BRB No. 11-0339

RODNEY F. BARNES, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KINDER MORGAN, INCORPORATED	)	DATE ISSUED: 01/27/2012
	)	
and	)	
	)	
ACE U.S.A.	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Partially Granting Claimant's Motion for Reconsideration of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Richard M. Slagle (Slagle Morgan, LLP), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Partially Granting Claimant's Motion for Reconsideration (2007-LHC-00159) of Administrative Law Judge Jennifer Gee 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 sustained a torn left rotator cuff on January 6, 2004, when he slipped on ice and fell during the course of his work for employer as a journeyman mechanic longshoreman.[1] He continued working until March 23, 2004, when his treating physician, Dr. Brenneke, certified claimant was unable to continue with any employment. EXs 2 at 35; 5 at 97. Claimant thereafter underwent heart bypass surgery on April 30, 2004,[2] EX 5 at 106, and left shoulder surgery on July 6, 2004, and was released to return to work, without restrictions, by Dr. Brenneke on December 15, 2004. EX 5 at 145-147. Claimant worked 86 hours from December 15 to December 23, 2004. Claimant was off work on, and received holiday pay for, December 24 and 25, 2004; on December 26, 2004, claimant sustained a non-work-related stroke and was kept off work. EX 7 at 160, 163. Claimant sustained a larger and more disabling stroke on January 7, 2005. EX 7 at 169. He has not returned to work. Claimant sought benefits under the Act for his shoulder injury.

In her decision, the administrative law judge initially found that claimant was temporarily totally disabled from March 23, 2004 until December 14, 2004,[3] when Dr. Brenneke released claimant to full-duty work with self-limitations. Determining that claimant's actual earnings after his return to work represent his wage-earning capacity, the administrative law judge next found, based on these wages, and a calculation of claimant's average weekly wage pursuant to Section 10(a), 33 U.S.C. §910(a), that claimant established a loss in wage-earning capacity and, thus, was entitled to temporary partial disability compensation, 33 U.S.C. §908(e), from December 15, 2004 to February 1, 2005, when he reached maximum medical improvement. The administrative law judge thereafter found claimant entitled to continuing compensation for permanent partial disability from February 2, 2005, 33 U.S.C. §908(c)(19), (21), as, although claimant became unable to work due to the stroke, his post-injury wage-earning capacity due to the shoulder injury remained unchanged. On reconsideration, the administrative law judge

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[1]Claimant had previously sustained a torn labrum in his left shoulder at work on March 10, 2001. Dr. Brenneke performed surgery on May 24, 2001; he noted that claimant also had a torn biceps tendon, which he was unable to repair. CX 11 at 91-92; EX 4 at 58. Claimant was released to return to work without restrictions on September 10, 2001. EX 4 at 63, 69-70.

[2]Claimant does not allege that his heart bypass surgery is related to his work for employer.

[3]Employer had voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), during this period based on an average weekly wage of $2,332.16. Decision and Order at 15.

amended her average weekly wage and wage-earning capacity calculations and resulting award of benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established a disability sufficient to support her compensation award, as well as her average weekly wage and wage-earning capacity findings. Claimant responds, urging affirmance. Employer filed a reply brief. For the reasons that follow, we affirm the temporary partial disability award but reverse the permanent partial disability award. We affirm the administrative law judge's average weekly wage calculation.

COMPENSATION AWARDS

Employer contends that the administrative law judge's crediting Dr. Brenneke's releasing claimant to return to longshore work without restrictions establishes that claimant was not disabled at all by the shoulder injury, prior to the stroke. Alternatively, employer argues that it is not responsible for any disability compensation after the date of claimant's non-work-related stroke. Thus, employer contends that neither the temporary partial nor permanent partial disability award is supported by substantial evidence.

Initially, we reject employer's premise that it cannot be held liable for any work-related disability following claimant's non-work-related stroke.[4] Where claimant sustains a non-work-related injury following a work-related injury, employer is relieved of liability for disability due to this intervening cause. However, employer remains liable for any disability that is related to the work injury. *See J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009); *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981). In this case, employer is not liable for the disability related to claimant's

[4]As support for its contention, employer cites *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993), *aff'g Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992). In that case, the United States Court of Appeals for the Fourth Circuit affirmed the Board's holding that where claimant had been fired from a suitable post-injury job with employer because of the violation of a company rule, employer had met its burden of establishing the availability of suitable alternate employment. Claimant's inability to perform the post-injury job in *Brooks* was due to his own misfeasance and not because of his work-related disability. As a result of this, there was no renewed burden on employer to establish the availability of suitable alternate employment and claimant was not entitled to total disability benefits after his termination. *Brooks* is inapposite; the issue in *Brooks* involved whether employer bore a renewed burden to show suitable alternate employment. In this case, claimant does not claim entitlement to total disability benefits after his stroke.

subsequent non-work-related stroke, but remains liable for any loss of wage-earning capacity due to claimant's January 2004 shoulder injury.

With respect to the seminal issue of whether claimant had a loss in wage-earning capacity due to the shoulder injury prior to the stroke, the administrative law judge rejected claimant's evidence that he had specific physical restrictions resulting from his shoulder surgery. The administrative law judge found that the restrictions stated by Dr. Brenneke in August 2006, a year and a half after releasing claimant without restrictions, and in his subsequent deposition testimony, were not creditable as they were contradicted by the physician's contemporaneous chart notes.[5] Decision and Order at 17-20; EX 5 at 156-158. The administrative law judge also rejected the vocational report of Scott Stipe, since it was based upon Dr. Brenneke's 2006 work restrictions. Decision and Order at 23; CX 10 at 56. The administrative law judge, instead, credited Dr. Brenneke's December 15, 2004 chart note that claimant could return to work at that time without restrictions, and his deposition testimony that claimant was advised to "self limit," which were the same terms by which Dr. Brenneke had released claimant to return to work after his 2001 left shoulder injury. CX 11 at 93, 103; EXs 5 at 145-147; 10 at 244; *see* n.1 *supra*. This finding is rational and is affirmed.

The administrative law judge nevertheless found that claimant sustained a loss of wage-earning capacity due to the shoulder injury since the longshore jobs claimant initially chose show that he "may have self-limited and delayed taking any journeyman mechanic positions." Decision and Order at 24; *see* EX 2 at 36. Claimant worked only eight hours each day for the first six days after he returned to work instead of the longer hours he had a history of working. He worked twelve hours on the seventh day, and eight hours on the eighth day. *Id*. The administrative law judge found that, as claimant worked fourteen hours as a journeyman mechanic on his last day of work (day nine), this "may indicate that he would have been able, as before, to continue working with no difficulty. However, that would be speculative." *Id*. Accordingly, the administrative law judge found that claimant established a loss in wage-earning capacity, and she thus awarded him temporary partial and permanent partial disability benefits.

Disability under the Act is an economic concept based on a medical foundation. *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978). The

[5]The restrictions stated in 2006 were that claimant not engage in longshore jobs involving climbing, overhead work and external rotation. Claimant would also have difficulty lifting straight up with his left arm. JX 18 at 38-40. At his deposition, Dr. Brenneke testified that these were essentially the same restrictions he imposed after claimant's March 2001 left shoulder injury. EX 10 at 253-254; *see* EX 5 at 80-83.

employee has the burden of establishing that he is disabled. *See, e.g., Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). Regarding claimant's physical disability, the administrative law judge credited Dr. Brenneke's testimony that claimant was advised to "self limit" on the basis that he could not completely repair claimant's shoulder injury,[6] as well as the physician's December 15, 2004 chart note which indicated that claimant's shoulder was not yet medically stationary. Decision and Order at 14, 21; EX 5 at 147. Accordingly, there is substantial evidence of physical problems due to the January 2004 work injury.

Regarding the economic basis for claimant's disability awards, claimant's payroll records support the administrative law judge's finding that he had historically worked longer than eight hour days and that he worked primarily as a journeyman mechanic. *See* EX 2. The administrative law judge acted within her discretion to credit Dr. Brenneke's restriction that claimant "self-limit" when he released him to return to work. In addition, the administrative law judge permissably inferred from the payroll records that claimant adhered to this restriction by working fewer hours and not working at his usual job as a journeyman mechanic until his last day of work before having two paid holidays off work. The administrative law judge is entitled to draw rational inferences from the record evidence. *See, e.g., Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998). Therefore, we affirm the administrative law judge's award of temporary partial disability compensation based on claimant's actual wages prior to his reaching maximum medical improvement, as it is supported by substantial evidence. *See Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991) (decrease in number of post-injury work hours can establish a loss in wage-earning capacity); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996) (suitable job offered by employer and held for a short period of time can establish claimant's wage-earning capacity); *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 216 (1989) (loss of overtime may establish loss of wage-earning capacity); *see* wage-earning capacity discussion, *infra.*

We next address the administrative law judge's continuing award of compensation for permanent partial disability after claimant's stroke. The administrative law judge stated, "[S]ince the Claimant is no longer able to work at all due to his stroke, it is obvious that his wage-earning capacity from his covered injury remained unchanged after he reached maximum medical improvement." Decision and Order at 25. While it is true

[6]Dr. Brenneke's July 2004 surgical notes state that the infraspinatus tendon, which was not damaged by claimant's March 2001 shoulder injury, was torn and could not be repaired. *See* JX 12 at 26-27; EX 4 at 58.

that any wage loss due to the work-related shoulder injury existing prior to the stroke continues, *Mangaliman*, 30 BRBS 39, here claimant's shoulder injury had not reached maximum medical improvement before the stroke. Claimant bears the burden to show a permanent loss of wage-earning capacity due to the shoulder injury; the stroke is not relevant to this determination. *See Tracy,* 43 BRBS 92. The parties stipulated that claimant reached maximum medical improvement on February 2, 2005, as claimant was "medically stationary" according to Dr. Brenneke's checking the "Yes" box on a form letter sent by employer. JX 17 at 37. Dr. Brenneke did not list any permanent work restrictions on the form. *Id.* As discussed above, the administrative law judge rationally rejected the permanent restrictions stated by Dr. Brenneke in 2006. Thus, there is not substantial evidence in the record to support a finding that, after the date of maximum medical improvement, claimant continued to have a physical shoulder impairment due to the work injury. Moreover, there is not substantial evidence to support the finding that claimant would have continued to work fewer hours after his shoulder needed maximum medical improvement due to his self-limiting. As the administrative law judge found, claimant worked an increasing number of hours during his nine days of employment and he had performed his usual longshore employment of a journeyman mechanic, for 14 hours, on his last work day before he suffered his first stroke on December 26, 2004. Accordingly, the record does not support the administrative law judge's inference that, absent his non-work-related strokes, claimant's self-limiting at work would have continued after claimant's shoulder condition reached maximum medical improvement on February 2, 2005, and that he would have sustained a permanent loss of wage-earning capacity due to the injury. Therefore, we reverse the administrative law judge's award of continuing compensation for permanent partial disability as it is not supported by substantial evidence of record.[7] *See generally Owens v. Traynor,* 274 F.Supp. 770 (D.Md. 1967), *cert. denied,* 396 F.2d 783 (4th Cir.), *cert. denied*, 393 U.S. 962 (1968).

WAGE-EARNNG CAPACITY

Employer contends that claimant's post-injury wages over nine days establish actual earnings of $3,126.32 per week and that, therefore, the administrative law judge erred in finding claimant sustained a loss in wage-earning capacity.[8] Post-injury wage-

[7]As we have reversed the administrative law judge's permanent partial disability award, we need not address employer's contention that the administrative law judge's computation of permanent wage loss based on nine days of work is not substantial evidence to support the award.

[8]Employer derives its post-injury wage-earning capacity of $3,126.32 by stating that claimant earned a total of $4,019.56 during the period after his return to work, dividing this number by nine to arrive at an average daily wage of $446.62 and

earning capacity of a partially disabled employee whose compensation is determined under Section 8(c)(21) is equal to his actual earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h); *see Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Container Stevedoring Co.*, 935 F.2d 1544, 24 BRBS 213(CRT).

In her decision, the administrative law judge found that claimant worked nine straight days and earned $3,978.60, which corresponds to an average daily wage of $442.07. The administrative law judge found that, as a six-day a week worker, this yields a wage-earning capacity of $2,550.40. Decision and Order at 11. On reconsideration, the administrative law judge agreed with claimant that $60.96 he received for travel time should be added to his post-injury earnings, increasing these earnings to $4,039.56, resulting in an average daily rate of $448.84, and a post-injury wage-earning capacity of $2,589.46. Order on Recon. at 9-11. The administrative law judge further adjusted claimant's wage-earning capacity to account for a fifty-cent post-injury wage increase in the basic longshore hourly rate from $28.18 in July 2004 to $28.68 as of December 2004. Order on Recon. at 11-12. The administrative law judge reduced claimant's post-injury earnings by 1.8 percent to $2,542.85, to reflect the level they would have been without the pay increase. The administrative law judge rationally determined claimant's wage-earning capacity based on the assumption he would average working six days a week as he did prior to his injury. *See generally Ryan v. Navy Exchange Service Command*, 41 BRBS 17 (2007); *see* discussion, *infra.* Because the administrative law judge's findings concerning claimant's wage-earning capacity are rational and supported by substantial evidence of record, they are affirmed. *Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT).

AVERAGE WEEKLY WAGE

Employer argues that the administrative law judge erred in calculating claimant's average weekly wage by applying Section 10(a) rather than Section 10(c), 33 U.S.C. §910(c), because claimant missed ten weeks of work during the year preceding his injury due to non-work-related diabetes. 33 U.S.C. §910(a), (c). Employer also argues that, under Section 10(a), the administrative law judge erred by finding that claimant was a six-day a week worker and by dividing claimant's earnings by the 237 days he worked and not the 252 days for which he was paid.

The Act requires application of Section 10(a) in calculating average weekly wage unless such application would be unreasonable or unfair or if the facts necessary for

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multiplying this figure by seven. Thus, employer's wage-earning capacity contention is based on its categorizing claimant as a seven-day per week worker.

application of Section 10(a) are not available. 33 U.S.C. §910(a), (c). In *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held that: "when a claimant works more than 75 percent of the workdays of the measuring year the presumption that §910(a) applies is not rebutted." *Matulic*, 154 F.3d at 1058, 32 BRBS at 151(CRT). Thus, because the claimant in *Matulic* worked 82 percent of the available work days and because the nature of his employment was stable and continuous, the court held that the administrative law judge should have applied Section 10(a) to determine his average weekly wage. *Id.*, 154 F.3d at 1058, 32 BRBS at 152(CRT); *see also Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

In her decision on reconsideration, the administrative law judge found that claimant worked 237 days during the period from January 6, 2003 to January 5, 2004.[9] Order on Recon. at 4-5. The administrative law judge included in this calculation eight holidays for which claimant was paid but did not work. Decision and Order at 12; EX 2 at 27-34. The administrative law judge next subtracted twelve weeks to account for the ten weeks claimant was unable to work due to his non-work-related diabetes, CX 2, and two weeks claimant was off in September, which she found the record does not indicate was paid time off. EX 2 at 31. Thus, she found that claimant worked an average of 5.95 days per week, as he worked 237 of the 280 days he was actually available to work. Decision and Order at 12. Specifically, she found that claimant worked twenty-one six-day work weeks, seven seven-day work weeks, and eleven five-day work weeks. Based on these findings, the administrative law judge concluded that Section 10(a) applies and that claimant is a six-day per week worker. *Id*.

Regarding employer's contention that the administrative law judge erred by finding that claimant is a six-day per week worker, the administrative law judge rationally factored out the ten weeks during the year claimant did not work for reasons unrelated to his employment to find that claimant was a six-day per week worker based on his working an average of 5.95 days during the 40 weeks he worked prior to his injury. *Duncan v. Washington Metropolitan Transit Authority*, 24 BRBS 133, 136 (1990); *see also Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991); *Klubniken v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984). The administrative law judge also rationally found that 40 weeks is substantially the whole of the year, based on the permanent nature of claimant's position. *Duncanson-*

[9]In her first decision, the administrative law judge found that claimant worked 238 days. Decision and Order at 12. On reconsideration, the administrative law judge stated that she had incorrectly included in her initial decision January 5, 2003, when she calculated the number of days worked. Order on Recon. at 4.

Harrelson Co. v. Director, OWCP [Freer], 686 F.2d 1336, 1342 (9th Cir. 1982), *vacated in part on other grounds*, 462 U.S. 1101 (1983), *decision on remand*, 713 F.2d 462 (9th Cir. 1983). Moreover, the calculation of claimant as a six-day per week worker is supported by substantial evidence as claimant worked six days per week for a clear majority of his time. Accordingly, we affirm the administrative law judge's finding that claimant was a six-day a week worker as it is supported by substantial evidence and in accordance with law. Furthermore, as the administrative law judge rationally determined that claimant worked 237 of the 300 work days for a six-day per week worker, or 79 percent of the available workdays, the administrative law judge properly applied Section 10(a) to calculate claimant's average weekly wage. *See General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Price*, 382 F.3d 878, 38 BRBS 51(CRT); *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT).

Employer also contends that the administrative law judge erred under Section 10(a) by dividing claimant's earnings by the 237 days he worked; employer alleges claimant was paid for 252 days, as claimant received vacation pay for time he actually took off. In *Trachsel v. Rogers Terminal & Shipping Corp.*, 597 F.3d 947, 43 BRBS 73(CRT) (9th Cir. 2009), the Ninth Circuit held that a day should be included as a "day employed" under Section 10(a) if claimant is paid for that day even if he did not actually work it; thus, unworked paid holidays are "days when so employed" under Section 10(a). *Id.*, 597 F.3d at 950, 43 BRBS at 74-75(CRT). In this case, the administrative law judge found that, given the absence of evidence that claimant actually took vacation on the days in question,[10] claimant was not given 80 hours of vacation pay for the two-week period in September 2003 when he did not work. The administrative law judge thus permissively did not include these 80 hours as 10 "days employed" for purposes of computing claimant's average daily wage under Section 10(a). *Id.*

Moreover, we reject employer's assertion that, even if claimant was given a lump sum and did not actually take time off for the 120 hours he received in vacation pay, these hours should nonetheless count as the equivalent of 15 days worked for purposes of computing the average daily wage under Section 10(a). In this case, the administrative law judge found that, pursuant to *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000), and *Trachsel*, only the days that claimant chose not to work and actually took as vacation days should be counted as days worked, while payment of a lump sum should not be converted into days worked. In *Wooley*, 204 F.3d at 618, 34 BRBS at 14(CRT), the United States Court of Appeals for the Fifth Circuit

[10]The administrative law judge found that while it seems that claimant took two weeks off in late September 2003, there is nothing in the record, such as time cards or testimony, to establish that this was actual vacation time. Decision and Order at 12; Order on Recon. at 5; EX 2 at 31.

affirmed the Board's holding that vacation days claimant "sold back" to employer and did not actually take were not days worked for purposes of calculating claimant's average daily wage. *See Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 88, 89-90 (1999) (decision on recon.), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000). Specifically, the Fifth Circuit held that the administrative law judge rationally determined that while the money received for the eleven unused vacation days was correctly treated as additional compensation and added to claimant's annual wage, they were not days which claimant worked for purposes of calculating his average daily wage.[11] *Wooley*, 204 F.3d at 618, 34 BRBS at 14(CRT). Accordingly, as both the Fifth Circuit and the Board have held that vacation pay for days not actually used for vacation are not "days employed" under Section 10(a), and the Ninth Circuit has followed *Wooley* in the context of holding that "days employed" under Section 10(a) includes holidays for which the claimant is paid, we reject employer's contention that the 120 hours for which claimant received vacation pay should count as the equivalent of 15 days worked for purposes of computing the average daily wage under Section 10(a). We therefore affirm the administrative law judge's finding that claimant had a pre-injury average weekly wage of $2,962.44.[12] As a comparison of claimant's average weekly wage with his post-injury wage-earning capacity results in a loss of wage-earning capacity, we affirm the award of temporary partial disability benefits through February 2, 2005. 33 U.S.C. §908(e), (h).

[11]In *Trachsel*, the Ninth Circuit stated that *Wooley* is "closely analogous," and "following *Wooley*" held that a "day employed" under Section 10(a) includes holidays for which the claimant is paid even if he did not actually work it. *Trachsel*, 597 F.3d at 950, 43 BRBS at 75(CRT). The Ninth Circuit did not address the precise issue raised in *Wooley* and in this case.

[12]The administrative law judge calculated claimant's average weekly wage under Section 10(a) by dividing the sum of claimant's earnings in the year preceding the injury, $121,697.21, by the 237 days he worked and then multiplying this average daily wage of $513.49 by 300 to find that claimant had average annual earnings of $154,047. *See* n. 11, *supra*. This number was divided by 52 to determine claimant's average weekly wage of $2,962.44. Decision on Recon. at 9.

Accordingly, the administrative law judge's award of compensation for permanent partial disability commencing February 2, 2005 is reversed. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and the Order Partially Granting claimant's Motion for Reconsideration are 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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JUDITH S. BOGGS
Administrative Appeals Judge