

Texas U.S. District Court Overturns K.S. v. SEI

On March 11, 2013, the United States District Court for the Southern District of Texas, Houston Division, issued an opinion overturning *K.S. v. Service Employees Int'l, Inc.*, 43 BRBS 136 (2009). The district court's decision has the potential to impact many Defense Base Act cases that are currently pending before the Department of Labor and may ultimately have far-reaching effects in the way that average weekly wages (AWW) are calculated. The U.S. District Court concluded in *Service Employee's Int'l, Inc. v. Director, OWCP*, Civil Action No. H-11-01065, that the ALJ has the discretion to utilize not only overseas wages, but also the wages of similar overseas employees and the claimant's past wages to determine the proper average weekly wage to be paid to Claimant under Section 10(c) of the Defense Base Act. As many employees are seven day per week workers who are injured overseas prior to working "substantially the whole" of a year, the formulas for determining AWW found in 10(a) and 10(b) of the Defense Base Act do not apply. Accordingly, the 10(c) calculation as interpreted by *K.S.* has controlled the fate of many AWW computations. The original *K.S.* decision was issued by the Benefits Review Board on March 13, 2009. In that case, the claimant was a domestic truck driver who went to work overseas for SEI in November 2003. Though he signed a one-year contract with the employer, he was injured after working only two months overseas. The employer disputed the amount of wages owed to Claimant and the ALJ utilized both overseas and stateside wages to arrive at a blended rate for the claimant's average weekly wage. The claimant appealed the ALJ's decision to the Benefits Review Board. The Benefits Review Board overruled the ALJ's decision regarding the computation of claimant's average weekly wage. *K.S.*, 43 BRBS 136 (2009). Relying on a prior decision, *Proffitt v. Service Employers International, Inc.*, 40 BRBS 41 (2006), the BRB found that the proper way to calculate average weekly wages was to utilize only the claimant's overseas wages. The BRB opined that because the *K.S.* claimant's injury occurred under circumstance similar to those present in *Proffitt*, the ALJ was bound to rely only upon the claimant's overseas wages and could consider nothing else. The impact of the *K.S.* on the industry has been to artificially inflate the average weekly wage on Defense Base Act claims and frequently make mitigation of loss of wage earning capacity difficult, if not impossible, to accomplish. The U.S. District Court disagreed with the BRB, vacated the *K.S.* opinion and remanded the case to the ALJ for a new calculation of the claimant's average weekly wage. The court pointed out that despite the BRB's reading of *Proffitt* in *K.S.*, the decision actually stood for the proposition that the ALJ had wide discretion and could, but need not, examine wages from prior employment in computing the claimant's average weekly wage under Section 10(c). The court analyzed Section 10(c), and indicated that the ALJ could consider three factors in determining average weekly wage: (1) past earnings of the employee in the job he was in at the time of the injury; (2) the earning history of similar employees in similar jobs; and (3) the employment history of the injured employee. The court concluded that the BRB's decision in *K.S.* stripped the ALJ of its wide discretion in determining AWW under Section 10(c) of the Act and was, therefore, in error. We believe it is very likely that the District Court's decision will be appealed to the Fifth Circuit after remand. At this point, however, the blended AWW approach has been revived in cases pending before the Department of Labor at both the OWCP and OALJ levels. The framework outlined by the District Court clearly opens the door for the ALJ to now consider past wages, domestic or foreign, where 10(c) applies. Please feel free to contact any of the attorneys in our Defense Base Act Department in our Houston, [West Palm Beach](#) or [Chicago](#) offices for more details and information on how this case may impact and mitigate your pending claims. [View the full opinion here](#)