BRB No. 06-0306

CHAD PROFFITT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYERS INTERNATIONAL, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	DATE ISSUED: 08/14/2006
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

Paul J. Cox (Cox, Cox, Filo, Camel & Wilson), Lake Charles, Louisiana, for claimant.

Patricia A. Krebs and Allan C. Crane (King, LeBlanc & Bland, L.L.P.), New Orleans, Louisiana, for employer/carrier.

Matthew W. Boyle (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2005-LDA-00083) of Administrative Law Judge Russell D. Pulver rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). We must affirm the 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). The Board held oral argument in this case on June 13, 2006, in New Orleans, Louisiana.

On April 23, 2004, claimant began working for employer as a labor foreman in Iraq. He injured his right knee on August 9, 2004, running for cover during a mortar attack. Claimant returned to the United States in September 2004 and underwent arthroscopic knee surgery. Employer voluntarily paid claimant compensation for temporary total disability commencing September 22, 2004. The parties agreed that claimant's knee condition has not reached maximum medical improvement. The sole issue before the administrative law judge was claimant's average weekly wage.

In his decision, the administrative law judge found that claimant's employment for employer as a labor foreman was not comparable to his last two stateside jobs as a maintenance worker and general laborer during the year prior to the work injury. The administrative law judge found that neither Section 10(a) nor (c) may be utilized to derive claimant's average weekly wage. 33 U.S.C. §910(a), (c); Decision and Order at 4-5. The administrative law judge found that claimant's average weekly wage should be based on the actual wages he earned with employer in Iraq, and that claimant was a five-day per week worker. The administrative law judge purported to apply Section 10(b), 33 U.S.C. §910(b), and he found that claimant's average weekly wage is $1,534.45.[1] The administrative law judge awarded claimant continuing compensation for temporary total disability from September 22, 2004, based on this average weekly wage.

On appeal, employer challenges the administrative law judge's average weekly wage calculation, contending that the administrative law judge erroneously relied on

[1] The administrative law judge credited claimant's calculation of his average weekly wage in Iraq which claimant contended in his post-hearing brief is $1,534.45. Decision and Order at 5. Claimant stated this figure was based on pay stubs showing that claimant earned $23,893.25 during the approximately 15 weeks he worked for employer in Iraq from April 23 to August 9, 2004. *See* Claimant's Brief at 3; CX 1. This specific information is not challenged on appeal.

Section 10(b) and that claimant's earnings from the entire 52 weeks preceding his injury should be included in his average weekly wage pursuant to either Section 10(a) or Section 10(c). Claimant responds, urging affirmance of the administrative law judge's calculation. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge's statement that he used Section 10(b) to determine claimant's average weekly wage is harmless error inasmuch as the administrative law judge acted within his discretion in calculating claimant's average weekly wage based solely on his earnings in Iraq.

We agree that the administrative law judge erred in purporting to rely on Section 10(b). This section may be applied where the employee was not employed for substantially the whole of the year, but the record contains evidence of the wages of an employee of the same class who worked substantially the whole year in the same or similar employment. *See Harrison v. Todd Pacific Shipyards Corp.,* 21 BRBS 339 (1988). In this case, there is no evidence of the wages earned by claimant's co-workers with employer or at any of claimant's stateside employers during the year preceding his work injury. Therefore, contrary to the administrative law judge's finding, Section 10(b) is inapplicable in this case to determine claimant's average weekly wage. *See generally Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998). In view of the administrative law judge's findings of fact, discussed *infra*, however, this error is harmless. *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

We reject employer's assertion that claimant's average weekly wage should be calculated pursuant to Section 10(a).[2] Section 10(a) looks to the actual wages of the

[2] Section 10 of the Act states, in relevant part, that a claimant's average weekly wage shall be determined as follows:

> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.
>
> (b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earning if a six-day worker, shall consist of three hundred times the average daily wage or salary and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working

injured worker, providing a specific formula for calculating the amount of compensation due, and is premised on the injured employee's working substantially the entire year prior to the injury in the same employment. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). In this case, the administrative law judge found that claimant earned $3,105.96 from August 9 to October 31, 2003, for Snow White Linen as a laborer in Louisiana; $13,096.68 from November 1, 2003, to April 22, 2004, for J & J Maintenance as a maintenance worker in Colorado; and $23,893.25 from April 23 to August 9, 2004, for employer. Decision and Order at 3; *see* EXs 4, 5. While Section 10(a) may be applied when an employee has worked in similar jobs for substantially the whole of the year immediately preceding his injury for this or another employer, *see* discussion *infra*, it requires evidence from which the administrative law judge can determine the average daily wage claimant earned during the preceding twelve months. In this case, claimant's W-2 statements and payroll records from his employers during the year prior to his injury fail to show the actual number of days claimant worked. CX 1; EXs 4, 5. Such evidence is necessary to determine claimant's average daily wage. *See Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 89 (1999)(decision on recon.), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981). As the record lacks the necessary evidence for application of its formula, Section 10(a) cannot be applied. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.2d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Employer's contention that claimant's average weekly wage can be determined under Section 10(a) may, therefore, be rejected on this basis alone.

> substantially the whole of such immediately preceding year in the same or similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.
>
> (c) 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 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(a)-(c).

Nevertheless, as it also relates to a calculation of average weekly wage under Section 10(c), we will address employer's contention that the administrative law judge erred in finding that claimant's job in Iraq was not comparable to his stateside employment. Section 10(a) applies when a claimant worked for substantially the whole of the year in the "same" employment, whether for the named employer or for other employers. *See Waters v. Farmers Export Co.*, 14 BRBS 102 (1981), *aff'd mem.*, 710 F.2d 836 (5th Cir. 1983)(table). Employer contends that the administrative law judge erred in finding that claimant's employment in the United States was not the same as his employment in Iraq, and that the Board's decision in *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1986), supports its contention in this regard.

In *Mulcare*, the claimant had worked as a journeyman electrician in the United States for over eight years. He obtained an electrician job in Saudi Arabia for higher wages for six months, from June through December 1978, and then returned to his former job in the United States. He suffered an injury in April 1979. The administrative law judge calculated claimant's average weekly wage pursuant to Section 10(a) and included the wages claimant earned in both the United States and Saudi Arabia. He rejected the employer's contention that the wages claimant earned in Saudi Arabia should be excluded from the average weekly wage calculation, finding that the two jobs required comparable skills, knowledge, and experience. The Board affirmed this finding as it was supported by substantial evidence, in that claimant had testified that the work was of the same type and that he had had supervisory functions in both jobs. The administrative law judge also found that the additional compensation and benefits claimant earned in Saudi Arabia for the same work he performed in the United States were for the sacrifices attendant to living away from home and family, and were not recompense for additional skills. The administrative law judge therefore concluded that as claimant's two jobs were comparable, all of claimant's wages in the year prior to the injury should be included in the average weekly wage calculation. *Id.* at 160-161. In rejecting the employer's assertion on appeal that Section 10(c) should apply to include only claimant's stateside earnings, the Board stated that the administrative law judge properly focused on the comparable nature of the claimant's employment rather than on the location of that employment,[3] and the Board affirmed the calculation of average weekly wage pursuant to Section 10(a) as it was rational and supported by substantial evidence. *Id.* at 161.

Contrary to employer's contention herein, *Mulcare* does not dictate the result it seeks as the case does not mandate the use of all of claimant's wages in the year prior to the injury. Rather, the inquiry under Section 10(a) is on whether the jobs for multiple employers in the year preceding the injury were comparable. *See Hole v. Miami*

[3] The Board noted that Section 10(a) does not contain a reference to a job's locality, as does Section 10(b). *See* n. 2, *supra.*

Shipyard Corp., 12 BRBS 38 (1980), *rev'd on other grounds*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). In this case, the administrative law judge found that the nature of claimant's stateside employment in the year preceding his work injury as a maintenance worker and general laborer differed from his work for employer as a labor foreman in Iraq. Decision and Order at 4. The administrative law judge rationally inferred, in the absence of contrary evidence, that claimant's job title of labor foreman denoted managerial responsibilities which claimant did not have in his two stateside positions as a laborer and maintenance worker, respectively, as described in claimant's resume. EX 2 at 55; *see generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Moreover, the administrative law judge rationally found that claimant's work in a combat zone is inherently different than his work in the United States by virtue of the dangerous location and the fact that his job required him to fulfill safety and security requirements that would not have been required of him in his work in the United States. EX 2 at 8, 18, 21, 24, 32, 38, 47, 53-54. *Mulcare* does not preclude consideration of the nature of the claimant's differing work locations as a factor affecting the comparability of the claimant's employment circumstances. Significantly, claimant's injury in this case occurred in the overseas location and affected his ability to continue to work in Iraq, whereas in *Mulcare*, a case arising under the District of Columbia Workmen's Compensation Act, the work injury occurred in the United States, after the period of overseas employment had ended. The administrative law judge therefore acted within his discretion in considering the extrinsic circumstances of claimant's employment when discussing the comparability of claimant's overseas and stateside employment. *See generally Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated on other grounds*, 462 U.S. 1101 (1983) (in addressing average weekly wage, "the nature of the decedent's work and the details of his employment [are] factual findings"). The administrative law judge's finding that claimant's employment in Iraq was not comparable to his employment in the United States is rational and supported by substantial evidence. Therefore, this finding is affirmed, as is the administrative law judge's consequent finding that claimant's average weekly wage cannot be computed pursuant to Section 10(a).

In their briefs to the Board, the parties agree that claimant's average weekly wage can be determined pursuant to Section 10(c) and, essentially, that the calculation made by the administrative law judge was made pursuant to this subsection. In addition to the argument just discussed, employer further alleges that, pursuant to Section 10(c), exclusion of the wages claimant earned from his stateside employers during the year preceding his injury results in an inaccurate representation of claimant's earning capacity.

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. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Taylor*, 14 BRBS

489. 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. *Preston*, 380 F.3d at 610, 38 BRBS at 69(CRT); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). Although Section 10(c) permits the use of wages from the claimant's other prior employment in an average weekly wage calculation, it does not require such use, as the administrative law judge is afforded wide discretion in arriving at a Section 10(c) calculation. *See generally Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *Harrison*, 21 BRBS at 344-345.

Employer asserts that relying on a "snapshot" of claimant's wages in Iraq unreasonably focuses on employment that is temporary in nature, limited in overall duration, and not representative of claimant's actual wage-earning capacity. We reject this contention. 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. *See* Decision and Order at 4, n.1; *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 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)).

In sum, the administrative law judge's calculation of claimant's average weekly accounts for the language of Section 10(c) in that he had "regard to 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). His finding that the wages claimant earned in Iraq are the best measure of claimant's annual earning capacity is rational and supported by substantial evidence. Therefore, we affirm the administrative law judge's average weekly wage calculation, albeit pursuant to Section 10(c) rather than Section 10(b).

In his response brief, claimant's counsel requests a fee of $1,800 for services rendered before the Board in defense of his award, representing 10 hours of attorney time at $180 per hour. Employer has not responded to the attorney's fee request. Claimant is entitled to an attorney's fee payable by employer for successfully defending against employer's appeal. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); 20 C.F.R. §802.203(b). We find the hourly rate of $180 for attorney time requested by counsel reasonable in this case, 20 C.F.R. §802.203(d)(4), and the number of hours requested to be reasonably commensurate with necessary work performed. 20 C.F.R. §802.203(e). We therefore grant a fee of $1,800, payable by directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge