

W.K.)
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 Claimant-Petitioner)
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 v.)
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 NORTHROP GRUMMAN SHIP SYSTEMS,) DATE ISSUED: 07/31/2007
 INCORPORATED)
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 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

D.A. Bass-Frazier (Huey Law Firm LLC), Mobile, Alabama, for claimant.

Susan Bruhnke Sevel (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2006-LHC-813) of Administrative Law Judge C. Richard Avery 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.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, while working for employer on August 5, 2004, injured her wrist, shoulder and arm while operating a vibrating scaling gun. Claimant underwent a surgical procedure on November 9, 2004, and has not returned to work for employer.

In his Decision and Order, the administrative law judge found claimant entitled to temporary total disability compensation from August 5, 2004, to July 28, 2005,

permanent total disability compensation from July 28, 2005 to November 1, 2005, and permanent partial disability compensation from November 1, 2005, and continuing, based on an average weekly wage of \$656.20, calculated pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a), and claimant's post-injury wage-earning capacity of \$234.07 per week. See 33 U.S.C. §908(a), (b), (c)(21), (h). The administrative law judge also awarded claimant medical benefits and employer relief pursuant to Section 8(f) of the Act. 33 U.S.C. §§907, 908(f).

On appeal, claimant challenges the administrative law judge's calculation of her average weekly wage under Section 10(a); specifically, claimant avers that a proper calculation under Section 10(a) results in an average weekly wage higher than that calculated by the administrative law judge. Employer responds, urging affirmance of the administrative law judge's decision.

In his decision, the administrative law judge noted the parties' agreement that claimant was a five-day per week worker, and that Section 10(a) of the Act, 33 U.S.C. §910(a), is applicable in computing her average weekly wage, as claimant worked "substantially the whole of the year" preceding her work injury. See, e.g., *Gulf Best Electric, Inc. v. Methé*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). Section 10(a) requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months; this average daily wage is calculated by dividing claimant's earnings during the year prior to the work injury by "the actual number of *days* for which the employee was paid."¹ *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 265, 31 BRBS 119, 125(CRT) (4th Cir. 1997) (emphasis in original); see also *Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 88 (1999), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000). Section 10(a) next directs multiplying the average daily wage by 260 for a five-day per week worker to arrive at the claimant's average annual earnings. Finally, pursuant to Section 10(d)(1), 33 U.S.C. §910(d)(1), claimant's average weekly wage is calculated by dividing by 52 claimant's average annual earnings. See *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290 (1978).

In determining claimant's average weekly wage at the time of her injury, the administrative law judge found claimant's earnings in the 52 weeks preceding her injury to be \$25,461.47, and he divided these earnings by 194, a number representing the sum of days claimant actually worked for employer plus the days of vacation and holiday pay

¹ The use of the number of actual days is required by 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).

that claimant received during this period of time. Pursuant to Section 10(a), the resulting average daily wage, \$131.24, was then multiplied by 260, and divided by 52, to yield an average weekly wage of \$656.20.

Claimant, citing *Wooley*, 33 BRBS 88, *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT), contends that the administrative law judge erred when he divided by eight the total number of vacation hours taken by claimant in the year preceding her injury when calculating the divisor to be used in determining claimant's average weekly wage. We reject claimant's contention of error. In *Wooley*, the Board addressed a situation in which an employee "sold back" his vacation days to his employer, *i.e.*, he did not use the vacation time which he had accrued but, rather, returned unused vacation hours to employer in exchange for additional monetary compensation. The Board held that where claimant received vacation pay in lieu of vacation days off, the determination of the number of days worked for purposes of calculating average daily wage does not include additional days derived from the hours for which claimant received vacation pay rather than time off. In *Wooley*, the inclusion of such "sold back" days in the calculation of claimant's average weekly wage would have resulted in claimant's having "worked" more days than a five-day a week worker can work in reality and more than the statutorily mandated 260 days used as a multiplier for a five-day per week worker. *Wooley*, 33 BRBS at 90. In affirming the Board's decision, the United States Court of Appeals for the Fifth Circuit noted that Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn in the year prior to his injury. The court found it to be "appropriate to charge the ALJ with making fact findings concerning whether a particular instance of vacation compensation counts as a 'day worked' or whether it was 'sold back' to the employer for additional pay." *Wooley*, 204 F.3d at 618, 34 BRBS at 14(CRT).

Contrary to claimant's contention on appeal, the decision of the Fifth Circuit in *Wooley* supports the administrative law judge's average weekly wage determination in the present case. Specifically, the administrative law judge's decision to include those vacation and holiday days on which claimant did not report to work for employer indicates an understanding that those days counted as "days worked" since claimant received wages for actual days off from work.² *Id.* In addition, in *Duncan*, 24 BRBS at 136, the Board held that vacation time actually taken is to be counted as days a claimant actually worked for purposes of determining whether a claimant worked "substantially

² Regarding this issue, claimant testified that she did not sell back any of her vacation days to employer in the year preceding her work-injury. *See* Tr. at 46. Additionally, while employer's wage records place all of a week's vacation hours on the Sunday of the applicable pay period, claimant acknowledged the impossibility of working 40 hours on such a day. *See id.* at 45; CX 1 at 21.

the whole of the year.” Therefore, the administrative law judge’s calculation of days worked in this case is consistent with the goal of Section 10(a) which is to arrive at a theoretical calculation of the claimant’s ideal earnings. *See Methe*, 396 F.3d 601, 38 BRBS 99(CRT). Accordingly, 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. *Wooley*, 33 BRBS 88, *aff’d*, 204 F.3d 616, 34 BRBS 12(CRT); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *Duncan*, 24 BRBS at 136.

Accordingly, the administrative law judge’s Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge