BRB No. 12-0134

CHARLES PETERSON Claimant- Respondent v. ROSS ISLAND SAND AND GRAVEL COMPANY and LIBERTY NORTHWEST INSURANCE CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 02/05/2013 ORDER on MOTION for RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board's Decision and Order in the captioned case, *Peterson v. Ross Island Sand and Gravel Co.*, BRB No. 12-0134 (Sep. 24, 2012). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant has not responded to this motion, but has filed a petition for an attorney's fee for services performed before the Board in connection with this appeal.

In its Motion for Reconsideration, employer contends the Board erred in affirming the administrative law judge's use of claimant's actual wages to calculate claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c). Employer asserts that, although it stipulated to claimant's actual average weekly earnings in the fifty-two weeks before his injury, it did not stipulate that this figure represented claimant's pre-injury earning capacity because the physical requirements of claimant's job exceeded the restrictions imposed on him by his physicians. As the Board previously explained, for purposes of calculating average weekly wage under Section 10(c), the relevant inquiry is

a claimant's wages earned prior to his injury, absent some extraordinary circumstance.[1] *Peterson*, slip op. at 5; *see also Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *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). Moreover, employer conceded that claimant's pre-injury work was not sheltered and that claimant performed the job for which he was paid. Thus, employer has not stated a basis for overturning the Board's affirmance of the administrative law judge's average weekly wage finding. We, therefore, deny employer's motion for reconsideration.

We next address claimant counsel request for an attorney's fee for work performed before the Board. On October 10, 2012, counsel for claimant submitted an attorney's fee petition to the Board seeking a fee totaling $4,653.75, representing 12 hours at an hourly rate of $365 and 2.76 hours at an hourly rate of $225. Employer responds, asserting that a fee award is premature until the Board issues a decision on its motion for reconsideration. Employer states that "attorneys for claimant and [e]mployer have reached a tentative agreement regarding fees, but only if the Board denies the Motion for Reconsideration." In view of the Board's denial of employer's motion for reconsideration, and the parties' tentative agreement on counsel's fee award, we decline to address counsel's fee petition at this time. The parties are afforded 20 days from their receipt of this Order to forward further comment to the Board regarding claimant's counsel's fee request. 20 C.F.R. §§802.203, 803.217.

[1]The cases employer cites in its brief do not support the contention that a claimant's working in excess of his physical restrictions constitutes extraordinary circumstances for purposes of calculating average weekly wage under Section 10(c). Employer cites *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998), and *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), all of which acknowledge that a claimant's pre-injury wages may not represent his earning capacity under Section 10(c) where the work is intermittent or discontinuous. Employer also cites *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990), which held that a claimant's post-injury actual earnings may not accurately represent her post-injury wage earning capacity under Section 8(h), 33 U.S.C. §908(h). As employer does not allege that claimant's pre-injury work was intermittent or discontinuous, and as Section 8(h) is not at issue in this case, employer's reliance on these cases is misplaced.

Accordingly, employer's Motion for Reconsideration is denied, and the Board's decision is affirmed. 20 C.F.R. §802.409. The parties are granted 20 days from receipt of this Order in which to forward further comment regarding counsel's fee request. 20 C.F.R. §§802.203, 802.217.

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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BETTY JEAN HALL
Administrative Appeals Judge