



BRB No. 16-0066

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| COSMO COLARUOTOLO |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| SSA CONTAINERS, INCORPORATED |) | DATE ISSUED: <u>June 28, 2016</u> |
| |) | |
| and |) | |
| |) | |
| HOMEPORT INSURANCE COMPANY |) | |
| |) | |
| Employer/Carrier- |) | |
| Respondents |) | ORDER |

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand (2013-LHC-00095) of Administrative Appeals Judge Larry W. Price 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 administrative law judge’s findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant first seeks modification of the administrative law judge’s calculation on remand of his average weekly wage. Claimant asserts that the proper calculation of his average weekly wage results in a sum of \$1,595.14, rather than \$1,557.16 as found by the administrative law judge. In response, employer acknowledges that, pursuant to the decision of the United States Court of Appeals for the Ninth Circuit in *Trachsel v. Rogers Terminal & Shipping Corp.*, 597 F.3d 947, 43 BRBS 73(CRT) (9th Cir. 2009), claimant’s calculation is correct. Accordingly, as the parties are in agreement, the average weekly wage calculated by the administrative law judge on remand is vacated, and his Decision and Order on Remand modified to reflect that claimant’s average weekly wage is \$1,595.14.

Claimant also has filed a Motion for Summary Affirmance of the remainder of the administrative law judge’s Decision and Order on Remand, stating that he seeks a final

order so that he may appeal to the United States Court of Appeals for the Ninth Circuit the Board's prior decision in this case, *Colaruotolo v. SSA Containers, Inc.*, BRB No. 14-0168 (Feb. 25, 2015) (Buzzard, J., concurring and dissenting). Employer does not oppose claimant's motion. As claimant does not challenge any other aspect of the administrative law judge's decision, and as the Board's prior decision constitutes the law of the case, we grant claimant's motion and affirm the administrative law judge's decision on remand, as modified herein. *See, e.g., Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003).

Accordingly, the administrative law judge's decision on remand is modified to reflect an average weekly wage of \$1,595.14. In all other respects, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring:

I concur in my colleagues' decision to modify claimant's average weekly wage pursuant to the agreement of the parties. However, for the reasons discussed in my dissenting opinion in the Board's prior decision, I continue to believe that the administrative law judge's initial award of total disability benefits was supported by substantial evidence and that his finding on reconsideration that employer established the availability of suitable alternate employment is not supported by substantial evidence. *Colaruotolo*, slip op. at 10-12. Nonetheless, as claimant seeks to appeal the majority's prior decision on this issue to the United States Court of Appeals for the Ninth Circuit, I concur in the decision to summarily affirm the administrative law judge's decision on remand, as modified herein.

GREG J. BUZZARD
Administrative Appeals Judge