U.S. Department of Labor

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

BRB No. 22-0052

JANELLE L. THOMAS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
SSA TERMINALS, LLC	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	DATE ISSUED: 02/27/2023
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration of Evan H. Nordby, Administrative Law Judge, United States Department of Labor.

Alan J. Chang and Gursimmar S. Sibia (Bruyneel Law Firm, LLP), San Francisco, California, for Employer/Carrier.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (2018-LHC-00408) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and 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 was employed as a utility tractor driver in the Port of Oakland for Employer, when, on January 3, 2014, a "large piece of waterfront machinery" collided with her tractor.[1] Bench Decision and Order (BD&O) at 8. She went to the emergency room that evening, and doctors treated her knee, neck, and back. After beginning treatment with Dr. Wendy Brody from January 2014 until March 2014, spine specialist Dr. Steven Lee then treated her and referred her to Dr. Jeff Chen for her shoulder pain. On July 30, 2015, Claimant underwent rotator cuff surgery performed by Dr. Kirk Jensen.[2] *See id.*; Claimant's Declaration (Cl. Decl.) at 3. Employer voluntarily paid temporary total disability benefits in the amount of $398 per week from January 14, 2014 until March 14, 2014, and then $715 per week from July 22, 2015 until August 1, 2016. JXs 14, 29.[3]

On October 2, 2018, the ALJ held a hearing in San Francisco, California; on November 17, 2020, he issued a bench decision (BD&O); and on January 26, 2021, he issued a written order (D&O) incorporating his bench decision findings.

The ALJ awarded Claimant benefits under Section 10(b), 33 U.S.C. §910(b), and nominal payments for partial permanent disability (PPD). He analyzed the payroll

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained her injury in California. 33 U.S.C. §921(c); *Hon v. Director, OWCP*, 699 F.2d 441 (8th Cir. 1983).

[2] Dr. Jensen released Claimant to work on July 22, 2016. Claimant's Declaration (Cl. Decl.) at 3.

[3] The parties submitted "unitized" exhibits 1-29 into the record at the hearing. TR at 4. These exhibits shall be referred to as "joint exhibits" or JX.

information Claimant submitted for her co-worker, George Raines, as well as Claimant's testimony, and concluded Mr. Raines was a five- to six-day worker who had a schedule similar to Claimant's, they picked up work for each other, and Mr. Raines constituted an "employee of the same class" or comparable employee. BD&O at 21. He also rejected application of Section 10(c), 33 U.S.C. §910(c), stating it would not be fair to apply that section under the circumstances of this case. Additionally, the ALJ acknowledged Claimant had returned to work, but because he considered it unpredictable "whether a surgically repaired right shoulder would cause a problem again," he awarded Claimant a nominal on-going award of $1 per week in permanent partial disability benefits. BD&O at 17. The ALJ denied Employer's motion for reconsideration on October 25, 2021, again concluding Section 10(b) applies to calculating Claimant's average weekly wage (AWW) and, with respect to the nominal award, stating "there is medical evidence in the record to support that while Claimant is earning more now, her shoulder condition may need further treatment and her earnings may therefore be affected in the future." Order Denying Motion for Reconsideration (Recon. Order) at 4.

Employer thereafter filed this appeal with the Board. The Director, Office of Workers' Compensation Programs (Director), filed a response brief, and Employer filed a reply brief. Employer contends the ALJ erred in calculating Claimant's AWW under Section 10(a), 33 U.S.C. §910(a), and in applying Section 10(b), 33 U.S.C. §910(b). It asserts the proper calculation is made pursuant to Section 10(c), 33 U.S.C. §910(c).[4] Additionally, Employer disputes the ALJ's award of nominal compensation and contends he erred in denying its motion for reconsideration. Employer's Petition (Emp. Pet.) at 16-17.

The Director responds, urging affirmance of the use of Section 10(b) because Claimant submitted payroll data for Mr. Raines "who worked a similar schedule in a similar job for substantially all of the year preceding Claimant's injury" and "Raines was a suitable comparator employee for Section 10(b)'s purposes." Director's Brief (Dir. Br.) at 3. Nevertheless, the Director acknowledges the ALJ did not make the requisite findings as to the number of days Mr. Raines worked or his average daily wage, and "instead, he simply took Raines's annual earnings, assumed Raines worked 260 days, and calculated the average weekly wage on that basis." Dir. Br. at 3. Thus, the Director urges remand for the

[4] Although the ALJ discussed the AWW calculation under Section 10(a) to demonstrate Claimant would be overcompensated, BD&O at 20, he ultimately used Section 10(b) to calculate Claimant's AWW. *Id.* at 20, 23. Consequently, any error in making calculations under Section 10(a) are harmless, and we need not address Employer's arguments on this aspect of the issue. *Moore v. Director, OWCP*, 835 F.2d 1219, 20 BRBS 68(CRT) (7th Cir. 1987). Additionally, Section 10(a) is inapplicable. *See* discussion, *infra*.

ALJ to determine how many days Mr. Raines worked in 2013 and to calculate Claimant's AWW accordingly. *Id.* at 4-5. Lastly, the Director urges affirmance of the ALJ's nominal award because the record shows "only that Class A longshoremen are guaranteed work, not that they are guaranteed jobs in any particular classification." Dir. Br. at 4.[5] As Claimant's shoulder condition could require additional treatment, the Director notes it may affect any loss in future earnings. Dir. Br. at 4. In reply, Employer asserts the Director made the same incorrect assumptions as the ALJ and did not accurately state the facts.

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d) to arrive at an AWW. The computation methods are directed towards establishing the claimant's earning power at the time of injury. 33 U.S.C. §910(a)-(d); *see, e.g., Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). Sections 10(a) and 10(b) are the statutory provisions applicable in determining an employee's AWW where the injured employee's work is regular and continuous. The computation of average annual earnings is made pursuant to subsection (c) if subsections (a) or (b) cannot be reasonably and fairly applied. 33 U.S.C. §910(c); *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Duncanson-Harrelson Co. v. Director, OWCP [Freer]*, 686 F.2d 1336, 1342 (9th Cir. 1982), *vacated in part on other grounds*, 462 U.S. 1101 (1983), *decision on remand*, 713 F.2d 462 (9th Cir. 1983).

We need not address Employer's and the Director's contentions regarding the applicability of Section 10(b) in this case, as it is evident from the record Claimant conceded Section 10(c) is applicable. In her initial disclosures with respect to her AWW, Claimant identified only Section 10(c) and stated its "objective . . . is to arrive at a figure that reflects the claimant's potential and opportunity to earn income absent injury." Cl. Disclosure at 2. In its Motion for Summary Decision, Employer cited to Claimant's initial disclosures: "Claimant stated in her Initial Disclosures that she is employing 10(c) as the method of calculation." Emp. MSD at 7. In the ALJ's Order Denying the Motion for Summary Decision, the ALJ acknowledged "Claimant argues that Section 910(c) is the appropriate method for calculating her average annual earnings. (COSD, p.4)." Order Denying Emp. MSD at 3. Further, during the hearing, Claimant again alleged Section 10(c) applies, stating: "[a]nd our biggest issue is the average weekly wage under a 10(c) argument." HT at 7. In Employer's Post-Hearing Brief, relying on Claimant's counsel's

[5] Claimant became a Class A longshoreman in 2017, and her work opportunities and pay increased. Cl. Decl. at 5.

hearing statements, it too asserted Section 10(c) is the appropriate section to use.[6] Employer's Post Hearing Brief at 16. Finally, even after the ALJ applied Section 10(b), Claimant argued in response to Employer's motion for reconsideration that Section 10(c) applies.[7] Claimant's Opposition to Employer's Motion for Recon. (Cl. Opp.) at 3.

As Claimant conceded the use of Section 10(c) to calculate her AWW up to, through, and after the hearing, and because use of Section 10(c) constitutes an appropriate application of the law in this situation, *Duhagon*, 31 BRBS 98; *see also Hall v. Consol. Emp't Sys., Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998), we vacate the ALJ's award based on an AWW calculated using Section 10(b) and remand the case for him to calculate Claimant's AWW using Section 10(c). The ALJ has broad discretion in using Section 10(c) and, therefore, may consider Mr. Raines' wages as well as other wage-related evidence in the record to assess Claimant's AWW.

Employer also contends the ALJ erred in awarding Claimant nominal PPD benefits of $1 per week from September 18, 2016, and ongoing. It argues the ALJ did not fully discuss or consider the Supreme Court's decision in *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), beyond stating "[t]here is really no way of predicting whether a surgically repaired right shoulder would cause a problem again, although I note that it's unlikely, with Claimant not being an A-class worker, there would not be light or sedentary work available to her." BD&O at 17.

In *Rambo*, the claimant sustained a work-related back injury, resulting in a 22.5% permanent partial disability. He was thereafter trained and became a full-time crane

[6] It was not until her Post-Hearing Brief that Claimant urged the use of either Section 10(a) or (b). However, the evidence establishes Claimant did not work substantially the whole of the year, so Section 10(a) cannot apply, and the ALJ failed to identify evidence supporting his conclusion that Claimant specifically testified "she was a five-day worker" for purposes of applying Section 10(b). *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981); Order Denying Summary Decision at 3; JX 3; TR at 60; Rebuttal Exh. 1; Cl. Post-Hearing Br. at 57.

[7] Claimant stated she "agrees that the [ALJ's] decision is not technically a § 10(b) award" and that although any error in applying Section 10(b) was harmless, the ALJ "perhaps [should] clarify[] that [he] was choosing to exercise [his] broad discretion under § 10(c)." Cl. Opp. at 3, 7.

operator, earning approximately three times the amount as he did before. Consequently, the employer sought to have the compensation award modified. The Court held:

> a worker is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions.

Rambo, 521 U.S. at 138, 31 BRBS at 61(CRT). In assessing the application, the Court stated:

> On the initial claim for nominal compensation under the Act, then, the employee has the burden of showing by a preponderance of the evidence that he has been injured and that the odds are significant that his wage-earning capacity will fall below his pre-injury wages at some point in the future.

Id.

Before us is the appeal of the initial claim, so Claimant bears the burden of showing an entitlement to a nominal award. *Id.* After awarding temporary partial disability benefits in an order following the hearing, the ALJ initially found there is no way of knowing whether Claimant's shoulder would "cause a problem again" and therefore she is entitled to a nominal award. BD&O at 17. In denying the motion for reconsideration, however, the ALJ elaborated on his finding and explained his decision was a "straightforward application of" *Rambo*. Order at 4.

The *Rambo* court specifically explained "the probability of a future decline is a matter of proof; it is not to be assumed *pro forma* as an administrative convenience in the run of cases." *Rambo*, 521 U.S. at 139, 31 BRBS at 62(CRT). In his order denying reconsideration, the ALJ described evidence of record which indicates Claimant's shoulder condition may need further treatment which may affect her future earnings. Order Denying Recon. at 4. Other than alleging that the ALJ's decision was impermissibly *pro forma*, Employer does not identify any error in the ALJ's findings of fact. As the ALJ's conclusion is in accordance with *Rambo* and supported by evidence identified in his Bench Decision, BD&O at 17, we reject the challenge to the nominal award.

Accordingly, we vacate the ALJ's AWW calculation and remand the case for further consideration and an award of benefits consistent with this opinion. In all other respects,

we affirm the ALJ's Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge