

## SECTION 10--Determination of Pay

### Average Weekly Wage in General

#### Introduction

Section 10 provides that the average weekly wage of the injured worker at the time of injury is the basis for an award of compensation. Section 10 sets forth three alternative methods for determining claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d) to arrive at an average weekly wage. The computation methods are directed towards establishing claimant's earning power at the time of injury. *See, e.g., Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9<sup>th</sup> Cir. 2006); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1<sup>st</sup> Cir. 2004); *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9<sup>th</sup> Cir. 1998); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5<sup>th</sup> Cir. 1996); *Orkney v. Gen. Dynamics Corp.*, 8 BRBS 543 (1978); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *decision after remand*, 8 BRBS 411 (1978), *aff'd sub nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7<sup>th</sup> Cir. 1979).

Sections 10(a) and 10(b) are the statutory provisions applicable in determining an employee's average annual earnings 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.

Claimant's compensation rate is based on a percentage of an employee's average weekly wage, subject to Section 6. *See Duncanson-Harrelson Co. v. Director, OWCP [Freer]*, 686 F.2d 1336 (9<sup>th</sup> Cir. 1982), *vacated in part on other grounds*, 462 U.S. 1101 (1983), *decision on remand*, 713 F.2d 462 (9<sup>th</sup> Cir. 1983); *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9<sup>th</sup> Cir. 1979); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985); *Strand v. Hansen Seaway Serv., Ltd.*, 9 BRBS 847 (1979), *aff'd in part and rev'd in part*, 614 F.2d 572, 11 BRBS 732 (7<sup>th</sup> Cir. 1980); *Duzant v. Gen. Dynamics Corp.*, 8 BRBS 670 (1978).

An employee's average weekly wage is calculated as of the time of injury. *Hastings v. Earth Satellite Corp.*, 8 BRBS 519 (1978), *aff'd in pertinent part*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); 33 U.S.C. §910. Since an aggravation of a prior condition is considered a new injury, average weekly wage is calculated at the time of an aggravation. *Id.* Where claimant's condition progresses, resulting in additional disability, but there is no new injury or aggravation, average weekly wage is properly based on earnings at the time of the injury. *See Director, OWCP v. Gen. Dynamics Corp. [Morales]*, 769 F.2d 66, 17 BRBS 130(CRT) (2<sup>d</sup> Cir. 1985) (where claimant's disability increased in 1979, the court held that the award was properly based on claimant's wages at the time of his 1970 injury rather than in 1979 when the increased

disability became manifest, as there was no evidence that claimant's osteoarthritis was an occupational disease or that claimant's work activities between 1970 and 1979 aggravated his pre-existing knee condition). The Ninth Circuit, however, has held that in the case of a latent traumatic injury, which did not affect claimant for years while she continued to work, average weekly wage should be calculated at the time the disability became manifest. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). This holding was subsequently rejected by the Fifth Circuit and the Board. *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). The Ninth Circuit subsequently distinguished *Johnson* in a case involving the natural progression of an initial injury, holding that the earnings at the time of injury control in those circumstances and stating that *Johnson* applies where the effects of an injury are "latent and unknown" for a lengthy period where claimant continued to work. *Port of Portland v. Director, OWCP [Ronne II]*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000). *Accord Deweert v. Stevedoring Services of Am.*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002).

While cases involving traumatic injury generally involve a specific date of injury, occupational disease cases raised the issue of whether the time of injury for purposes of calculating average weekly wage should be the date of exposure, the date that symptoms first appeared, or the date of claimant's awareness of work-related disease. The 1984 Amendments resolved this issue by adding Section 10(i), which states that for purposes of Section 10 "with respect to a claim for disability or death due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability." 33 U.S.C. §910(i). *See* Section 10(i), *infra*.

There is only one average weekly wage upon which payments of compensation for a specific injury may be based regardless of whether the disability for which compensation is payable is characterized as temporary or permanent, partial or total. *Thompson v. Nw. Enviro Services, Inc.*, 26 BRBS 53 (1992); *James v. Sol Salins, Inc.*, 13 BRBS 762 (1981) (reversing separate average weekly wage findings for temporary total and permanent partial disability).

A determination of an employee's annual earnings must be based on adequate evidence of record. *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981) (insufficient evidence for Sections 10(a) and (b)); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052 (1978) (insufficient evidence for Section 10(c)). However, this determination can be based on claimant's testimony. *Carle v. Georgetown Builders, Inc.*, 14 BRBS 45 (1981); *Smith v. Terminal Stevedores, Inc.*, 11 BRBS 635 (1979). An administrative law judge can also rely on a voluntary stipulation as to average weekly wage which is based on a reasonable

method of calculation under the Act. Such a stipulation is not a waiver of compensation under Section 15(b). *Fox v. Melville Shoe Corp., Inc.*, 17 BRBS 71 (1985). See also *Belton v. Traynor*, 381 F.2d 82 (4th Cir. 1967) (holding that deputy commissioner erred in awarding compensation based on rate set in agreement between union and employer's association, rather than relying on claimant's actual wages); *California Ship Service Co. v. Pillsbury*, 175 F.2d 873 (9th Cir. 1949) (court affirms deputy commissioner who disregarded stipulation as to average weekly wage which was not properly computed under 33 U.S.C. §910).

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The Board affirmed the administrative law judge's average weekly wage determination, holding that it would be the same whether claimant's condition was considered to be an occupational disease or a traumatic injury. Claimant's date of awareness under Section 10(i) is the same date as the date of the last aggravation. *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986).

Where claimant was injured in the course of his part-time employment as a furniture mover, but his injury did not affect his ability to earn wages in his full-time job as an insurance claims supervisor, the Board held that the wages from the job which was not affected by the injury should be excluded from the calculation of average weekly wage. The Board reasoned that holding employer responsible for this higher level of compensation when claimant is fully able to earn wages at his full-time job is unfair and contrary to the purposes of the Act. Thus, claimant's compensation rate for his scheduled injury was based solely on his average weekly wage in the part-time job in which he was injured. *Harper v. Office Movers/E.I. Kane, Inc.*, 19 BRBS 128 (1986).

The Board held that the administrative law judge erred in basing claimant's award for disability due to a 1984 injury on claimant's 1980 earnings. Where an employee sustains an injury which aggravates a prior condition, his average weekly wage for the resulting disability is based on his earnings at the time of the aggravation. His average weekly wage should be based on the wage-earning capacity remaining after the disability due to the first injury he sustained while working for the first employer. The Board remanded for the administrative law judge to determine if claimant is entitled to concurrent awards: a permanent partial disability award based on the loss in wage-earning capacity caused by the first injury payable by the first employer, and a temporary total disability award based on an average weekly wage reflective of claimant's already reduced wage-earning capacity prior to the second injury payable by the second employer. *Lopez v. S. Stevedores*, 23 BRBS 295 (1990).

The Ninth Circuit held that where the disability attributable to claimant's traumatic injury did not occur until several years later, claimant's average weekly wage should be calculated as of the time the disability became manifest, rather than at the time of the accident. To

hold otherwise would discourage claimants from attempting to return to work after the accident, and this holding is consistent with the law as developed in occupational disease cases. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).

In a case where claimant suffered a work-related injury but returned to work for the same employer after a period of disability and later became totally disabled, if claimant's resulting condition is the result of aggravations (*i.e.*, new injuries) after he returned to work, his average weekly wage for disability due to the aggravations must be computed at that time. This would result in a computation consistent with *Johnson*, 911 F.2d 247, 24 BRBS 3(CRT). If, however, claimant's ultimate disability is the result of the initial work injury, the Board held that *Johnson* was distinguishable in that in this case employer voluntarily paid compensation for the initial period of disability, and there can be only one average weekly wage for a given injury. Moreover, claimant's earnings decreased between 1985 and 1987, and use of the 1987 average weekly wage would penalize claimant for attempting to return to work, contrary to the concern expressed in *Johnson*. The case was remanded for the administrative law judge to determine whether claimant's disability was due to the 1985 injury or to subsequent aggravations, and to determine an average weekly wage consistent with the above. *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140 (1991).

The accident that caused claimant's disability in 1985 occurred in 1981. The Board affirmed the administrative law judge's use of claimant's wages in 1985 to determine his average weekly wage, rather than his wages in 1981. The Board held that the date of disability rather than the date the accident occurred may be the appropriate date of "injury" for the purposes of average weekly wage inasmuch as "injury" has been defined as awareness of an impairment in wage-earning capacity due to the accident. This result is consistent with the Ninth Circuit's decision in *Johnson*, 911 F.2d 247, 24 BRBS 3(CRT). *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

The Fifth Circuit held that where claimant's back condition, degenerative facet disease, resulted from a fall from a ship ladder, it was a traumatic injury and not an occupational disease. Since claimant's degenerative facet disease resulted from traumatic physical impact, not exposure to external, environmentally hazardous conditions of employment, compensation benefits must be based on claimant's average weekly wage at the time of the 1987 injury, *i.e.*, the date the incident occurred, rather than the higher average weekly wage at the time the condition was diagnosed in 1992. The Fifth Circuit expressed its disagreement with the Ninth Circuit's application of concept of latent trauma in *Johnson*, 911 F.2d 247, 24 BRBS 3(CRT). *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997).

In this case, where claimant sustained a knee injury in 1984 but did not learn of the extent of his disability until 1989, the administrative law judge determined that claimant's disability is related to his 1984 injury and that there was no intervening cause of his 1989

condition. Nevertheless, she awarded benefits based on claimant's 1989 average weekly wage in accordance with *Johnson*, 911 F.2d 247, 24 BRBS 3(CRT), and *Kubin*, 29 BRBS 117. The Board, adhering to the language of Section 10 of the Act, adopted the reasoning of the Fifth and Second Circuits in *LeBlanc*, 130 F.3d 157, 31 BRBS 195(CRT), and *Morales*, 769 F.2d 66, 17 BRBS 130(CRT), and it held that, in all but the Ninth Circuit where *Johnson* controls, the "time of injury" in a traumatic injury case is the date when the accident causing the injury occurred. Thus, benefits awarded in a case involving a latent traumatic injury shall be based on the average weekly wage at the time of the injury and not at the time any latent effects became manifest. Consequently, the Board modified the administrative law judge's award and held that claimant's permanent partial disability benefits must be based on his 1984 average weekly wage. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

In a case where claimant suffered immediate partial disability from his work-related knee injury and was unable to return to his longshore work and eventually his disability became total and permanent when a back problem arose as a result of the knee injury, the Ninth Circuit affirmed the Board's holding that claimant's average weekly wage should be calculated at the time of the knee injury. The court distinguished its decision in *Johnson*, 911 F.2d 247, 24 BRBS 3(CRT), on the basis that *Johnson* involved a latent injury in which the disabling symptoms of an accident first appeared years after the accident whereas the accident from the instant case resulted in immediate disability, and the totally disabling back condition represented a natural and unavoidable progression of the original knee injury. Consistent with other law on natural progression, in such cases average weekly wage is to be calculated as of the time of the initial injury. *Port of Portland v. Director, OWCP [Ronne II]*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000).

In this case claimant continued to work several weeks following his work injury and sought to have the date of injury be the date on which he ceased working. The Ninth Circuit held that this was not a case which required computing claimant's average weekly wage as of a date subsequent to the actual date of injury as this was not a latent injury merely because claimant was not immediately disabled. The court distinguished *Johnson*, 911 F.2d 247, 24 BRBS 3(CRT), in that claimant herein immediately knew he was injured, and because *Johnson* was an "exceptional" case. The court declined to hold that the date of injury is always the date claimant stopped working. *Deweert v. Stevedoring Services of Am.*, 272 F.3d 1241, 36 BRBS 1(CRT) (9<sup>th</sup> Cir. 2002).

The Board held that the administrative law judge properly applied the parties' stipulation as to claimant's average weekly wage at the date of injury, rejecting employer's argument that, while claimant's average weekly wage at the date of injury was appropriate for short-term temporary disability benefits, claimant's long-term compensation payments for permanent disability should account for industry-wide wage reductions that occurred subsequent to the date of injury. First, there can only be one average weekly wage upon

which compensation payments are based, regardless of the type or types of disability for which benefits are found payable. Secondly, in the instant case, the administrative law judge was limited to considering claimant's earnings under Section 10(a), as the record contained claimant's actual earnings during the year preceding the date of injury, and claimant's employment was not seasonal or intermittent. Finally, post-injury events normally are not relevant to average weekly wage, and the parties' stipulation was binding upon them, as the administrative law judge did not question its validity. *Thompson v. Nw. Enviro Services, Inc.*, 26 BRBS 53 (1992).

The Board remanded the case where the administrative law judge awarded claimant permanent total disability for a 1986 injury at the average weekly wage he found for a 1988 injury. There can be only one average weekly wage for a given injury and in this case, the applicable injury is that in 1986. Moreover, post-injury events generally are irrelevant to average weekly wage. As the administrative law judge's use of 1988 earnings appeared contrary to law and he failed to explain it, the Board found remand necessary. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995).

In a concurrent awards case, the Ninth Circuit stated that factors such as inflation and a change of wage rate may affect an employee's projected loss of earnings in the first award, and thus following a second injury, the award for the first injury may be adjusted if more reliable information indicates a change in wage-earning capacity. While the court agreed with the D.C. Circuit's methodology in *Hastings*, 628 F.2d 85, 14 BRBS 345, in this case, the combination of claimant's permanent partial disability from the first injury and permanent total disability from the second resulted in a total award exceeding that provided under Section 8(a). As the administrative law judge did not address whether claimant's first injury accurately reflected his wage-earning capacity, the court remanded the case for the administrative law judge to do so and make whatever adjustments were necessary so that the combined awards did not exceed the statutory rate. *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995).

The Board affirmed the administrative law judge's finding that claimant's actual earnings in the year prior to his injury should be used to calculate his average weekly wage under Section 10(c) as he worked successfully in this job for a significant period. The Board rejected claimant's contention that he would have earned more during this period but for his back pain as the administrative law judge rationally concluded that claimant's testimony in this regard could not be credited. *Fox v. W. State, Inc.*, 31 BRBS 118 (1997).

Sections 10(a) and 10(d) do not provide mutually exclusive means by which the administrative law judge is to calculate a claimant's average weekly wage. Rather, the two provisions work in unison to give the administrative law judge a formula to determine claimant's average weekly wage. Section 10(a) specifically serves as one of three methods by which an employee's average annual wage is to be calculated. Section 10(d) then

mandates that the administrative law judge divide the average annual wage by 52 to arrive at claimant's average weekly wage. The Board affirmed the administrative law judge's calculation under Section 10(a). *Diosdado v. Newport Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

In an occupational disease case where the Board modified the administrative law judge's decision to hold the onset date of disability was May 6, 1983, the Board also held that the relevant 52 week period for calculating average weekly wage was from May 6, 1982 to May 6, 1983, pursuant to Section 10(c) and 10(d)(2)(A). The Board rejected claimant's argument that it should modify the average weekly wage based on his average earnings in the prior calendar year, 1982, stating it could not find these earnings representative as a matter of law, and remanded the case for calculation of claimant's average weekly wage for the relevant 52 week period. *Alexander v. Triple A Mach. Shop*, 32 BRBS 40 (1998), *rev'd on other grounds sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

Pursuant to *Benjamin*, 297 F.3d 797, 36 BRBS 28(CRT), the Board reversed the administrative law judge's finding that the two hearing loss claims should be merged for adjudication. The first employer is liable for the hearing loss demonstrated on the first audiogram, at the average weekly wage in effect at the time of that injury. The second employer is liable for claimant's full hearing loss, as the aggravation rule still is applicable, based on the average weekly wage at the time of the second injury, but the second employer is entitled to a credit for the dollar amount of the benefits claimant receives for his prior hearing loss claim. *Giacalone v. Matson Terminals, Inc.*, 37 BRBS 87 (2003); *see generally Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.*, 20 BRBS 26 (1987), *aff'd in part and rev'd in part sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1988).

Decedent's average weekly wage was calculated pursuant to Section 10(c) based solely on the wages he earned during the thirteen weeks he worked for employer. The court affirmed inasmuch as there was substantial evidence to support the administrative law judge's determination that these wages represented his wage-earning capacity at the time of injury. Moreover, the court held that a claimant may choose to establish his average weekly wage pursuant to Section 10(c) even if he could have chosen to proceed under Section 10(b). As no evidence relevant to Section 10(b) was submitted, that section is inapplicable. *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9<sup>th</sup> Cir. 2006).

## Definition of Wages

The term “wages” for the purpose of determining the average weekly wage is defined in Section 2(13) of the Act. The 1972 Act defined “wages” as the “money rate at which the service rendered is recompensed under the contract of hiring in force at the time of injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.” 33 U.S.C. §902(13)(1982)(amended 1984).

Under this provision, the Supreme Court held that wages do not include fringe benefits such as employer contributions to union, retirement, pension, health and welfare or other benefit plans. *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155(CRT) (1983).

The holding in *Morrison-Knudsen* was subsequently codified in the 1984 Amendments to Section 2(13). The new definition provides

The term “wages” means the money rate at which the service rendered by the employee is compensated by an employer under the contract of hiring in force at the time of injury, including the reasonable value of any advantage received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes). The term wages does not include fringe benefits including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee’s or dependent’s benefit, or any other employee’s dependent entitlement.

33 U.S.C. §902(13). This definition was made applicable as of the effective date of the 1984 Amendments and thus did not apply to cases pending on appeal on the date of enactment. *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6 (1984). In *Thompson*, the Board held that the amended provision was inapplicable, and under pre-amendment Section 2(13), the *Morrison-Knudsen* rule did not apply to overseas additives which are readily ascertainable and therefore includable. *Thompson*, 17 BRBS 6.

The 1984 Amendments distinguish between the “money rate” under the contract of hire, which is included in “wages,” and a non-cash “advantage,” which is only included if included for purposes of withholding under the Internal Revenue Code. Thus, cash *per diem* payments to an employee have been held includable in wages, while the value of meals and lodging has been excluded where it was not subject to withholding. *Compare B & D Contracting v. Pearley*, 548 F.3d 338, 42 BRBS 60(CRT) (5<sup>th</sup> Cir. 2008), and *Custom Ship Interiors v. Roberts*, 300 F.3d 510, 36 BRBS 51(CRT) (4<sup>th</sup> Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003), with *H.B. Zachery Co. v. Quinones*, 206 F.3d 474, 34 BRBS



23(CRT) (5th Cir. 2000), and *Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997). Cf. *McNutt v. Benefits Review Board*, 140 F.3d 1247, 32 BRBS 71(CRT) (9th Cir. 1998) (cash *per diem* to pay for meals and lodging treated as an advantage and excluded from “wages”).

Wages do not include unemployment compensation. *Strand v. Hansen Seaway Serv., Ltd.*, 614 F.2d 572, 11 BRBS 732 (7<sup>th</sup> Cir. 1980); *Blakney v. Delaware Operating Co.*, 25 BRBS 273 (1992); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *decision after remand*, 8 BRBS 411 (1978), *aff'd sub nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

In computing average weekly wage, overtime should be included if a regular and normal part of claimant’s employment. *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989); *Bury v. Joseph Smith & Sons*, 13 BRBS 694 (1981); *Ward v. Gen. Dynamics Corp.*, 9 BRBS 569 (1978); *Gray v. Gen. Dynamics Corp.*, 5 BRBS 279 (1976), *aff'd on other grounds sub nom. Gen. Dynamics Corp. v. Benefits Review Board*, 565 F.2d 208, 7 BRBS 831 (2d Cir. 1977). *But see McDonough v. Gen. Dynamics Corp.*, 8 BRBS 303 (1978) (overtime which may have been earned in year following injury not included).

Under the pre-1984 Amendment version of Section 2(13), the Board held that the fact that claimant was paid in kind (automobile parts) rather than money for his work was immaterial because the reasonable value of advantages received by claimant was included in “wages.” *Carter v. Gen. Elevator Co.*, 14 BRBS 90 (1981).

The Board has held that posthumous bonuses and cash gifts are not included in determining average weekly wage. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Waters v. Farmers Export Co.*, 14 BRBS 102 (1981), *aff'd mem.*, 710 F.2d 836 (5th Cir. 1983). The Board has also held that while a one-time bonus received prior to injury constituted “wages,” it should not be included as it inflated claimant’s earning capacity. *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

Claimant’s wages also should include vacation pay in lieu of vacation. *Waters*, 14 BRBS 102; *Parks v. John T. Clark & Son*, 9 BRBS 462 (1978), *rev'd on other grounds sub nom. John T. Clark & Son of Maryland, Inc. v. Benefits Review Board*, 621 F.2d 93, 12 BRBS 229 (4th Cir. 1980); *Lawson v. Atl. & Gulf Grain Stevedores Co.*, 6 BRBS 770 (1977); *Baldwin v. Gen. Dynamics Corp.*, 5 BRBS 579 (1977), *aff'd on recon.*, 6 BRBS 396 (1977). *See Sproull v. Director, OWCP*, 86 F.3d 895, 899, 30 BRBS 49, 51(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997) (vacation pay earned pre-injury but paid thereafter may be included). *See also Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133 (1990) (since vacation pay is included in wages, vacation days paid are included as days worked for purposes of a Section 10(a) calculation).

When earned prior to the injury, royalty payments may be included in average weekly wage, even though not paid until after the injury. *Parks*, 9 BRBS 462. See *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5<sup>th</sup> Cir. 2000); *Universal Mar. Serv. Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4<sup>th</sup> Cir. 1998); *Lopez v. S. Stevedores*, 23 BRBS 295 (1990).

The Board has also noted that a claimant's average weekly wage should reflect all of his earnings at the time of injury including his earnings from a second part-time job. *Lawson*, 6 BRBS 770; *Stutz v. Indep. Stevedore Co.*, 3 BRBS 72 (1975). Cf. *Harper v. Office Movers/E.I. Kane, Inc.*, 19 BRBS 128 (1986) (where injury affected only claimant's ability to perform a part-time job, average weekly wage was properly based only on earnings in that job).

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In computing average weekly wage, tax benefits created by deductible losses are not included as they do not constitute wages under Section 2(13). *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988).

The Board affirmed the administrative law judge's calculation of the decedent's average weekly wage, holding that an employee's average weekly wage should not be reduced by the effective tax rate. The Board further held that overseas post allowances, foreign housing allowances, foreign service additives, incentive compensation, completion awards, and cost of living adjustments are properly included in average weekly wage as they are readily calculable. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

The Board held that Guaranteed Annual Income payments constitute wages under Section 2(13) and are included in average weekly wage under both the 1972 Act and the 1984 Amendments. The value of the GAI payments was readily calculable, and the fact that the payments were made to the employees from a trust fund rather than from employer was not material. Moreover, the payments were subject to income tax withholding, and thus fell within the amended definition of Section 2(13). *McMennamy v. Young & Co.*, 21 BRBS 351 (1988).

When overtime hours are a regular and normal part of claimant's employment, they should be considered in determining claimant's average weekly wage. Loss of overtime is a factor in determining post-injury wage-earning capacity if overtime was included in claimant's average weekly wage. *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989).

The Board held for the first time under the 1984 Amendments that container royalty payments to claimant should be included in calculating his average weekly wage. The Board determined that this holding applies the plain language of amended Section 2(13)

which defines wages as encompassing advantages included for purposes of tax withholding. The Board rejected the argument that these payments constitute a fringe benefit. The value of the container royalty payment is readily calculable and the payments are made directly to the employee on the basis of seniority and career hours worked. *Lopez v. S. Stevedores*, 23 BRBS 295 (1990).

The Board reversed the administrative law judge's finding that container royalty payments decedent received are not to be included in the calculation of his average weekly wage. The Board has held that such payments, when made pursuant to a contract, are included in an employee's average weekly wage, as they are readily calculable, made directly to the employee, and are part of an employee's taxable income. *Lopez*, 23 BRBS 295; *McMennamy*, 21 BRBS 351. In the instant case, it was undisputed that the container royalty payments decedent received were made pursuant to a collective bargaining agreement, and that employer was bound by that agreement. *Trice v. Virginia Int'l Terminals, Inc.*, 30 BRBS 165 (1996).

A post-injury bonus is not relevant to the average weekly wage determination under Section 10(a) of the Act where it is not part of claimant's actual prior earnings. Because a contingent right to a bonus to be paid in the future is, like a fringe benefit, too speculative to be considered as part of the money rate at which the employee is being compensated as of the time of the injury under 33 U.S.C. §902(13), the post-injury bonus did not constitute a "wage" properly includable in computing claimant's average weekly wage at the time of injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992).

The Board affirmed the administrative law judge's conclusion that claimant's vacation, holiday, and container royalty pay, earned prior to his injury, were properly included in the calculation of his average weekly wage. *Wright v. Universal Mar. Serv. Corp.*, 31 BRBS 195 (1997), *aff'd and remanded*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998).

The Fourth Circuit, after analyzing the language of the Act and the legislative history, determined that the phrase "any advantage" should be given its usual meaning while the term "fringe benefits" must be limited to only certain types of fringe benefits. Therefore, the court held that the term "fringe benefits" as used in Section 2(13) refers to those advantages given to an employee, in addition to a monetary salary, whose value is too speculative to be converted into a cash equivalent. Thus, "fringe benefits" are not included in "wages," and "wages" are defined as a dollar measure of compensation provided for 1) an employee's services; 2) by an employer; and 3) under a contract of hiring in force at the time of the injury. (The court questioned the 9<sup>th</sup> Circuit's decisions in *Wausau, infra*, and *McNutt, infra*, in a footnote). Using this definition, the Fourth Circuit affirmed the Board and concluded that holiday, vacation and container royalty payments are included as "wages" if the employee earned these payments for services rendered, *i.e.*, the employee satisfied the contract by actually working the requisite number of hours. Because the record lacked evidence as to whether claimant met the contractual hours through actual

work or due to a disability credit (in which case the payments would not be “wages” because they would not have been awarded for services), the court remanded the case for the administrative law judge to make this determination. *Universal Mar. Serv. Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4<sup>th</sup> Cir. 1998).

The Fifth Circuit affirmed the administrative law judge’s inclusion of container royalty payments in claimant’s average weekly wage under Sections 2(13) and 10(c) because they constitute monetary compensation/taxable advantage and not a fringe benefit. They are paid based on a number of hours worked, and thus are in paid in exchange for services rendered. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5<sup>th</sup> Cir. 2000).

The Board affirmed the administrative law judge’s inclusion of \$6,000 paid by decedent’s employer into a tax-sheltered annuity (TSA) in decedent’s average weekly wage. TSA payments are within the 1984 Act’s definition of wages even though they are not subject to tax withholding. The plain language of amended Section 2(13) does not mandate that a benefit not subject to withholding is not a wage. The \$6,000 paid into the TSA by decedent’s employer was included in his contract of hiring, and was therefore intended to compensate him for his employment services. The Board further holds that the payment does not constitute a fringe benefit under *Morrison-Knudsen*, 461 U.S. 624, 15 BRBS 155(CRT). The Board held that the fluidity of the TSA, as evidenced by claimant’s rolling over of the TSA into an IRA, placed it within the Court’s definition of wages, which was formulated pursuant to the 1972 Act. Furthermore, the TSA contribution was included in the salary agreed to under decedent’s employment contract. Accordingly, the Board concluded that a TSA payment is a wage as defined by both the 1972 and 1984 Act. *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *aff’d in part and rev’d in part on other grounds sub nom. Cretan v. Director, OWCP*, 1 F.3d 843, 27 BRBS 93(CRT) (9<sup>th</sup> Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994).

The Board held that in calculating claimant’s average weekly wage, his vacation pay should be accounted for in the year it was received, because claimant only “qualified” in the year prior to the injury for vacation pay in the year after the injury. Thus, his wages in the year prior to injury should not include the vacation paid after the injury at post-injury rates. It was only because of the union contract that the vacation earned in the year of the injury was paid after the injury at the next year’s wage rate. Similarly, holiday pay earned and paid in the year prior to claimant’s work-related injury should be included in calculating claimant’s average weekly wage. *Sproull v. Stevedoring Services of Am.*, 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), *aff’d in part and modified in part on recon. en banc*, 28 BRBS 271 (1994) (Smith and Dolder, JJ., dissenting in part), *rev’d in part sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9<sup>th</sup> Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

On reconsideration, the Board reaffirmed its prior holding that the holiday pay actually paid in the 52-week period preceding the injury is to be included in average weekly wage, on the facts in this case. The Board also reaffirmed its prior holding on the issue of vacation pay and held that vacation pay paid to claimant after his injury cannot be used in calculating claimant's average weekly wage because it represented an accrual method rather than a cash method of calculating earnings, and did not represent what claimant actually received prior to the injury. *Sproull v. Stevedoring Services of Am.*, 28 BRBS 271 (1994) (Smith and Dolder, JJ., dissenting in part), *aff'g in part and modifying in part on recon. en banc*, 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), *rev'd in part sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

The Ninth Circuit reversed the Board's modification of the administrative law judge's average weekly wage determination. The court held that vacation pay earned during the year prior to claimant's injury but paid after the date of injury was properly included in the calculation of claimant's average weekly wage, noting there was no evidence of confusion or inconvenience associated with such a calculation. *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

Taxed unemployment compensation benefits are not includable in calculating average weekly wage under the current version of Section 2(13) as well as under the pre-1984 provision. *Blakney v. Delaware Operating Co.*, 25 BRBS 273 (1992).

Inasmuch as the "subsistence and quarters" was provided to claimant by employer under the terms of claimant's employment contract, and the value of these services is readily ascertainable at a daily rate of \$30, the room and board provided by employer cannot be deemed a fringe benefit as the amount is readily calculable under Section 2(13) of the Act. The fact that the funds were not subject to withholding tax under the Internal Revenue is not dispositive of this issue. These funds therefore were "wages" within the meaning of the Act and the Board modified the administrative law judge's decision to include them in average weekly wage. *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996), *rev'd sub nom. Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997).

The Ninth Circuit held that the definition of wages under Section 2(13) is controlled by the Internal Revenue Code's criteria. Under 26 U.S.C. §119(a), claimant's meals and lodging were not income, as they were provided for the convenience of employer, the meals were furnished on employer's business premises, and claimant was required to accept such lodging as a condition of employment. Thus, the court held that the value of claimant's meals and lodging should not have been included as wages under Section 2(13). *Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997).

The Board affirmed the administrative law judge's inclusion in claimant's average weekly wage of the value of room and board provided by employer, as room and board are not fringe benefits under a benefit plan. The Board declined to follow *Wausau*, 114 F.3d 120, 31 BRBS 41(CRT), outside the Ninth Circuit, explaining that the court's restriction on the term "wages" in Section 2(13) is not consistent with the rules of statutory construction. Section 2(13) states that "wages" include the reasonable value of any advantage received from employer and subject to withholding, but the term "including" is not a limit on the definition of wages but is merely one item that is clearly included. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *rev'd in part*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

The Fifth Circuit agreed with the Ninth Circuit's holding in *Wausau*, 114 F.3d 120, 31 BRBS 41(CRT), that Section 2(13), on its face, excludes from the definition of "wages" the value of meals and lodging that are exempted from federal income taxation by Section 119 of the Internal Revenue Code (furnished for convenience of employer, on employer's premises, as condition of employment). The court stated that the Board's construction of Section 2(13) read the phrase "and included for purposes of any withholding of tax under subtitle C of title 26" out of the statute. The court concluded that "wages" equals monetary compensation plus taxable advantages. *H.B. Zachery Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

The Ninth Circuit held that, consistent with its holding in *Wausau*, 114 F.3d 120, 31 BRBS 41(CRT), while the *per diem* the claimant in this case received from employer in order to pay for his room and board while working abroad was an "advantage," it was not a "wage" because it was not subject to withholding under the Internal Revenue Code. *McNutt v. Benefits Review Board*, 140 F.3d 1247, 32 BRBS 71(CRT) (9th Cir. 1998).

In addressing the issue of whether tips may be included in the calculation of a claimant's average weekly wage under amended Section 2(13), the Board held that if the contract of hire between claimant and employer contemplated tips as part of the "money rate" at which claimant was to be compensated, then claimant's tips must be included in her average weekly wage. As the administrative law judge did not address this question, and there was evidence in the record which, if credited, could support a finding that tips were part of the "money rate" of claimant's contract of hire, the Board vacated the determination that tips were not includable in the calculation of claimant's average weekly wage and remanded the case for reconsideration of this issue. *Story v. Navy Exch. Serv. Ctr.*, 30 BRBS 225 (1997).

Considering employer's motion for reconsideration, the Board reaffirmed its previous holding that the term "including any advantage received from employer and included for purposes of tax withholding" as used in Section 2(13) is meant to be exemplary, not exclusive, and that claimant's tips must be included in her average weekly wage if they were part of the "money rate" under the contract of hiring. In rendering its decision, the

Board declined to follow *Wausau*, 114 F.3d 120, 31 BRBS 41(CRT), since this case is outside the Ninth Circuit, and instead followed its decision in *Quinones*, 32 BRBS 6 (1998), and the Fourth Circuit's decision in *Wright*, 155 F.3d 311, 33 BRBS 15(CRT). *Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999).

The Board reversed the administrative law judge's exclusion of the value of the *per diem* claimant received from employer from claimant's average weekly wage, in this case arising in the Fourth Circuit. The *per diem* at issue here was part of the money claimant received from employer, and was thus includable in average weekly wage under the first clause of Section 2(13), regardless of whether it was subject to tax withholding, as it was included in claimant's paycheck from employer every week and was part of the agreement, or contract, under which claimant was hired. The Fourth Circuit, in *Wright*, 155 F.3d 311, 33 BRBS 15(CRT), and the Board interpret the term "including" which prefaces the second clause of the first sentence of Section 2(13) as exemplary, rather than exclusive, and the disparate interpretations of this section by the Fifth and Ninth Circuits are discussed. The value of the free room and board claimant received, however, was not includable in addition to the *per diem* to avoid double recovery. *Roberts v. Custom Ship Interiors*, 35 BRBS 65 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003).

The Fourth Circuit rejected employer's argument that claimant's *per diem* was a nontaxable payment intended to reimburse claimant for his meal and lodging expenses. The court relied on *Wright*, 155 F.3d 311, 33 BRBS 15(CRT), and distinguished *Quinones*, 206 F.3d 474, 34 BRBS 23(CRT), and *Wausau*, 114 F.3d 120, 31 BRBS 41(CRT). The court reasoned that claimant's *per diem* was paid weekly in claimant's paycheck pursuant to his employment contract, and the money was paid with no restrictions and despite employer's knowledge that Carnival Cruise Lines provided free food and lodging to ship remodelers. Thus, the payment was not a true reimbursement linked to any actual expenses, and it was virtually indistinguishable from claimant's regular wages. Accordingly, the Fourth Circuit affirmed the Board's decision and held that claimant's *per diem* is to be included in his average weekly wage. *Custom Ship Interiors v. Roberts*, 300 F.3d 510, 36 BRBS 51(CRT) (4<sup>th</sup> Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003).

Although the Board held that the one-time payment of \$4,000 claimant received in 1996 in return for the termination of the GAI program constituted "wages" under Section 2(13), it reversed the administrative law judge's inclusion of that amount in the calculation of claimant's average weekly wage. The Board held that the one-time payment was more akin to a bonus and was a singular event which, if included, would inflate claimant's weekly wage beyond what he was reasonably expected to earn in future years. As claimant's injury had no effect on his ability to receive this amount in 1996 or on his inability to receive it in the future, it should not be included to compensate him for earnings lost due to his injury. In addition to guidance from the Fourth Circuit's decision in *Wright*, 155 F.3d 311, 33 BRBS 15(CRT), the Board considered this situation analogous to other

Section 10(c) cases wherein an unusual event occurred during the year, making the claimant's actual earnings for that year not representative of his annual earning capacity. In those situations, the administrative law judge is not restricted to using actual earnings to approximate earning capacity. Accordingly, the Board modified the administrative law judge's decision to exclude the \$4,000 payment from claimant's average weekly wage. *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

The Fifth Circuit affirmed the finding that *per diem* payments to claimant constituted wages within the meaning of Section 2(13) for purposes of calculating claimant's average weekly wage. The court rejected employer's argument that the *per diem* payments were not "wages" because they were not taxable. The court restated its holding in *Quinones*, 206 F.3d 474, 34 BRBS 23(CRT), that "wages" are "the money rate at which the employee is compensated" plus any taxable advantages. The "money rate" prong does not require taxability. The *per diem* in this case was monetary compensation paid in the same paycheck as salary and was based on the number of hours worked. That the *per diem* payments were not tied to claimant's actual expenses is not controlling; the taxability of the payments is not an issue before the court. *B & D Contracting v. Pearley*, 548 F.3d 338, 42 BRBS 60(CRT) (5<sup>th</sup> Cir. 2008).

The Second Circuit affirmed the administrative law judge's finding that claimant did not establish that certain disputed payments made to a comparable worker were "wages," as well as the consequent finding that these payments should not be included in calculating claimant's benefits. The administrative law judge found that the record contained evidence establishing that these payments were listed as "other" rather than "reg. hours," and may have been related to the comparable employee's position on the board of directors of an employee-owned company that leased property to employer. *Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2<sup>d</sup> Cir. 2008).

The Board rejected employer's assertion that claimant's travel expenses should not have been included in his average weekly wage calculation as they are "fringe benefits" and not "wages." The Board stated that the contract clearly enumerated the amounts to be paid for travel and that they would be paid at the six- and twelve-month employment marks. Thus, the Board concluded that the travel expenses are "wages" and affirmed the administrative law judge's inclusion of the amounts that are contractual, earned, and readily calculable. However, because claimant was not working at the time the final installment of the travel expenses, \$600, was to be paid, the Board analogized that final installment to a post-injury contingent bonus and held that the administrative law judge erred in including it in claimant's average weekly wage calculation. Accordingly, the Board modified claimant's average weekly wage by excluding that \$600. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

In this case arising in the Fourth Circuit, the Board held that the administrative law judge properly relied on the Fourth Circuit's decision in *Wright*, 155 F.3d 311, 33 BRBS 15(CRT), to exclude claimant's vacation, holiday and container royalty payments from the



calculation of his average weekly wage. The court held in Wright that a claimant's vacation, holiday and container royalty payments can be included in his average weekly wage only when they are earned with the requisite number of hour of actual work and that such payments received on the basis of disability credit are not paid for "services" and therefore are not "wages." As claimant in this case did not have the requisite number of actual hours of work to earn vacation, holiday and container royalty payments for the contract years ending on September 30, 2010 or September 30, 2011, and received those payments in both contract years based on a combination of actual hours worked and workers' compensation disability credit hours, the Board affirmed the administrative law judge's finding that those payments are not "wages" and cannot be included in his average weekly wage. *Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014), *aff'd sub nom. Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016).

## Section 10(a)

Section 10(a) provides a specific formula for determining average annual earnings based on the actual earnings of an injured worker who was employed for substantially the whole year prior to the injury. Section 10(a) applies where “the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury.” In such cases, the administrative law judge must determine the worker’s average daily wage, generally by dividing the total earnings by the number of days worked, and his average annual earning capacity is 300 times that amount for a six-day worker and 260 times that amount for a five-day worker.

Section 10(a) is thus premised on the injured employee’s having worked for “substantially” the entire year prior to the injury in the same job. *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). The term “substantially the whole of the year” refers to the nature of claimant’s employment, not the availability of wage records. *Eleazer v. Gen. Dynamics Corp.*, 7 BRBS 75 (1977). In *Eleazer*, the Board thus held Section 10(a) was not precluded because wage records were only submitted for 28 weeks prior to injury, stating the evidence demonstrated claimant worked substantially the whole of the year. However, the Board held that Section 10(a) could not be reasonably and fairly applied as its formula could not account for claimant’s sizable overtime work on Saturdays.

Section 10(a) cannot be applied where there is insufficient evidence in the record from which an average daily wage can be calculated. *E.g.*, *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Proffitt v. Serv. Employers Int’l, Inc.*, 40 BRBS 41 (2006); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff’d on recon.*, 25 BRBS 88 (1991); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981).

The Board has considered 42 weeks to be substantially the whole of the year. *Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980), *rev’d and remanded on other grounds*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). *Cf. Louisiana Ins. Guar. Ass’n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000) (Board properly affirmed administrative law judge’s finding that the 42 weeks claimant worked did not fairly represent an entire year’s work). On the other hand, 33 weeks is not a substantial part of the previous year. *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979). In *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982), the administrative law judge therefore correctly rejected application of Section 10(a) when claimant worked a full 40-hour week in only 13 weeks of the year preceding injury. Note that in *Anderson v. Todd Shipyards*, 13 BRBS 593, 596 (1981), in remanding the case for reconsideration of average weekly wage, the Board cited *Eleazer*,

7 BRBS at 78-79, as support for the statement that as little as 28 weeks could be substantially the whole of the year. However, as discussed above, *Eleazer* did not hold that 28 weeks was substantially the whole of the year but held that the fact that wage records for only 28 weeks had been submitted was insufficient alone to preclude application of Section 10(a) where the record demonstrated claimant had worked substantially the whole of the year. Claimant in *Eleazer* had worked for employer five or six days per week from 1958 to 1975. The Board's statement in *Anderson* regarding *Eleazer* was thus in error. See also *Waters v. Farmers Export Co.*, 14 BRBS 102, 107 (1981), *aff'd*, 710 F.2d 836 (5th Cir. 1983).

The Ninth Circuit has adopted a bright line rule that Section 10(a) must be applied where claimant works 75 percent of the available workdays in a year. *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Stevedoring Services of Am. v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9<sup>th</sup> Cir. 2004), *cert. denied*, 544 U.S. 960 (2005); *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9<sup>th</sup> Cir. 1998). The Fifth Circuit noted *Matulic*, but found it unnecessary to decide whether to adopt the bright line rule, holding Section 10(a) applied where claimant worked 91 percent of the available days. *Gulf Best Elec., Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5<sup>th</sup> Cir. 2004).

The Board has held that a substantial part of the year may be composed of work for two different employers where there was sufficient evidence to support the administrative law judge's conclusion that the skills used in the two jobs were highly comparable. *Hole*, 12 BRBS 38. See also *Waters*, 14 BRBS 102; *Anderson*, 13 BRBS 593. In *Proffitt*, 40 BRBS 41, the Board stated Section 10(a) applies when a claimant worked substantially the whole of the year in the "same" employment, whether for the named employer or for other employers, and it affirmed the administrative law judge's finding that claimant's employment in Iraq was not comparable to his employment in the United States as his job had different duties and work in a combat zone is inherently different as it involves dangerous working conditions.

All employment in the year prior to injury and not merely employment covered under the Act can be considered in determining whether Section 10(a) is applicable. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862, 867 n.6 (1981), *rev'd*, 698 F.2d 743, 15 BRBS 94(CRT) (5<sup>th</sup> Cir. 1983), *vacated on reh'g en banc*, 723 F.2d 399, 16 BRBS 34(CRT) (1984), *cert. denied*, 469 U.S. 818 (1984). In *Roundtree*, the Board held that Section 10(c) was the appropriate subsection, as claimant was self-employed, rejecting employer's argument for use of Section 10(b) and stating that Section 10(a) did not apply. Although the Board remanded the case for further findings, a panel of the Fifth Circuit accepted an appeal of the Board's decision, holding that application of Section 10(c) is limited to facts such as intermittent employment or where the record does not contain the necessary evidence for a calculation under Section 10(a) or (b). However, the court agreed in *Roundtree*, 698 F.2d at 749, 15 BRBS at 99(CRT), that Section 10(a) was not available

where claimant was employed in the year preceding the injury as a self-employed contractor. As an independent contractor, claimant had no employer as mandated by subsection (a). While the court's opinion in *Roundtree* supports a conclusion that Section 10(a) must apply if its requirements are met, it was subsequently vacated on procedural grounds, with the court holding en banc that the panel erred in accepting jurisdiction as the Board's decision remanding the case was not a final disposition. Thus, the panel decision in *Roundtree* is not binding precedent.

However, other courts have since indicated that Section 10(a) must be applied where claimant meets the "substantially the whole of the year" requirement and the evidence supports application of its formula. See *Price*, 382 F.3d 878, 38 BRBS 51(CRT) (presumption that 910(a) or (b) applies rather than 910(c)); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996) (subsections (a) and (b) provide the basic formulae for determining average annual income; only if these provisions cannot "reasonably and fairly be applied" is subsection (c) applicable).

Sections 10(a) and (b) cannot reasonably and fairly be applied where claimant's employment is "casual, irregular, seasonal, intermittent, and discontinuous." *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932). See cases cited in Section 10(c), *infra*. Thus, Section 10(a) is used only where the employment in which claimant was injured was of a permanent or steady nature. Where claimant did not work for eight weeks of the preceding year because no work was available for his employer during that time, the employment was not considered permanent or steady in nature. *Lozupone*, 12 BRBS 148.

A Section 10(a) calculation arrives at a theoretical approximation of what claimant would have earned working a full year based on his actual daily earnings. The Board has therefore approved a calculation based on claimant's actual wages in the year prior to injury even though claimant earned considerably more in that year than in past years. *Mulcare v. E. C. Ernst, Inc.*, 18 BRBS 158 (1986). Because Section 10(a) aims at a theoretical approximation of what claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness, etc., is not deducted from the computation. *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133 (1990); *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290 (1978).

To calculate average weekly wage under Section 10(a), claimant's actual earnings for the 52 weeks prior to the injury are divided by the number of days he actually worked during that period to determine his average daily wage. See *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000); *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The average daily wage is then multiplied by 300 for a six-day worker or 260 for a five-day worker to result in claimant's average annual earnings, and this number is then divided by 52 pursuant to Section 10(d) to reach the average weekly wage. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Hardrick v. Campbell Indus., Inc.*, 12 BRBS 265 (1980); *LeBatard v. Ingalls Shipbuilding Div., Litton*

*Sys., Inc.*, 10 BRBS 317 (1979); *O'Connor*, 8 BRBS 290; *Tangorra v. Nat'l Steel & Shipbuilding Co.*, 6 BRBS 427 (1977), *aff'd in part and vacated in part on other grounds mem. sub nom. Nat'l Steel & Shipbuilding Co. v. Director, OWCP*, 607 F.2d 1009 (9th Cir. 1979). Where this formula is not applied, the administrative law judge has not made a Section 10(a) calculation; however, his result may be affirmable under Section 10(c). See *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

The Board affirmed an administrative law judge's finding that claimant was a six-day-a-week worker in spite of employer's stipulated classification of claimant's position as a five-day-a-week position where claimant worked six-day weeks in 71 percent of the 52 weeks preceding injury. *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986).

### Digests

Affirming an administrative law judge's application of Section 10(c), the Board noted that employer's reliance on *Roundtree*, 698 F.2d 743, 15 BRBS 94(CRT), for the proposition that the use of Section 10(a) is mandatory if the "substantially the whole of the year" test is met, was misplaced since this decision is not binding precedent as it was vacated by the court sitting en banc on procedural grounds. *Roundtree*, 723 F.2d 339, 16 BRBS 34(CRT). The Board held that where claimant receives wage increases in the year prior to injury, Section 10(c) is appropriate as Section 10(a) cannot be fairly and reasonably applied. *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

In vacating the administrative law judge's finding that Section 10(a) was not applicable in determining claimant's average weekly wage, the Board held that, since average weekly wage includes vacation pay in lieu of vacation, six weeks of vacation time should have been included as time actually worked during the year preceding claimant's injury, giving him a total of 34.5 weeks. Inasmuch as employer admitted that claimant's work as a station attendant was full-time and steady, the Board remanded the case for the administrative law judge to calculate the claimant's average weekly wage pursuant to Section 10(a). Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, so time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133 (1990).

The Fifth Circuit held that the administrative law judge properly applied Section 10(a) in determining claimant's average weekly wage, rejecting employer's suggestion that Section 10(c) should apply to account for a post-injury economic decline in claimant's field of employment. First, the court found nothing in the statute to suggest that either subsection (a) or (b) may be deemed inapplicable solely on the basis of economic fluctuations subsequent to the time of injury or that such an occurrence should inure to the benefit of employer. Second, in the instant case, the court rejected the application of Section 10(c)

as claimant's work was not intermittent or discontinuous and no harsh results will follow from determining average weekly wage pursuant to Section 10(a). *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

The Board affirmed the administrative law judge's calculation of claimant's average weekly wage under Section 10(a) as claimant worked substantially the whole of the year preceding the injury and as the administrative law judge rationally calculated the number of days claimant worked by dividing the number of hours worked by eight. *Diosdado v. Newport Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

The Board affirmed the administrative law judge's determination that the calculation of claimant's average weekly wage should be made pursuant to Section 10(c) of the Act, not Section 10(a), as there was no evidence regarding the wages paid or the amount of time worked and thus the record did not establish that claimant worked in the same employment for "substantially the whole of the year" prior to her injury. *Story v. Navy Exch. Serv. Ctr.*, 30 BRBS 225 (1997).

The Fourth Circuit held that the administrative law judge erred in calculating claimant's average weekly wage under Section 10(a) by dividing claimant's yearly earnings in 1991 by the number of weeks worked during the year. The court held that the administrative law judge must first calculate claimant's average daily wage by determining the total income claimant earned in the 52 weeks preceding the work injury, divide that sum by the actual number of days claimant worked, multiply by 260 or 300 as appropriate, and divide by 52. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

The Ninth Circuit held that an administrative law judge must apply Section 10(a) to calculate claimant's average weekly wage where claimant worked more than 75 percent of the workdays of the year prior to injury. Under these circumstances, Section 10(c) may not be invoked merely because a calculation under Section 10(a) would inflate claimant's actual earnings. Moreover, the court noted that Section 10(a) is not precluded in cases where the claimant worked fewer than 75 percent of the workdays if other relevant factors are present. The court remanded the case to the administrative law judge to calculate the award under Section 10(a) since claimant worked 82 percent of the workdays in the year prior to injury. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998).

The Board affirmed the administrative law judge's finding that Section 10(a), rather than 10(c) applies, as the Ninth Circuit in *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT), held that Section 10(a) must be applied to calculate average weekly wage when the claimant worked 75 percent or more of the workdays in the year preceding the injury, if the number of days worked is known. In this case, claimant worked over 75 percent of available work days and the administrative law judge found that his work was not intermittent. Under Section 10(a), however, the administrative law judge must first determine an average daily

wage, multiply that figure by 260 to obtain claimant's annual earning capacity, then divided by 52 under Section 10(d); the administrative law judge merely divided claimant's earnings by 52. As the proper computation could be made based on the administrative law judge's findings, the decision was modified to reflect the correct average weekly wage. *Price v. Stevedoring Services of Am.*, 36 BRBS 56 (2002), *aff'd in part and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9<sup>th</sup> Cir. 2004), *and aff'd and rev'd on other grounds*, No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9<sup>th</sup> Cir. May 11, 2004), *cert. denied*, 544 U.S. 960 (2005).

The Ninth Circuit reaffirmed its bright-line rule of *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT), that Section 10(a) applies when claimant works more than 75 percent of the workdays of the measuring year. Claimant worked 75.77 percent of available days, so the court held the administrative law judge properly applied Section 10(a). The court rejected employer's contention that claimant's employment was intermittent and casual such that Section 10(c) should apply merely because claimant did not work the same number of days every week. The court held that a determination of whether claimant's employment is casual, irregular, seasonal, intermittent and discontinuous for purposes of applying Section 10(c) must be based on the nature of the employment and of the industry itself, not merely on the prior work history of a particular claimant. *Stevedoring Services of Am. v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9<sup>th</sup> Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

The Board rejected employer's contention that the administrative law judge erred in calculating claimant's average weekly wage using Section 10(a) of the Act instead of Section 10(c). Under Section 10(a), claimant's average weekly wage computed to approximately \$12,000 more than his actual annual earnings. This case arose in the Ninth Circuit, and that court held in *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT), that Section 10(a) is presumed to apply if a claimant works 75 percent or more of the workdays of the measuring year. Thus, Section 10(a) applies to this case where claimant worked 77.4 percent of the workdays. Overcompensation alone is an insufficient basis for rejecting the use of Section 10(a), and employer raised no other basis for finding Section 10(a) inapplicable. *Castro v. Gen. Constr. Co.*, 37 BRBS 65 (2003), *aff'd*, 401 F.3d 963, 39 BRBS 13(CRT) (9<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006).

The Ninth Circuit rejected employer's arguments and reaffirmed its decision in *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT). The court stated that as claimant worked 77.4 percent of the year his case fit squarely into the rule established by *Matulic* and required that Section 10(a) of the Act be applied to determine claimant's average weekly wage. Consequently, the Ninth Circuit affirmed the Board's decision. *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006).

The Board affirmed the administrative law judge's calculation of claimant's average weekly wage under Section 10(a) based on claimant's having worked 34.8 weeks in the year prior to injury, rejecting employer's argument that he should have used lower earnings

in his computation. While the administrative law judge stated at the hearing that evidence indicated that claimant earned \$9,648 during the year prior to the injury, he requested that counsel independently confirm this figure. In his decision, the administrative law judge rationally applied the figures claimant submitted into evidence, which showed that claimant earned \$10,701 for 174 days of work during the 52-week period prior to his injury, in calculating claimant's average daily wage. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

On reconsideration of a decision in which the Board added an additional 11 days to the 256 days claimant actually worked by dividing his vacation time by 8, the Board held that it erred in dividing the total number of vacation hours for which claimant was paid in order to derive additional days for purposes of calculating claimant's average daily wage under Section 10(a). The Board stated that the language of Section 10(a), as well as case law interpreting it, supports a conclusion that only the actual days worked should be used to calculate claimant's average daily wage. The Board distinguished *Duncan*, 24 BRBS 133, which held that vacation time used in lieu of days worked is included in the computation, stating that *Duncan* does not mandate that every eight hours of vacation pay received should be fashioned into a "day" for purposes of determining claimant's average daily wage. The Board also noted that dividing the number of hours worked by 8 had the effect in this case of diluting claimant's earnings and resulted in claimant's having "worked" more than the 260 days maximum for a 5-day per week worker. The Board thus modified its decision to affirm the administrative law judge's calculation under Section 10(a) utilizing only the actual number of days claimant worked. *Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 89 (1999) (decision on recon.), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000).

The Fifth Circuit affirmed the average daily wage determination based on the actual days worked. The court held that the administrative law judge rationally treated as days worked four vacation days claimant actually took. Moreover, the administrative law judge rationally determined that eleven vacation days claimant "sold back" to employer and did not actually take were not days worked for purposes of calculating claimant's average daily wage. The money received for the eleven unused vacation days was correctly treated as additional compensation and added to claimant's annual wage under these circumstances. *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000).

The Ninth Circuit affirmed the calculation of claimant's average weekly wage pursuant to Section 10(a). The administrative law judge properly included days for which claimant was paid but did not work. The court followed *Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000), in concluding that a day should be included as a "day employed" under 10(a) if claimant is paid for that day even if he did not actually work it. Thus, unworked paid holidays are "days so employed" under Section 10(a). *Trachsel v. Rogers Terminal & Shipping Corp.*, 597 F.3d 947, 43 BRBS 73(CRT) (9th Cir. 2010).



As the record contained only partial information about claimant's work history over the year immediately preceding his work injury, addressing only the last 39 weeks, with no indication of whether he worked five days or six days per week, the First Circuit held that administrative law judge properly concluded that Section 10(a) could not be applied to calculate claimant's average weekly wage. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1<sup>st</sup> Cir. 2004).

The Fifth Circuit affirmed the use of Section 10(a) to calculate claimant's average weekly wage where the claimant had worked 91 percent of the available workdays as this is "substantially the whole of the year." The court rejected the argument that use of Section 10(a) could result in overcompensation, stating that Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn if he had worked every available work day in the year. *Gulf Best Elec., Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5<sup>th</sup> Cir. 2004).

Section 10(a) requires evidence from which the administrative law judge can determine the average daily wage claimant earned during the preceding twelve months. Where claimant's W-2 statements and payroll records from his employers during the year prior to his injury failed to show the actual number of days he worked, the Board held that as the record lacked the necessary evidence, Section 10(a) cannot be applied. Moreover, Section 10(a) applies when a claimant worked substantially the whole of the year in the "same" employment, whether for the named employer or for other employers. The Board affirmed the administrative law judge's finding that claimant's employment in Iraq was not comparable to his employment in the United States. The administrative law judge rationally inferred, in the absence of contrary evidence, that claimant's job title of labor foreman denoted managerial responsibilities which claimant did not have in his stateside positions as a laborer and maintenance worker. Moreover, the administrative law judge rationally found that claimant's work in a combat zone is inherently different than his work in the United States by virtue of the dangerous location and the fact that his job included safety and security requirements that would not have been required of him in his work in the United States. The administrative law judge acted within his discretion in considering the extrinsic circumstances of claimant's employment when discussing the comparability of claimant's overseas and stateside employment. The Board discussed *Mulcare*, 18 BRBS 158, and held it was distinguishable. *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006).

Although claimant worked substantially the whole of the year prior to his injury and testified he was a six-day worker, the Board nevertheless concluded that the administrative law judge erred in citing Section 10(a) in calculating claimant's average weekly wage. The administrative law judge did not find, and the record does not contain information necessary to find, the number of days claimant worked during the year preceding his injury. As such, a Section 10(a) calculation cannot be applied, and where a Section 10(a) calculation has not been made, the administrative law judge's calculation may be affirmed

under Section 10(c). Therefore, under Section 10(c), the Board affirmed the administrative law judge's rational reliance on the amounts reflected on two pay stubs showing that claimant earned approximately \$1,820 per week. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

## Section 10(b)

Section 10(b), like Section 10(a), applies to regular and continuous employment. If claimant's job was continuous, then subsection (b), rather than subsection (a), will apply if the employee was not employed for substantially the whole of the year in such employment. In such cases, claimant's average annual earnings are based on the average daily wage "which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed." 33 U.S.C. §910(b). The average daily wage is then multiplied by 260 for a five-day worker or 300 for a six-day worker, as in Section 10(a).

Thus, for example, subsection (b) may apply if a worker had been recently hired after having been unemployed, or after having been in a lower paying position. *Duncanson-Harrelson Co. v. Director, OWCP [Freer]*, 686 F.2d 1336 (9<sup>th</sup> Cir. 1982), *vacated and remanded*, 462 U.S. 1101 (1983), *decision on remand*, 713 F.2d 462 (9<sup>th</sup> Cir. 1983).

Section 10(b) looks to the wages of another worker in the same employment situation and directs that the average weekly wage should be based on the wages of an employee of the same class who worked substantially the whole year preceding the injury in the same or similar employment in the same or a neighboring place. *McKee v. D. E. Foster Co.*, 14 BRBS 513 (1981); *Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978). Thus, it is necessary that the fact-finder have evidence of the substitute employee's wages. *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981); *Eckstein v. Gen. Dynamics Corp.*, 11 BRBS 781 (1980); *McDonough v. Gen. Dynamics Corp.*, 8 BRBS 303 (1978).

In *Roundtree v. Newport Shipbuilding & Repair, Inc.*, 13 BRBS 862, 868 (1981), *rev'd*, 698 F.2d 743, 15 BRBS 94(CRT) (5<sup>th</sup> Cir. 1983), *vacated on reh'g en banc*, 723 F.2d 399, 16 BRBS 34(CRT) (1984), *cert. denied*, 469 U.S. 818 (1984), claimant was injured on the first day of work for employer; prior to that time he had been self-employed as a welder. Employer introduced the wages of three employees working for it in the same classification as claimant. The Board held that the administrative law judge erred in rejecting employer's evidence on the basis that the earnings of three employees out of 100 were not adequate, stating that Section 10(b) requires the earnings of one substitute employee and a statistical sampling of employees is not required. However, the Board held that employer's introduction of the evidence required by Section 10(b) did not mandate the use of that subsection, stating that application of subsection (b) would not reasonably or accurately represent claimant's wage-earning capacity as an independent contractor in the year prior to injury. The Board also affirmed the finding that Section 10(b) could not apply due to a recent wage increase. The Fifth Circuit reversed, holding that application of Section 10(b) was fair and reasonable and therefore mandatory. However, this decision was vacated by the Fifth Circuit en banc due to lack of jurisdiction, as the Board had remanded the case and its decision was therefore not final.

Application of Section 10(b) does not require claimant to be available for work in the open labor market during the part of the year preceding the injury during which he was not employed. The Board therefore rejected the argument that claimant's time in prison precludes Section 10(b). *Daugherty v. Los Angeles Container Terminals, Inc.*, 8 BRBS 363 (1978).

The Board rejected the argument that an award of death benefits should be based on the earnings of like employees at the time of death, as average weekly wage is determined at the time of injury. *Buck v. Gen. Dynamics Corp., Elec. Boat Div.*, 22 BRBS 111 (1989); *Bell v. Johns Manville Sales Corp.*, 16 BRBS 243 (1984).

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The administrative law judge properly concluded that Section 10(b) should not be used to compute claimant's pre-injury average weekly wage in view of claimant's frequent job changes, his tendency to get fired, his previous convictions, his brief period of employment with employer, his lack of seniority, his routine lay-off shortly after the injury, and the misrepresentations which he made on his employment application. *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988).

Where decedent had been receiving benefits since 1975 and died in 1986, the Board rejected claimant's argument that her survivor's benefits should be based on the average weekly wage of a like employee at the time of death under Section 10(b). While the Board recognized that use of decedent's earnings when injured resulted in significantly lower compensation than claimant and decedent received prior to his death, claimant's policy arguments could not overcome the language of Section 10 stating that average weekly wage is determined at the time of injury. The Board also noted it rejected a similar Section 10(b) argument in *Bell*, 16 BRBS 243. *Buck v. Gen. Dynamics Corp., Elec. Boat Div.*, 22 BRBS 111 (1989).

The Fifth Circuit found that although there was some evidence that claimant's employment at the time of injury would have led to permanent employment, the administrative law judge's finding that claimant's employment was intermittent and discontinuous was supported by substantial evidence, and accordingly the administrative law judge did not abuse his discretion in determining that claimant's average weekly wage should be calculated under Section 10(c) instead of Section 10(b). Moreover, claimant presented no evidence of the wages of co-workers, which is necessary for an average weekly wage calculation under Section 10(b). *Hall v. Consol. Emp't Sys., Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998).

The Board held that the administrative law judge erred in purporting to rely on Section 10(b), as the record contained no evidence of the wages of an employee of the same class who worked substantially the whole year in the same or similar employment. The Board thus reviewed the administrative law judge's findings pursuant to Section 10(c). *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006).

Decedent's average weekly wage was calculated pursuant to Section 10(c) based solely on the wages he earned during the thirteen weeks he worked for employer. The court affirmed inasmuch as there was substantial evidence to support the administrative law judge's determination that these wages represented his wage-earning capacity at the time of injury. Moreover, the court held that a claimant may choose to establish his average weekly wage pursuant to Section 10(c) even if he could have chosen to proceed under Section 10(b). As no evidence relevant to Section 10(b) was submitted, that section is inapplicable. *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9<sup>th</sup> Cir. 2006).

## Section 10(c)

Section 10(c) is a general, catch-all provision applicable to cases where subsections (a) and (b) cannot “reasonably and fairly” be applied in calculating average annual earnings. Under this subsection,

average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c).

Section 10(c) has been applied in the following situations:

(1) Where the claimant’s employment is seasonal, part-time, intermittent, or discontinuous. *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980); *Strand v. Hansen Seaway Serv., Ltd.*, 614 F.2d 572, 11 BRBS 732 (7<sup>th</sup> Cir. 1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979), *aff’g Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *decision after remand*, 8 BRBS 411 (1978) and *Jesse v. Tri-State Terminals, Inc.*, 7 BRBS 156 (1977); *Mattera v. M/V Mary Antoinette, Pac. King, Inc.*, 20 BRBS 43 (1987); *Taylor v. Tri-State Terminals Inc.*, 9 BRBS 531 (1978); *Kerch v. Air Am., Inc.*, 8 BRBS 490 (1978), *aff’d in part and rev’d in part sub nom. Air Am., Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979). A determination of whether claimant’s employment is casual, irregular, seasonal, intermittent and discontinuous for purposes of applying Section 10(c) must be based on the nature of the employment and of the industry itself, not merely on the prior work history of a particular claimant. *Stevedoring Services of Am. v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9<sup>th</sup> Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

(2) Where there is insufficient evidence in the record to make a determination of average daily wage under either subsection (a) or (b). *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98 (1997), *aff’d*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Todd Shipyards, Inc. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); *Proffitt v. Serv. Employers Int’l, Inc.*, 40 BRBS 41 (2006); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff’d on recon.*, 25 BRBS 88 (1991); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981); *McDonough v. Gen. Dynamics Corp.*, 8 BRBS 303 (1978); *Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978); *Duzant v. Gen. Dynamics Corp.*, 8 BRBS 670 (1978). Where the administrative law judge purports to use subsection (a) or (b) but does

not apply the statutory formula, the result may be affirmable under Section 10(c). *Proffitt*, 40 BRBS 41; *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

(3) Whenever Sections 10(a) or 10(b) cannot reasonably and fairly be applied and therefore would not reflect claimant's earning capacity at the time of the injury, *see Sobolewski v. Gen. Dynamics Corp.*, 5 BRBS 474 (1977), *aff'd on other grounds sub nom. Gen. Dynamics Corp. v. Benefits Review Board*, 565 F.2d 208, 7 BRBS 831 (2d Cir. 1977) (Section 10(a) inapplicable due to overtime and a significant pay raise), or would unfairly inflate the employee's wage base. *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) (use of Section 10(a) would inflate claimant's earnings by allowing benefits for 33 percent more days than decedent actually worked). *See, e.g., Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985); *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982) (Section 10(c) employed where claimant voluntarily rejected work opportunities).

(4) Section 10(c) may also be employed in occupational disease cases where the work-related disability predates the awareness of the relationship between the disability and employment under Section 10(i), *infra*. In such circumstances, claimant may have no earnings at the time of awareness and thus the calculation of average weekly wage should reflect the earnings prior to the onset of disability rather than the subsequent earnings at the later time of awareness. Section 10(c) may apply based on the "other employment" language of the statute. *LaFaille v. Gen. Dynamics Corp.*, 18 BRBS 88 (1986), *rev'd sub nom. LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989). *See* H.R. Rep. No. 1027, 98th Cong., 2d Sess. 30 (1984). In holding that average weekly wage was properly determined at the date of awareness in this case, the Second Circuit initially indicated that use of Section 10(c) to calculate average weekly wage at an earlier date of disability may be appropriate in some cases but was not necessary here as claimant returned to work with higher earnings at the date of awareness and thus use of Section 10(i) did not produce an unjust result, although later in discussing the comparison with claimant's post-injury earnings, the court acknowledged that use of an average weekly wage in the same time frame would not adequately compensate claimant. *See Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988) (where claimant retired due to his occupational disease, the Board held that since claimant's disability preceded his retirement, his average weekly wage must be determined under Section 10(c) rather than Section 10(d)(2), which applies in cases involving "post-retirement" injuries).

The administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *Hicks v. Pac. Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981); *Anderson v. Todd Shipyards, Inc.*, 13 BRBS 593 (1981); *Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 509 (1979); *Bonner v. Nat'l Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in part*, 600 F.2d 1288 (9th Cir. 1979).

The objective of Section 10(c) is to reach a fair and reasonable approximation of claimant's earning capacity at the time of the injury. *Barber*, 3 BRBS 244. A definition of "earning capacity" for purposes of this subsection is the "ability, willingness, and opportunity to work," or "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." *Jackson v. Potomac Temporaries Inc.*, 12 BRBS 410, 413 (1980); *Tri-State Terminals*, 596 F.2d at 757, 10 BRBS at 706-707; *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74 (9th Cir. 1932). In keeping with this definition of earning capacity, the Board has held that for claimant to base his average weekly wage on other than his previous earnings or those of employees similarly situated, claimant must show that he has the ability, willingness, and opportunity to do the work for the wages which he is claiming. *Jackson*, 12 BRBS at 416. In *Jackson*, claimant was engaged in temporary part-time work when injured but argued she was capable of full-time work in her prior occupation as a bookkeeper and thus her earning capacity under Section 10(c) should be based on such full-time earnings. The Board affirmed the administrative law judge's finding that claimant did not demonstrate the ability or opportunity to do this work.

Section 10(c) requires a determination of claimant's annual earning capacity. This figure is then divided by 52 under Section 10(d). However, where the administrative law judge divides total earnings by a lower number of weeks, this result may be affirmed where it achieves the same result as extrapolating wages earned in fewer than 52 weeks over an entire year and then dividing by 52 (for example, dividing by 48 to achieve an average of actual earnings, then multiplying by 52 to obtain annual earning capacity and then dividing by 52 under Section 10(d)). 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) (5<sup>th</sup> Cir. 2000); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5<sup>th</sup> Cir. 2000); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990).

Section 10(c) determinations will be affirmed if they reflect a reasonable representation of earning capacity and claimant has failed to establish the basis for a higher award. *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

Unlike Sections 10(a) and (b), subsection (c) contains no requirement that the previous earnings considered be within the year immediately preceding the injury. *Anderson*, 13 BRBS 593. Rather, an administrative law judge may compute average annual earnings under subsection (c) based on claimant's earning pattern over a period of years prior to the injury. *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283 (1981). However, when he employs this method, the administrative law judge must take into account the earnings of all the years within that period under *Anderson*. *Anderson* modified contrary language in *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58 (1976). The Fifth Circuit has approved the Board's approach in *Anderson*. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5<sup>th</sup> Cir. 1991). *Accord New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5<sup>th</sup> Cir. 1997).

However, the Board held that the administrative law judge erred in using a mathematical average of the claimant's salaries over the previous five years where this computation did not account for wage increases prior to the injury and remanded for a determination of the wage rate at the time of injury multiplied by a variable which represented the number of hours normally available to the claimant. *Lozupone v. Stephano Lozupone & Son*, 14 BRBS 462 (1981).

Actual earnings are not necessarily controlling. *Bonner*, 600 F.2d at 1292. Section 10(c) computations may take into account time lost in the year prior to the injury due to strikes. *Hawthorne v. Director, OWCP*, 844 F.2d 318, 21 BRBS 22(CRT) (6th Cir. 1988); *Duncanson-Harrelson*, 686 F.2d 1336; *LeBatard v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 10 BRBS 317 (1979); *Duzant*, 8 BRBS 670; *Toraiff v. Triple A Mach. Shop*, 1 BRBS 465 (1975). Similarly, the Board has allowed an administrative law judge's computation to make up for time lost due to a layoff. *Holmes*, 8 BRBS 455. Note that in these cases the use of an actual earnings figure would not fully reflect the wage-earning capacity of a claimant who, although he had lost time and earnings in the year prior to the injury, was again working. By working, he showed the willingness, ability, and opportunity necessary to the definition of wage-earning capacity.

The Board has also noted that actual earnings in the year prior to claimant's injury may not reasonably represent claimant's wage-earning capacity where there has been a depression in earnings in the year prior to the injury due to the unavailability of work. *See Cummins*, 12 BRBS 283; *Lozupone*, 14 BRBS 462. However, the Board has affirmed computations that make up for such a depression only when it is clear that work was again available after the injury. *See Pruner v. Duncanson-Harrelson Co.*, 11 BRBS 201 (1979) (Board affirmed administrative law judge's determination based on claimant's actual annual wage during all but his last year of employment with employer, the collective bargaining agreement setting forth the hourly rate claimant could continue to expect were it not for his injury, and the continued availability of employment in claimant's line of work as a pilebutt).

Where claimant had a depression in earnings due to a period of work-related temporary total disability in the year prior to his injury, the Board affirmed a computation which included the wages claimant would have earned but for the injury. *Strand v. Hansen Seaway Serv., Ltd.*, 9 BRBS 847 (1979), *aff'd in part and rev'd in part*, 614 F.2d 572, 11 BRBS 732 (7<sup>th</sup> Cir. 1980). In *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984), the Board similarly held that the administrative law judge erred in disregarding the wages claimant would have earned but for a non work-related auto accident. The Board cautioned, however, that in computing Section 10(c) earning capacity, the administrative law judge must take into account any permanent reduction in earnings caused by the non work-related accident, since it is unfair to hold employer responsible for any reduced earning capacity resulting from the non work-related injury. 16 BRBS at 186. *See Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991)



(administrative law judge appropriately accounted for 7 weeks lost due to death of claimant's mother as it is similar to time lost due to strike or illness).

Actual earnings may not reasonably represent claimant's wage-earning capacity in a variety of other factual situations. Where claimant returned to work part-time after a stroke and then sustained a second injury resulting in permanent total disability, the D.C. Circuit held that his average weekly wage for the second injury was properly computed at that time, and his actual earnings in the year prior to injury should not be used where he was working an increasing number of hours at the time of the injury. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980). Under those circumstances, the court held that claimant's earning capacity was best determined based on the amount he worked during the two-or four-week period immediately preceding the injury. The court cautioned it was not holding that an administrative law judge must reach this result whenever there is a prospect of increased earnings in the future, as an employer is not required to pay a claimant more than his current earnings on the speculative possibility of higher future earnings if the injury had not occurred, but held that this case did not involve speculation. Thus, where an employee demonstrates a progressive increase (or decrease) in earnings in the year immediately preceding an injury, compensation should not be based on earnings received as much as 12 months before the injury but should be based on earnings more immediately preceding the injury.

Likewise, actual wages in the year prior to injury may not be representative where claimant started a new job at higher wages shortly before her injury. *Bonner*, 600 F.2d 1288. In *Bonner*, claimant was injured 13 weeks after starting a job at substantially higher wages. The court held that the administrative law judge rationally excluded prior earnings in lower paying jobs in the year prior to injury and affirmed his calculation based only on wages earned in her job at the time of injury.

A Section 10(c) computation, therefore, should reflect: a pay raise received shortly before the injury, *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981); *Eckstein v. Gen. Dynamics Corp.*, 11 BRBS 781 (1980); *Feagin v. Gen. Dynamics Corp.*, 10 BRBS 664 (1979); *Sobolewski v. Gen. Dynamics Corp.*, 5 BRBS 474 (1977), *aff'd on other grounds sub nom. Gen. Dynamics Corp. v. Benefits Review Board*, 565 F.2d 208, 7 BRBS 831 (2d Cir. 1977); a promotion received shortly before the injury, *see Feagin*, 10 BRBS 664; and extensive absence due to a non-work-related illness, *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). Conversely, the Board has held that actual wages should be used where a claimant shows his unwillingness to work at higher wage levels by rejecting work opportunities and, therefore, has earnings lower than his earning capacity. *Conatser v. Pittsburgh Testing Lab.*, 9 BRBS 541 (1978).

In cases of self-employment, the Board has held Section 10(c) applicable and reversed an administrative law judge's determination based on claimant's gross earnings in self-employment, holding that the more appropriate calculation is based on the cost of hiring another welder of equivalent skill and experience to perform the same work but excluding profits or goodwill. *Roundtree v. Newport Shipbuilding & Repair, Inc.*, 13 BRBS 62 (1987), *rev'd on other grounds*, 698 F.2d 743, 15 BRBS 94(CRT) (5<sup>th</sup> Cir. 1983), *vacated on reh'g en banc*, 723 F.2d 399, 16 BRBS 34(CRT) (5<sup>th</sup> Cir. 1984), *cert. denied*, 469 U.S. 818 (1984). In *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991), the Board affirmed a calculation based on claimant's net earnings in self-employment, stating that *Roundtree* did not hold that the cost of hiring a similar employee was the sole method of calculating average annual earnings in self-employment and any reasonable method may be used.

In computing average weekly wage under Section 10(c), overtime should be included, if it is a regular and normal part of claimant's employment. *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989); *Bury v. Joseph Smith & Sons*, 13 BRBS 694 (1981); *Ward v. Gen. Dynamics Corp.*, 9 BRBS 569 (1978); *Gray v. Gen. Dynamics Corp.*, 5 BRBS 279 (1976), *aff'd on other grounds sub nom. Gen. Dynamics Corp. v. Benefits Review Board*, 565 F.2d 208, 7 BRBS 831 (2d Cir. 1977). *But see McDonough v. Gen. Dynamics Corp.*, 8 BRBS 303 (1978) (overtime which could have been earned in year following injury not included).

An additional way to compute claimant's average weekly wage under Section 10(c) is to multiply claimant's wage rate by a time variable. The Board has approved this use of claimant's contract hourly wage. *Brown*, 23 BRBS 110; *Eckstein*, 11 BRBS 781; *Orkney v. Gen. Dynamics Corp.*, 8 BRBS 543 (1978). However, if this method is used, the time variable must be one which reasonably represents the amount of work which normally would have been available to the claimant. *Cummins*, 12 BRBS 283; *Matthews v. Mid-State Stevedoring Corp.*, 11 BRBS 139 (1979).

While post-injury events are generally not relevant, *see, e.g., Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1987), consideration of circumstances existing after the date of injury is appropriate where previous earnings do not realistically reflect wage-earning potential. *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980) (in remanding for consideration of whether claimant's employment as a painter was intermittent, court stated that availability of work for a painter with claimant's seniority after the date of injury should also be considered). *But see Bury v. Joseph Smith & Sons*, 13 BRBS 694, 701 (1981) (administrative law judge erred in including earnings past the date of injury in the computation). The Board has allowed the consideration of probable future earnings in limited circumstances such as where claimant was involved in seasonal work and there was evidence of opportunities for increased work in the remaining part of the year when the injury occurred. *Tri-State Terminals Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182, 187 (1984). *Jesse*

involved the claims of two longshoremen, Barber and Jesse, who worked seasonal jobs in a port. The year following their injuries was a boom year for longshoremen at the port, and their former co-workers earned approximately three times more in the year after the injury than in the prior year. The Board held that both claimants were entitled to compensation based on this increase in earnings because they would have been able to earn the greater amount had they not been injured. *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *decision after remand* 8 BRBS 411 (1978); *Jesse v. Tri-State Terminals, Inc.*, 7 BRBS 156 (1977). The Seventh Circuit affirmed the Board, stating it would be unjust “to compute loss of earning power on facts which do not realistically reflect it.” *Jesse*, 596 F.2d at 758, 10 BRBS at 707. The court found that the Board had correctly interpreted Section 10(c) to construe the “earning capacity of the injured workman to mean the amount of earnings the claimant would have the potential and opportunity to earn absent injury.” *Id.*

The Board has further held that there is no authorization in the Act for reducing the compensation base because of criminal or other socially undesirable activities which may have affected the claimant’s earning history. *Daugherty v. Los Angeles Container Terminals Inc.*, 8 BRBS 363 (1978) (rejecting employer’s argument that Section 10(c) was not available due to claimant’s criminal activity and incarcerations in years prior to his employment, or that a calculation should include those years).

### Digests

The D.C. Circuit held that on the facts of the case there is no reason to depart from the general rule that post-injury events are not relevant to a determination of average weekly wage under Section 10(c). Section 10(c) is applicable because claimant had not worked substantially the whole of the year prior to her injury, and there were no employees of the same class, as claimant had just completed a training program. As she had recently graduated from a training program, it was appropriate to look only to her earnings as a bus driver. However, there were no exceptional circumstances here making use of the wages of a bus driver in the year after injury appropriate, and that argument was rejected. *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1987).

In calculating claimant’s average weekly wage under Section 10(c), the administrative law judge considered claimant’s history of pay raises during the year preceding injury, annualized claimant’s January to June earnings of that year and arrived at an average weekly rate. Given claimant’s history of pay raises, the Board held that the administrative law judge’s calculations reasonably approximated claimant’s earning capacity at the time of injury and affirmed this method of computation. *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev’d on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

The administrative law judge did not err in determining claimant's average weekly wage under Section 10(c) based solely on his part-time earnings as a longshoreman. The administrative law judge considered the 30 hours per week claimant worked without pay as a trainee-cook but found this work irrelevant to his average weekly wage determination and rationally rejected claimant's argument that he should be either credited with a wage of \$7/hour for this work or with the full-time earnings of a Class A longshoreman. As claimant voluntarily undertook this position long before he sustained the work-related injury, he chose to limit himself to part-time work, and he is entitled to recover only for the loss of earning capacity due to his work injury. *Geisler v. Cont'l Grain Co.*, 20 BRBS 35 (1987).

The Board affirmed the computation of average weekly wage under Section 10(c) where claimant worked intermittently whenever fishing boats arrived at the harbor. The administrative law judge rationally relied solely on claimant's income tax records over hearing testimony regarding the amount claimant earned. *Mattera v. M/V Mary Antoinette, Pac. King, Inc.*, 20 BRBS 43 (1987).

The Board rejected employer's contention that the evidence indicated claimant had neither the ability nor the willingness to consistently work fulltime as a shipscaler and thus her average weekly wage was less than the minimum wage at the time of injury, rather than her actual earnings as a shipscaler. The Board held the administrative law judge's use of actual earnings was supported by substantial evidence, as before her injury claimant had no difficulty performing her job as a shipscaler and the administrative law judge reasonably found that claimant's prior work history and wages could not reasonably measure her loss as a result of her injury since her job with employer was a fundamental change from her earlier jobs. The administrative law judge's use of claimant's actual wages at the time of injury to determine her annual earning capacity under Section 10(c) was affirmed. *Dangerfield v. Todd Pac. Shipyards Corp.*, 22 BRBS 104 (1989).

The Sixth Circuit remanded the case to the administrative law judge for recalculation of claimant's average weekly wage under Section 10(c), instructing him to base the calculation on only that portion of the relevant year during which claimant was not on strike. The court noted that Section 10(c) requires that claimants be "allowed to offer evidence as to what they earned or would have earned but for periods of involuntary non-work such as labor strikes." This issue had not been raised or addressed in the Board's disposition of the case. *Hawthorne v. Director, OWCP*, 844 F.2d 318, 21 BRBS 22(CRT) (6th Cir. 1988).

The administrative law judge properly calculated claimant's average weekly wage pursuant to Section 10(c), rather than Section 10(a), even though claimant had worked during most of the weeks of the one-year period preceding his injury. The Board reasoned that calculating claimant's average weekly wage under Section 10(a) in this case, where weather conditions had caused work to be available to claimant on only an intermittent

basis (and the amount of pay he received for a given day to thus be variable), would distort the projection of what claimant could have earned had he continued to work in the same job beyond the date of his injury, in that Section 10(a) presupposes that work would be available to the claimant each day. The administrative law judge's utilization of Section 10(c) was thus within his discretion. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987).

Where uncontradicted evidence established that claimant's occupational disease caused his pre-retirement work difficulties and subsequent reductions in income, the Board reversed the administrative law judge's finding that claimant experienced no compensable disability until after he retired in 1983, and held that claimant is entitled to permanent partial disability benefits from the 1978 date on which his difficulties began to affect his income. Since claimant's disability preceded his retirement, the average weekly wage on which his awards are to be based must be determined pursuant to Section 10(c), rather than Section 10(d)(2), which applies in cases involving "post-retirement" injuries. *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988).

Following remand, the Board affirmed the administrative law judge's average weekly wage calculation under Section 10(c) based on claimant's 1977 net earnings. The Board acknowledged that all sources of a claimant's income, including commissions, are to be included in average weekly wage, and held that the administrative law judge's determination was reasonable. The Board rejected employer's contention that since claimant was self-employed claimant's average weekly wage should be based on the cost of hiring another employee of equivalent skill and experience. *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991).

In computing claimant's pre-injury average weekly wage, the administrative law judge reasonably relied in part upon the actual earnings of another employee without seniority who worked for employer in 1982, because claimant was only employed by employer for a 2-month period. He then averaged these hypothetical 1982 earnings and the minimum wage rate in 1981 and 1982, when claimant received minimal earnings from part-time employment. The Board rejected employer's argument that the administrative law judge should have used only the minimum wage rate because of claimant's earnings history and short-term employment with employer. The administrative law judge rationally relied upon claimant's "good fortune" in obtaining a higher-paying job with employer in 1982 and thus reasonably found an average annual earning capacity which was higher than that previously earned. *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988).

The Board held that the administrative law judge followed the plain language of Section 10(c) by relying on claimant's hourly earnings at the time of injury and the number of hours worked the preceding year by two other employees of employer in the same occupation to determine claimant's average weekly wage. The Board held that the administrative law judge properly did not consider downturn in employer's business that occurred more than

a year after the work injury. *Hayes v. P & M Crane Co.*, 23 BRBS 389 (1990), *rev'd on other grounds*, 930 F.2d 424, 24 BRBS 116(CRT) (5<sup>th</sup> Cir. 1991).

The administrative law judge erred in calculating claimant's average weekly wage by dividing his earnings during the first 38 weeks of 1984 by 52 because he failed to account for periods when claimant would have been able to work absent his injury and his determination only accounted for claimant's earnings during the 38 weeks preceding his injury. Under Section 10(c), the administrative law judge should determine claimant's average annual earnings by arriving at a figure approximating an entire year of work and then dividing this figure by 52. *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990).

The administrative law judge properly applied Section 10(c) to determine claimant's average weekly wage in his second, part-time job as a real estate agent. Claimant's earnings from real estate sales were recorded upon the closing of a sale even though the work may have been done months earlier, and his commission income was recorded quarterly. Under these circumstances, the Board held it was appropriate for the administrative law judge to divide claimant's real estate commission income, paid in the third quarter by the 39 preceding weeks to determine his average weekly wage from sales. The Board noted that Section 10(a) cannot be fairly applied when there is no information from which an average daily wage can be calculated. *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990).

The administrative law judge properly utilized Section 10(c) to calculate claimant's average weekly wage. Although claimant worked for employer for 45 weeks in the year preceding her injury, the record does not contain evidence from which claimant's average daily wage can be calculated; therefore, Section 10(a) cannot be applied. Moreover, the administrative law judge acted within his broad discretion under Section 10(c) in including in claimant's average weekly wage the seven weeks during the year preceding her injury that claimant would have worked for employer but for her attendance at her mother's funeral and to her mother's affairs. The administrative law judge rationally concluded that the funeral is a non-recurring event similar to a personal illness or strike and that as such the time should be included in average weekly wage. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

The Fifth Circuit held that the administrative law judge properly used claimant's wages as a salesman, a job claimant held 2 years prior to his injury, to calculate claimant's average weekly wage pursuant to Section 10(c) where claimant's longshoring work in the 52 weeks prior to his injury was intermittent, and therefore his wages during that period did not reasonably and fairly represent his wage-earning capacity. The court approved the Board's decision in *Anderson*, 13 BRBS 593, which held that if average weekly wage is calculated by considering the claimant's earning history over a period of years prior to the injury, all

the years within the period must be included. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

The Eighth Circuit affirmed the administrative law judge's calculation of average weekly wage as reasonable where it took into consideration the number of days claimant averaged per year as a longshoreman from 1984-1989. The administrative law judge found claimant worked 43 days in the year of injury and determined his current daily wage. He then determined the average number of days claimant worked in the preceding 5 years and multiplied that by the daily wage to arrive at claimant's annual earning capacity. The court affirmed this calculation as reasonably representing claimant's annual earnings, citing *Gatlin* for the proposition that an administrative law judge may properly base a Section 10(c) finding on claimant's earning pattern over a period of years prior to the injury, where all of the years within the period are taken into account. *Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

The administrative law judge rationally calculated claimant's average weekly wage under Section 10(c) by dividing claimant's stipulated annual earnings by the number of weeks he worked. The fact that claimant's earnings reflected a pay scale no longer available after claimant's injury is not determinative as post-injury events are not generally relevant to average weekly wage determinations. *Simonds v. Pittman Mech. Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mech. Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

The Board affirmed the administrative law judge's use of Section 10(c) to calculate claimant's average weekly wage. Claimant worked a series of 13-week contracts and was forced to take a period of leave between contracts. As claimant's employment was not continuous and as the contract had to be renewed before each work period, the administrative law judge rationally found that Section 10(a) could not be applied. *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996), *rev'd on other grounds sub nom. Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997).

The Fifth Circuit held that the administrative law judge properly applied Section 10(a) in determining claimant's average weekly wage, rejecting employer's suggestion that Section 10(c) should apply to account for a post-injury economic decline in claimant's field of employment. First, the court found nothing in the statute to suggest that either subsection (a) or (b) may be deemed inapplicable solely on the basis of economic fluctuations subsequent to the time of injury or that such an occurrence should inure to the benefit of employer. Second, in the instant case, the court rejected the application of Section 10(c) as claimant's work was not intermittent or discontinuous and no harsh results will follow from determining average weekly wage pursuant to Section 10(a). *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

The Board held that, although this case arises under the D.C. Act and the 1984 Amendments to the Longshore Act are not applicable, the administrative law judge properly determined that claimants are entitled to death benefits based on decedent's average weekly wage as of the year before his death. Long-standing precedent provides that the "time of injury" in an occupational disease case is the date on which the disability becomes manifest; thus, the "time of injury" for determining average weekly wage is the date on which the occupational disease becomes manifest through a loss of wage-earning capacity. As decedent was diagnosed with chronic active hepatitis in 1977 but continued working until his occupational disease hospitalized him and then caused his death 1992, it is consistent with case law to base his average weekly wage on the wages earned in the year preceding his death, and this compensates claimants for the full extent of decedent's wage loss. *Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997).

In making a determination of average weekly wage under Section 10(c), the administrative law judge must determine the average weekly wage at the time of the injury. Accordingly, if the administrative law judge looks beyond the one year immediately preceding the injury, he must take into account the earnings of all the years within that period. The court held that the administrative law judge erred in using claimant's wages from 1988 when the injury occurred in 1992 given claimant's own testimony that his work in the three years immediately preceding the accident had been intermittent because work had not been available. *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997).

The Board affirmed the administrative law judge's finding that claimant's actual earnings in the year prior to his injury should be used to calculate his average weekly wage under Section 10(c) as he worked successfully in this job for a significant period. The Board rejected claimant's contention that he would have earned more during this period but for his back pain as the administrative law judge rationally concluded that claimant's testimony in this regard could not be credited. *Fox v. W. State, Inc.*, 31 BRBS 118 (1997).

The Board affirmed the administrative law judge's determination that the calculation of claimant's average weekly wage should be made pursuant to Section 10(c) of the Act, not Section 10(a), as claimant's payroll records failed to apportion the number of hours worked by claimant during a pay period to specific days, and thus, claimant could not establish that he was either a five-day or six-day per week worker. *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

The Ninth Circuit affirmed the Board's affirmance of the administrative law judge's calculation of claimant's average weekly wage under Section 10(c), and not Section 10(a), because the payroll summaries did not establish the number of days claimant worked per week. *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).



The Board affirmed the administrative law judge's calculation of claimant's average weekly wage under Section 10(c), which included income derived from a part-time job, as the administrative law judge's decision to credit claimant's testimony that he can no longer perform this part-time job was rational and supported by substantial evidence. *Wilson v. Norfolk & W. Ry. Co.*, 32 BRBS 57 (1998), *rev'd*, 7 F. App'x 156 (4<sup>th</sup> Cir. 2001).

The Fifth Circuit held that although there was some evidence that claimant's employment at the time of injury would have led to permanent employment, the administrative law judge's finding that claimant's employment was intermittent and discontinuous was supported by substantial evidence, and accordingly the administrative law judge did not abuse his discretion in determining that claimant's average weekly wage should be calculated under Section 10(c) instead of Section 10(b). The court concluded that the administrative law judge did not abuse his discretion when, in calculating claimant's average weekly wage under Section 10(c), he did not include the wages from the year of the injury because the administrative law judge determined that the wages at the time of injury did not adequately represent his earning capacity. The administrative law judge instead used the average of claimant's income in eight preceding years. The court cautioned that it will be an exceedingly rare circumstance wherein claimant's earnings at the time of injury are wholly disregarded as irrelevant, unhelpful or unreliable. *Hall v. Consol. Emp't Sys., Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5<sup>th</sup> Cir. 1998).

The Fourth Circuit rejected employer's argument that holiday, vacation and container royalty payments are "fringe benefits" because, due to the delay between when they are earned and when they are distributed, they are too speculative to calculate for purposes of determining a claimant's average weekly wage. The court stated that, contrary to employer's presumption, Section 10(a) need not be used to determine average weekly wage; rather, use of Section 10(c) would be appropriate due to the timing of the payments. In this case, the court stated that claimant's average weekly wage could be determined by adding his monetary wages to the holiday and vacation pay specified by the local contract and then using the most recent container royalty payment as an approximation of the money he would earn as a container royalty. If claimant did not earn the payments through work, but rather through disability credit, then they are not "wages" and they are not included in average weekly wage. Because the record does not demonstrate whether claimant earned his holiday, vacation and container royalty payments through work, the court remanded the case for further consideration of this issue. *Universal Mar. Serv. Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4<sup>th</sup> Cir. 1998), *aff'g and remanding* 31 BRBS 195 (1997).

