BRB Nos. 06-0591
and 07-0710

S.K.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYERS INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 09/28/2007
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order and the Decision and Order Denying Modification of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington D.C., and Gary B. Pitts (Pitts & Associates), Houston, Texas, for claimant.

Brian E. White and John L. Schouest (Phelps Dunbar), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Decision and Order Denying Modification (2005-LDA-66) of Administrative Law Judge Lee J. Romero, Jr., 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 was employed as a laundry service worker in Baghdad, Iraq. She previously had worked as a pre-school teacher in Houston, Texas. Claimant had worked in Iraq for approximately five weeks when she was injured in a motor vehicle accident on October 3, 2004. The driver of the car in which she was riding swerved to avoid hitting a box in the road, which the driver believed to be a bomb, and the car rolled over several times. Claimant suffered injuries which left her paralyzed from the mid-chest area downward. Claimant is currently unable to return to any employment.

Employer voluntarily paid claimant temporary total disability benefits under the Act based on an average weekly wage of $313. Employer determined claimant's average weekly wage by calculating her wages for the year preceding the injury, including the amounts she earned as a teacher in Houston and as a laundry worker in Iraq. Claimant sought benefits based only on the wages she would have earned on the job in Iraq.

In his initial decision, the administrative law judge accepted the parties' stipulations that claimant's disability prevents her from returning to her former employment and that she has not yet reached maximum medical improvement. In determining claimant's average weekly wage, the administrative law judge found that, as claimant did not work in the same employment for substantially all of the year prior to the injury, Sections 10(a) and (b), 33 U.S.C. §910(a), (b), do not apply. Thus, the administrative law judge concluded that he must determine claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c). The administrative law judge found that the most fair and reasonable method of computing claimant's average weekly wage is to award benefits commensurate with her earning power at the time of injury, considering only claimant's earnings as a laundry worker in Iraq.[1] Thus, the administrative law judge found that as claimant earned $4,776.12 during the 5 3/7 weeks of her employment with employer, her average weekly wage was $879.82.

[1] The administrative law judge found that claimant's base salary was $2,583 per month for a 40-hour week, and that she also was entitled to a five percent foreign service bonus, a 25 percent area differential, and a 25 percent hazard/danger pay, which totaled $4,003.65 per month. The administrative law judge also found that during the 5 3/7 weeks she was employed she earned $4,776.12.

Claimant appealed this decision, BRB No. 06-0591, but before the case was considered by the Board, claimant requested that the case be remanded to the administrative law judge to consider a petition for modification. 33 U.S.C. §922. The Board granted this requested by Order dated April 18, 2006. In the Decision and Order Denying Modification, the administrative law judge found that claimant did not establish a mistake in fact or change in condition. The administrative law judge stated that claimant's contention that wage records of similar employees should be considered in a Section 10(c) calculation is a new legal theory which claimant could have raised, but did not, in the initial proceeding. He also stated that Section 10(c) does not permit the use of prospective wages of the claimant or of similar employees. Thus, the administrative law judge denied claimant's petition for modification.

Claimant appealed this decision, BRB No. 07-0710, and requested reinstatement of her appeal of the administrative law judge's original decision, which the Board granted by Order dated July 10, 2007. On appeal, claimant contends that, in his original decision, the administrative law judge erred in determining an average weekly wage which was below claimant's contract rate, exclusive of overtime, of $923.92 per week, as the administrative law judge erred in dividing claimant's earnings by 5 3/7 weeks rather than by the stipulated 5 weeks of work. Claimant also contends the administrative law judge erred in giving no weight to the evidence concerning the wages of similarly situated employees pursuant to Section 10(c). Claimant contends that, on modification, the administrative law judge erred in not considering the wages of similarly situated employees on the erroneous basis that claimant had not argued this position under Section 10(c) in the first proceeding. Claimant further avers that Section 22 may be used to correct any mistake in fact, including the average weekly wage, regardless of the method of calculation urged in the initial proceedings.

Section 10(c) is to be used in instances when neither Section 10(a) nor (b) can be reasonably and fairly applied to calculate claimant's average weekly wage, or where there is insufficient information for application of those subsections.[2] *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981). Section 10(c) states:

> 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

[2] The parties do not contest the administrative law judge's finding that Section 10(a), (b) is inapplicable in the instant case. *See Proffitt v. Service Employers Int'l Inc.*, 40 BRBS 41 (2006).

> 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). The object of Section 10(c) is to arrive at a sum that reasonably represents claimant's annual earning capacity at the time of her injury. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). The statute requires that the administrative law judge have "regard" for the previous earnings of the employee. Thus, while post-injury events generally are irrelevant to the calculation of a claimant's average weekly wage, *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *see also Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Hawthorne v. Ingalls Shipbuilding Corp.*, 28 BRBS 73 (1994), *modified on other grounds*, 29 BRBS 103 (1995); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992), consideration of post-injury factors may be appropriate pursuant to Section 10(c) where a claimant's previous earnings do not realistically reflect the claimant's wage-earning potential. *See Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979), *aff'g Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984). Moreover, Section 10(c) specifically permits the administrative law judge to address the wages of employees similar to the claimant. 33 U.S.C. §910(c).

Claimant contends that the administrative law judge's calculation of her average weekly wage does not yield a fair and reasonable reflection of her annual earning capacity, as the administrative law judge did not consider the earnings of similarly situated employees or the amount of overtime claimant would have been expected to work. Claimant requested from employer the earning records for other laundry service employees. The initial records that employer provided did not indicate these employees' terms of employment. Moreover, the records did not state the number of hours worked by the employees but listed only a gross monthly wage amount for periods post-dating claimant's injury. In his original decision, the administrative law judge found that these wage records were not sufficient to establish that the employees were similarly situated to claimant pursuant to Section 10(b).[3] He also found that the other employees' earnings

[3] Section 10(b) permits a calculation of average weekly wage based on wages of "an employee in the same class working substantially the whole of the year . . . in the same or similar employment in the same or a neighboring place . . ." 33 U.S.C. §910(b).

did not represent wages for the whole of the year prior to claimant's injury, as the records represented earnings for periods after claimant's injury.

On modification, claimant submitted into evidence a second set of other employees' wage records which had been provided by employer. Employer stated that all but one of these employees had substantially the same employment contract as claimant, including their base pay, except that the "uplifts" had increased to 75 percent.[4] Claimant contended that these records establish that she had an earning potential of between $1,475 and $1,525.85 per week. The administrative law judge denied claimant's request for modification, finding that claimant should have raised the legal theory that this information could be considered under Section 10(c) when the case originally was before him. The administrative law judge stated that a modification proceeding cannot be used to correct litigation strategies. The administrative law judge also stated that it was inappropriate to use prospective wages pursuant to Section 10(c).

We agree with claimant's contention that the denial of modification cannot be affirmed on the grounds stated by the administrative law judge. Section 22 of the Act provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition, *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The scope of Section 22 extends to any mistake in fact, *Banks*, 390 U.S. 459, including mixed questions of law and fact. *See, e.g., Moore v. Virginia Int'l Terminals, Inc.*, 35 BRBS 28 (2001); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989).

Claimant contended on modification that the calculation of her average weekly wage pursuant to Section 10(c) was erroneous. This issue is within the scope of Section 22, contrary to the administrative law judge's finding, as it is a factual issue concerning the ultimate calculation of average weekly wage.[5] *Wheeler v. Newport News*

[4] Claimant's "uplifts" appear to total 55 percent of her regular wages and consist of the five percent foreign service bonus, the 25 percent area differential, and the 25 percent hazard/danger pay.

[5] The primary cases cited by the administrative law judge for the proposition that modification is not intended to correct strategic errors are of questionable support in this case. *General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982), involved the failure of employer to raise a Section 8(f) claim at the

Shipbuilding & Dry Dock Co., 37 BRBS 107 (2003); *see generally Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir.1993). Moreover, the administrative law judge is factually in error in stating that claimant did not urge reliance on the other employees' wages in the initial proceeding. Claimant raised this issue in her supplemental brief submitted prior to the issuance of the administrative law judge's original decision. *See* Supplemental Brief for Claimant (March 14, 2006). Therefore, as it is not in accordance with law, we vacate the administrative law judge's denial of claimant's petition for modification. We remand this case to the administrative law judge for consideration of claimant's Section 10(c) contentions in the first instance, pursuant to relevant law.[6] The administrative law judge should address claimant's contention that her "annual earning capacity" is greater than that found by the administrative law judge as demonstrated by the other employees' earnings and in view of the overtime she would have earned.

We also agree with claimant's contention that the administrative law judge erred in dividing claimant's actual earnings by 5 3/7 weeks to determine the weekly amount claimant earned prior to her injury. Although claimant began working for employer on August 26, 2004, she did not arrive in Iraq until August 28, and the parties stipulated that claimant had worked for employer for only five weeks before she was injured. There is no contrary evidence in the record. Thus, we vacate the administrative law judge's finding that claimant's earnings with employer should be divided by 5 3/7 weeks to determine the amount claimant earned per week and hold that the proper divisor is five. *See generally James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000) (permissible to use divisor less than 52 as wages could be extrapolated over a year's time); *Fox v. Melville Shoe Corp., Inc*., 17 BRBS 71 (1985) (stipulation concerning average weekly wage properly accepted). If the administrative law judge finds on remand that claimant's actual earnings with employer fairly and

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first hearing, a requirement of law, and thus modification was precluded. *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), involved egregious behavior by the employer. Neither scenario is present here, and the administrative law judge's narrow construction of Section 22 does not comport with recent case precedent. *See, e.g., Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002).

[6] On remand, in considering the probative value of the other employees' wage records submitted by employer in response to claimant's request, the administrative law judge may address claimant's request for an adverse inference against employer for its alleged failure to produce detailed wage records of other employees. *See, e.g., Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

reasonably represent her earning capacity at the time of her injury, her average weekly wage would be $955.22 ($4,776.12 ÷ 5).

Accordingly, the administrative law judge's Decision and Order finding that claimant's average weekly wage was $879.82 and the administrative law judge's Decision and Order Denying Modification are vacated, and the case is remanded for further consideration consistent with this opinion.[7]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[7] In view of our decision herein, claimant's motion to expedite these appeals is moot.