical treatment in Iraq for his injury, but the condition worsened. *Id.* Although Hutchins attempted to continue to work to fulfill his contract, he was physically unable to do so. *Id.* SEII subsequently found Hutchins at fault for the accident, terminated his contract, and flew him home. *Id.* All told, Hutchins worked for SEII from December 12, 2005 through May 15, 2006, a period of 155 days, or slightly over 22 weeks. ER 35.

D. The decisions below

1. The ALJ award of benefits

The ALJ resolved two issues that are relevant to the Director's participation in this appeal: (1) Hutchins's AWW at the time of his injury; and (2) SEII's entitlement to relief under Section 8(f).⁸

a. The ALJ's calculation of Hutchins's AWW and disability compensation based on his overseas earnings

The ALJ used Section 10(c) of the Act to determine Hutchins's AWW. ER 32-35. He explained that "the object of § 10(c) is to arrive at a sum that reasonably represents claimant's annual earning capacity *at the time of his injury*." ER 33 (emphasis added). The ALJ further observed that although Section 10(c) "permits the use of wages from the claimant's prior employment," it "does not require such use," and that he is "afforded wide discretion" to determine the wages that reasonably represent the claimant's earning capacity at the time of injury. ER 33 (citations omitted).

In that regard, however, he also noted that "[t]ypically, a claimant's wages at the time of injury will best reflect [his] earning capacity." ER 35.

Accordingly, the ALJ recognized that "AWW calculations for workers

⁸ SEII also challenges on appeal whether substantial evidence supports the award and the ALJ's finding that Hutchins's testimony was credible. The Director will leave briefing on these issues to the private parties.

earning substantially higher wages in dangerous overseas areas” can be “based solely on such overseas wages” if those wages reasonably reflect actual earning capacity at the time of injury. ER 33 (citing two Board cases *K.S. v. Service Employees Int’l, Inc (K.S.)*, 43 BRBS 136 (2009) (en banc) and *Proffitt v. Service Employers Int’l Inc.(Proffitt)*, 40 BRBS 41 (2006) for the proposition that AWW calculations for workers earning substantially higher wages overseas in dangerous area should be based solely on such overseas wages).

Finding the facts here “strikingly similar” to *K.S.* and *Proffitt* and those decisions “indistinguishable,” the ALJ held that this is the “classic case” in which overseas contract wages should be used to determine AWW. ER 34. He pointed out that Hutchins, like the claimant in *Proffitt*, was injured about halfway into a one-year contract to drive trucks in Iraq that paid him a higher wage than his stateside employment “to compensate for working under the dangerous conditions.” ER 34. Moreover, he emphasized that “as in *Proffitt*, [Hutchins] was hired by [SEII] to work full-time under a contract with an expected duration of twelve months,” and that “there [was] no evidence that [he] did not intend to fulfill his contract obligation.” ER 34. Thus, the ALJ ruled that but for his injury, Hutchins “had the ability to continue earning substantially higher income from working overseas.” ER 34. As a result, the

ALJ concluded that “Claimant’s actual earnings while employed by SEII provides the most accurate basis for establishing Claimant’s annual earning capacity at the time of his injury.” ER 35.⁹

The ALJ then calculated Hutchins’s AWW and disability compensation based on his overseas employment. Because Hutchins earned a total of \$9,354.02 during his employment with SEII, which lasted a total of 22.143 weeks, the ALJ determined his AWW was \$1,777.27 ($\$9,354.02 \div 22.143 = \$1,777.27$). 33 U.S.C. § 910(d)(1); ER 35. The ALJ then used the AWW figure to calculate Hutchins’s disability compensation. Hutchins was temporarily totally disabled from May 16, 2006 through February 8, 2007, during which time he was entitled to two thirds of his AWW, or \$1,184.85 ($1,777.27 \times 2/3 = 1,184.85$). ER 43. Since that number exceeded the cap set in

⁹ In reaching this conclusion, the ALJ specifically rejected SEII’s three factual arguments attempting to distinguish this case from *K.S.* and *Proffitt*. First, the ALJ held that SEII’s attrition evidence that 38% of its drivers in Iraq did not complete their contracts did not establish that Hutchins would not fulfill his one year contract because the evidence “actually shows that more drivers completed their contracts than did not.” ER 34. Second, the ALJ rejected SEII’s argument that Hutchins’s prior back and knee injuries would have prevented him from completing his contract. To the contrary, the ALJ found that those injuries “were disclosed on the pre-employment physical” and “clearly were determined to be no obstacle to successful completion of the contract.” ER 34. Finally, the ALJ did not credit the testimony of a former employer of Hutchins who claimed broadly that Hutchins would not have finished his contract because he was an unreliable employee. ER 34.

33 U.S.C. § 906(b)(1), the ALJ reduced it to the maximum compensation rate in effect at the time of his injury, or \$1,073.64. ER 43.

Hutchins was temporarily partially disabled from February 9, 2007 until January 23, 2008 and permanently partially disabled thereafter. The ALJ calculated his wage-earning capacity under § 8(h) using his actual wages for those periods, which yielded \$707.14 per week. ER 31. Two thirds of the difference between his AWW and his residual wage-earning capacity therefore entitled him to a compensation rate of \$713.42 per week from February 9, 2007 onward for his partial disability. ($1,777.27 - 707.14 = 1,070.13 \times 2/3 = \713.42). ER 31.

b. The denial of Section 8(f) relief

The ALJ also held that SEII failed to satisfy any of the Section 8(f) elements and therefore denied relief under that section. ER 42. First, the ALJ found no evidence of a pre-existing disability. Although noting Hutchins's prior back injury, the ALJ ruled that Hutchins had been released to return to work and had worked unrestricted for SEII until the date of the accident. ER 42. Second, the ALJ found that "no medical or opinion evidence on record [] establishes that [Hutchins's] current restrictions are contributed to by any preexisting conditions" and that "[c]ertainly there is no medical evidence or opinion on record establishing that Claimant's current restrictions are more

severe than he would otherwise have without the history of back pain.” ER 42. Finally, the ALJ held that SEII’s pre-employment determination that Hutchins had no disability and no resulting work restrictions demonstrated that any preexisting injury was not manifest to SEII. ER 42.

As a result, the ALJ concluded that SEII remained liable to pay all compensation for Hutchins’s disability benefits. ER 42.

2. The Board affirmance

The Board rejected SEII’s arguments opposing the ALJ’s calculation of Hutchins’s AWW wage and post-injury wage-earning capacity. It found the present case legally indistinguishable from *K.S.* and *Profitt* and therefore upheld the ALJ’s use of only Hutchins’s overseas earnings to calculate his AWW. ER 4. Second, the Board found “no support in either the Act or the case law” for an award based on SEII’s proposed “two-tiered” approach.¹⁰ ER 4, citing *Raymond v. Blackwater Security Consulting, L.L.C.*, 45 BRBS 5 (2011). Finally, the Board rejected SEII’s request for an ALJ remand to consider the two-tier argument because the issue was appropriately decided as one of law. ER 5, n.3.

¹⁰ Under it, SEII argued, any disability award based upon Hutchins’s Iraq earnings should last only so long as his overseas employment would have lasted, and any additional benefits should be based solely on the difference (if any) between his pre-Iraq earnings and post-Iraq earning capacity (so as to account for any decrease upon his return to the United States). ER 4.

The Board also rejected SEII's argument that the ALJ erred in denying Section 8(f) relief. First, it ruled that SEII had waived any objection to the denial by waiting until its reply brief to address the ALJ's findings against it on the second and third elements necessary to Section 8(f) relief. ER 6.

Despite finding waiver, the Board nonetheless determined that the ALJ had correctly found that SEII failed to establish the contribution element. The Board observed that SEII (in its reply brief) relied solely on Dr. Giuliani's opinion to establish contribution, but the doctor's one page letter "at best" "appears" to confirm that the work injury "may have combined" with a previous injury back injury. ER 7. But it did not demonstrate, as required by the Act, that Hutchins's "current condition is 'materially and substantially' greater' than it would have been absent the pre-existing back condition or that the current permanent partial disability is not due solely to the work injury." ER 7. Further, the Board found that there is no evidence whatsoever that Hutchins's "prior knee condition materially and substantially contributed to his current condition." ER 7.

STANDARD OF REVIEW

The ALJ's determination of AWW under Section 10(c) and his factual findings regarding Section 8(f) relief are afforded wide deference. *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 1165 (9th Cir. 2010) ("If the

ALJ's determination of [AWW] under section 10(c) is supported by substantial evidence in the record, it must be affirmed"); *Quan*, 203 F.3d at 667 (a reviewing body in a Section 8(f) case "must accept the ALJ's findings of fact unless they are contrary to law, irrational, or unsupported by substantial evidence."). The "substantial evidence test for upholding factual findings is extremely deferential to the factfinder. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rhine*, 596 F.3d at 1165 (citations omitted). The court's task therefore "is not to reweigh the evidence, but only to determine if substantial evidence supports the ALJ's findings." *Id.* (citations omitted).

SEII's argument regarding its "two tiered" approach and challenge to the Board's waiver determination raise questions of law over which this Court exercises *de novo* review. *See Gen. Constr. Co. v. Castro*, 401 F.3d 963, 965 (9th Cir. 2005). To the extent the Board's waiver ruling involves a consistent interpretation of its own procedural regulations, it is entitled to deference. *Aetna Cas. & Sur. Co. v. Director, OWCP*, 97 F.3d 815, 818 (5th Cir. 1996); *cf. Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 367 n.2 (4th Cir. 1994) (calling the level of deference afforded the Board "a difficult question," but giving deference, if ever, when Board consistently interprets own procedural regulations without objection from the Director).

SUMMARY OF ARGUMENT

The ALJ properly based Hutchins's AWW solely on his overseas earnings at the time of his injury. When he was injured, Hutchins was driving trucks for SEII in Iraq. This overseas employment was far more difficult and dangerous than his stateside work as a truck driver, and Hutchins accordingly received greater compensation. His overseas earnings therefore best reflect the "previous earnings of the injured employee *in the employment in which he was working at the time of the injury.*" 33 U.S.C. § 910(c) (emphasis added).

SEII's attempts to incorporate Hutchins's stateside earnings into his AWW either by blending, *i.e.*, averaging, them with his overseas earnings or by establishing an entirely different "second tier" of disability compensation have no basis in the Act or case law and are entirely extra-statutory. The ALJ scrupulously applied Section 10(c) in accordance with this Circuit's law and his AWW finding, an exercise of fact-finding discretion, is entitled to deference. The Court should therefore reject SEII's challenges to the ALJ's AWW determination.

SEII's request for Section 8(f) relief is also without merit. Consistent with its appellate procedure, the Board ruled that SEII waived its Section 8(f) argument by failing to challenge all of the adverse ALJ findings in its opening brief. This Court should affirm the Board's waiver ruling.

Even if SEII's Section 8(f) argument is procedurally viable, substantial evidence supports the ALJ's finding that SEII failed to establish all the elements of Section 8(f) relief. Among other reasons, SEII failed to prove the Section 8(f) contribution element, namely that Hutchins's current disability is materially or substantially greater than it would have been without his preexisting disabilities.

ARGUMENT

A. Under Section 10(c), the ALJ must use the information that best reflects a claimant's earning capacity at the time of injury.

Section 10(c) permits a broad inquiry into the injured employee's wages in order to arrive at an amount that best represents the injured employee's annual earning capacity at the time of injury. The ALJ is to consider the employee's actual wages at the time of the injury, and the wages of similarly situated employees *or* other employment of the employee. 33 U.S.C. § 910(c); *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 1103 (9th Cir. 2006).¹¹ The prime objective of this broad discretion is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of the injury. *Healy Tibbitts*, 444 F.3d at 1102 (internal citations omitted). Unsurprisingly then, "[t]ypically a claimant's wages at the time of injury will

¹¹ See note 5, *supra* for the text of Section 10(c).

best reflect the claimant's earning capacity at that time." *Hall v. Consol. Employment Sys., Inc.*, 139 F.3d 1025, 1031 (5th Cir. 1991).

The claimant's wages when injured are especially probative when the claimant's job differs significantly from previous employment. In that circumstance, the AWW calculation, based solely on the claimant's higher wages in the new position, better reflects the claimant's current potential to earn. In *Healy Tibbitts Builders*, this Court affirmed an award of benefits calculated under section 10(c) using only the higher wages of a claimant's job at the time of injury, despite the fact that the claimant worked for 13 weeks on a project lasting 19 weeks. 444 F.3d at 1097, 1103. In that case, like here, the ALJ credited evidence that the claimant would have been able to continue earning higher wages at his new job absent the disabling injury. *Id.*; *see also Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1293 (9th Cir. 1979) (upholding an award of benefits where ALJ calculated AWW under Section 10(c) by considering only wages earned in 13-week period before injury, because claimant earned significantly less in her previous employment). Thus, in both *Healy Tibbitts* and *Bonner*, the Court found no basis to disturb the ALJ's AWW calculations based solely on time-of-injury wages and which gave "little or no weight" to the claimant's prior earnings or

the earnings of other employees, “so long as both were considered.” *Healy Tibbitts*, 444 F.3d at 1103 quoting *Bonner*, 600 F.2d at 1292.¹²

Courts in other circuits have likewise affirmed Section 10(c) calculations of AWW using only wages at the time of injury. For example, in *Bollinger Shipyards Inc. v. Director, OWCP*, the Fifth Circuit affirmed a 10(c) AWW calculation that was based only on the wages from the injured employee’s recently secured steadier, higher paying job. 314 Fed. Appx. 683, 686-687 (2009). The court recognized that “a change in circumstances, such as a recent change in work, could provide a reason for finding annual earnings at the time of the accident greater than the claimant’s actual annual earnings in the immediately preceding years.” *Id.*; see also *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 1031 (5th Cir. 1997) (indicating that evidence of a change in circumstances including recent change in work could result in calculating AWW using only wages from certain time period).

Section 10(c) is plainly written in the disjunctive. The text thus permits the ALJ to determine an injured employee’s AWW using only the injured employee’s wages at the time of injury. So long as the ALJ at least considers

¹² By contrast, Hutchins had worked in the “new” higher paying job for SEII for over 22 weeks, which is longer than the claimant in either *Healy Tibbitts* or *Bonner*. Moreover, Hutchins’s renewable one year contract far exceeded the claimant’s 19 week project in *Healy*.

the other earning data, that is sufficient. There is no requirement that he must give it weight. SEII's argument that Section 10(c) somehow *requires* the blending of wages earned before or after the time of injury has no support whatsoever in the statutory text. Instead, the relevance of pre and post-injury wages is left to the ALJ's discretion.

1. Hutchins's overseas wages best reflect his earning capacity at the time of injury.

This is a textbook case for applying an employee's higher time-of-injury earnings to calculate AWW, as the ALJ recognized. Hutchins worked in two different worlds that imposed vastly different risks and generated vastly different incomes. He was injured when working in the more dangerous, but more lucrative, job. Hutchins's injury compensation should be commensurate with the higher wages paid to entice him to do that vital job, which accurately reflects his earning capacity at the time of his injury.

Hutchins moved to Iraq and hauled supplies over hazardous roads because he wanted to earn more money than he did driving in the U.S. and because he wanted to help the war effort. Hutchins was well-paid to compensate for the risk, fear, and discomfort of driving long distances in Iraq, and there was no evidence that either SEII or Hutchins intended to end this lucrative overseas work prior to the end of the one-year contract period. ER 34. Absent injury, Hutchins was able, willing and had the opportunity to work as a truck driver

in Iraq (and then possibly in Afghanistan) for the foreseeable future. ER 34, 17. For these reasons, his SEII earnings accurately reflect his earning capacity at the time of injury. *See Healy Tibbitts*, 444 F.3d at 1103.

Conversely, his lower earnings from his mundane and safe stateside driving work clearly are not reflective of his earning capacity at the time of injury. Nor does blending these stateside earnings with his highly compensated SEII employment paint an accurate picture – blending simply dilutes his actual earnings at the time of injury and gives a false impression of the amount of lost earning power. *See Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 758 (7th Cir. 1979).

The ALJ here, fully cognizant of his discretion in determining Hutchins's AWW, ER 32, came to similar conclusions. ER 34-35 (finding, *inter alia*, overseas wages higher because work in Iraq was more dangerous and inconvenient, and but for injury Hutchins could have continued to receive higher wages and complete the one-year contract). As a result, the ALJ found, as the Board did in *K.S.* and *Proffitt*, that overseas wages alone provided the proper measure for calculating AWW. ER 34-35. This finding is undoubtedly correct as no other measure would “reasonably represent” Hutchins's earning capacity as required by Section 10(c). ER 35.

In sum, SEII, like the employers in *Healy Tibbitts* and *Bonner*, has given this Court no valid reason to disturb the ALJ's AWW calculation. The Court should affirm the ALJ's determination as within his discretion.¹³

2. The Longshore Act provides unambiguous formulas for setting disability compensation; there is no support in the Act or the case law to depart from them and adopt an extra-statutory “two-tiered” or *de minimis* exception.

In addition to its argument that the ALJ abused his discretion in determining AWW by not blending Hutchins's wages from his pre-injury employment with his SEII time-of-injury wages, SEII argues that Hutchins “should not receive disability benefits indefinitely at a rate based upon his higher earnings overseas, but should instead received [sic] such benefits at that rate only for as long as his overseas employment would have lasted, and should receive benefits at a lower rate thereafter.” SEII br. at 37. According to SEII, this would entail using his “overseas earnings” through the date the U.S. combat mission ended in Iraq, or when the withdrawal of troops was complete, and then arbitrarily reducing his compensation “to no greater than a

¹³ In its opening brief, SEII goes to great lengths to attempt to establish that *K.S.* and *Proffitt* were wrongly-decided or, alternatively, that this case is distinguishable from them. But its arguments miss the point. This Court should not affirm the ALJ's decision solely because it follows the Board's reasoning in *K.S.* and *Proffitt*. It should affirm the ALJ's decision because it adheres to the longstanding law of this circuit regarding Section 10(c). Indeed, the Board's rationale in both *K.S.* and *Proffitt* is premised on this Court's decisions in *Healy Tibbitts* and *Bonner*.

de minimis award after that date.” *Id.* at 41. In a nutshell, this is SEII’s “two-tiered approach.”

As an initial matter, it is not clear whether this argument once again attacks the ALJ’s finding on AWW (by calling for consideration of Hutchins’s “other employment” under Section 10(c)), or if SEII is baldly asking this Court to ignore the Act’s statutory framework and text and create out of whole cloth a special *de minimis* exception to the Act’s compensation formulas. Either way, the argument is without merit. If SEII is arguing that the ALJ should have based AWW on both Hutchins’s contract and his pre and post-Iraq employment, it is simply revisiting the same failed “blended rate” argument under Section 10(c), albeit the proposed blending occurs temporally, not mathematically. If SEII is asking this Court to create a *de minimis* exception to the compensation formulas -- based solely on the fact that Hutchins made a similar salary before and after his employment in Iraq -- this Court should flatly decline its invitation to create such an extra-statutory remedy.

The statutory formulas to calculate disability compensation are unambiguous. Once AWW and post-injury earning capacity are established, the compensation rate is two-thirds of the AWW in cases of total disability, and two thirds of the difference between AWW and post-injury earning

capacity in cases of partial disability, subject to the statutory maximum. 33 U.S.C. §§ 908(c), (e). Nothing in the Longshore Act's language or policies allows termination of an award based on the employee's pre-injury plan to eventually take lower-paying employment or because subsequent events might terminate the higher paying jobs that served as the basis for an AWW.

Unlike damages in a tort-based system, the Longshore Act simply does not permit adjustments to the compensation rate based on projections of what the claimant's financial status would have been but for the injury. This Court's decisions thus uniformly reject the notion that a tribunal can depart from the statutory formula in setting the compensation rate once a worker's average weekly wage and post-injury earning capacity are set.

In *Keenan v. Director, OWCP*, 392 F.3d 1041 (9th Cir. 2004), this Court construed Section 8(c)(21) and concluded that the statute plainly forbids adjustment of a compensation award based on a claimant's pre-injury earning expectations. It rejected the claimant's argument that he should receive an upward adjustment in his compensation award based on a promotion that he anticipated he would have received had he not been injured. *Id.* at 1043, 1045-46. The Court held that "the statutory formula contemplates wages at time of injury, rather than projected present wages, as the relevant baseline for comparison to actual present earning capacity." *Id.* at 1045.

In reaching its decision, the Court reasoned that the Longshore Act differs from the tort system, which uses a “damages formula, under which the employer must compensate [the injured party] for the difference between his actual economic position and his hypothetical economic position, which he would have enjoyed but for the injury.” *Id.* In contrast, the worker’s hypothetical economic position is irrelevant to Longshore Act compensation awards, which are simply based on “the difference between the employee’s pre-injury average weekly wages and his post-injury wage-earning capacity.” *Id.* at 1045-46 quoting *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1160 (9th Cir. 2002).

The Second Circuit reached the same conclusion in *New Haven Terminal Corp. v. Lake*, 337 F.3d 261 (2d Cir. 2003), a case even more closely on point than *Keenan*. In construing Section 8(c)(21), the court discussed whether it should consider post-injury events that could have changed the claimant’s wages “as time passed.” The court pointed to events that would have occurred but for the claimant’s injury as a potential basis for reducing the award; there was evidence that, had he not been injured, the claimant would have endured an across-the-board wage reduction along with the natural decline in his wages as he aged and worked less overtime. *Id.* at 267. But the Second Circuit held that the Longshore Act “forecloses this economic

argument,” because the Act hews to a strict formula for calculating permanent partial disability awards, and “does not permit adjustments to pre-injury wages.” *Id.*

An ALJ’s decision to arbitrarily adjust an award based on external factors ignores the straightforward statutory text and framework of the Act. The Board’s decision to reject SEII’s extra-statutory “two-tiered” argument as a matter of law was correct, and the Director respectfully submits that this Court should affirm the Board’s decision.¹⁴

¹⁴ As its only legal authority for this argument, SEII points to two ostensibly on-point old Benefits Review Board cases involving professional football players, which arose under an extension of the Longshore Act covering District of Columbia private employees: *Murphy v. Pro-Football, Inc.*, 24 BRBS 187 (1991), *aff’d on recon.*, 25 BRBS 114 (1991), *rev’d by mem. on other grounds*, Case No. 91-1601 (D.C. Cir. Dec. 18, 1992); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). In both cases, the injured football players agreed that their compensation should be terminated when their professional careers would have ended absent their injuries. The Benefits Review Board, the very tribunal that issued those decisions, disavowed as *dicta* any language in them purporting to authorize reduced awards. *Raymond v. Blackwater Security Consulting LLC*, 45 BRBS 4, 2011 WL 1752169 (2012). As such, these cases have lost the imprimatur of the Board along with any special weight accorded the decisions of that tribunal. Furthermore, the appropriateness of using the “two-tiered” approach under the Act is currently fully-briefed and in front of this Court in *Blackwater Security Consulting v. Raymond*, No. 11-71587 (oral argument held December 7, 2012). In that case, the Board summarily reversed an ALJ decision that adopted the extra-statutory *de minimis* exception SEII asks the Court to create here.

B. SEII is not entitled to Section 8(f) relief.

1. SEII waived its Section 8(f) claim by failing to properly pursue it at the Board.

To qualify for § 8(f) relief, the employer bears the burden of establishing (1) that “the claimant had an existing permanent partial disability prior to the employment injury;” (2) that “the disability was manifest to the employer prior to the employment injury”, and (3) that “the current disability is not due solely to the most recent injury.” *Quan*, 203 F.3d at 668.¹⁵

The ALJ held that SEII established none of Section 8(f)’s three elements. ER 42. In its opening brief to the Board, SEII contested the ALJ’s finding regarding the first element, but entirely failed to mention, let alone challenge, the unfavorable findings regarding the second and third elements. *See* Supplemental Excerpts of Record at 39-40. The Board accordingly found SEII’s request for Section 8(f) claim waived because it did not challenge the unfavorable second and third element findings until its reply brief. ER 6.

SEII’s excuse for not specifically addressing the unfavorable findings against it -- that “it made it clear throughout its initial briefing to the Board that it was challenging [the ALJ’s] overall conclusion that it was not entitled to Section 8(f) relief,” SEII br. at 43 -- is legally insufficient. The Board’s

¹⁵ See note 6 *supra* for the pertinent text of Section 8(f).

procedural regulation governing the opening brief explicitly requires that it “specifically state[] the issues to be considered by the Board” and “*present[] argument with respect to each issue presented* with references to transcripts, pieces of evidence and other parts of the record.” 20 C.F.R. § 802.211(b) (emphasis added).¹⁶ The Board thus has long held that uncontested findings of an administrative law judge will not be addressed, nor will arguments raised for the first time in a reply brief. *See, e.g., Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35, 40 n.6 (2011); *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff’d on recon en banc* 31 BRBS 13 (1997); *Skrack v. Island Creek Coal Co.*, 6 BRBS 1-710, 1-711 (1983) (“Claimant does not contest this finding in his Petition and Brief ... uncontested findings of the administrative law judge will generally not be addressed by the Board.”) (citation omitted).

¹⁶ The Board’s nomenclature may be confusing because it uses some of the same terms used by the courts of appeals to mean somewhat different things. A party (petitioner) appeals an adverse ALJ decision by filing a “notice of appeal” with the Board. 20 C.F.R. §§ 802.201(a); 802.208. The Board then “acknowledges” the notice of appeal, § 802.210, which triggers the requirement that the petitioner file a “petition for review” “accompanied” by a “supporting brief.” 20 C.F.R. § 802.211. The opposing party (respondent) may then file a response brief, 20 C.F.R. § 802.212, and the petitioner may then file a reply brief. 20 C.F.R. 802.213. As explained above, SEII’s supporting brief, which accompanied its petition for review, *i.e.*, its opening brief, was deficient.

It needs no argument beyond observing that the Board’s prohibition against raising an argument for the first time in a reply brief is consistent with both the Federal Rules of Appellate Procedure and this Court’s case law. *See, e.g.,* Fed. R. App. P. 28(a)(9) (opening brief argument must contain “contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”); *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1182 (9th Cir. 2001) (observing that issues raised in an appellate brief but not supported by argument are deemed abandoned); *Alaska Ctr. for Env’t v. United States Forest Serv.*, 189 F.3d 851, 858 n. 4 (9th Cir. 1999) (noting that an appellant who waives an argument by failing to raise it in his opening brief cannot raise the argument for the first time in his reply brief). Consequently, the Board correctly found SEII’s Section 8(f) argument waived.¹⁷

2. Even if viable, SEII plainly cannot establish the elements of Section 8(f) under the facts of this case.

Even if SEII’s Section 8(f) argument is properly before the Court, SEII has not demonstrated that the ALJ’s denial of such relief is not supported by

¹⁷ In a slightly different context, the Supreme Court has stated that Section 802.211 creates a requirement to exhaust all issues in an administrative appeal and that reviewing courts “regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues.” *Sims v. Apfel*, 530 U.S. 103, 108 (2000); *see also Vaught v. Scottsdale Healthcare Corp. Plan*, 546 F.3d 620, 630 (9th Cir. 2008) (explaining *Sims*).

substantial evidence. The ALJ correctly found that SEII failed to prove the second and third elements of Section 8(f) relief, namely that any pre-existing disability was manifest to SEII before Hutchins was injured and that any pre-existing disability contributed to his current disability.¹⁸

SEII's attempt to prove the ALJ wrong on the second element -- that Hutchins's knee or supposed back disability was manifest to it before Hutchins was injured -- consists of a bare statement that it "reiterates on appeal that the medical records introduced into evidence satisfied the requirement that the preexisting disability be manifest to the employer." SEII br. at 44. SEII does not cite any particular medical records or otherwise identify which medical records it is referring to, nor does it explain how it was aware of those records at the time Hutchins was injured. The argument, therefore, is insufficiently general to even warrant this Court's consideration. Fed. R. App. P. 28(a)(9) (opening brief argument must contain "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"); *United States v. Berber-Tinoco*, 510 F.3d 1083, 1089 n.2 (9th Cir. 2007) (undeveloped argument may be deemed abandoned); *Humble v. Boeing Co.*, 305 F.3d 1004, 1012 (9th Cir. 2002)

¹⁸ Before the Board, the Director conceded the first element of Section 8(f) relief – the existence of a pre-existing disability, namely, Hutchins's knee injury. The Board also stated that it was "arguable" that Hutchins's back injury was a pre-existing disability.

(failure to outline elements of discrimination claims resulted in abandonment of the issues).

Moreover, because SEII has failed to identify any medical records establishing its prior knowledge of the preexisting disability, there is no factual basis to reverse the ALJ's contrary findings that SEII's pre-employment physical revealed that Hutchins "effectively had no disability and resulting work restrictions" and that SEII was therefore unaware of any preexisting disabilities when it hired Hutchins. ER 42. Thus, the ALJ's finding must be affirmed on substantial evidence grounds as well. *See, e.g., E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1353 (9th Cir. 1993) (substantial evidence means "such relevant evidence as a reasonable mind might accept to support a conclusion").

In any event, SEII cannot establish the contribution element, as both the ALJ found and the Board squarely held. To make out contribution, an employer must establish that the claimant's current disability is not due solely to the subsequent work injury and is "materially and substantially greater" due to the pre-existing disability than it would be from the second injury alone. *Quan*, 203 F.3d at 668; *E.P. Paup Co.*, 999 F.2d at 1353.

The only possible relevant evidence -- Dr. Giuliani's letter -- does not come close to meeting this standard. ER 342. SEII rests its entire argument,

SEII br. at 45, on the doctor’s statement that “[o]n MRI the patient did show degenerative changes with radicular pain that I feel is directly related to the injury and trauma causing significant irritation to his back and spine.” ER 342. As a threshold matter, the letter does not identify the back injury or trauma, which may well be Hutchins’s Iraq injury. Moreover, the letter makes no mention of any previous back disability or injury whatsoever. Instead, SEII simply assumes that the mention of “degenerative changes” relates to a pre-existing back injury. But that is far from apparent. All spines degenerate over time. As the ALJ observed, “the pure existence” of such degenerative changes “is simply insufficient to bring the claim within the purview of Section 8(f).” ER 42. *See, e.g., Director, OWCP v. Berkstresser*, 921 F.2d 306, 311 (D.C. Cir. 1991) (labeling normal degenerative spinal changes as a preexisting condition would be “tantamount to making middle age a *prima facie* preexisting disability under § 8(f).”) (citation omitted).

And while it might be possible to interpret the letter as meaning the two injuries combined to create Hutchins’s disability, that is not enough to carry SEII’s burden.¹⁹ SEII must refute the possibility that the second injury alone

¹⁹ The fact that SEII’s understanding of its doctor’s opinion differs from the ALJ’s also cannot overturn the ALJ’s interpretation, given this Court’s substantial evidence standard of review. *Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 492 (7th Cir. 2004) (“on substantial evidence review

was the sole cause of the current disability. *E.P. Paup Co.*, 999 F.2d at 1353 (“It is not sufficient if the evidence indicates only that his two injuries create a greater disability than would his back injury alone.”). In other words, the letter does not show that a preexisting disability had a material or substantial effect on the current disability, as is required. There is no attempt at quantifying the effect of the alleged preexisting disability on the current disability, let alone elevating that effect to a “material or substantial” level. Dr. Giuliani’s letter therefore is legally insufficient on its face for this reason as well. *See, e.g., Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303, 306-08 (5th Cir. 1997) (“Satisfying the ‘materially and substantially greater’ prong of the statutory test requires ‘an employer [to] present evidence of the type and extent of the disability that the claimant would suffer if not previously disabled when injured subsequently.’”); *see also Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 8 F.3d 175, 185 (4th Cir. 1993) (contribution element “requires quantification of the level of impairment that would ensue from the work-related injury alone”).

Accordingly, assuming the Court considers the merits of SEII’s Section 8(f) claim, it should affirm the ALJ’s denial of such relief.

we would have to find the latter interpretation [of the doctor’s opinion] was the only permissible one, not that it was one of several”).

CONCLUSION

For all the above reasons, the decision of the Benefits Review Board should be affirmed.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN FRANK JAMES
Associate Solicitor

MARK A. REINHALTER
Counsel for Longshore

GARY K. STEARMAN
Counsel for Appellate Litigation

/s/ Jonathan P. Rolfe

JONATHAN P. ROLFE

Attorney

U.S. Department of Labor

Office of the Solicitor

Suite N-2117

200 Constitution Avenue, NW

Washington, D.C. 20210

(202) 693-5339

*Attorneys for the Director, Office
of Workers' Compensation Program*

STATEMENT OF RELATED CASES

Pursuant to Ninth Cir. Rule 28-2.6, the Director states that the case of *Raymond v. Blackwater Security Consulting*, Docket No. 11-71587, is presently pending before the Court. In *Raymond*, the Board summarily reversed an ALJ decision that used the same extra-statutory “two tiered” remedy that SEII advocates here.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14 point typeface, and contains 7,404 words, as counted by Microsoft Office Word 2010.

/s/ Jonathan P. Rolfe
JONATHAN P. ROLFE
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, NW
Washington, D.C. 20210
(202) 693-5339

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2012, I electronically filed the foregoing Brief of the Federal Respondent with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that for all participants in the case who are registered CM/ECF users, service will be accomplished by the appellate CM/ECF system. I also certify that I mailed 4 copies of the Supplemental Excerpts of Record to the Court and the parties on this date.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First Class mail, postage prepaid, to the following non-CM/ECF participants.

Gary Pitts
Pitts & Mills
307 South Friendswood Drive
Houston, TX 77546

/s/ Jonathan P. Rolfe
JONATHAN P. ROLFE
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, NW
Washington, D.C. 20210
(202) 693-5339