BRB No. 98-0501

JAMES E. WOOLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: June 22, 1999
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER on RECONSIDERATION

Appeal of the Decision and Order Awarding Benefits of Richard D. Mills, Administrative law judge, United States Department of Labor.

D.A. Bass-Frazier (Huey & Leon), Mobile, Alabama, for claimant.

Donald P. Moore (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant has filed a timely motion for reconsideration of the Board's decision in the captioned case, *Wooley v. Ingalls Shipbuilding, Inc.*, BRB No. 98-0501 (Nov. 30, 1998). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer has filed a brief in response, urging the Board to deny claimant's motion. For the reasons that follow, we grant claimant's motion, vacate the Board's decision, and affirm the administrative law judge's calculation of claimant's average weekly wage.

To recapitulate the relevant facts, claimant and employer stipulated that claimant is entitled to permanent total disability benefits as a result of his work injury. 33 U.S.C. §908(a). One of the issues presented to the administrative law judge for adjudication was the applicable average weekly wage. The parties agreed that Section 10(a) of the Act, 33 U.S.C.

§910(a),[1] should be used to calculate claimant's average weekly wage, and the administrative law judge determined that only the number of days claimant actually worked, 256, should be used in the calculation.[2] As claimant earned a total of $29,462.10 in the year

[1]Section 10(a) states:

> 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.

33 U.S.C. §910(a).

[2]The administrative law judge found claimant's method of calculating average weekly wage to be supported by the language of Section 10(a) of the Act. Claimant's post-hearing brief states that he counted as a day worked individual dates on which claimant received wages or paid vacation time. Post-hearing brief at 3. The administrative law judge rejected employer's method of arriving at the number of days worked by dividing by eight the total number of hours paid.

prior to injury, the administrative law judge found his average daily wage to be $115.08. Multiplying this figure by 260 days for a 5-day worker, the administrative law judge found that claimant had average annual earnings of $29,922,44, which when divided by 52, as required under Section 10(d), 33 U.S.C. §910(d), yielded an average weekly wage of $575.43.

Employer appealed, contending that the administrative law judge erred in failing to include in claimant's average weekly wage the days in which claimant received vacation pay in lieu of vacation. The Board agreed, and therefore modified the average weekly wage calculation to include an additional 11 days, representing 88 hours for which claimant received vacation pay. This resulted in an average weekly wage of $551.70.[3]

In his motion for reconsideration, claimant contends that the Board erred in "creating" additional work days based on the number of hours for which claimant received vacation pay, thereby reducing claimant's average weekly wage below his actual earnings. Claimant contends that, as the administrative law judge found, only the actual number of days claimant worked should be utilized to calculate his average daily wage under Section 10(a). In this regard, claimant asserts that *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990), cited by the Board in its decision, does not support the Board's determination.

We agree that the Board erred in modifying claimant's average weekly wage, and that *Duncan* does not support the result reached; thus, we vacate the Board's decision. In *Duncan*, the Board held that inasmuch as vacation pay received in lieu of days off is included in average weekly wage, *see* 33 U.S.C. §902(13), actual vacation time should be included as time actually worked in determining whether a claimant works "substantially the whole of the year," a prerequisite to the application of Section 10(a). 24 BRBS at 136. The case does not mandate, however, that every eight hours of vacation pay received in lieu of vacation be fashioned into a "day" for purposes of determining claimant's average daily wage under Section 10(a). Indeed, the United States Court of Appeals for the Fourth Circuit has rejected a similar approach. In *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997), the court rejected the contention that under Section 10(a) an administrative law judge could merely divide the claimant's annual earnings by 52 weeks. The court stated that the proper inquiry requires the administrative law judge to determine the claimant's total earnings in the 52 weeks prior to the injury and to divide that sum by "the

[3]$29.462.10 divided by 267 days yields an average daily wage of $110.34. Multiplying this figure by 260 results in average annual earnings of $28,688.40, which when divided by 52 yields an average weekly wage of $551.70.

actual number of *days* for which the employee was paid to determine an average daily wage," which is then multiplied by 260 or 300 depending on whether the employee is a 5 or 6-day per week worker. *Moore*, 126 F.3d at 265, 31 BRBS at 125(CRT) (emphasis in original). This use of only the number of actual days worked is consistent with the language of Section 10(a) stating that a claimant's earnings are those extrapolated from the average daily wage earned "during the *days* when so employed." 33 U.S.C. §910(a) (emphasis added). Thus, we conclude that the administrative law judge's use of only the actual number of days claimant worked, *see* n.2, *supra*, accords with law and should be affirmed.

Moreover, as claimant suggests, the result reached by the Board has the effect of reducing claimant's average weekly wage below his actual earnings. The effect of a calculation pursuant to Section 10(a) is the approximation of what the claimant would have earned had he worked every available work day in the year prior to his injury. *Duncanson-Harrelson Co. v. Director, OWCP [Freer]*, 686 F.2d 1336 (9th Cir. 1982), *vacated on other grounds*, 462 U.S. 1101 (1983); *see also Johnson v. Britton*, 290 F.2d 355 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 859 (1961). For a five-day per week worker like claimant, the maximum number of work days per year is 260 (52 week x 5 = 260); thus, a claimant's average daily wage is multiplied by this number pursuant to Section 10(a). Given the language of Section 10(a), we agree with claimant that diluting his earnings by creating additional work days, resulting in claimant's having "worked" more days than a 5-day a week worker can work in reality and more than the statutorily mandated number of days for a five-day per week worker, is not supported by the Act. Moreover, the resulting lower annual earnings than those he actually earned is not consistent with the purpose of Section 10(a). *See generally Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT) (9th Cir. 1998).[4] Therefore, inasmuch as the administrative law judge's calculation of claimant's average weekly wage is rational, supported by substantial evidence and in accordance with law, it is affirmed.

Accordingly, claimant's motion for reconsideration is granted. 20 C.F.R. §802.409. The Board's decision is vacated, and the administrative law judge's calculation of claimant's average weekly wage as $575.43 is affirmed.

SO ORDERED.

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[4]In *Matulic*, the United States Court of Appeals for the Ninth Circuit held that Section 10(a) must be applied to calculate average weekly wage when the claimant has worked 75 percent of the workdays of the year preceding the injury. The court noted that the statute contemplates that the number of days worked in the measuring year ordinarily will be less than 260 for a five-day worker, and that when the claimant has worked at least 75 percent of the available days, a calculation under Section 10(a) "falls well within the realm of theoretical or actual 'overcompensation' that Congress contemplated." 154 F.3d at 1057, 32 BRBS at 152 (CRT).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge