

GRACIE BECERRA, CORY BECERRA)
AND ABRAN BECERRA)
(Survivors of FREDDIE BECERRA))

Claimants-Respondents)

v.)

SAN FRANCISCO DRY DOCK COMPANY)

DATE ISSUED: 07/28/2003

and)

LEGION INSURANCE COMPANY)

Employer/Carrier-)
Petitioners)

DECISION and ORDER

Appeal of the Decision and Order Granting Survivors= Benefits of William Dorsey, Administrative Law Judge, United States Department of Labor.

Romeo R. Uriarte (Uriarte & Carr, L.L.P.), Oakland, California, for claimants.

Frank B. Hugg, San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Survivors= Benefits (2000-LHC-3010) of Administrative Law Judge William Dorsey 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).

Decedent, age 23, was a painter trainee performing ship maintenance at the time of his death on December 16, 1997. He fell onto his head from a height of 6 to 8 feet while working on a man lift, and died from head trauma on December 19, 1997. He was unmarried

and had no children. The claimants are his dependent mother and two minor siblings; they sought death benefits under the Act. 33 U.S.C. '909.

The only issue in dispute before the administrative law judge was the amount of the decedent=s average weekly wage. The administrative law judge found that decedent=s actual earnings in the year prior to his death provide the most accurate gauge of his earning capacity and that Section 10(a), 33 U.S.C. '910(a), can be applied to calculate his average weekly wage. Using Section 10(a), the administrative law judge calculated decedent=s average weekly wage to be \$594.85. In addition, the administrative law judge made an alternate determination of the decedent=s average annual earnings under Section 10(c) of the Act, 33 U.S.C. '910(c).

On appeal, employer contends that the administrative law judge erred in calculating decedent=s average weekly wage pursuant to Section 10(a), and that a multi-year average of decedent=s earnings under Section 10(c) would be more appropriate. Claimants respond, urging affirmance of the administrative law judge=s decision.

Section 10(a) applies where an employee worked substantially the whole of the year preceding the injury and looks to the actual wages of the injured worker as the monetary base

for a determination of the amount of compensation.¹ 33 U.S.C. '910(a); *see Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 178(CRT)(9th Cir. 1998). To calculate average weekly wage under this section, the employee=s actual earnings for the 52 weeks prior to the injury are divided by the number of days he actually worked during that period, to determine an average daily wage. The average daily wage is then multiplied by 260 for a five-day per week worker and 300 for a six-day per week worker and the quotient is divided by 52 pursuant to Section 10(d), 33 U.S.C. '910(d), to determine the employee=s average weekly wage. Section 10(c), on the other hand, applies where the worker=s employment is seasonal, part-time, intermittent, or discontinuous, *see Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), or A[i]f either of the foregoing methods [Section 10(a) or (b)] of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied. 33 U.S.C. '910(c).

¹ Specifically, Section 10(a) of the Act, 33 U.S.C. '910(a), states:

If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

Initially, we address employer=s contention that Section 10(c) should have been applied in determining the decedent=s average weekly wage because his work was not stable and continuous. The record indicates that during the years and months prior to his death, the decedent was laid-off and rehired a number of times. Emp. Ex. 2. Employer=s records indicate that the decedent worked as a general laborer from August 24, 1995 through September 4, 1995, November 18, 1996 through November 21, 1996, and December 4, 1996 through December 5, 1996. During the twelve months prior to his December 1997 death, decedent worked as a painter trainee, Level II. For the year 1997, the records indicate that the decedent worked as a painter trainee and was laid off and rehired approximately eight times.² *Id.* Nonetheless, the record indicates that the decedent worked an average of 18 days per month from March until his death in mid-December. Moreover, employer=s records indicate that the decedent qualified for seniority benefits by July 1997, which gave him a measure of priority in the rehiring process. Emp. Ex. 2 at 49; H. Tr. at 78. Therefore, despite the layoffs we affirm the administrative law judge=s finding that the decedent=s job was sufficiently continuous and stable to warrant application of Section 10(a). However, in order to determine whether Section 10(a) is applicable to calculate the decedent=s average weekly wage, we also must consider whether the administrative law judge properly determined that decedent worked Asubstantially the whole of the year@ prior to his death.

² The administrative law judge found that the decedent worked the following number of days in each month in the year prior to his injury:

12/17/96 to 12/31/96YY.8 days
1/2/97 to 1/31/97YYYY6 days
2/1/97 to 2/28/97YYYY0 days
3/4/97 to 3/31/97YYYY20 days
4/1/97 to 4/30/97YYYY21 days
5/2/97 to 5/30/97YYYY14 days
6/3/97 to 6/29/97YYYY19 days
7/2/97 to 7/24/97YYYY13 days
8/1/97 to 8/31/97YYYY22 days
9/1/97 to 9/30/97YYYY15 days
10/1/97 to 10/31/97YYY19 days
11/1/97 to 11/30/97YYY17 days
12/1/97 to 12/16/97YYY12 days

Decision and Order at 4.

Employer contends that as claimant worked only 186 days, or 71.54 percent, of the 260 theoretically available workdays, claimant did not work substantially the whole of the year. The Board has held that 42 weeks is substantially the whole of the year,³ *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), but that 33 weeks is not, *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979). Because the phrase "substantially the whole of the year" is undefined, the United States Court of Appeals for the Ninth Circuit, in *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), addressed the threshold for applicability of Section 10(a).

In *Matulic*, the administrative law judge found that the claimant actually earned \$43,370.81 in the year preceding his injury and that use of Section 10(a) would result in calculated earnings of \$52,941.20; thus, he concluded that Section 10(a) could not be used because it would overestimate the claimant's annual earnings. On appeal, the Ninth Circuit held that under the statutory framework, Section 10(a) must be used in calculating average weekly wage unless to do so would be unreasonable or unfair. *Matulic*, 154 F.3d at 1057, 32 BRBS at 150-151 (CRT); *see* 33 U.S.C. '910(c). The Ninth Circuit held that "overpayment due to the application of Section 10(a) is not unreasonable or unfair but is built into the system." *Matulic*, 154 F.3d at 1057, 32 BRBS at 151 (CRT); *see also Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated and remanded*, 462 U.S. 1101, *on remand*, 713 F.2d 462 (1983). The court concluded that "when a claimant works more than 75% 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 *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). *Id.*, 154 F.3d at 1058, 32 BRBS at 152 (CRT). However, the court added: "[w]e do not mean to suggest that a figure that is 75% or lower will necessarily result in the application of '910(c)." ³ *Matulic*, 154 F.3d at 1057, 32 BRBS at 152(CRT). The Board followed *Matulic* in *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *appeal pending*, No. 02-71207 (9th Cir.) (75.7 percent of available work days), and in *Castro v. General Constr. Co.*, 37 BRBS 65 (2003) (77.4 percent). In *Castro*, citing *Matulic*, the Board rejected the employer's contention that the presumptive use of Section 10(a) is rebutted because the calculated earnings exceeded claimant's actual earnings by \$12,000. *Castro*, 37 BRBS at 65.

In considering whether the decedent worked substantially the whole of the year in the present case, which arises in the jurisdiction of the Ninth Circuit, the administrative law

³ The example given by the *Matulic* court involved the situation where the employee experienced an atypical reduction in his working days the year prior to injury, as compared to previous years. *Matulic*, 154 F.3d at 1057, 32 BRBS at 152(CRT).

judge addressed the Ninth Circuit's decision in *Matulic* and stated that the court held that whenever a worker has worked 75% or more the work days in a year, average annual earnings must be calculated using ' 10(a). The court considered and specifically refused to hold that if the percentage of days worked fell below 75%, use of ' 10(c) would become mandatory. @ Decision and Order at 8, citing *Matulic*, 154 F.3d at 1058, 32 BRBS at 152(CRT). The administrative law judge then found that the decedent worked 71.54 percent of the work days during the year preceding his death. He reasoned that the court set a high threshold for rejecting the calculation methods prescribed in ' 10(a) and (b), requiring what it characterized as an >exceptional circumstance= before reaching the calculation method found in ' 10(c). @ Decision and Order at 8, citing *Matulic*, 154 F.3d at 1057, 32 BRBS at 151(CRT) The administrative law judge concluded that the decedent worked enough days in the last year of his life that his employment can be characterized as stable and continuous and that it is not unreasonable or unfair @ to use Section 10(a) to calculate average weekly wage. He contrasted the cases which the *Matulic* court identified as properly applying Section 10(c), and found that the claimants in those cases had worked for lesser percentages of the year at the job in which they had been injured. See *Johnson v. Britton*, 290 F.2d 355, 357 (D.C. Cir. 1961)(claimant worked 69 percent of the year); *Marshall v. Andrew F. Mahoney Co.*, 56 F.2d 74, 75 (9th Cir. 1932)(claimant worked 61 percent of the year).

The Ninth Circuit held in *Matulic* that the Act requires the application of Section 10(a) or (b) except in unusual circumstances. *Matulic*, 154 F.3d at 1056, 32 BRBS at 151 (CRT). The administrative law judge found that the difference in the percentage of days worked above which the court in *Matulic* found Section 10(a) presumptively applicable (75%) and the percentage of days worked by the decedent in the instance case (71.54%) was not so great that it is unreasonable or unfair @ to use the Section 10(a) calculation. The administrative law judge also found that the decedent's earnings for the year preceding his death accurately reflect his wages given his increase in maturity and change to a position as a painter trainee. Decision and Order at 7. The Ninth Circuit held in *Matulic* that flexibility and the resolution of doubts in favor of the worker is the rule rather than rigid mathematical certainty. @ *Matulic*, 154 F.3d at 1056, 32 BRBS at 151(CRT). As the Ninth Circuit in *Matulic* did not restrict application of Section 10(a) to claims in which the claimant worked at least 75 percent of the year, and as the administrative law judge's findings are rational and supported by substantial evidence, we affirm the administrative law judge's application of Section 10(a) under the facts of this case.⁴

We also reject employer's contention that the administrative law judge erred in failing to account for the ship industry's decline in the San Francisco Bay area in

⁴ As we affirm the administrative law judge's use of Section 10(a), we need not address employer's contention regarding the administrative law judge's alternate findings under Section 10(c).

determining decedent=s average weekly wage. The Board has held that an administrative law judge did not err in considering a downturn in employer=s business that occurred more than one year after the work injury, *Hayes v. P & M Crane Co.*, 23 BRBS 389 (1990), *rev=d on other grounds*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh=g denied*, 935 F.2d 1293 (5th Cir. 1991), and has held that the fact that a claimant=s earnings reflected a pay scale no longer available after claimant=s injury is not determinative, as post-injury events are not generally relevant to average weekly wage determinations. *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff=d sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Indeed, the United States Court of Appeals for the Fifth Circuit has stated that:

There is nothing the statute to suggest that either subsection (a) or (b) may be deemed inapplicable solely on the basis of economic fluctuations in the claimant=s field of employment subsequent to the time of the injury or that such economic fluctuations should inure to the benefit of the employer. Indeed, the statute=s language supports the opposite conclusion.

SGS Control Serv. v. Director, OWCP, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

In the present case, the administrative law judge was not persuaded by employer=s contentions regarding the downturn in ship repair industry in the Bay area. Initially, he noted that generally an employer may seek modification of an award of permanent disability benefits to reflect any permanent change in conditions, such as in the economy, *see generally Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995), but as this is a claim for death benefits, post-injury changes in the economy cannot affect future benefits. The administrative law judge also found that the decedent=s work opportunities were not necessarily tied to employer=s fortunes as he was hired from a union hall and thus may have other opportunities even when employer suffered a downturn in business. Decision and Order at 9-10. Lastly, the administrative law judge found that the Act looks to determine the worker=s earning capacity at the time of injury, not the employer=s. The administrative law judge found the evidence regarding any reduction in the earnings the decedent might have experienced to be too speculative, just as any projection of what the decedent=s hourly wage might have been in future years would be. Thus, the administrative law judge concluded that the post-injury events are not relevant in calculating the decedent=s average weekly wage. The Ninth Circuit has held that consideration of circumstances existing after the date of injury is appropriate where previous earnings do not realistically reflect an employee=s wage-earning potential. *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980). As the administrative law judge in the present case reviewed employer=s evidence regarding the post-injury downturn in its business, and concluded that the decedent=s actual wages accurately and realistically reflected his potential earning capacity at the time of his death, we reject employer=s contention that the

decedent=s average weekly wage should have been adjusted to account for the subsequent decline in work opportunities. *SGS Control Services*, 86 F.3d 438, 30 BRBS 57(CRT); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992); *Hayes*, 23 BRBS at 393.

Accordingly, the administrative law judge=s Decision and Order Granting Survivors= Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge