BRB No. 08-0583

K.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 09/25/2009
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	ORDER on RECONSIDERATION
Party-in-Interest	)	*EN BANC*

Employer has timely filed a motion for reconsideration *en banc* of the Board's Decision and Order in *K.S. v. Service Employees Int'l, Inc.*, 43 BRBS 18 (2009). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief urging rejection of employer's motion.

In its decision, the Board vacated the administrative law judge's finding that claimant's average weekly wage was $972.03 based on the combination of his earnings overseas and in the United States during the 52 weeks prior to his injury. The Board held that claimant's average weekly wage must be calculated based solely on his overseas earnings in Kuwait and Iraq in order to reflect his earning capacity in the employment in which he was injured. *K.S.*, 43 BRBS at 20. The Board held that 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. *Id*. at 21.

The Board held that the facts in this case are not distinguishable from those in *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006), wherein the Board affirmed the administrative law judge's average weekly wage calculation based solely on the claimant's earnings in Iraq. *K.S.*, 43 BRBS at 20. The Board remanded the case for the administrative law judge to re-determine claimant's average weekly wage based solely on his overseas earnings.

In its motion for reconsideration, employer argues that in holding that only the overseas wages of a Defense Base Act (DBA) employee may be used in calculating average weekly wage, the Board did not afford proper deference to the administrative law judge's broad discretion under Section 10(c) of the Act, 33 U.S.C. §910(c). Employer also contends that requiring the administrative law judge to use only claimant's overseas earnings is inconsistent with the plain language of Section 10(c), which states that a claimant's "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* . . ." 33 U.S.C. §910(c) (emphasis added).

Contrary to employer's contention, the Board did not hold that in every DBA case the claimant's average weekly wage must be derived solely from overseas earnings. Rather, the Board held that the circumstances presented in this case required that claimant's average weekly wage be based exclusively on the higher wages earned in the job in which he was injured in Iraq. *K.S.*, 43 BRBS at 21. In this regard, we reject employer's argument that *Proffitt* is distinguishable, as the relevant facts are the same in both cases. Specifically, employer paid claimant substantially higher wages to work overseas than he had earned stateside, claimant's employment entailed dangerous working conditions, and claimant was hired to work full-time under a one-year contract. *Compare K.S.*, 43 BRBS at 20, *with Proffitt*, 40 BRBS at 42, 44-45. Under these circumstances, claimant's earnings in Iraq are determinative of his annual earning capacity. As the Director correctly states, the fact that claimant's injury here was not "peculiar to" overseas work does not negate the conditions which formed the basis for his remuneration. Accordingly, the Board properly concluded that the facts here are not distinguishable from those in *Proffitt*. *K.S.*, 43 BRBS at 21.

Thus, we also reject employer's contention that the Board usurped the administrative law judge's discretionary authority to determine the claimant's average weekly wage pursuant to Section 10(c). Although the administrative law judge is afforded broad discretion in determining the average weekly wage of a claimant pursuant

to Section 10(c), that discretion is not unfettered.[1] The administrative law judge's finding must be based on applicable law. For example, in *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991), the Fifth Circuit adopted the Board's decision in *Anderson v. Todd Shipyards*, 13 BRBS 593 (1981), and held that where an administrative law judge "calculates average annual earnings under section 10(c) by considering the [employee's] earning history over a period of years prior to injury, he must take into account the earnings of all the years within that period." *Gatlin*, 936 F.2d at 823, 25 BRBS at 29(CRT). Similarly, in this case the Board's holding regarding the use of overseas wages provides the legal framework within which the administrative law judge may exercise his discretion in determining the amount of claimant's average weekly wage.

Moreover, Section 10(c) does not mandate the use of all of a claimant's wages in the year prior to injury. *Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT). Rather, this subsection is written in the disjunctive, stating that the administrative law judge should have "regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury," or of other employment of the employee.[2] The objective of Section 10(c) is "'to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of the injury.'" *Id.*, 936 F.2d at 823, 25 BRBS at 29(CRT), *citing Cummins v. Todd Shipyards*, 12 BRBS 283, 285

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[1] The Act must be construed so that employees injured under the same circumstances receive equal treatment. To allow two employees who are working under the same contract and conditions, and injured at the same time, to receive different amounts of compensation because one administrative law judge relied on Iraq wages while another reduced claimant's rate by combining lower, stateside earnings, would be arbitrary.

[2] Section 10(c) of the Act, 33 U.S.C. §910(c), states:

> 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 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.

(1980). Thus, the administrative law judge is to "make a fair and accurate assessment" of the amount the employee would have the potential and opportunity of earning absent the injury. *Id.* Therefore, based on the facts in this case, claimant's average weekly wage must be solely on the higher wages he was paid in his overseas employment as it best reflects his annual wage-earning capacity at the time of injury. *See 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); *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). As employer has not demonstrated error in the Board's decision in this case, employer's motion for reconsideration is denied.

Claimant's counsel has filed a petition for an attorney's fee for services performed in connection with his appeal to the Board. Counsel for claimant requests a fee of $2,631, representing .75 of an hour of attorney time by Ed W. Barton at $300 per hour and 8.75 hours of attorney time by John D. McElroy at $275 per hour. Employer objects to the hourly rates, contending that $250 for Mr. Barton and $225 for Mr. McElroy are appropriate. Employer also objects to, as vague, 2.5 hours expended on June 16, 2008, for "legal research."

We reject employer's contentions. The entry for "legal research" fully describes the task performed and the number of hours requested for the task is reasonable. 20 C.F.R. §802.203(d)(1)-(3). Moreover, the hourly rates claimed are reasonable and customary for the Houston, Texas, area. 20 C.F.R. §802.203(d)(4). As claimant successfully appealed the administrative law judge's average weekly wage finding, and as the itemized entries and hourly rates requested are reasonable, we grant counsel the requested fee of $2,631. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, employer's motion for reconsideration is denied. 20 C.F.R. §802.409. The Board's decision is affirmed, and the case is remanded to the administrative law judge as stated therein. Claimant's counsel is awarded a fee of $2,631, payable by directly to counsel by employer.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge