BRB No. 04-0936

DWAYNE C. LUNDY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS	)	DATE ISSUED: 09/15/2005
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

D. A. Bass-Frazier (Huey, Leon & Bass-Frazier, LLP), Mobile, Alabama, for claimant.

Donald P. Moore (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-LHC-0390) of Administrative Law Judge Lee J. Romero, Jr., 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his left knee on August 2, 2002, while working for employer as a shipfitter. Employer voluntarily paid claimant temporary total disability benefits from August 8, 2002, through January 12, 2003, and from April 2, 2004, through April 15, 2004. 33 U.S.C. §908(b). At the formal hearing, employer stipulated to claimant's entitlement to additional temporary total disability benefits from May 5, 2003, through July 28, 2003, and from April 16, 2004, through April 28, 2004. Tr. at 10-14; EX 4.

Accordingly, the sole issues adjudicated before the administrative law judge involved the calculation of claimant's average weekly wage at the time of his injury and employer's liability for a Section 14(e) penalty. In his Decision and Order, the administrative law judge utilized Section 10(a) of the Act, 33 U.S.C. §910(a), in determining that claimant's average weekly wage was $692.55 at the time of his work injury, and that, as employer did not timely file a notice of controversion, it is liable to claimant for a penalty pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e).

On appeal, claimant contends that the administrative law judge erroneously calculated his average weekly wage. Employer responds, urging that the administrative law judge's method of calculation be affirmed.[1]

Where, as in the instant case, the employee has worked "substantially the whole of the year" preceding his work-injury, Section 10(a) is applicable in calculating claimant's average weekly wage at the time of his injury and aims at a theoretical approximation of what claimant could ideally have been expected to earn. 33 U.S.C. §910(a); *see Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). Section 10(a) requires the administrative law judge to initially determine the average daily wage claimant earned during the preceding twelve months; this average daily wage is best calculated by dividing claimant's earnings during the year prior to the work injury by "the actual number of *days* for which the employee was paid."[2] *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 265, 31 BRBS 119, 125(CRT) (4th Cir. 1997) (emphasis in original). *See also Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 88 (1999), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000). Section 10(a) next directs multiplying the average daily wage by 260 for a five-day a week worker. Finally, pursuant to Section 10(d)(1), 33 U.S.C. §910(d)(1), claimant's average weekly wage is calculated by dividing claimant's average annual earnings by 52. *See SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290 (1978).

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[1] By motion dated August 25, 2005, employer moved that the captioned case be consolidated with appeals in *Richmond v. Northrop Grumman Ship Systems, Inc.*, BRB No. 05-492; *McGee v. Northrop Grumman Ship Systems, Inc.*, BRB No. 05-533; and *Robinson v. Northrop Grumman Ship Systems, Inc.*, BRB No. 05-852. Employer's motion is denied with regard to the captioned case in view of the approaching one year deadline for deciding this appeal. Pub. L. No. 108-447 (2004). A separate order will issue with regard to the potential consolidation of the remaining three cases.

[2] The use of the number of actual days is required by the language of Section 10(a) stating that a claimant's earnings are those extrapolated from the average daily wage earned "during the *days* when so employed." 33 U.S.C. §910(a) (emphasis added).

In the instant case, claimant was a five-day a week worker. His payroll records from July 30, 2001, to July 28, 2002, the year prior to his injury, reflect the following: 1) gross earnings of $34,213.64, 2) 233 days actually worked, 3) eight paid vacation days and six paid holidays, and 4) two lump sum attendance bonus payments totaling $250.[3] *See* CX 2. Pursuant to this information, the administrative law judge stated that he would treat claimant's attendance bonuses as analogous to container royalty payments and include them in claimant's annual gross earnings, but that he would not add any corresponding "days" to his average weekly wage calculation. Decision and Order at 10. The administrative law judge then divided claimant's total earnings during the year preceding his injury by 247, a number representing the sum of the actual number of days claimant worked added to claimant's 14 days of vacation and holiday pay, giving claimant an average daily wage of $138.51. As claimant was a five-day a week worker, the administrative law judge multiplied claimant's average daily wage by 260, which yields an average annual wage of $36,012.60. Lastly, the administrative law judge divided claimant's average annual earnings of $36,012.60 by 52 to conclude that claimant's average weekly wage is $692.55.

Claimant, citing the Board's decision in *Wooley*, 33 BRBS 88, contends that the administrative law judge erred in including the number of days claimant received paid vacation or holiday leave in the year prior to his work injury when calculating claimant's average weekly wage pursuant to Section 10(a).[4] We reject this contention. In *Wooley*, the Board addressed a situation in which a worker "sold back" his vacation days to his employer, *i.e.*, he did not use the vacation time which he had accrued but, rather, he returned unused vacation hours to employer in exchange for additional monetary compensation. The Board held that where claimant received vacation pay in lieu of vacation days off, the determination of the days worked for purposes of calculating average daily wage does not include additional days derived from the hours for which claimant received vacation pay rather than time off. In *Wooley*, the inclusion of such "sold back" days in the calculation of claimant's average weekly wage would have resulted in claimant's having "worked" more days than a five-day a week worker can work in reality and more than the statutorily mandated 260 days used as a multiplier for a five-day per week worker. *Wooley*, 33 BRBS at 90.

[3] An employee earned an attendance bonus of $125 when he worked for forty days without an absence.

[4] Claimant alleges that his average weekly wage should be $737.35. Claimant arrived at this amount as follows: he divided the $34,213.64 he earned in the year prior to the injury by the actual number of days that he worked for employer, which yielded an average daily rate of $147.47; this sum was then multiplied by 260, since claimant was a 5-day a week worker, and then divided by 52, which resulted in an average weekly wage of $737.35.

In affirming the Board's decision, the United States Court of Appeals for the Fifth Circuit, after initially acknowledging that 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, specifically found it to be "appropriate to charge the ALJ with making factfindings concerning whether a particular instance of vacation compensation counts as a 'day worked' or whether it was 'sold back' to the employer for additional pay." *Wooley*, 204 F.3d at 618, 34 BRBS at 14(CRT). Accordingly, rather than mandate reversal of the administrative law judge's calculation in the case at bar, the decision of the court in *Wooley* supports the administrative law judge's average weekly wage determination. Specifically, the administrative law judge, as factfinder, determined that the vacation and holiday days that claimant did not report to work for employer counted as "days worked" since claimant received wages for actual days off from work. *Id.* Accordingly, as the administrative law judge's calculation of claimant's average weekly wage is rational, supported by substantial evidence, and in accordance with law, it is affirmed. *Wooley*, 204 F.3d 616, 34 BRBS 12(CRT); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge