BRB No. 08-0583

K.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 03/13/2009<u>2009</u>
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	
		DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

John D. McElroy (Barton, Price, McElroy & Townsend), Orange, Texas, for claimant.

Jerry R. McKenney and James L. Azzarello, Jr. (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2007-LDA-00237) of Administrative Law Judge Clement J. Kennington 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 began working for employer as a truck driver in Kuwait and Iraq on November 11, 2003. He injured his left hand on January 11, 2004, when his hand slipped off a ratchet and struck the underside of a truck. He returned to the United States on January 23, 2004, because his hand condition did not respond to treatment. Claimant was diagnosed with totally disabling reflex sympathetic dystrophy (RSD). Employer challenged this diagnosis, contending claimant does not have RSD nor does he require a prialt pain pump. The parties also disputed claimant's average weekly wage and his entitlement to mileage reimbursement for obtaining medical treatment. The parties agreed that claimant has been totally disabled since January 23, 2004.

In his decision, the administrative law judge credited claimant's treating physicians to find that claimant has RSD and that he requires a pain pump. The administrative law judge also found claimant entitled to mileage reimbursement for medical treatment. The administrative law judge found that claimant's average weekly wage must be calculated pursuant to Section 10(c), as Sections 10(a) and (b) are inapplicable. 33 U.S.C. §910(a)-(c). The administrative law judge rejected claimant's contention that his average weekly wage should be based solely on his earnings in Kuwait and Iraq. Decision and Order at 10. The administrative law judge accepted employer's average weekly wage calculation of $972.03 based on the combination of claimant's earnings overseas and in the United States during the 52 weeks prior to his injury. The administrative law judge awarded claimant ongoing temporary total disability compensation. 33 U.S.C. §908(b).

On appeal, claimant challenges the administrative law judge's average weekly wage finding, arguing that his average weekly wage should be based solely on his earnings with employer in Kuwait and Iraq. Alternatively, claimant argues that the administrative law judge erred in calculating claimant's combined overseas and United States earnings during the year preceding his injury. Employer responds, urging affirmance of the administrative law judge's decision.

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.[1] *See Empire United*

[1] The parties do not assert that the administrative law judge erred by finding inapplicable Sections 10(a) and (b). Section 10(c) of the Act states that a claimant's average weekly wage shall be determined as follows:

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous

Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981). The object of Section 10(c) is to arrive at a sum that reasonably represents claimant's annual earning capacity at the time of his injury. *Hall v. Consol. Employment Sys., Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998). As the Board has previously affirmed average weekly wage determinations based solely on overseas earnings on facts similar to those in the present case, we hold that claimant's average weekly wage must be similarly determined and therefore vacate the administrative law judge's determination on this issue.

In *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006), the Board held that the administrative law judge properly considered the extrinsic circumstances of claimant's employment in Iraq in basing the average weekly wage calculation solely on the claimant's earnings in Iraq. The Board rejected employer's contention that the use of only the overseas earnings "unreasonably focuse[d] on employment that is temporary in nature, limited in overall duration, and not representative of claimant's actual wage-earning capacity." The Board stated:

> Use of only the wages claimant earned from employer appropriately reflects the increase in pay claimant received when he commenced working for employer in Iraq on April 23, 2003, which the administrative law judge found represented a 322 percent increase over his salary in the United States. *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986); *see also National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). Moreover, the use of claimant's earnings with employer fully compensates claimant for the earnings he lost due to his injury. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). The goal of Section 10(c), that of arriving at a reasonable "annual earning capacity," is intended to reflect the *potential* of claimant's ability to earn. *Id.* Claimant's employment contract with employer stated, "The duration of your assignment is

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> 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).

> anticipated to be approximately 12 months. There is no minimum guaranteed duration of employment." EX 2 at 12. Thus, while claimant's employment in Iraq was not necessarily intended to be long-term, claimant's injury cost him the ability and opportunity to earn higher wages for at least the rest of his contract term. *See Jesse*, 596 F.2d 752, 10 BRBS 700; *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981). In addition, post-injury events, such as decreased work opportunities or wages, 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); *cf. Jesse*, 596 F.2d 752, 10 BRBS 700 (permissible to account for increasing wages at port post-injury due to increased business). The United States Court of Appeals for the Fifth Circuit has held that such a change of circumstance post-injury should not inure to the benefit of employer. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996) (discussing applicability of Section 10(a)).

Proffitt, 40 BRBS at 45. The Board held that the administrative law judge's calculation of the claimant's average weekly wage accounted for the language of Section 10(c) in that it had "regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury." Therefore, the Board affirmed the administrative law judge's average weekly wage calculation based solely on claimant's overseas earnings as it was the best measure of claimant's annual earning capacity.[2] *Id.*

[2] In addition, several unpublished decisions of the Board have reached the same result, and there are no contrary unpublished decisions. *See R.L. v. Service Employees Int'l, Inc.*, BRB No. 07-0907 (Mar. 25, 2008), *appeal pending*, No. 08-2582 (2d Cir.); *J.C. v. Serv. Employees Int'l, Inc.*, No. 07-0615 (Jan. 29, 2008); *Patton v. Brown & Root Services*, BRB No. 06-0401 (Nov. 28, 2006); *Zimmerman v. Serv. Employees Int'l, Inc.*, BRB No. 05-0580 (Feb. 22, 2006); *see also S.K. v. Serv. Employees Int'l, Inc.*, 41 BRBS 123 (2007) (administrative law judge used employee's Iraq-only wages; Board remands for administrative law judge to consider higher post-injury earnings of co-workers, pursuant to Section 22, 33 U.S.C. §922).

In the present case, the administrative law judge combined claimant's earnings in Iraq with his stateside wages in the year prior to the date of injury to determine his average weekly wage under Section 10(c). This resulted in a lower wage than that based on claimant's actual earnings in Iraq under his contract. The administrative law judge agreed with employer's assertion that using only claimant's wages from his overseas employment to calculate average weekly wage distorts rather than represents claimant's true wage-earning capacity as claimant's historical earnings from 2000-2003 were substantially less than the wages he earned from employer. EX 7 at 4-5. The administrative law judge further relied on the fact that the duration of claimant's contract with employer was for only one year of service, although he also noted claimant's statement that he intended to work in Iraq for a longer period of time. Tr. at 34-35; CX 5 at 2. Although the administrative law judge recognized that claimant's Iraq employment entailed long hours of work and dangerous working conditions, he concluded that combining claimant's overseas and stateside wages for the 52-week period prior to his injury is more reflective of claimant's true wage-earning capacity. Decision and Order at 10. The administrative law judge accepted employer's representation that this figure is $972.03.[3] The administrative law judge did not discuss the Board's decision in *Proffitt.*

Contrary to the administrative law judge's finding, claimant's average weekly wage must be calculated based solely on his overseas earnings in order to reflect his earning capacity in the employment in which he was injured. In this regard, the facts of this case are indistinguishable from those in *Proffitt.* Claimant in *Proffitt* was injured when he was approximately three and a half months into a one-year contract which paid him a higher wage than his stateside employment to compensate for working under the dangerous conditions existing in Iraq. In the present case, employer similarly paid claimant substantially higher wages for his work in Iraq, which entailed dangerous working conditions that claimant accepted in return for higher wages.[4] Tr. at 32. Claimant testified, and the administrative law judge found, that he worked seven days a week for twelve to eighteen hours a day, that armed escorts dictated when and where a truck convoy could stop for rest, and that he was required to carry a gas mask and wear a flak jacket and helmet. Moreover, claimant sustained attacks while driving, including assaults with rocks. *Id.* at 37-40, 73; Decision and Order at 10. As in *Proffitt,* claimant was hired by employer to work full-time under a contract with an expected duration of 12 months, and there is no evidence that claimant did not intend to fulfill his contractual

[3] The administrative law judge did not rely on any evidence of record to make this calculation himself, but merely accepted employer's calculation.

[4] Claimant expected to earn $80,000 to $90,000 for a year's employment in Iraq, whereas his stateside earnings from 2000 to 2003 ranged from $7,385 to $38,283. Decision and Order at 3, 10.

obligation. CX 5 at 2. In fact, the administrative law judge credited claimant's testimony that he intended to work in Iraq for more than a year. *Id.;* Tr. at 34-35.

Where, as here, claimant is injured after being enticed to work in a dangerous environment in return for higher wages, it is disingenuous to suggest that his earning capacity should not be calculated based upon the full amount of the earnings lost due to the injury. While the administrative law judge is afforded discretion in determining an employee's annual earning capacity, Section 10(c) directs the administrative law judge to do so "having regard to the previous earnings of the injured employee in the employment in which he was injured." The goal of Section 10(c) in this regard is intended to result in a sum that reflects the *potential* of claimant to earn absent injury. *See Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). Average weekly wage calculations based solely on a claimant's new, higher wages have been affirmed where they reflect the potential to earn at that level. *Healy Tibbitts Builders, Inc.*, 444 F.3d 1095, 40 BRBS 13(CRT); *Bonner*, 600 F.2d 1288; *see also Miranda v. Excavation Constr*., Inc., 13 BRBS 882 (1981). Claimant's potential to maintain the higher level of earnings afforded by his overseas work was cut short by his injury. Moreover, while claimant's job was not everlasting, he had a one-year contract, there is no evidence to suggest he would not have fulfilled this term absent injury, and claimant expressed his intent to continue working in Iraq for a longer period. The one-year contract term is consistent with the Act's focus on annual earning capacity, and his earnings under this contract thus provide the best evidence of claimant's capacity to earn absent injury.

Under these circumstances, claimant's average weekly wage must be based exclusively on the higher wages earned in the job in which he was injured in Iraq, particularly since these wages were the primary reason for his accepting employment under the dangerous working conditions that existed there. Tr. at 32. Employer's attempted analogy of this case to those cases in which the claimant's work is cyclical or intermittent, *see, e.g., New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997), fails as unsupported by the evidence of record.[5] As we have stated, claimant's employment here was full-time on a one-year contract. Claimant

[5] In this regard, we note that if the record contained credible evidence that a claimant's employment overseas was in fact, or was intended to be, short term, *i.e.,* for less than a one-year contractual term, the result herein would not necessarily control. We reject adoption of the "blended approach" in cases involving a one-year contract because it treats similarly situated employees differently, as the amount of each average weekly wage computation would depend upon how long into the contractual year a claimant's injury occurred.

agreed to accept a job with employer requiring exposure to difficult and dangerous conditions, and employer agreed to pay claimant a premium wage to work under those conditions. To compensate claimant for his injury at a lesser rate than the wage paid by the job in which he was injured distorts his earning capacity by reducing it to a lower level than employer agreed to pay claimant to work under the conditions in Iraq. Therefore, as the facts in this case are not distinguishable from those in *Proffitt*, and as the analysis in that case fully accounts for the circumstances of employment in Iraq in a contemporaneous time period, we hold that the calculation of claimant's average weekly wage under Section 10(c) must be based solely on his overseas earnings in Iraq. Therefore, we vacate the administrative law judge's average weekly wage finding. On remand, the administrative law judge must re-determine claimant's average weekly wage based solely on his earnings in Iraq.[6]

Accordingly, the administrative law judge's average weekly wage computation is vacated, and the case remanded for further proceedings in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

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

[6] Claimant contends, moreover, that employer never complied with his discovery requests to produce his wage records showing the number of days claimant worked in Iraq and the amount paid. *See* n.3, *supra.* The administrative law judge should address this contention on remand and his average weekly wage calculation must be based on evidence of record. Based on our disposition of claimant's appeal, we need not address his contention that the administrative law judge erred in calculating claimant's combined overseas and state-side earnings during the year preceding his injury.