U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0074

ALBERT JACKSON, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HORIZON SHIPBUILDING, INCORPORATED	)	DATE ISSUED: 04/15/2020
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Claimant's Motion for Reconsideration of J. Alick Henderson, Administrative Law Judge, United States Department of Labor.

Albert Jackson, Jr., Pensacola, Florida.

Douglas L. Brown (Brady Radcliff & Brown, LLP), Mobile, Alabama, for employer/carrier.

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant, appearing without representation, appeals the Decision and Order and the Order Denying Claimant's Motion for Reconsideration (2019-LHC-00143) of Administrative Law Judge J. Alick Henderson rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). In an appeal by a claimant without counsel, the Board will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. If they

are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a welder from September 21, 2016, to June 6, 2017. EXs 13, 14. He injured his left knee on February 27, 2017. The parties stipulated claimant is entitled to temporary total disability compensation, 33 U.S.C. §908(b), from June 6 to September 18, 2017, and for a two percent permanent partial disability of the left lower extremity.[1] 33 U.S.C. §908(c)(2); Decision and Order at 3; Tr. at 25, 52-53. The sole issue before the administrative law judge was claimant's average weekly wage. Decision and Order at 3; Tr. at 30.

The administrative law judge found Section 10(a) of the Act, 33 U.S.C. §910(a), is inapplicable because claimant worked only 23 weeks for employer prior to his work injury and there is no evidence of other earnings during the year preceding his injury.[2] Decision and Order at 5. The administrative law judge rejected employer's evidence of wages three of claimant's coworkers earned in light of the unexplained discrepancy between their pay rates and hours when compared to claimant's to find Section 10(b), 33 U.S.C. §910(b), inapplicable. *Id*. at 7. He instead relied on claimant's earnings for employer prior to his work injury to determine his average weekly wage under Section 10(c), 33 U.S.C. §910(c). The administrative law judge found claimant worked for employer an average of 38.93 hours per week of regular and holiday time at $20 per hour and 13.81 hours per week of overtime at $30 per hour. The administrative law judge multiplied these variables for regular and overtime hours and pay by 52 weeks to derive gross annual earnings of $62,032.32, which he divided by 52 to find claimant's average weekly wage is $1,192.93. Claimant moved for reconsideration. In his Order Denying Claimant's Motion for Reconsideration, the administrative law judge determined claimant did not show a manifest error of law or fact in his calculation of the average weekly wage.

On appeal, claimant contends the administrative law judge erred in calculating his average weekly wage.[3] Employer responds, urging affirmance of the determination. Claimant filed a reply brief.

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[1] Employer also paid temporary total disability compensation from September 19, 2017 to February 28, 2018. Decision and Order at 3.

[2] Claimant testified at his deposition that he did not work in 2016 prior to working for employer. EX 2 at 23.

[3] Claimant also avers the administrative law judge erred by not addressing his complaints of fraud and misrepresentation under Section 31(c), 33 U.S.C. §931(c), and of discrimination under Section 49, 33 U.S.C. §948a. Claimant stipulated at the June 5, 2019

Section 10(c) of the Act is a catch-all provision used to calculate a claimant's average weekly wage when neither Section 10(a) nor Section 10(b) can be reasonably and fairly applied.[4] *See Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999). The object of Section 10(c) is to calculate a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

In this case, the administrative law judge reasonably divided claimant's gross annual earnings by 52 to calculate his average weekly wage. *See Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000). However, we agree with claimant that the administrative law judge erred in calculating his gross annual earnings. As claimant accurately summarizes in his petition for review, employer's payroll record reflects he worked 900.50 regular hours, 310.70 over time hours, and received 16 hours of holiday

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hearing that the only issue before the administrative law judge was his average weekly wage. His allegations under Sections 31(c) and 49 were first raised in a complaint filed on August 29, 2019, right before the post-hearing briefing schedule closed on September 3, 2019. Decision and Order at 2. Moreover, claimant raised his allegation that he is entitled to an additional day of disability benefits for the first time after the record closed. The administrative law judge has the discretion to not address issues raised for the first time post-hearing. *See Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). A new claim alleging discrimination under Section 49 may be filed at any time, as there is no statute of limitations on such a claim, 20 C.F.R. §702.222(d), and a complaint of fraud or misrepresentation under Section 31 is properly brought before the appropriate United States Attorney, not the administrative law judge. *Valdez v. Crosby & Overton*, 34 BRBS 69, *aff'd on recon.*, 34 BRBS 185 (2000).

[4] The administrative law judge properly found Section 10(a) inapplicable because claimant's earnings during the year prior to his February 27, 2017 work injury consisted of only his wages for the 23 weeks he worked for employer, which does not entail substantially the whole of the year preceding his injury. *See generally Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). Moreover, the administrative law judge permissibly concluded employer did not establish claimant's coworkers, whose wages were submitted for comparison under Section 10(b), were "similarly situated" so their wages should be used to calculate claimant's average weekly wage. *See generally Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

pay.[5] Cl. Pet. for Rev. at 7; CX 2. Employer also paid claimant a $50 bonus on December 23, 2016, for the pay period from December 12 to December 18, 2016. CX 2 at 13. Dividing claimant's 916.5 regular hours and holiday hours by the 23 weeks he worked for employer establishes he worked an average of 39.85 hours per week at $20 an hour. Dividing claimant's 310.70 overtime hours by 23 results in an average of 13.51 hours per week at $30 an hour.[6] Multiplying the hours claimant worked and hourly pay variables by 52, plus adding the $50 bonus, results in gross annual earnings of $62,569.60.[7] Dividing claimant's gross annual earnings by 52 equals an average weekly wage of $1,203.26, not $1,192.93 as the administrative law judge found. Claimant's average weekly wage is corrected, therefore, to $1,203.26, with a resulting compensation rate for total and scheduled partial disability of $802.17. 33 U.S.C. §908(b), (c)(2); *see James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

[5] We reject claimant's assertion that the administrative law judge erred by not crediting him with an additional 29 hours of work from January 2 to January 8, 2017. The document claimant references appears to double-count time on three days. *Compare* CX 2 at 16 *with* CX 3 at 16. Although claimant asserts that these were "overtime hours charged as regular hours," his pay stub for that week, on which the administrative law judge permissibly based his average weekly wage calculation, does not include pay for those hours. CX 2 at 16.

[6] We reject claimant's contention that his overtime hours should be divided by the 20 weeks he actually received overtime pay. The administrative law judge permissibly found his total overtime hours divided by 23 weeks best reflects the average hours per week claimant was paid overtime. *See generally New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997); *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989).

[7] (39.85 x $20 x 5,2) + (13.51 x $30 x 52) + $50 = $62,569.50. $62,569.50 ÷ 52 = $1,203.26. ($1,203.26 x 2) ÷ 3 = $802.17. 33 U.S.C. §908(b), (c)(2).

Accordingly, the administrative law judge's average weekly wage calculation is modified in accordance with this opinion. In all other respects, his Decision and Order and Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge