

ANDRE S. RICHMOND)	BRB No. 05-0492
)	
Claimant-Petitioner)	
)	
v.)	
)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED)	DATE ISSUED: 03/03/2006
)	
Self-Insured)	
Employer-Respondent)	
)	
ALBERTA P. ROBINSON)	BRB No. 05-0852
)	
Claimant-Petitioner)	
)	
v.)	
)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeals of the Decision and Order-Awarding Benefits and the Order Denying Claimant's Motion for Reconsideration and the Decision and Order- Awarding Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

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

Donald P. Moore and Paul B. Howell (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 Andre S. Richmond appeals the Decision and Order-Awarding Benefits and the Order Denying Claimant's Motion for Reconsideration (2004-LHC-0427) and Claimant Alberta B. Robinson appeals the Decision and Order-Awarding Benefits (2004-LHC-2554, 2555) of Administrative Law Judge Richard D. Mills rendered on claims 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant Richmond sustained a low back injury on October 17, 2002, while working for employer. Employer voluntarily paid claimant temporary total disability compensation from November 20, 2002, through November 21, 2003, and temporary partial disability from November 22, 2003, through the date of the formal hearing on June 9, 2004. Claimant Robinson sustained work-related knee injuries on September 20, 1999, and October 11, 1999. The parties stipulated that claimant Robinson suffers a permanent disability of 20 percent to each leg. 33 U.S.C. §908(c)(2).

The issues adjudicated before the administrative law judge in each case included the calculation of claimant's average weekly wage at the time of injury. In his respective decisions, the administrative law judge utilized Section 10(a) of the Act, 33 U.S.C. §910(a), in determining that claimant Richmond's average weekly wage was \$747.60 at the time of his injury, and that claimant Robinson's average weekly wage at the time of her injury was \$838.55.

On appeal, claimants contend that the administrative law judge erroneously calculated their average weekly wage. BRB No. 05-0492; BRB No. 05-0852.¹ Employer responds, urging affirmance.²

¹ By Order dated September 28, 2005, the Board granted employer's motion to consolidate the appeals in *Richmond v. Northrop Grumman Ship Systems, Inc.*, BRB No. 05-0492; *McGee v. Northrop Grumman Ship Systems, Inc.*, BRB No. 05-0533; and *Robinson v. Northrop Grumman Ship Systems, Inc.*, BRB No. 05-0852, for purpose of decision. We hereby sever the appeal in *McGee*, and the Board will issue a separate decision in BRB No. 05-0533. 20 C.F.R. §802.104(b).

² Employer also moved for summary affirmance in these cases, based on the Board's decision in *Lundy v. Northrop Grumman Ship Systems*, BRB No. 04-0936 (Sept. 15, 2005)(unpub.). Claimant opposed the motion on the ground that a motion for reconsideration was filed in *Lundy*. Given our disposition of these appeals, employer's motion is moot.

The administrative law judge noted the parties' agreement that Section 10(a) is applicable in computing claimants' average weekly wage, as they each worked "substantially the whole of the year" preceding their work injuries. *See, e.g., Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). Section 10(a) requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months; this average daily wage is 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."³ *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 per week worker to arrive at the claimant's average annual earnings. Finally, pursuant to Section 10(d)(1), 33 U.S.C. §910(d)(1), claimant's average weekly wage is calculated by dividing by 52 claimant's average annual earnings. *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).

In these cases, both claimants were five-day per week workers. Tr. at 17 (Richmond); Tr. at 18-24 (Robinson). In *Richmond*, the administrative law judge found that claimant's gross earnings from October 15, 2001, through October 20, 2002, were \$38,682.91, *see* CX 2 (Richmond), and he divided these earnings by 256, a number representing the sum of the 232 actual days claimant Richmond worked plus the 24 days of vacation and holiday pay that claimant received during this period, resulting in an average daily wage of \$149.52. Pursuant to Section 10(a), the administrative law judge found that claimant Richmond's average weekly wage is \$747.60.

During the year prior to her injury, claimant Robinson had earnings of \$35,551.51. The administrative law judge divided these earnings by 212, a number representing the 199 days claimant actually worked plus 13 days of vacation time that claimant took this period. EX 5 (Robinson). Pursuant to Section 10(a), the administrative law judge concluded that claimant Robinson's average weekly wage is \$838.55.

Claimants in both cases, citing the Board's decision in *Wooley*, 33 BRBS 88, contend that the administrative law judge erred in including in the divisor the number of days for which they received paid vacation and/or holiday leave. We reject this

³ 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).

contention on the facts of these cases.⁴ In *Wooley*, the Board addressed a situation in which an employee “sold back” his vacation days to his employer, *i.e.*, he did not use the vacation time which he had accrued but, rather, 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 number of 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. In affirming the Board’s decision, the United States Court of Appeals for the Fifth Circuit noted 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. The court found it to be “appropriate to charge the ALJ with making fact findings 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).

The decisions in *Wooley* support the administrative law judge’s average weekly wage determinations in the present cases. Specifically, the administrative law judge, as factfinder, determined that the vacation and holiday days on which claimants did not report to work for employer counted as “days worked” since claimant received wages for actual days off from work.⁵ *Id.* In addition, in *Duncan*, 24 BRBS at 136, the Board held that vacation time actually taken is to be counted as days a claimant actually worked for purposes of determining whether a claimant worked “substantially the whole of the year.” The calculation of days worked in these cases is consistent with the goal of Section 10(a) which is to arrive at a theoretical calculation of the claimants’ ideal earnings. *See Methé*,

⁴ We decline to address claimants’ hypothetical factual situations in which we are asked to assume that claimants worked all 260 days available to a five-day per week worker, and, in addition, received holiday and vacation pay for 24 days (Richmond) and 13 days (Robinson). These fact patterns are not presented in these cases, as the days the claimants actually worked plus paid vacation days and holidays equal less than 260.

⁵ Moreover, contrary to claimants’ contentions that *Wooley* can be distinguished from these cases because in *Wooley* there was a paucity of wage information while the instant cases contain a detailed breakdown of days taken for earned wages, vacation, and holidays, this was not the basis for the decision in *Wooley*. Rather, *Wooley* addressed the issue of whether a day paid constituted a day worked or a day sold back for additional pay.

396 F.3d 601, 38 BRBS 99(CRT). Accordingly, as the administrative law judge's calculation of claimant's average weekly wage in both cases is rational, supported by substantial evidence, and in accordance with law, it is affirmed. *Wooley*, 33 BRBS 88, *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT); *Duncan*, 24 BRBS at 136.

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits and Order Denying Claimant's Motion for Reconsideration in *Richmond* are affirmed. BRB No. 05-0492. The administrative law judge's Decision and Order-Awarding Benefits in *Robinson* is affirmed. BRB No. 05-0852.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge