BRB No. 05-0533

PAUL G. McGEE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 03/20/2006
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

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

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 appeals the Decision and Order (2004-LHC-1749) of Administrative Law Judge Patrick M. Rosenow 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 work-related injury on July 23, 2001. Thereafter, employer paid claimant temporary total disability compensation for various periods of time. Subsequently, a dispute arose regarding claimant's applicable average weekly wage at the

time of his work-injury.[1] Specifically, the parties disputed whether claimant's paid holiday and vacation days were properly counted as days worked in determining claimant's average daily wage under Section 10(a) of the Act, 33 U.S.C. §910(a).

In his Decision and Order, the administrative law judge found that claimant's paid vacation and holidays were properly included in the number of days worked under Section 10(a). He thus accepted the parties' calculation that using claimant's 234 days worked plus 29 paid vacation days and holidays, claimant's average weekly wage under Section 10(a) was $641.15. Accordingly, the administrative law judge awarded claimant temporary total disability benefits based upon an average weekly wage of $641.15.

On appeal, claimant contends that the administrative law judge erred in calculating his average weekly wage under Section 10(a) by including vacation time and holidays as days worked.[2] Employer responds, urging affirmance.[3]

In the instant case, the administrative law judge accepted the parties' stipulation that Section 10(a) of the Act provides the appropriate method for calculating claimant's average weekly wage at the time of his work injury. Decision and Order at 2 stip. 9. *See, e.g., Gulf Best Electric, Inc. v. Methe,* 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 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

[1] Due to the aftereffects of Hurricane Katrina, the Board has been unable, despite repeated efforts, to obtain the record in this case. The essential facts in this case, however, are not disputed by the parties, and we have determined that the legal issues presented may be addressed without our receiving the record.

[2] By Order dated September 28, 2005, the Board granted employer's motion to consolidate the appeal in this case with its appeals in the cases of *Richmond v. Northrop Grumman Ship Systems, Inc.,* BRB No. 05-0492, and *Robinson v. Northrop Grumman Ship Systems, Inc.,* BRB No. 05-0852. On March 3, 2006, the Board severed the instant appeal when it issued a consolidated decision in *Richmond* and *Robinson*. 20 C.F.R. §802.104(b).

[3] Employer has moved for summary affirmance in this case, based on the Board's decision in *Lundy v. Northrop Grumman Ship Systems, Inc.,* BRB No. 04-0936 (Sept. 15, 2005), *recon. denied,* (March 3, 2006). Employer's motion is denied.

"the actual number of *days* for which the employee was paid."[4] *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)(decision on recon.), *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 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).

The administrative law judge found that claimant, working Monday through Friday, averaged five days of work per week. Decision and Order at 3. The administrative law judge then addressed the contested issue of whether vacation days and holidays on which claimant did not work, but for which claimant received pay, should be included as days worked in the calculation of his average weekly wage. After considering the decision of the United States Court of Appeals for the Fifth Circuit in *Wooley*, 204 F.3d 616, 34 BRBS 12(CRT), the administrative law judge concluded that such vacation days and holidays must be included in his calculation as work days. Therefore, as the administrative law judge had previously accepted the parties' agreement that claimant actually worked 234 days and was paid for an additional 29 days for vacation and holidays, for a total of 263 paid days in the year preceding his work injury, Decision and Order at 2 stip. 11, the administrative law judge found claimant's average weekly wage at the time of his injury was $641.15.[5]

Claimant contends that the administrative law judge erred in adding 29 paid vacation days and holidays to the 234 days that claimant actually worked. Specifically, claimant asserts that only actual days worked should be included and relying on the court's statement in *Gulf Best Electric*, 396 F.3d at 606, n.1, 38 BRBS at 103, n.1(CRT), that Section 10(a) recognizes that due to vacation and other causes, virtually no employee works every day of the week. In addition, claimant points out that the number of "days" used as a divisor in this case, 263, represents three more days than a five-day a week

[4] 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).

[5] This figure would appear to have been determined by the following calculation: dividing claimant's wages during the year prior to his injury, $33,725.79, by 263, resulting in an average daily wage of $128.23; multiplying this average daily wage figure by 260, the multiplier for a five-day worker pursuant to Section 10(a); and dividing the resulting sum by 52, to arrive at an average weekly wage at the time of injury of $641.15.

worker can work during a year, resulting in calculated annual earnings under Section 10(a) which are lower than those claimant actually earned. Claimant also avers that the Fifth Circuit's decision in *Wooley* is inapplicable because the wage information provided in this case permits a more accurate analysis than that permitted in *Wooley.*

Initially, we reject claimant's argument that only the days claimant actually worked at the shipyard are included under Section 10(a). Consistent with *Wooley*, vacation days and holidays paid in lieu of regular work days are properly included in the Section 10(a) calculation. However, as there is merit to claimant's argument that the resulting calculation of 263 days worked is flawed because it exceeds the number of days available to a five-day worker, we conclude this case must be remanded for further consideration.

In *Wooley*, the Board initially agreed with employer that the administrative law judge erred in failing to include an additional 11 days of vacation under Section 10(a), and modified the average weekly wage accordingly. *Wooley v. Ingalls Shipbuilding, Inc.*, BRB No. 98-0501 (Nov. 30, 1998)(not published). On reconsideration, however, the Board stated that these "days" had in actuality been created by dividing hours of paid vacation time by eight. While the Board reiterated that paid days off taken in lieu of a work day are properly included in average weekly wage, it concluded that the administrative law judge had properly calculated the number of days worked based on days claimant was actually paid. The Board also noted that the inclusion of the additional "created" days in the calculation of claimant's average weekly wage resulted in claimant's having "worked" 267 days, which exceeds the 260 days that a five-day a week worker can work in reality as well as the statutory multiplier, and thus reduced claimant's average weekly wage below his actual earnings. *Wooley*, 33 BRBS at 90. In affirming the Board's decision, the United States Court of Appeals for the Fifth Circuit stated 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."[6] *Wooley*, 204 F.3d at 618, 34 BRBS at 14(CRT).

Consistent with *Wooley*, claimant's paid vacation days and holidays in this case taken in lieu of a work day are properly included in making the average daily wage calculation. However, the conclusion that claimant thus had 263 work days in the year prior to his injury cannot be affirmed without additional findings, as the number of days

[6] In rendering its decision, the court stated that there is no meaningful distinction between vacation compensation and holiday compensation. *Wooley*, 204 F.3d at 617 n.1, 34 BRBS at 12 n.1(CRT).

exceeds the 260 days per year available to a five-day worker.[7] It is undisputed that claimant was a five-day per week worker, working regularly Monday through Friday. That the number of days calculated exceeds 260 raises the possibility that days have been created by dividing hours paid by eight, a result contrary to *Wooley*, or that claimant received vacation or holiday pay for time that was not in lieu of a regular work day. As claimant asserts, the resulting calculation reduces claimant's theoretical annual earnings under Section 10(a) to a figure below his actual earnings.[8] Under these

[7] The 52 weeks in a year multiplied by 5 days per week equals 260 available days.

[8] In response, employer relies on a statement in *Matulic v. Director, OWCP*, 154 F.3d 1052, 1057, 32 BRBS 148, 151(CRT) (9th Cir. 1998), that, while ordinarily any inaccuracy in estimating earning capacity will favor the worker and thus may result in overcompensation, in other cases, the statutory calculation may benefit the employer. The court footnoted an example involving the interaction of the statutory maximum to limit a claimant's average weekly wage. *See* 33 U.S.C. §906(b)(1). This statement accurately reflects that, on any given facts, the party which is benefited by a particular formula may vary. However, *Matulic* did not involve a situation where the number of days counted as worked exceeded the days available in a year, as claimant there worked only 213 days, nor did it address a calculation reducing earning capacity below actual earnings.

circumstances, we conclude the case must be remanded for further findings consistent with *Wooley*, 204 F.3d 616, 34 BRBS 12(CRT).[9]

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

[9] As discussed, *supra*, *Wooley* leaves it to the administrative law judge to determine whether a vacation day was paid in lieu of a work day or whether claimant simply received additional pay. In this case, the administrative law judge did not make the requisite findings but relied on an agreement between the parties as to the number of vacation days and holidays. Although the administrative law judge listed this agreement in his stipulations, he noted it was in fact gleaned from their arguments. Decision and Order at 3, n.5, citing Tr. at 41. As we do not have the record, we are unable to verify this agreement or determine how the number of days was calculated. In any event, a stipulation which evinces an incorrect application of law is not binding. *See Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990).