The Board affirmed the administrative law judge's determination that the calculation of claimant's average weekly wage should be made pursuant to Section 10(c) of the Act, not Section 10(a), as there was no evidence regarding the wages paid or the amount of time worked and thus the record did not establish that claimant worked in the same employment for "substantially the whole of the year" prior to her injury. The case was remanded for

findings regarding whether tips were part of the money rate in the contract of hire. *Story v. Navy Exch. Serv. Ctr.*, 30 BRBS 225 (1997).

Following remand, the administrative law judge credited evidence that although tipping was not formally part of any written or oral contract of hire, it was understood to be part of claimant's earnings, condoned and tolerated by employer. Thus, the Board affirmed the administrative law judge's determination on remand that tips were part of the "money rate" by which claimant was compensated by employer, as it was rational and supported by substantial evidence. Moreover, the Board affirmed the administrative law judge's crediting of claimant's records of tips, and her ultimate calculation of claimant's average weekly wage pursuant to Section 10(c), as the result reached was reasonable and supported by substantial evidence. *Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999).

The Fifth Circuit affirmed the administrative law judge's use of Section 10(c) to calculate claimant's average weekly wage where the administrative law judge found that the 42 weeks claimant worked failed to fairly represent the whole of a year. The court found that the administrative law judge did not commit error in finding that Section 10(a) was inapplicable. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

The Fifth Circuit affirmed the average weekly wage calculation under Section 10(c) arrived at by using claimant's actual wages divided by 48 weeks, as claimant was off for four weeks because of an unrelated injury. The court noted that this divisor is in technical violation of Section 10(d), but stated that the same result obtains as if the administrative law judge had added four weeks' salary to the wages earned and divided by 52. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

In calculating claimant's average weekly wage, the administrative law judge, purportedly pursuant to Section 10(a), multiplied claimant's hourly rate at the time of his injury by his normal work week of 40 hours. The Board held that although this is not a Section 10(a) calculation, the administrative law judge's conclusion regarding claimant's average weekly wage reflects a reasonable method of calculation under Section 10(c). Consequently, the Board held that the administrative law judge's citation to Section 10(a) is harmless and affirmed his determination of claimant's average weekly wage under Section 10(c). *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989).

The First Circuit held that substantial evidence supported the administrative law judge's calculation of claimant's average weekly wage under Section 10(c) by taking the wages he earned during 39 weeks accounted for in a wage report and dividing that amount by 31 weeks (wage report indicated no earnings in 8 weeks). *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

The Fifth Circuit determined that the administrative law judge acted within his authority in estimating claimant's average weekly wage using Section 10(c) and the most recent year of employment, rejecting employer's assertion that an administrative law judge may not rely exclusively on the preceding year's wages. Thus, the Fifth Circuit affirmed the administrative law judge's computation based on claimant's wages in the year preceding his injury, even though that year consisted of only 27 working weeks, as substantial evidence supports the finding that these wages most accurately reflect claimant's earning capacity at the time of injury. Moreover, the court held that it was proper to account for time lost due to another work injury by dividing the annual earnings by 27 (which yields the same mathematical result as increasing the estimate of claimant's annual earning and dividing by 52). *Staffex 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) (5<sup>th</sup> Cir. 2000).

Although the Board held that the one-time payment of \$4,000 claimant received in 1996 in return for the termination of the GAI program constituted "wages" under Section 2(13), it reversed the administrative law judge's inclusion of that amount in the calculation of claimant's average weekly wage. The Board held that the one-time payment is more akin to a bonus and is a singular event which, if included, would inflate claimant's weekly wage beyond what he is reasonably expected to earn in future years. As claimant's injury had no effect on his ability to receive this amount in 1996 or on his inability to receive it in the future, it should not be included to compensate him for earnings lost due to his injury. In addition to guidance from the Fourth Circuit's decision in *Wright*, 155 F.3d 311, 33 BRBS 15(CRT), the Board considered this situation analogous to other Section 10(c) cases wherein an unusual event occurred during the year, making the claimant's actual earnings for that year not representative of his annual earning capacity. In those situations, the administrative law judge is not restricted to using actual earnings to approximate earning capacity. Accordingly, the Board modified the administrative law judge's decision to exclude the \$4,000 payment from claimant's average weekly wage. *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

The Ninth Circuit reaffirmed its bright line rule from *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT) (9<sup>th</sup> Cir. 1998), that Section 10(a) applies when claimant works more than 75 percent of the workdays of the measuring year. Claimant worked 75.77 percent of available days, so the court held the administrative law judge properly applied Section 10(a). The court rejected employer's contention that claimant's employment was intermittent and casual such that Section 10(c) should apply merely because claimant did not work the same number of days every week. The court held that a determination of whether claimant's employment is casual, irregular, seasonal, intermittent and discontinuous for purposes of applying Section 10(c) must be based on the nature of the employment and of the industry itself, not merely on the prior work history of a particular claimant. *Stevedoring Services of Am. v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9<sup>th</sup> Cir. 2004), *aff'g in part and rev'g on other grounds* 36 BRBS 56 (2002), *cert. denied*, 544 U.S. 960 (2005).

Decedent's average weekly wage was calculated pursuant to Section 10(c) based solely on the wages he earned during the thirteen weeks he worked for employer. The court affirmed as there was substantial evidence to support the administrative law judge's determination that these wages represented his wage-earning capacity at the time of injury. Moreover, the court held that a claimant may choose to establish his average weekly wage pursuant to Section 10(c) even if he could have chosen to proceed under Section 10(b). As no evidence relevant to Section 10(b) was submitted, that section is inapplicable. *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9<sup>th</sup> Cir. 2006).

Although Section 10(a) was not applicable, the Board reviewed the comparability of claimant's jobs as it is relevant to Section 10(c). The Board affirmed the administrative law judge's finding that claimant's employment in Iraq was not comparable to his employment in the United States. The administrative law judge rationally inferred, in the absence of contrary evidence, that claimant's job title of labor foreman denoted managerial responsibilities which claimant did not have in his stateside positions as a laborer and maintenance worker. Moreover, the administrative law judge rationally found that claimant's work in a combat zone was inherently different than his work in the United States by virtue of the dangerous location and the fact that his job included safety and security requirements that would not have been required of him in his work in the United States. The administrative law judge acted within his discretion in considering the extrinsic circumstances of claimant's employment when discussing the comparability of claimant's overseas and stateside employment. The Board discussed *Mulcare*, 18 BRBS 158, and held it was distinguishable. Although Section 10(c) permits the use of wages from claimant's other prior employment, it does not require such use. Use of only the wages claimant earned from employer appropriately reflects the increase in pay claimant received when he commenced working for employer in Iraq, and fully compensates claimant for the earnings he lost due to his injury. Moreover, post-injury events, such as decreased work opportunities or wages, generally are irrelevant to the calculation of claimant's average weekly wage. The Board therefore affirmed the administrative law judge's average weekly wage calculation under Section 10(c) based solely on claimant's wages in Iraq, as he had "regard to the previous earning of the injured employee in the employment in which he was working at the time of the injury." *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006).

Consideration of post-injury factors may be appropriate pursuant to Section 10(c) where a claimant's previous earnings do not realistically reflect the claimant's wage-earning potential. The case was remanded for the administrative law judge to address claimant's contention that her "annual earning capacity" was greater than that found by the administrative law judge as demonstrated by fellow employees' earnings and in view of the overtime she would have earned but for her injury. Claimant raised this issue in the initial proceeding and on modification, and the administrative law judge erroneously declined to address it. *S.K. [Khan] v. Serv. Employers Int'l, Inc.*, 41 BRBS 123 (2007).

The Board reversed the administrative law judge's use of claimant's combined overseas and stateside earnings during the year preceding his injury to calculate average weekly wage under Section 10(c). The Board held that claimant's average weekly wage must be calculated based solely on his overseas earnings in order to account for the plain language of Section 10(c) that this method shall reflect "the previous earnings of the injured employee in the employment in which he was working at the time of injury." Claimant was enticed to work in a dangerous environment in Iraq and Kuwait in return for higher wages. Claimant's potential to maintain his higher level of earnings afforded by his one-year contract to perform work overseas was cut short by his injury. Claimant's earnings under this contract provide the best evidence of claimant's capacity to earn absent this injury. *K.S. [Simons] v. Serv. Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009), *vacated and remanded sub nom. Serv. Employees Int'l, Inc. v. Director, OWCP*, No. H-11-01065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013).

The Board denied employer's motion for reconsideration of the holding that, on the facts of this case, claimant's average weekly wage had to be calculated with use of only his overseas wages. The fact that claimant's injury was not caused by peculiar dangers of overseas work does not negate the conditions which formed the basis for his remuneration, specifically, employer's agreement to pay claimant substantially higher wages to work overseas in dangerous settings. Although the administrative law judge is afforded broad discretion in determining the average weekly wage pursuant to Section 10(c), that discretion is not unfettered as the administrative law judge's finding must be based on applicable law. In this case, the exclusive use of overseas wages provides the legal framework within which the administrative law judge may exercise his discretion in determining the amount of claimant's average weekly wage. *K.S. [Simons] v. Serv. Employees Int'l, Inc.*, 43 BRBS 136 (2009) (*en banc*), *aff'g on recon.* 43 BRBS 18 (2009), *vacated and remanded sub nom. Serv. Employees Int'l, Inc. v. Director, OWCP*, No. H-11-01065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013).

The district court vacated the Board's holding in *Simons*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009), that claimant's average weekly wage had to be calculated only with reference to the wages he earned in Kuwait, holding that the Board engaged in a *de novo* review of the evidence and usurped the administrative law judge's authority. Substantial evidence supported the administrative law judge's finding that a blended approach, using both stateside and overseas earnings, better reflected claimant's true earning capacity pursuant to Section 10(c), taking into account claimant's one-year contract and the conditions of overseas employment. The court held that the Board did not provide any support for the proposition that the decision in *Proffitt*, 40 BRBS 41 (2006) should be applied to all cases with similar facts, as such a conclusion abrogated the wide discretion afforded administrative law judges pursuant to Section 10(c). The court remanded the case, and a companion case, for further proceedings. *Serv. Employees Int'l, Inc. v. Director, OWCP*, No. H-11-01065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013).

In a DBA case arising on the Kwajalein Atoll in the South Pacific, the Board affirmed the administrative law judge's finding that the rate of pay claimant earned in that position realistically reflected his wage-earning potential at the date of injury. The Board rejected claimant's contention that the post-injury job offer he received to return to higher-paying work in the Middle East should be factored into his average weekly wage under Section 10(c). Claimant voluntarily chose to leave higher-paying work in the Middle East and accept a lower-paying job for employer. The administrative law judge's average weekly wage determination accounts for the extrinsic circumstances of claimant's employment on the Kwajalein Atoll and the language of Section 10(c) that the administrative law judge give "regard to the previous earnings of the injured employee in which he was working at the time of the injury." *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011).

In a claim arising under the DBA, the Board affirmed the administrative law judge's calculation of claimant's average weekly wage at the time of his injury under Section 10(c), based on a blend of his stateside earnings and his contract rate of pay with employer at the time of his injury. Noting that *Simons*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009), does not mandate the use of only overseas to calculate a claimant's average weekly wage in all DBA cases, the administrative law judge rationally found that claimant was working overseas pursuant to a six-month contract, and that claimant's history of non-continuous overseas employment indicated the lack of a long-term commitment to such employment. *Jasmine v. Can-Am Protection Grp., Inc.*, 46 BRBS 17 (2012).

In this case, the administrative law judge stated that the wages claimant earned closest to the time he ceased work in 2002 best represented his wage-earning capacity. However, the administrative law judge declined to use the wages claimant earned during the year preceding his injury, stating that claimant did not usually work 52 consecutive weeks. Consequently, she calculated average weekly wage using the wages claimant earned during 2000-2001, stating that these years were the last two years claimant could physically work a full year. As the administrative law judge's reason for rejecting the more recent earnings conflicted with the reason she gave for accepting the earlier earnings, the Board vacated the award of benefits and remanded the case for further consideration of claimant's average weekly wage for his upper extremity condition. The Board stated that the administrative law judge should calculate claimant's average weekly wage using either the earnings during the 52-week period preceding the onset of disability or all his earnings between 2000 and 2002. *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9<sup>th</sup> Cir. 2012), *cert. denied*, 570 U.S. 904 (2013).

The Ninth Circuit affirmed the administrative law judge's application of Section 10(c) to calculate claimant's average weekly wage. Noting that Section 10(c) merely requires that an administrative law judge give regard to evidence of the employee's previous earnings in determining average weekly wage, the court held that the administrative law judge's use of the "far from perfect" PMA average data to calculate claimant's earning capacity is

supported by substantial evidence since the administrative law judge reasonably concluded, upon consideration of all available evidence, that those figures represented the best estimate of claimant's average wages, given his finding about claimant's "self-serving" testimony. *Rhine v. Stevedoring Services of Am.*, 596 F.3d 1161, 44 BRBS 9(CRT) (9<sup>th</sup> Cir. 2010).

Although the administrative law judge purported to make a Section 10(a) calculation, the record did not contain evidence concerning the number of days claimant actually worked. Therefore, Section 10(a) is inapplicable. The Board reviewed the administrative law judge's calculation under Section 10(c), and affirmed it as substantial evidence, in the form of two pay stubs, supports the approximation of claimant's wage-earning capacity at the time of injury. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

## Section 10(d)

### Section 10(d)(1)

Prior to the 1984 Amendments, Section 10(d) stated, “The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.” The 1984 Amendments renumbered this provision Section 10(d)(1). The subsection mandates that claimant’s average annual earnings be divided by 52 to arrive at the average weekly wage.

In *Duzant v. Gen. Dynamics Corp.*, 8 BRBS 670 (1978), the Board stated that Section 10(d) does not require that the administrative law judge have a record of 52 weeks of actual earnings to make a Section 10(c) determination. Thus, in making calculations under Section 10(c), the Board has allowed the use of a lower number of weeks as a divisor. *Brown v. Gen. Dynamics Corp.*, 7 BRBS 561 (1978). In *Brown*, the Board upheld a divisor of 39 where claimant actually worked for 52 weeks but records beyond 39 weeks were unavailable despite employer’s assurances that they would be produced. The Board reasoned that the use of a 52-week divisor into earnings over a 39-week period would have distorted the determination of claimant’s earning capacity.

Once annual earnings have been determined under one of the three methods in Section 10, application of the 52-week divisor under Section 10(d)(1) is mandatory. See *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984); *Roundtree v. Newport Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev’d on other grounds*, 698 F.2d 743, 15 BRBS 94(CRT) (5th Cir. 1983), *vacated on reh’g en banc*, 723 F.2d 399, 16 BRBS 34(CRT) (5th Cir.), *cert. denied*, 469 U.S. 818 (1984); *Eckstein v. Gen. Dynamics Corp.*, 11 BRBS 781 (1980); *Strand v. Hansen Seaway Serv. Ltd.*, 9 BRBS 847 (1979), *rev’d and remanded in part on other grounds*, 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980). When a claimant is unable to work due to a strike or non work-related injury in the year preceding an injury for which compensation is sought, however, that time must be taken into account in determining annual earning capacity before implementing the mandatory 52-week divisor, thus achieving a result similar to the *Brown* approach. *Klubnikin*, 16 BRBS 182. See *Duzant*, 8 BRBS 670.

Thus, where claimant has worked less than 52 weeks in the year before injury due to a prior injury or similar conditions, such facts should be taken into account in arriving at a figure which approximates claimant’s earnings over an entire year. This figure establishes claimant’s annual earnings, which are then subject to the Section 10(d)(1) divisor. See *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff’d on recon.*, 25 BRBS 88 (1991). In making this calculation, dividing actual earnings by the number of weeks worked has been affirmed, as this figure reflects actual weekly earnings and extrapolating it over an entire year by multiplying by 52 and then dividing by 52 under Section 10(d)(1) would yield the same result. *Id.* 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) (5<sup>th</sup> Cir.



2000); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5<sup>th</sup> Cir. 2000).

The Board has also upheld the administrative law judge's computation where a figure representing claimant's weekly earnings was multiplied by 50 to reach claimant's average annual wages and then divided by 52 to arrive at claimant's average weekly wage. The administrative law judge used the multiplier of only 50 weeks due to what he found was a pattern of "occasional but persistent" missed time from work. *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

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The Board held that the administrative law judge erred in calculating claimant's average weekly wage by dividing his earnings during the 38 weeks of the year prior to his injury by 52 as it failed to account for periods claimant would have been able to work absent his injury and only accounted for claimant's earnings during the 38 weeks preceding his injury. Section 10(c) provides a method for determining average annual earnings. Thus, the administrative law judge should arrive at a figure approximating an entire year of work, which is then divided by 52 under Section 10(d)(1). The division of claimant's earnings by 52 based on only 38 weeks of earnings distorted the determination of claimant's earning capacity at the time of injury. *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990).

Where claimant missed seven weeks of work due to her mother's death, the Board affirmed an average weekly wage calculation that included these weeks in calculation annual earning capacity. Pursuant to Section 10(c), the administrative law judge divided claimant's gross income in the year preceding her injury by the forty-five weeks she actually worked during this period to derive a weekly wage of \$500.42. He then multiplied this figure by the seven weeks claimant would have worked but for her mother's death and added that number to her actual earnings to derive a gross income in the year preceding her injury which was divided by fifty-two weeks. This computation resulted in an average weekly wage at the time of injury which was also \$500.42. The Board thus rejected employer's argument that claimant's actual earnings should have been divided by 52, for an average weekly wage of \$433.06. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

The Fifth Circuit affirmed the average weekly wage calculation under Section 10(c) arrived at by using claimant's actual wages divided by 48 weeks, as claimant was off for four weeks because of an unrelated injury. The court noted that this divisor is in technical violation of Section 10(d), but stated that the same result obtains as if the administrative law judge had added four weeks' salary to the wages earned and divided by 52. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5<sup>th</sup> Cir. 2000).

The Fifth Circuit affirmed the administrative law judge's computation based on claimant's wages in the year preceding his injury, even though that year consisted of only 27 working weeks, as substantial evidence supports the finding that these wages most accurately reflect claimant's earning capacity at the time of injury. Moreover, the court held that it was proper to account for time lost due to another work injury by dividing the annual earnings by 27 (which yields the same mathematical result as increasing the estimate of claimant's annual earning and dividing by 52). *Staflex 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) (5<sup>th</sup> Cir. 2000).

## Section 10(d)(2)

Section 10(d)(2) was added by the 1984 Amendments to provide an average weekly wage for employees who were voluntarily retired at the time a work-related occupational disease became manifest. *See also* 33 U.S.C. §§908(c)(23), 910(i), 902(10). The addition of this provision provides the basis for compensating voluntary retirees for occupational diseases that become manifest after retirement.

Prior to the 1984 Amendments, the Board held that where an occupational disease became manifest after voluntary retirement, there was no loss in wage-earning capacity and thus no compensable disability under the Act. *Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 131 (1984). *See also Redick v. Bethlehem Steel Corp.*, 16 BRBS 155 (1984) (same result applied to scheduled injury). In such cases, prior to enactment of Section 10(d)(2), such an employee had no earnings due to his retirement and thus no basis for computing an average weekly wage. Section 10(d)(2) provides an average weekly wage for such employees.

The legislative history of the 1984 Amendments makes it clear that Congress intended to provide relief to those employees whose occupational diseases become manifest after retirement and to survivors of such retirees. H.R. Rep. No. 98-1027, 98th Cong., 2d Sess. at 30; Cong. Rec. H9730, Sept. 18, 1984; Cong. Rec. S11625, Sept. 20, 1984. The amendments specifically overruled *Aduddell*, as well as other cases denying benefits to persons who were retired when their occupational diseases became manifest.

Section 10(d)(2) details the average weekly wage to be employed in occupational disease cases where the time of injury determined under Section 10(i) is within one year of voluntary retirement or is more than one year after retirement. *See Rajotte v. Gen. Dynamics Corp.*, 18 BRBS 85 (1986). Section 10(i) provides that in cases of an occupational disease which does not immediately result in death or disability, the time of injury is the date of “awareness” of the relationship between the disease, the employment and the death or disability. *See* Section 10(i), *infra*. Under Section 8(c)(23), in a claim for permanent partial disability for employees whose average weekly wage is determined under Section 10(d)(2), compensation is based on the percentage of permanent physical impairment, as determined under Section 2(10), rather than on economic factors. *Kellis v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 109 (1985); *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985). Section 2(10) states that disability for persons whose claim is described in Section 10(d)(2) shall mean permanent impairment, determined under the guides to the evaluation of permanent impairment as promulgated and modified by the American Medical Association (AMA). The regulations provide that if the *AMA Guides* do not evaluate impairment for an affected part of the body, other professionally recognized standards may be utilized. 20 C.F.R. §702.601(b). Thus, the compensation awarded voluntarily retired workers under Section 8(c)(23) is a permanent partial disability benefit based on the average weekly wage under Section 10(d)(2), multiplied by the impairment

rating of Section 2(10), and then multiplied by the usual 66 2/3 percent. 33 U.S.C. §908(c)(23).

In enacting the retiree provisions, however, Congress did not intend to preclude those employees who were forced to retire due to their occupational injuries from obtaining compensation for total disability. *Rajotte*, 18 BRBS 85. Therefore, where an employee involuntarily withdraws from the workforce due to his occupational disease, he is entitled to benefits for total or partial disability based on a loss in earning capacity and the post-retirement provisions at Sections 2(10), 8(c)(23) and 10(d)(2) do not apply. In such cases, claimant's average weekly wage is based on earnings prior to the date of retirement. *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986).

Section 10(d)(2)(A) specifies that if the employee's time of injury occurs within the first year of voluntary retirement, the average weekly wage shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement. Section 10(d)(2)(B) is employed where the injury occurs more than one year after voluntary retirement and specifies that the average weekly wage shall be deemed to be the national average weekly wage, as determined under Section 6(b), applicable at the time of injury.

The Board held that the provisions of Sections 2(10), 8(c)(23) and 10(d)(2) applied to cases pending before the Board on the enactment date of the 1984 Amendments, September 28, 1984. *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985).

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The Board vacated the administrative law judge's decision, which followed *Aduddell*, pursuant to the 1984 Amendments. The Board held that the survivor of a voluntary retiree whose occupational disease manifested itself more than one year after retirement and who died from the disease was entitled to Section 9 death benefits based on the national average weekly wage pursuant to Section 10(d)(2). *Arganbright v. Maranship Corp.*, 18 BRBS 281 (1986).

In a D.C. Act case decided prior to *Keener v. Washington Metro. Area Transit Auth.*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987), which held the 1984 Amendments do not apply to cases under the 1928 D.C. Act, the Board remanded the case for a determination as to whether claimant was a voluntary retiree, noting that if claimant left the workforce for reasons related to his injury, the post-retirement provisions of Sections 2(10), 8(c)(23) and 10(d)(2) do not apply. *Pryor v. James McHugh Constr. Co.*, 18 BRBS 273 (1986).

If the date of injury under Section 10(i) occurs more than one year after retirement, the average weekly wage is based on the national average weekly wage under Section

10(d)(2)(B) rather than on actual wages received by the employee. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987).

Voluntary retirement for the purpose of calculating claimant's average weekly wage occurs when claimant leaves the workforce for reasons unrelated to his disease or disability and with no realistic expectation that he will return. Since claimant in this case became "aware" for purposes of Section 10(i) within one year of his retirement, his average weekly wage is based on his earnings during the year preceding his exit from the work force, pursuant to Section 10(c) and 10(d)(2)(A). *Coughlin v. Bethlehem Steel Corp.*, 20 BRBS 193 (1988).

A decedent who indicated to claimant, his widow, that he "decided to retire" at age 62 and who began receiving Social Security retirement benefits at the time but returned to part-time employment several months later and was subsequently diagnosed as having work-related lung cancer which ultimately lead to his death, was held to be a voluntary retiree as of the time he left his full-time job; consequently, the provisions of Section 10(d)(2) were applicable in calculating his average weekly wage. *Jones v. U.S. Steel Corp.*, 22 BRBS 229 (1989).

The Board held that the administrative law judge erred in relying on *Redick*, 16 BRBS 155, to deny benefits for permanent partial disability to a body part within the schedule due to claimant's failure to establish a loss of wage-earning capacity. In *Redick*, the claimant voluntarily withdrew from the work-force before manifestation of an occupational disease, and prior to passage of Sections 8(c)(23), 2(10), 10(d)(2) in 1984, the Board held such was not compensable. In this case, claimant sought benefits for a traumatic injury to his toe, and no loss in wage-earning capacity need be shown for claimant to recover under the schedule. The Board noted that even if *Redick* had not been overruled by the 1984 Amendments, it would not apply as claimant sought benefits for a traumatic injury occurring prior to voluntary retirement, with residuals carrying over into retirement. Claimant's injury did not therefore become manifest wholly after retirement. *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989).

The Board held that the administrative law judge's finding that claimant voluntarily retired was supported by substantial evidence where claimant filed for Social Security retirement benefits just prior to leaving employer but alleged no disability, his separation papers indicated voluntary retirement, claimant failed to subsequently seek any other employment, and the medical evidence did not establish a pre-retirement breathing impairment. Thus, the administrative law judge properly calculated claimant's award pursuant to Section 10(d)(2)(A) where claimant first became aware of his condition within one year of retirement. *Johnson v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 22 BRBS 160 (1989).

The Board affirmed the administrative law judge's finding that claimant left the workforce in order to receive SSA and pension benefits, reasons unrelated to his asbestosis. Since the wage-earning capacity of a voluntary retiree is irrelevant, the Board rejected claimant's

arguments that the administrative law judge erred in failing to consider whether employer established suitable alternate employment and that a physician's recommendation that claimant avoid further exposure to asbestos caused a loss in claimant's wage-earning capacity. *Frawley v. Savannah Shipyard Co.*, 22 BRBS 328 (1989).

The Board rejected employer's contention that claimants must be considered involuntary retirees for purposes of their hearing loss claims because, in separate claims for asbestosis, claimant's alleged that they left the workforce due to their respiratory impairments. Since claimants did not leave the workforce due to their hearing impairments, they are voluntary retirees within the meaning of the Act for purposes of their hearing loss claims. *Manders v. Alabama Dry Dock & Shipbuilding Corp.*, 23 BRBS 19 (1989) (but see, *infra*, for supervening law on compensation for hearing loss).

The administrative law judge properly determined that the national average weekly wage in effect when decedent's occupational disease became manifest is the basis for the disability award, and that the national average weekly wage in effect when decedent died is the basis for the death award in the case of a voluntary retiree. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

The Board held that in a death benefits case where the decedent voluntarily retired, the compensation rate for the award was properly based on the national average weekly wage in effect at the time the claimant became aware of the work-relatedness of the death, which can be no earlier than the date of death. It is not based on the national average weekly wage on the date of manifestation of the decedent's injury. *Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991), *aff'd sub nom. Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55(CRT) (1st Cir. 1991).

In occupational disease cases where decedent was a voluntary retiree, claimant's award of death benefits should be based on the national average weekly wage in effect no earlier than the national average weekly wage applicable on the date of decedent's death, as claimant's date of awareness of the work-relatedness of decedent's death could not have been earlier. In cases where decedent was a not a voluntary retiree, claimant's award of death benefits should be based on decedent's actual average weekly wage at the time of injury, as the retiree provisions are inapplicable. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only).

The Board affirmed the administrative law judge's determination that claimant's average weekly wage must be calculated pursuant to Section 10(d)(2)(B). The administrative law judge permissibly credited claimant's testimony and the medical evidence to find that claimant's work-related disability due to his occupational disease became manifest more than one year after he voluntarily retired, and not at the time he left Iraq. *Gindo v. AECOM Nat'l Sec. Programs, Inc.*, 52 BRBS 51 (2018), *vacated and remanded*, No. 4:19-CV-01745 (S.D. TX March 23, 2022).

### **Section 10(e)**

Section 10(e) provides that, if an employee is a minor when injured and under normal conditions his wages should be expected to increase during the period of disability, that fact may be considered in determining his average weekly wage.

The Board initially established 21 years of age as the uniform age of majority for purposes of Section 10(e), reversing the administrative law judge's holding applying state law. *Stokes v. George Hyman Constr. Co.*, 14 BRBS 698 (1981). When the case was before the Board again on appeal, the Board held that pursuant to a D.C. Circuit holding that the D.C. Act was a "local law," the law in the District of Columbia applied. Since the age of majority in D.C. is 18, the Board held that in D.C. Act cases, a "minor" under Section 10(e) is a person who has not reached the age of 18. *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986).

## Section 10(f), (g)

Under the 1972 Act, Section 10(f) provided that, effective October 1 of each year, the compensation or death benefits for permanent total disability or death due to injuries sustained after the date of enactment shall be adjusted annually to reflect the rise in the national average weekly wage. Under the 1984 Amendments, the annual adjustments under Section 10(f) are limited to the lesser of the yearly increase in the national average weekly wage or five percent. *See* 20 C.F.R. §702.701. Section 10(g) provides that weekly compensation after a Section 10(f) adjustment shall be fixed at the nearest dollar. It also states that “no adjustment of less than \$1 shall be made, but in no event shall compensation for death benefits be reduced.” 33 U.S.C. §910(g).

Section 10(h)(3) provides that for purposes of subsections (f) and (g), an injury resulting in permanent total disability or death which occurred prior to enactment of the 1972 Amendments shall be considered to have occurred on the day following such enactment. Thus, permanent total disability and death benefits for pre-1972 injuries are subject to annual adjustment under Section 10(f) just as if the injuries had occurred post-Amendment. The Board has held that annual adjustments under Section 10(f) and (h)(3) do not apply to death benefits if the death was not due to the employment injury. *Witthuhn v. Todd Shipyards Corp.*, 3 BRBS 146 (1976), *aff'd on other grounds*, 596 F.2d 899, 10 BRBS 517 (9th Cir. 1979); *Egger v. Willamette Iron & Steel Co.*, 2 BRBS 247 (1975)

The statute limits Section 10(f) to permanent total disability or death. It is thus not applicable to temporary total disability benefits. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). However, the Fifth Circuit, without discussion, held that the permanent total disability rate should include all intervening Section 10(f) adjustments occurring during a period of previous temporary total disability. *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981).

The Board declined to follow the method of computation of *Holliday*, finding it to be an indirect means of providing Section 10(f) adjustments during periods of temporary total disability, contrary to the express language of the statute. *Brandt v. Stidham Tire Co.*, 16 BRBS 277 (1984), *rev'd in part*, 785 F.2d 329, 18 BRBS 73(CRT) (D.C. Cir. 1986). The D.C. Circuit, however, reversed the Board's decision refusing to follow *Holliday*. In *Brandt*, 654 F.2d 415, 13 BRBS 741, the D. C. Circuit presented no legal analysis with respect to Section 10(f) but merely expressed its displeasure with the method in which the Director sought to abandon his support for the *Holliday* method he previously advocated, expressed its reluctance to create a split in the circuits, and stated that it would follow *Holliday* until the precedent was overruled in the Fifth Circuit or until the Director publicly announced that prospectively he would seek to apply his current interpretation evenhandedly to all similarly situated claimants in all circuits. The Board continued to express its disagreement with the Fifth and D.C. Circuits regarding annual adjustments and



stated it would apply *Holliday* only in those circuits. *Scott v. Lockheed Shipbuilding & Constr. Co.*, 18 BRBS 246 (1986).

The Fifth Circuit subsequently overruled its decision in *Holliday*. *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (en banc). The Second and Ninth Circuits have followed *Phillips*, holding that Section 10(f) provides adjustments only for permanent total disability and that claimants cannot receive the benefit of intervening adjustments during prior periods of temporary total disability. *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78(CRT) (2d Cir. 1990); *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT) (9th Cir. 1990). However, the Eleventh Circuit held that it was bound by the precedent in *Holliday*, under its ruling that opinions of the Fifth Circuit issued prior to September 30, 1981 are binding precedent. *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989). The court upheld this result even after *Holliday* was overruled by the Fifth Circuit. *Se. Mar. Co. v. Brown*, 121 F.3d 648, 31 BRBS 140(CRT) (11th Cir. 1997), *cert. denied*, 524 U.S. 951 (1998).

In light of *Phillips*, the Board held that *Holliday* was inapplicable in a case arising in D.C. *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76 (1998). The D.C. Circuit subsequently was presented with this Section 10(f) issue, but declined to address it because it had been raised in an appeal of a supplementary compensation order declaring default, over which the Board had no jurisdiction. *Snowden v. Director, OWCP*, 253 F.3d 725, 35 BRBS 81(CRT) (D.C. Cir. 2001), *cert. denied*, 535 U.S. 1090 (2002).

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The Board affirmed the administrative law judge's determination that claimant/widow is not entitled to Section 10(f) adjustments on her death benefits, finding Dr. Thompson's opinion sufficient to support the administrative law judge's finding that decedent's death was not causally related to his employment. Section 10(f) adjustments are only available in the case of death benefits where decedent's death is found to be causally related to his employment. *Bingham v. Gen. Dynamics Corp.*, 20 BRBS 198 (1988).

The Board reversed an administrative law judge's award of Section 10(f) adjustments on claimant's permanent partial disability award. Section 10(f) only applies to awards of permanent total disability or death benefits. *Allison v. Washington Society for the Blind*, 20 BRBS 158 (1988), *rev'd on other grounds*, 919 F.2d 763 (D.C. Cir. 1990).

While the Board continued to express its disagreement with the Fifth Circuit's holding in *Holliday* regarding annual adjustments, it followed that ruling in a case arising in the Fifth Circuit. *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

The Board reversed the administrative law judge's award of Section 10(f) adjustments on claimant's temporary total disability award since the language of the statute specifically applies only to awards for permanent total disability and death. However, the Board held that because the case arose in the Fifth Circuit, *Holliday* applies, and the compensation rate for claimant's permanent total disability award must include all intervening Section 10(f) adjustments occurring during previous periods of temporary total disability. In addition, the Board held that the amended Section 10(f) provision, limiting adjustments to the lesser of the increase in NAWW or 5 percent, applies prospectively, that is, to all adjustments to which a claimant is entitled beginning on October 1, 1984. Therefore, the administrative law judge erred in finding the amended Section 10(f) limitation provision was inapplicable. *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83(CRT) (5th Cir. 1989), *rev'd*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (en banc).

Stating it was bound by the court's former decision in *Holliday*, 654 F.2d 415, 13 BRBS 741, a panel of the Fifth Circuit affirmed the Board's decision that claimant was entitled to Section 10(f) adjustments at a rate including all intervening Section 10(f) adjustments occurring during previous periods of temporary total disability. *Phillips v. Marine Concrete Structures, Inc.*, 877 F.2d 1231, 22 BRBS 83(CRT) (5th Cir. 1989), *rev'd*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (en banc).

Upon reconsideration by the court sitting en banc, the Fifth Circuit overruled *Holliday* and held that Section 10(f) adjustments apply only to awards of permanent total disability. The court further held that claimant's benefits were to be adjusted prospectively to the amount that would have been calculated absent *Holliday*. *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (en banc), *rev'g in part* 877 F.2d 1231, 22 BRBS 83(CRT) (5th Cir. 1989).

The Board held that since *Holliday*, 654 F.2d 415, 13 BRBS 741, was issued prior to September 30, 1981, it is binding precedent in the Eleventh Circuit and therefore its holding pertaining to Section 10(f) must be applied in that circuit despite the Board's disagreement with it. *Hamilton v. Crowder Constr. Co.*, 22 BRBS 121 (1989), *aff'd sub nom. Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989).

The Eleventh Circuit held that its ruling in the instant case was governed by the Fifth Circuit's holding in *Holliday*, 654 F.2d 415, 13 BRBS 741, in which the court applied Section 10(f) to previous periods of temporary total disability where claimant was now permanently totally disabled. The court also noted the Director's acknowledgement that it must affirm the Board's decision below unless the Eleventh Circuit, en banc, overrules *Holliday*. Thus, the court affirmed the Board's decision without prejudice to the Director's right to petition the court for rehearing en banc. *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989).

The Board reversed an award of Section 10(f) adjustments for periods of temporary total disability in this case arising in the Eleventh Circuit based upon the opinion of the Fifth Circuit in *Phillips*, 895 F.2d 1033, 23 BRBS 36(CRT), overruling *Holliday*. *Stanfield v. Fortis Corp.*, 23 BRBS 230 (1990).

In light of its decision in *Hamilton*, 890 F.2d 1143, the Eleventh Circuit held that the law as set forth in *Holliday*, 654 F.2d 415, 13 BRBS 741, which states that a claimant's permanent total disability rate should include all intervening Section 10(f) adjustments occurring during the previous period of temporary total disability, is the controlling law of the circuit. Therefore, the Eleventh Circuit affirmed the Board's application of *Holliday* in this case. *Se. Mar. Co. v. Brown*, 121 F.3d 648, 31 BRBS 140(CRT) (11th Cir. 1997), *cert. denied*, 524 U.S. 951 (1998).

There is no requirement that a disability be due solely to the work injury in order for Section 10(f) to apply. For purposes of Section 10(f), the term injury includes the aggravation of pre-existing non-work related conditions or the combination of work and non-work related conditions. *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990).

The Second Circuit determined that it would follow the Fifth Circuit's determination in *Phillips*, 895 F.2d 1033, 23 BRBS 36(CRT), in which the court, sitting en banc, overruled *Holliday*. The court thus adopted the *Phillips* interpretation of Section 10(f), which states that Section 10(f) entitles a claimant to compensation adjustments that occur only after a condition of total disability becomes permanent. *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78(CRT) (2d Cir. 1990).

The Ninth Circuit held that by its terms, Section 10(f) provides only for an annual cost-of-living adjustment, effective October 1 of each year, to the compensation payable for permanent total disability. Claimants are not to receive the benefit of intervening cost-of-living adjustments occurring during the prior period of temporary disability. *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT) (9th Cir. 1990).

In a case involving the maximum compensation rate under Section 6, the Board rejected employer's contention that the maximum rate in effect at the time of the injury remains constant subject only to Section 10(f) adjustments on that rate, as that argument was rejected in *Marko*, 23 BRBS 353. Noting that the Board's reasoning in *Marko* is supported by the Ninth Circuit's decision in *Roberts*, 625 F.3d 1204, 44 BRBS 73(CRT), the Board reaffirmed the *Marko* holding that in a permanent total disability case where claimant's actual average weekly wage exceeds the Section 6(b)(3) statutory maximum, he is entitled to the new maximum rate each fiscal year. Such a claimant is entitled to the new Section 6(b)(3) maximum rate each fiscal year until such time as two-thirds of his average weekly wage falls below 200 percent of the applicable national average weekly wage, and thereafter is entitled to annual adjustments under Section 10(f). *Lake v. L-3 Communications*, 47 BRBS 45 (2013).

The Board affirmed the administrative law judge's denial of employer's petition for modification seeking a retroactive adjustment of benefits due to the Fifth Circuit's holding in *Phillips*, limiting Section 10(f) to permanent total disability. The administrative law judge properly interpreted the *Phillips* decision as applying to cases which had not become final, unlike this case, and moreover, employer's request for modification is based on a change in law. *Ryan v. Lane & Co.*, 28 BRBS 132 (1994).

The Board affirmed the administrative law judge's finding that claimant was entitled to Section 10(f) adjustments for the period of his permanent total disability, November 14, 1988 through January 16, 1992, as the administrative law judge accepted the parties' stipulation that decedent was permanently totally disabled as of November 14, 1988. Claimants are entitled to Section 10(f) adjustments to compensation during periods of permanent total disability. *Trice v. Virginia Int'l Terminals, Inc.*, 30 BRBS 165 (1996).

In affirming the district director's award of death benefits, the Board held that Section 9(e)(1) does not bar the application of Section 10(f) adjustments where such adjustments to death benefits would increase compensation above the employee's average weekly wage, as the maximum ceiling on death benefits is contained in Section 6(b)(1), which provides that compensation for disability or death benefits "shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage . . . ." The Board held that the "shall not exceed" phrase in Section 9(e)(1) is applicable only to the initial calculation of the base rate at which death benefits are payable, and does not act as a ceiling on the rate at which death benefits can be paid to a survivor. *Donovan v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 2 (1997).

The Board reversed the district director's award of a Section 14(f) assessment based on employer's failure to pay annual adjustments pursuant to Section 10(f) in accordance with *Holliday*, 654 F.2d 415, 13 BRBS 741, as *Holliday* was overruled by the Fifth Circuit in *Phillips*, 895 F.2d 1033, 23 BRBS 36(CRT), and as the D.C. Circuit, in whose jurisdiction this case arises, stated in *Brandt*, 785 F.2d 329, 18 BRBS 73(CRT), that it would accept *Holliday* until it was overruled by the Fifth Circuit. Consequently, the Board disavowed the holding in *Holliday* and *Brandt* in Section 10(f) cases in the D.C. Circuit and followed *Phillips*. *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76 (1998).

The D.C. Circuit held that the Board did not have jurisdiction to address a supplementary compensation order declaring payments in default issued pursuant to Section 18(a) of the Act. Specifically, in this case, the OWCP issued a supplementary compensation order finding employer/carrier in violation for failure to make payments of benefits pursuant to *Brandt/Holliday*, and it awarded claimant a Section 14(f) penalty of 20 percent of the shortfall. Because employer/carrier raised the issue of whether claimant's benefits were subject to cost-of-living adjustments under Section 10(f) pursuant to *Brandt/Holliday*, and because this issue had not been addressed previously, the Board took the position that the Section 10(f) payments were not the subject of a compensation order and were properly

before it for the first time; following *Bailey*, 32 BRBS 76, the Board held that prospective benefits are not subject to Section 10(f) adjustments. The court vacated the Board's order, holding that employer did not timely challenge the Section 10(f) issue, and that the Board lacks jurisdiction to address issues raised in a default order. The court thus declined to address the merits of the Section 10(f) issue. *Snowden v. Director, OWCP*, 253 F.3d 725, 35 BRBS 81(CRT) (D.C. Cir. 2001), *cert. denied*, 535 U.S. 1090 (2002).

The Board held that the administrative law judge erred in applying the district director's method of computing the amount of benefits to which claimant was entitled under the commutation provision of Section 9(g), in light of Section 10(f), the application of which is mandatory to an award of death benefits. The discount rate applied by the district director accounted for the present value of the lump sum payable, but it can be applied only after Section 10(f) adjustments are taken into account in determining the lump sum. The rejection of Section 10(f) based on the difficulty in ascertaining the value of future increases in the national average weekly wage is not a valid reason for not applying Section 10(f). It is not reasonable to assume that no increases will occur, although Section 9(g) provides the district director with discretion as to the value of the future Section 10(f) adjustments. Thus, the case is remanded so that Section 10(f) adjustments may be included in the calculation of claimant's commuted death benefits. *Logara v. Jackson Eng'g Co.*, 35 BRBS 83 (2001).

Where the second employer or carrier is entitled to a credit if claimant's concurrent permanent partial and permanent total disability awards exceed the maximum allowable compensation under Section 8(a), but as a result claimant's permanent total disability award may be reduced by loss of full benefit of Section 10(f) adjustment, claimant is entitled to receive the full amount of the Section 10(f) adjustment on his permanent total disability award in calculating the amount then subject to the credit for the initial permanent partial disability award, pursuant to *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9<sup>th</sup> Cir. 1995). *Price v. Stevedoring Services of Am.*, 36 BRBS 56 (2002), *aff'd, vacated and remanded, and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9<sup>th</sup> Cir. 2004) and No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9<sup>th</sup> Cir. May 11, 2004), *cert. denied*, 544 U.S. 960 (2005).

In this D.C. Act, and therefore pre-1984 Amendment, case, the Board held that Section 9(e) does not limit the maximum compensation payments to the amount of the decedent's average weekly wage. Rather, this maximum applies to the initial computation of death benefits. Thereafter, due to application of Section 10(f) adjustments, the payments of death benefits may exceed the decedent's average weekly wage as to hold otherwise would nullify Section 10(f) which applies to awards of death benefits. The Board followed *Donovan*, 31 BRBS 2, in the pre-1984 context. *Weeks v. U.S. Elevator Corp.*, 39 BRBS 25 (2005).

Claimant's award of Section 9(c) death benefits is subject to annual increases pursuant to Section 10(f) of the Act. *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010).

## Section 10(h)

### In General

Section 10(h), originally enacted in the 1972 Amendments, provides adjustments to compensation for permanent total disability or death which commenced or occurred before October 27, 1972, the date of enactment of the 1972 Amendments. *Silberstein v. Serv. Printing Co., Inc.*, 2 BRBS 143 (1975). The purpose of Section 10(h) is to upgrade benefits in such cases. Subsections 10(h)(1) and (3) upgrade the benefits payable for pre-1972 Amendment injuries to an amount above the pre-Amendment maximum, and subsection 10(h)(2) shifts liability for the increase from the employer to the Special Fund and appropriations.

Section 10(h) applicability is contingent on the occurrence of a pre-1972 Amendment injury. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987); *Pitts v. Bethlehem Steel Corp.*, 17 BRBS 17 (1985), *aff'd on recon.*, 17 BRBS 166 (1985). In the case of an occupational disease, for Section 10(h) to apply the employee's disease must have been manifest before 1972. *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84 (1985). This holding is based on Section 10(i), *infra*, which defines "injury" in occupational disease cases for purposes of Section 10.

In *Am. Stevedores, Inc. v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976), *aff'g* 2 BRBS 178 (1975), the court held that subsections (h)(1) and (3) are constitutional even though given retroactive effect.

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The Board vacated the parties' stipulation that the injury occurred in 1968, thereby making Section 10(h) applicable to the claim, in light of the 1984 Amendments that govern when an injury occurs in an occupational disease case and because the stipulation bound the Special Fund without its participation. *Truitt v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 79 (1987).

### Section 10(h)(1), (3)

Section 10(h)(1) provides for an initial adjustment to the compensation being paid to an employee or his survivors awarded permanent total disability or death benefits. *Luke v. Petro-Weld, Inc.*, 8 BRBS 369 (1978), *aff'd in part*, 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980). The section provides that the amount of the adjustment is determined by designating the applicable national average weekly wage as the employee's average weekly wage and computing the compensation as if the disabling injury or death occurred on the day after enactment. After the initial adjustment, the employee or survivors are entitled to annual adjustments pursuant to Section 10(h)(3), which provides that the injury or death is considered to have occurred on the day after enactment for purposes of Section 10(f).

The Board has held that the adjustments are available in cases where the injury occurred prior to the enactment of the 1972 Amendments, but total disability or death did not occur until afterward. *Hernandez v. Base Billeting Fund, Laughlin Air Force Base*, 13 BRBS 214 (1980), *modified on recon.*, 13 BRBS 220 (1981); *Silberstein v. Serv. Printing Co., Inc.*, 2 BRBS 143 (1975). This provision is also applicable where claimant's decedent was injured prior to the 1972 Amendments but died as a result of the injury after the date of the Amendments. *Dennis v. Detroit Harbor Terminals*, 18 BRBS 250 (1986), *aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 21 BRBS 85(CRT) (6th Cir. 1988) (although claimant's death benefits were greater under Section 9(e) than the Section 10(h)(1) adjustment would provide, Section 10(h) still applies and the Section 10(h)(2) sources were liable for part of the payments). *See also Alford v. Lear Siegler, Inc.*, 4 BRBS 217 (1976). *Cf. Director, OWCP v. Bath Iron Works Corp. [Lebel]*, 885 F.2d 983, 22 BRBS 131(CRT) (1st Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990), *infra*.

The Board has also held that the adjustments do not apply to compensation for permanent partial disability, *Sursum Corda, Inc. v. Cooper*, 1 BRBS 60 (1974), *aff'd on other grounds*, 521 F.2d 324, 3 BRBS 3 (D.C. Cir. 1975), or for temporary total disability, *Delgado v. Universal Terminal & Stevedoring Co.*, 1 BRBS 233 (1974).

Benefits for pre-1972 Amendment injuries must be calculated pursuant to Section 10(h)(1); the employee's actual average weekly wage is no longer relevant for post-1972 payments. *Landrum v. Air Am., Inc.*, 534 F.2d 67, 4 BRBS 152 (5th Cir. 1976), *aff'g* 1 BRBS 268 (1975); *Lebel v. Bath Iron Works Corp.*, 3 BRBS 216 (1976), *aff'd on other grounds*, 544 F.2d 1112, 5 BRBS 90 (1st Cir. 1976).

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The court affirmed the Board's holding that Section 10(h) applies to claims in which the employee was injured prior to the date of enactment of the 1972 Amendments but died after that date. *Director, OWCP v. Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 21 BRBS 85(CRT) (6th Cir. 1988), *aff'g Dennis v. Detroit Harbor Terminals*, 18 BRBS 250 (1986).

The Board followed the decisions in *Dennis* and held that Section 10(h) applies where a post-1972 Amendment death follows a pre-1972-Amendment injury. *Fox v. Pac. Ship Repair*, 21 BRBS 171 (1988).

The First Circuit reversed the Board's determination, pursuant to *Dennis*, 18 BRBS 250, that Section 10(h) applies where a post-1972 amendment death follows a pre-1972 amendment injury. The court held that because death benefits for a post-1972 death are calculated at the more generous post-1972 rates, *see* 33 U.S.C. §909(e)(1982) (amended 1984), it was unnecessary for the "gap-closing" provision of Section 10(h)(1) to apply. *Director, OWCP v. Bath Iron Works Corp. [Lebel]*, 885 F.2d 983, 22 BRBS 131(CRT) (1st Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990).

Section 10(h) increases apply only to compensation for permanent total disability or death, not temporary total disability. *Nooner v. Nat'l Steel & Shipbuilding Co.*, 19 BRBS 43 (1986).

The Board reversed the administrative law judge's finding that the Special Fund was liable for annual adjustments to claimant's benefits pursuant to Section 10(h) because under Section 10(i), as amended in 1984, the time of "injury" occurred in 1982, although the employee's death occurred in 1965. The Board held that since the time of injury occurred after 1972, Section 10(h) does not apply and employer, rather than the Special Fund, is liable for annual adjustments under Section 10(f). *Taddeo v. Bethlehem Steel Corp.*, 22 BRBS 52 (1989).



## Section 10(h)(2)

Section 10(h)(2) provides that the initial adjustment under Section 10(h)(1) and the annual adjustments under Section 10(h)(3) are to be paid from the Special Fund and appropriations, *Ness v. Todd Shipyards Corp.*, 10 BRBS 726 (1978), thereby relieving employer of liability for the additional compensation.

Before Section 10(h)(2) is invoked, two pre-conditions must be satisfied: (1) there must be a pre-1972 Amendment injury, and (2) additional compensation for this injury must be awarded as a result of adjustments required by subsections 10(h)(1) and (3). *Pitts v. Bethlehem Steel Corp.*, 17 BRBS 17 (1985). *See also Dennis*, 18 BRBS 250. Annual adjustments arising out of post-Amendment injuries, however, are to be paid by the employer/carrier, not the Special Fund and appropriations. *Balderson v. Maurice P. Foley Co.*, 4 BRBS 401 (1976), *aff'd on other grounds*, 569 F.2d 132, 7 BRBS 69 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978).

Once the Special Fund becomes liable for payments of compensation under Section 8(f), it is also liable for adjustments under Section 10. *Spencer v. Bethlehem Steel Corp.*, 7 BRBS 675 (1978). In *Waganer v. Alabama Dry Dock & Shipbuilding Co.*, 12 BRBS 582 (1980), *rev'd on other grounds sub nom. Director, OWCP v. Alabama Dry Dock & Shipbuilding Co.*, 672 F.2d 847, 14 BRBS 669 (11th Cir. 1982), the Board held that the liability of Section 10(h)(2) sources could be offset against claimant's third-party recovery.

Although the Act does not specifically provide for interest on overdue benefits, the Board relied on case law providing for such interest assessments against the Special Fund in Section 8(f) cases and held that under this rationale, the Special Fund is liable for interest on its portion of overdue Section 10(h) payments. The Board noted that this rationale does not apply to the portion of 10(h) payments owed by general appropriations, as such funds are not subject to interest assessment absent express statutory authorization. *Evangelista v. Bethlehem Steel Corp.*, 19 BRBS 174 (1986). *See Lawson v. Atl. & Gulf Stevedores*, 9 BRBS 855 (1979).

## Section 10(i)

Section 10(i) was added by the 1984 Amendments to the Act in order to resolve the problem of choosing a time of injury for purposes of Section 10 in occupational disease cases. Section 10(i) applies to claims for compensation for death or disability due to an occupational disease which does not immediately result in death or disability. In such cases, the “time of injury shall be deemed to be the date on which employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.” 33 U.S.C. §910(i). Section 10(i) applied to cases pending at the time of enactment of the 1984 Amendments, including cases on appeal to the Board. *Yalowchuk v. Gen. Dynamics Corp.*, 17 BRBS 131 (1985). See generally *Kellis v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 109 (1985); *Dolowich v. W. Side Iron Works*, 17 BRBS 197 (1985); *Hoey v. Gen. Dynamics Corp.*, 17 BRBS 229 (1985).

This provision is consistent with case law reversing the Board’s holding in *Dunn v. Todd Shipyard Corp.*, 13 BRBS 647 (1981), which adopted the date of last exposure as the “time of injury.” See *Todd Shipyard Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984); *Morales v. Gen. Dynamics Corp.*, 16 BRBS 293 (1984), rev’d sub nom. *Director, OWCP v. Gen. Dynamics Corp.*, 769 F.2d 66, 17 BRBS(CRT) (2d Cir. 1985); *Dunn v. Todd Shipyard Corp.*, 18 BRBS 125 (1986). Therefore, in *Hoey*, 17 BRBS 229, where the claimant last worked for employer as an asbestos insulator in 1958, but his asbestosis was not diagnosed until 1974, the Board remanded for a recalculation of average weekly wage based on claimant’s 1974 wages.

In occupational disease cases where the work-related wage loss pre-dates awareness of the relationship between disability and employment, the average weekly wage should reflect earnings prior to the onset of disability rather than the subsequent earnings at the later time of awareness. *LaFaille v. Gen. Dynamics Corp.*, 18 BRBS 88 (1986), rev’d sub nom. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2<sup>d</sup> Cir. 1989) (discussed, *infra*). See Section 10(c), *supra*.

While the Board held that Section 10(i) does not apply to traumatic injuries, see *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1985), the Board initially held that it applied in hearing loss cases, as hearing loss is an occupational disease. Under these circumstances, the Board stated that awareness for purposes of Section 10(i) may be the date an audiogram was administered, consistent with the 1984 Amendments to Section 8(c)(13) which mandate that for purposes of Sections 12 and 13, claimant’s awareness can occur no earlier than the date on which he receives an audiogram with accompanying report and knows of the causal relationship between his employment and the hearing loss. See *Byrd v. J. F. Shea Constr. Co.*, 18 BRBS 48 (1986). However, after considerable litigation over the application of the 1984 Amendments to hearing loss claims of retirees, the Supreme Court held that hearing loss is not “an occupational disease which does not immediately result in death or

disability.” