BRB No. 03-0785

RICHARD STETZER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT, INCORPORATED	)	DATE ISSUED:Aug. 20, 2004
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Monstream & May L.L.P.), Glastonbury, Connecticut, for claimant.

Peter D. Quay (Murphy and Beane), New London, Connecticut, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (01-LHC-3116) of Administrative Law Judge Daniel F. Sutton 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 supported by substantial evidence, are rational, and are 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, a longshoreman, was injured on July 8, 2000, when he slipped and fell. He was temporarily totally disabled until May 13, 2001, when he returned to restricted duty. Employer voluntarily paid benefits at a rate of $712.79, based on an average weekly wage of $1,069.19. Claimant sought additional compensation for injuries he sustained to his back and right hand. In his decision, the administrative law judge found that claimant's back and hand impairments are related to his work accident. The administrative law judge found that claimant's average weekly wage is $1,046.58, calculated pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c). In addition, the administrative law judge awarded claimant temporary partial disability compensation commencing May 31, 2001, for a period not to exceed five years, based on the difference between claimant's actual post-injury earnings and those received by a similarly situated non-disabled employee. 33 U.S.C. §908(e), (h).

The only issue on appeal is the method by which the administrative law judge calculated claimant's average weekly wage at the time of injury. Claimant argues that the administrative law judge erred in determining his average weekly wage pursuant to Section 10(c), rather than Section 10(a), 33 U.S.C. §910(a). Employer responds, urging affirmance of the administrative law judge's calculation under Section 10(c).

A claimant's average weekly wage at the time of injury is determined by utilizing one of three methods set forth in Section 10 of the Act. 33 U.S.C. §910(a)-(c). Section 10(a) applies when claimant has worked in the same or comparable employment for substantially the whole of the year immediately preceding the injury and provides a specific formula for calculating annual earnings. Where claimant's employment is regular and continuous, but he has not been employed in that employment for substantially the whole of the year, Section 10(b) may be applied based on the wages of comparable employees.[1] Section 10(c) provides a general method for determining annual earning capacity where neither Section 10(a) nor (b) can fairly or reasonably be applied to calculate claimant's average weekly wage at the time of the injury. *See Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26(CRT)(5th Cir. 1991).

Claimant, relying upon *Matulic v. Director, OWCP*, 154 F.2d 1052, 32 BRBS 148(CRT)(9th Cir. 1998), argues that the administrative law judge erred in not applying Section 10(a) to compute his average weekly wage because he worked substantially the whole year preceding the injury in regular and continuous employment and the amount is readily calculable. The administrative law judge determined that claimant's average weekly wage would be $1,248.20 pursuant to Section 10(a).[2] The administrative law

[1] No party argues that Section 10(b) is applicable in this case.

[2] Under Section 10(a), the administrative law judge divided claimant's total annual salary ($54,422.03) by the actual number of days worked (218) to produce an average

judge, however, concluded that use of Section 10(a) was inappropriate for two reasons: (1) it yielded an average yearly wage of $64,906.60, an amount 16 percent higher than claimant's actual income for the preceding year; and (2) claimant was neither a five- nor a six-day worker, averaging 4.2 days per week. Accordingly he calculated claimant's average weekly wage pursuant Section 10(c) by dividing 52 weeks into claimant's total income ($54,422.03) for an average weekly wage of $1,046.58. Decision and Order at 3-5.

Subsections (a) and (b) are the basic formulae for determining average annual income; subsection 10(c) is applied only if neither provision can reasonably and fairly be applied. *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT)(5th Cir. 1996). If claimant worked substantially the whole of the year preceding his injury, and the record contains evidence from which an average daily wage can be calculated, Section 10(a) generally is applicable. *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *Taylor v. Smith & Kelly*, 14 BRBS 489 (1981). 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. *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000), *aff'g* 33 BRBS 88 (1999).

We agree with claimant that his average weekly wage should be calculated pursuant to Section 10(a), as claimant worked substantially the whole of the year prior to the injury and the record contains sufficient information such that the administrative law judge could calculate claimant's average daily wage. In this case, claimant worked in all 52 weeks of the year prior to his injury and worked 218 days, which is 84 percent of the available work days for a five-day per week worker. Tr. at 66-69. Thus, claimant worked "substantially worked the whole of the year." The Board has previously held that 42 weeks constitutes "substantially the whole of the year," *see Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980), *rev'd and remanded on other grounds*, 640 F.2d 769, 12 BRBS 237 (5th Cir. 1981). In addition, the permanent nature of claimant's employment supports the use of Section 10(a). *See SGS Control Services*, 86 F.3d at 443, 30 BRBS at 60-61(CRT); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). In *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT), the United States Court of Appeals for the Ninth Circuit held that Section 10(a) must be applied when claimant worked at least 75 percent of available workdays, as this is the threshold for "substantially the whole of the year." *See also Price v. Stevedoring Services of America*, 366 F.3d 1045 (9th Cir. 2004). While this case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit, and *Matulic* therefore is not controlling

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daily wage of $249.64 which is multiplied by 260 for a five-day employee to produce an average weekly wage of $1,248.20. Decision and Order at 4; *see* 33 U.S.C. §910(d).

precedent, it provides useful guidance on the issue presented in conjunction with the Board's previous decisions on this issue. *See Duncan,* 24 BRBS 133.

As claimant worked substantially the whole of the year prior to injury, and the record contains the number of days claimant worked, Section 10(a) is applicable if claimant was a five- or six-day per week worker. In this regard, we cannot affirm the administrative law judge's finding that claimant was neither a five-day nor a six-day per week worker. The administrative law judge determined that claimant worked 8.6 hours a day and 4.2 days a week, by dividing the number of days worked, 218, by 52 and the number of hours worked, 2870, by the number of days. The administrative law judge's averaging of hours inappropriately reallocates hours into extended days and abbreviated weeks creating the appearance of four-day weeks when the record reflects that in a majority of weeks claimant worked five or more days.[3] *Wooley*, 204 F.3d 616, 34 BRBS 12(CRT). In this case, therefore, we hold that clamant is a 5-day worker.

The only potentially "harsh result" of use of Section 10(a) identified by the administrative law judge is the over-compensation that results from the theoretical approximation of the wages claimant would have earned had he worked every day. As this "over-compensation" is built into the statutory framework of Section 10(a), *see Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT); *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1986), the difference between claimant's theoretical and actual wages cannot provide a basis for the non-use of Section 10(a) where that section is otherwise applicable. *See generally Wooley*, 204 F.3d 616, 34 BRBS 12(CRT); *SGS Control Services*, 86 F.3d 438, 30 BRBS 57(CRT). Consequently, we hold that the application of Section 10(a) in this case is mandated as claimant worked substantially the whole year prior to his injury. Therefore, we vacate the administrative law judge's calculation under Section 10(c) of the Act. As the administrative law judge has already determined that claimant's average weekly wage under Section 10(a) is $1,248.20, it is not necessary to remand this case for further consideration. We hold that claimant's average weekly wage under Section 10(a) is $1,248.20, and we modify the administrative law judge's decision to hold that claimant is entitled to temporary total disability compensation from July 9, 2000 to May 13, 2001, at 66 2/3 percent of this average weekly wage. 33 U.S.C. §908(b).

[3] Using the administrative law judge's calculations of 8.6 hour days, 4.2 days per week, claimant worked an average of 36.12 hours per week, which is substantially a five-day work week. The record shows that claimant worked 40 hours per week in 23 weeks, over 40 hours per week in 11 weeks, and fewer than 32 hours in 18 weeks. Cl. Ex. 1.

Accordingly, the administrative law judge's Decision and Order is modified to reflect that claimant's average weekly wage is $1,248.20, and that claimant's benefits for temporary total disability should be based on 66 2/3 percent of this rate. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

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