BRB Nos. 89-1209,
89-1209A,
89-1209B
and 90-804

CHARLES SPROULL	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: _____)
	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER on
Cross-petitioner	)	RECONSIDERATION EN BANC

Appeal of the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees of Alfred Lindeman, Administrative Law Judge, United States Department of Labor, and the Denial of Assessment of 20 Percent Penalty-Section 14(f) on Interest of Karen P. Goodwin, Deputy Commissioner, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Samuel J. Oshinsky, Counsel for Longshore (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

DOLDER, Acting Chief Administrative Appeals Judge:

Claimant and the Director, Office of Workers' Compensation Programs (the Director), have filed timely Motions for Reconsideration of the Board's Decision and Order in the captioned case, *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991)(Brown, J., concurring and dissenting). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a). The Director also has requested reconsideration by the permanent members of the Board *en banc*. *See* 20 C.F.R. §802.407(b). Employer has not responded to these motions. In addition, claimant's counsel has filed a petition seeking an attorney's fee for work performed before the Board, to which employer has not objected. We grant the motions for reconsideration and will consider the issues *en banc*. Pertinent to these motions, in the original decision, the Board vacated and modified the administrative law judge's average weekly wage finding, holding that claimant's 1984 vacation and holiday pay should be included in claimant's average weekly wage, rather than the vacation and holiday pay claimant received in 1985. *Sproull*, 25 BRBS at 106. The Board also held that employer should receive a credit for disability payments made to claimant for an unrelated injury for the days, post-injury, employer paid claimant holiday pay under the union contract.[1] *Sproull*, 25 BRBS at 107-108.

In this decision, all permanent members of the Board vote to reaffirm the Board's prior holding that claimant's 1984 holiday pay should be included in claimant's average weekly wage. Two members, in a separate opinion, vote to reaffirm the Board's decision that claimant's 1984 vacation pay should be included in his average weekly wage; two members would reverse the Board's holding and would affirm the administrative law judge's inclusion of vacation pay earned in 1984 and received in 1985 in claimant's average weekly wage. As a result of these votes, the Board's prior decision on average weekly wage is affirmed in its entirety. 20 C.F.R. §801.301(c). All members vote to vacate the Board's

determination that employer is entitled to a credit for disability compensation paid to claimant on holidays.

[1]The Board also affirmed the administrative law judge's finding that claimant has a loss in wage-earning capacity and is entitled to an award for permanent partial disability under Section 8(c)(21), 33 U.S.C. §908(c)(21), and it reversed the administrative law judge's award of relief pursuant to Section 8(f), 33 U.S.C. §908(f), to employer. The majority of the panel also reversed the deputy commissioner's denial of a 20 percent assessment pursuant to 33 U.S.C. §914(f) on an award of past-due interest.

To recapitulate, claimant was employed by Stevedoring Services of America when he was injured by a fall at work on January 10, 1985. On April 17, 1985, Dr. Cohen performed an open repair of claimant's left rotator cuff, and released claimant to return to "modified work" on September 16, 1985. Cl. Exs. 11, 12; Emp. Ex. 21. In a closing examination report dated May 20, 1988, Dr. Cohen opined that claimant suffered a loss of strength of the left shoulder of at least twenty percent, but did not impose any work limitations. Claimant was examined by Dr. Langston on January 12, 1989 at employer's request, and he evaluated claimant's impairment as a seven percent permanent loss of function of his left arm, but did not recommend further treatment. *See* Emp. Ex. 22. Claimant sought permanent partial disability benefits, contending he has a loss in wage-earning capacity.

The administrative law judge found that claimant suffered a loss in wage-earning capacity and awarded him permanent partial disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21). The administrative law judge found that at the time of the injury, claimant had an average weekly wage of $854.55. Decision and Order at 3. The administrative law judge derived this figure by adding to claimant's earnings the vacation and holiday payments he received in 1985 and subtracting the vacation and holiday payments received in 1984.[2] In addition, the administrative law judge denied employer a credit for vacation and holiday pay claimant received during the period he was also receiving temporary total disability for a prior injury. Decision and Order at 5.

In his motion for reconsideration, claimant requests that the Board reconsider its treatment of holiday pay and vacation pay in claimant's average weekly wage, and modify its decision to affirm the administrative law judge's findings on these issues. The Director also contends that the Board erred in holding that vacation and holiday pay should be accounted for in the year they are received in computing claimant's average weekly wage. Claimant and the Director contend that because claimant only earned the right to receive holiday and vacation pay in 1984, the year prior to the injury, and did not receive actual payment until 1985, the administrative law judge properly included the 1985 holiday and vacation pay in claimant's average weekly wage. In addition, claimant and the Director assert that the Board erred in permitting employer to receive a credit for its disability payments on the days claimant received holiday pay.

Average Weekly Wage

In its Decision and Order, the Board vacated and modified the administrative law judge's permanent partial disability award based on its determination that the administrative law judge incorrectly calculated claimant's average weekly wage. To determine claimant's overall average

[2]The administrative law judge further added the approximate sum claimant would have earned during the seven weeks in 1984 that he was off work due to a prior injury. Specifically, after making his calculations involving the holiday and vacation pay for a total of $38,454.82, the administrative law judge divided this figure by the 45 weeks the administrative law judge found claimant was available to work in the year preceding the injury, and arrived at a figure of $5981.85 for the remaining seven weeks of the year. The total of $44,436.67 was divided by 52 for an average weekly wage of $854.55.

weekly wage, the Board referred to the contractual language in the collective bargaining agreement between employer and the union.

Initially, the Board noted that holiday and vacation pay are not paid in the same manner. The agreement indicates that "[p]ayment for each 'paid holiday' shall be made on the second payday following the payroll week in which the 'paid holiday' falls." Emp. Ex. 31. Inasmuch as holiday pay is paid within two paydays of the payroll week the holiday falls in, and not delayed a year as the administrative law judge found, the Board held that holiday pay actually paid in 1984 should be included in claimant's 1984 average weekly wage. Claimant and the Director assert that as claimant only earned the right to holiday pay by virtue of his employment in 1984 and was not actually paid for it until 1985, the administrative law judge correctly included the 1985 holiday pay in claimant's average weekly wage.

We deny the relief requested on this issue, as the holiday pay received in 1985 is compensation for a specific day in 1985, after the injury occurred, and should not be included in pre-injury average weekly wage. As claimant and the Director note, in 1984, claimant only earned the entitlement to be compensated for a holiday when it occurred in 1985. A pre-requisite to entitlement to holiday pay had to be met before claimant was paid for the 1985 holiday, *i.e.*, the holiday had to occur. Thus, 1984 holidays were paid in 1984 based on entitlement earned in 1983, and the pay for these days should be included in the average weekly wage for the 52 weeks preceding the injury. Inclusion of the pay for the 1984 holidays allows for a readily calculable average weekly wage in the 52 weeks preceding the injury in the event employer wishes to institute voluntary payment of benefits, and is not contingent upon the occurrence of a future event, *i.e.*, the occurrence of the actual holiday. Accordingly, we hold, on the facts of this case, that the holiday pay actually paid in the 52-week period preceding the injury is to be included in claimant's average weekly wage, and the Board's prior holding on this issue is reaffirmed.

With regard to vacations, however, the collective bargaining agreement states that:

> In any payroll year, each longshoreman who is registered and qualified on December 31 of the calendar year in which he earns his vacation shall receive a vacation with pay the following year at the straight-time hourly rate to which the employee was entitled...on January 1 of the calendar year in which vacations are paid.

Emp. Ex. 31. The document further notes that "[v]acation checks will be distributed in the first week of April of the calendar year in which the vacations are paid." *Id.* The Board held in *Parks v. John T. Clark & Son of Maryland, Inc.*, 9 BRBS 462 (1978)(Smith, C.J., dissenting), that vacation pay and container royalty pay paid to the claimant after his injury could be used in calculating his average weekly wage because they were earned by claimant over the course of the contract year containing the injury. In *Parks*, the union contract specified that the benefits were to be paid out at the end of the contract year. The Board held that container royalty and vacation pay paid to the claimant after his injury could be used in calculating claimant's average weekly wage because they were earned over the course of the calendar year containing the injury. *Parks*, 9 BRBS at 465. The

Board also noted that had the contract not so specified, the claimant would have been entitled to these benefits as they were earned. *Parks*, 9 BRBS at 465-466.

Similarly, as claimant and the Director contend in their motions for reconsideration, in this case the contract specified that vacation pay earned in one calendar year was to be paid the following April. Emp. Ex. 31. The Board based its original holding on the rationale that this case differed from *Parks* inasmuch as the vacation pay earned in 1984 was to be paid the following April at 1985 wage rates. *Sproull*, 25 BRBS at 106. Claimant urges the Board on reconsideration to not depart from the holding in *Parks*, and notes that wage rates did not change under the contract until July 1 of the following year, and thus the vacation pay earned in 1984 would have been paid at the same rate whether it was paid in April 1985 or at the end of the contract year as in *Parks*. *See* Cl. Ex. 21. In the present case, claimant earned the vacation pay he received in April 1985 by his work through December 31 of the prior calendar year, 1984. Moreover, the contract actually provided that the vacation would be paid based on the straight hourly rate applicable on January 1 of the year in which vacations are paid. Because the wage rate did not increase until July 1985, claimant's vacation pay would have been based on the rate applicable from July 1, 1984 to June 30, 1985. Thus, the facts in *Parks* are indistinguishable from the facts herein and the holding in *Parks* supports the administrative law judge's inclusion of the 1984 vacation pay which was paid in 1985 in claimant's average weekly wage. Accordingly, we would grant the motions for reconsiderations on this issue. We would reverse the Board's prior holding on the issue of vacation pay and affirm the administrative law judge's inclusion of vacation pay earned in 1984, but received in 1985, in claimant's average weekly wage.[3]

Credit

The administrative law judge found that while a credit would be appropriate for payments made as advances of disability compensation, the vacation and holiday pay should not be credited where, as here, they are based on the hours worked in the prior year. Decision and Order at 5. In its original Decision and Order, citing *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990) and *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989), the Board affirmed the administrative law judge's

[3]We disagree with our colleagues' conclusion that Section 10 of the Act requires computation of average weekly wage on a "cash" basis. Section 10 states that average weekly wage is to be determined "at the time of the injury." 33 U.S.C. §910. Three methods for calculating average weekly wage are provided in subsections (a), (b), and (c). The administrative law judge here applied subsection (c), finding that subsections (a) and (b) could not reasonably and fairly be applied. The administrative law judge's use of subsection (c) is unchallenged. Under that subsection, average weekly wage is based upon the annual earning *capacity* of the injured employee. The Section 10(c) inquiry is not limited to actual earnings but includes earning potential, and the administrative law judge may consider relevant factors including, for example, wages which would have been earned post-injury. *See Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). There is thus no basis in the Act to limit a Section 10(c) calculation to cash received in the year prior to injury. Here, we would affirm the administrative law judge, as his decision is fully consistent with the statute.

determination that employer does not get a credit for the holiday pay paid during the period of temporary total disability in 1985 for the unrelated hand injury, but held that employer is entitled to a credit for its disability payments on the days employer paid claimant holiday pay under the union contract. *Sproull*, 25 BRBS at 107-108. The Board also affirmed the administrative law judge's denial of a credit for vacation pay based on the fact that claimant qualified for and earned his vacation in the prior year.

The Board held in *Andrews* that because claimant incurred no wage loss on the days he received holiday pay, employer is not required to pay him compensation under the Act for these days. *Andrews*, 23 BRBS at 174. The contract in *Andrews* specifically provided for payment of compensation on holidays that occurred while employees were off work due to on-the-job injuries. Thus, the Board held that as the holiday pay was "intended in lieu of compensation," claimant incurred no wage loss on the days he received holiday pay. *Andrews*, 23 BRBS at 174. In the present case, however, there is no evidence of a provision for the payment of holiday pay in lieu of compensation. Consequently, claimant arguably did incur a wage loss because, pursuant to the union contract, he was entitled to a paid holiday whether or not he worked. Moreover, registered employees who were eligible for a paid holiday could work on the holiday and receive payment as prescribed in the collective bargaining agreement. Thus, as claimant asserts, had he not been injured, he could have received both his holiday pay and wages. As the facts in *Andrews* are distinguishable, and employer has not established that the holiday pay provided for in the contract is in lieu of compensation, the holding in *Andrews* is not controlling in the instant case.

Accordingly, we vacate the Board's prior determination that employer is entitled to a credit for disability compensation paid to claimant on holidays.[4]

Attorney's Fee

Claimant's attorney also petitions the Board for a fee for work performed before the Board. Claimant's counsel requests a fee in the amount of $6,625 for 43.75 hours of legal services at the rate of $150 per hour and 1.25 of a legal assistant's time at the rate of $50 per hour.

In its original decision, the Board reversed the deputy commissioner's denial of a Section 14(f) penalty on overdue interest payments, and this issue is not contested in the Motions for Reconsideration. Claimant also was successful in defending some of the issues involved in the original appeal, such as employer's argument that claimant did not suffer a loss in wage-earning capacity. Therefore, we award counsel an attorney's fee for work performed before the Board in the initial appeal. *See generally Bonds v. Smith & Kelly Co.*, 21 BRBS 240, 243 (1988); *Cutting v. General Dynamics Corp.*, 21 BRBS 108 (1988). This includes the dates from March 24, 1989 to

[4]We reject, however, claimant's contention that no credit is owed because the Pacific Maritime Association (PMA) rather than employer made the holiday and vacation payments, inasmuch as pursuant to the union contract, PMA served as employer's agent for disbursement of these funds. *See* Emp. Ex. 31, p. 61.

October 24, 1991 for a total of 37.5 hours of legal services and 1.25 hours of services performed by a legal assistant.

The remaining hours, not including the work on the fee petition on May 28, 1992, are for work performed on the Motion for Reconsideration. Inasmuch as we reverse the holding that employer is entitled to a credit for its disability payments on the days employer paid claimant holiday pay under the union contract, claimant's counsel has been successful in his motion for reconsideration by the Board. Thus, we award claimant's counsel the remaining 4.75 hours for legal services performed on and after November 14, 1991.

However, we disallow the 1.5 hours spent preparing the fee petition, as this service was not reasonably necessary to protect claimant's interests. *Shaller v. Cramp Shipbuilding and Dry Dock Co.*, 23 BRBS 140 (1989); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). The Board has long held that the preparation of a fee petition is non-compensable. *See Verderane v. Jacksonville Shipyards, Inc.*, 14 BRBS 220.15 (1981); *Keith v. General Dynamics Corp.*, 13 BRBS 404 (1981); *Staffile v. International Terminal Operating Co., Inc.*, 12 BRBS 895 (1980); *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979). The Board has noted that attorneys should keep regular records of the time they devote to each case and that the preparation of the fee application should be, for the most part, a clerical function included in overhead expenses. *Morris*, 10 BRBS at 383.

Claimant contends that the United States Court of Appeals for the Ninth Circuit has indicated in other fee-shifting statutes that time spent in preparing a fee petition is compensable. *See Davis v. County and City of San Francisco*, 976 F.2d 1536 (9th Cir. 1992)(Title VII Action pursuant to 42 U.S.C. §2000e-5(k)); *D'Emanuele v. Montgomery Ward & Co., Inc.*, 904 F.2d 1379 (9th Cir. 1990)(ERISA action under 29 U.S.C. §1132(g));*Clark v. City of Los Angeles*, 803 F.2d 987 (9th Cir. 1987)(under 42 U.S.C. §1988 time spent preparing fee petition is compensable); *In re Nucorp Energy, Inc.*, 764 F.2d 655 (9th Cir. 1985)(bankruptcy counsel were entitled to compensation for time and effort spent in preparing attorney's fee applications). These cases, however, do not stand for the proposition that all fee-shifting statutes require that an attorney be compensated for the time spent preparing a fee application.[5]

Moreover, the fee request in most longshore cases is quite small in comparison to the fees requested in civil rights cases, where litigation is often complex and lengthy. *See Hensley v. Eckerhart*, 461 U.S. 424 (1988). Thus, the fee petitions will necessarily be shorter and less complex. Furthermore, unlike the fee petition in the present case, fee applications in the bankruptcy cases are required to be extremely detailed. *See Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088 (5th Cir. 1980). The fee petition in *In re Nucorp Energy*, was a detailed account required by the court which totalled more than 400 typewritten pages describing in detail the services rendered by some 40

[5]We note that the implementing regulations of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.*, which has incorporated Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, *see* 30 U.S.C. §932(a), provide that no fee approved shall include payment for time spent in preparation of a fee application. 20 C.F.R. §725.366(b).

attorneys and paralegals over a six-month period and involved approximately 6,500 hours of professional time. *In re Nucorp Energy*, 764 F.2d at 659 n.3. In the present case, we see no compelling reason to depart from the Board's longstanding holding that time spent preparing a fee petition is not compensable. *Shaller*, 23 BRBS at 140.

Inasmuch as the remaining hours requested are reasonably commensurate with the necessary work done, claimant's counsel is entitled to a fee in the amount of $6,400 representing 42.25 hours of legal services at the hourly rate of $150 and 1.25 hours of services performed by a legal assistant at $50 per hour to be paid by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the Director's and claimant's motions for reconsideration *en banc* are granted. We reaffirm the Board's previous holding on the issues of holiday and vacation pay. In addition, we vacate the Board's prior determination that employer is entitled to a credit for disability compensation paid to claimant on holidays for which he received holiday pay. Claimant's attorney is awarded a fee of $6400 for work performed before the Board to be paid directly to counsel by employer.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring in part:

The procedural history of this case, and the facts, are amply set forth in the Decision and Order in *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991)(Brown, J., concurring and dissenting). In that decision, the Board vacated and modified the administrative law judge's average weekly wage finding in a permanent partial disability award, holding that claimant's vacation and holiday pay should be accounted for in the year it is received, rather than the year in which it is earned. The Board also held that employer should receive a credit for disability payments made to claimant for an unrelated injury for the days, post-injury, employer paid claimant holiday pay under the union contract. The Director and claimant have filed Petitions for Reconsideration *en banc* which have been granted. The Board has denied the relief requested on the issue of holiday pay, a result with which we agree. We also agree with the decision to grant the relief requested on the credit issue. All members of the Board agree on these issues.

With regard to the issue of vacation pay, however, we disagree with our two colleagues who would grant the relief requested. In our opinion the Board properly decided that the vacation pay received in the year prior to the injury should be included in the calculation of the average weekly

wage, rather than the vacation pay received after the injury on the theory that it had been "earned" in the year prior to the injury. Therefore, as there is no majority in favor of granting relief on this issue, *see* 20 C.F.R. §801.301(c),[6] the relief requested by the parties on reconsideration of the average weekly wage issue is denied and the Board's prior opinion affirmed for the following reasons.

An employee's average weekly wage is to be determined as of the time of his injury. In order to do this Section 10 of the Act, 33 U.S.C. §910, sets forth *various formulas which relate to the year before the injury.* This is normally done by looking at the payroll for the year *preceding* the injury. The calculation must be done promptly and compensation must be made within 14 days after it becomes due to avoid a 10 percent penalty. *See* 33 U.S.C. §914(e).

While we agree with our colleagues that holiday payments actually received made in the year prior to injury should be included in the average weekly wage calculation, our disagreement relates to the payments to be included for vacation pay. We would include vacation payments made to and received by the employee in the year *prior* to the injury, rather than payments made in the year following the injury. Here the injury was on January 10, 1985, and we would include in the calculation any vacation pay received in April 1984, that is, within the year prior to the injury, not the vacation pay received in April 1985, after the injury, as our colleagues would.

The opinion of our colleagues is based on the union contract on the theory that subsequent payment was "earned" in the prior year. Our view is that a vacation is paid in April of a particular year because of the employee's wages and number of hours worked in the prior calendar year. This is what "entitled" the employee to a vacation the following year. He receives it only if he is "registered and qualified" on December 31 of a given calendar year. Emp Ex. 31, union contract 7.1. If eligible, payment is to be made the following April based on the hourly rates in effect on January 1 of that following year.

We reaffirm the Board's original decision to calculate the average weekly wage based upon payments received in the year prior to the injury. This method of calculation is, in essence, a cash method of accounting for the wages claimant received in the year prior to the injury and allows for an easy calculation of the wages claimant received prior to the injury. Our colleagues' method with regard to vacation pay is an accrual method which will create needless administrative problems. Although an employer could make an initial estimate of the average weekly wage at the time of injury, their view would postpone the calculation of the claimant's true average weekly wage until April of the following year. First, there would have to be a determination as to whether the longshore employee was "registered and qualified" on December 31 of any given year. Union contract 7.1, Emp. Ex. 31, p. 62. There is nothing in the record to indicate what the requirements are to be "qualified." If eligible, payment is to be made the following April based on the hourly wage

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[6]Section 801.301(c) provides:

> A panel decision shall stand unless vacated or modified by the concurring vote of at least three permanent members sitting *en banc*.
>
> 20 C.F.R. §801.301(c).

rate as of January 1 of that year. The administrative headache will be caused by the fact that calculation and payment of compensation must be made promptly under Sections 10 and 14 of the Act. Subsequently, if an employee is "qualified" and receives vacation pay the following April, a final average weekly wage determination must be made at that time.[7] This was admitted by the claimant's counsel at oral argument in this case. Transcript of Oral Argument p. 37. He also mentioned that this procedure would be applicable to all longshoremen operating on the West Coast, that is, to all longshoremen operating under the Pacific Coast Longshore Contract between the International Longshoremen's and Warehousemen's Union and the Pacific Maritime Association. Emp. Ex. 31, p. 59. Query whether this situation would arise at southern and east coast ports, or at shipbuilding and ship repair yards that would also be covered under the Longshore Act, but where the employees would be operating under different contracts. There was no answer to this question at the oral argument.

Two of our colleagues would hold that the 1985 vacation pay was "earned" in 1984. Here, again, is the accrual theory. An examination of Section 10 of the Act indicates, however, that in determining the average weekly wage of an injured employee you look to the "whole of the year" immediately preceding the injury. The annual "earnings" are arrived at by a multiple of the average daily "wage" or "salary" of the employee, or, in some cases, of an employee of the same class. The average annual "earnings" are then divided by 52 to get back to the average weekly "wage." The terms are used interchangeably but the whole thrust is to calculate what the employee was paid in the year prior to the injury. The whole concept is to determine what was paid in the "year immediately preceding" the injury. There is no reference in the statute to money paid following the injury.[8] The statute is clear. Two colleagues attempt to amend the statute by their interpretation of

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[7]In addition to the lack of a statutory basis for this procedure, the impracticality of the method is readily apparent when one realizes that in many cases a claimant may be temporarily disabled for only a few months and then returns to work. He is back on the payroll, compensation is suspended and the employer files a Form LS-208 notifying the district director. Under the procedure used by the original panel, which we would affirm, based on payments received in the year prior to the injury, the case can be closed for all intents and purposes. Under the procedure urged by our colleagues, in the same fact situation referred to above, the case cannot be closed when the employee returns to work but must be re-opened to re-adjust the average weekly wage calculation taking into account the post-injury payment of vacation pay. In other words, the case should be closed for all intents and purposes but the parties still do not know the basic figure which is needed to determine the compensation rate.

[8]The administrative law judge stated that the provisions of Section 10(a) and (b) could not be fairly applied and that his calculation of average weekly wage was made under §10(c). In footnote 3 two colleagues state that this involves a determination of earning *capacity* and is not limited to actual earnings. They point out that it could include earning potential and possibly future earnings. On the facts of this case, these comments are irrelevant. Although the administrative law judge indicated he used Section 10(c), he did not follow the criteria of that section. For instance, there was no determination of potential or future earnings or, in fact, earning capacity. Furthermore, no regard was given to the earnings of other employees of the same or most similar class or in employment in the same or neighboring locality. The administrative law judge actually used a modified Section 10(a) method, relied solely on actual earnings, divided the total amount paid by 45 rather than 52, to

the contract between the union and management.

Accordingly, the Board's decision is reaffirmed to reflect the inclusion of vacation pay received in April of 1984 in the average weekly wage for the year immediately preceding claimant's January 10, 1985 injury. In all other respects, we concur.

JAMES F. BROWN
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

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account for 7 weeks lost due to a prior injury and arrived at his calculation of $854.55 as the average weekly wage. The only error is that this figure was based, in part, on vacation pay received in 1985, after the injury, rather than the vacation pay received in 1984, in the year prior to the injury.