

BRB Nos. 06-0242  
and 06-0242A

OSCAR CONTRERAS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
MANSON CONSTRUCTION	)	DATE ISSUED: 06/29/2007
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	ORDER ON MOTION FOR
Cross-Petitioners	)	RECONSIDERATION

Employer has filed a timely motion for reconsideration *en banc* of the Board's decision in *Contreras v. Manson Construction*, BRB Nos. 06-0242/A (Nov. 29, 2006). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant responds, urging the Board to reject employer's motion. Employer has filed a reply brief.

In its decision, the Board, *inter alia*, addressed claimant's contention that the administrative law judge did not include claimant's overtime wages in the average weekly wage calculation. The Board declined to address the merits of claimant's contention in the first instance, but vacated the average weekly wage finding and remanded the case for the administrative law judge to address this issue, as claimant had raised it before the administrative law judge. *Contreras*, slip op. at 7.

In its motion for reconsideration, employer contends that there is no credible evidence of record establishing that overtime was a regular part of claimant's pre-injury work and that such work would have continued to be available to claimant had he not been injured. Thus, employer contends that remand is unnecessary and that the administrative law judge's average weekly wage calculation should be affirmed.

We reject employer's contention. There is evidence of record pertaining to claimant's pre-injury overtime work which the administrative law judge did not address in his decision. For example, claimant testified on deposition that he regularly worked

overtime prior to his injury. Emp. Ex. 110 at 33-34. Moreover, claimant contended before the administrative law judge that his gross earnings divided by the number of hours worked establish an hourly rate of pay higher than his base rate and attributed this increase to the inclusion of a higher overtime rate. Since the administrative law judge did not address these contentions, the Board appropriately remanded the case for the administrative law judge to address in the first instance the evidence concerning claimant's overtime wages prior to the injury and to calculate an average weekly wage accounting for these wages, if appropriate. Employer may make any arguments concerning the sufficiency of claimant's evidence to the administrative law judge on remand.

Accordingly, employer's motion for reconsideration is denied, 20 C.F.R. §802.409, and the Board's decision to remand the case is affirmed.<sup>1</sup>

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

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<sup>1</sup> As a majority of the permanent Board members has denied reconsideration, the request for reconsideration *en banc* is also denied. 20 C.F.R. §801.301(c).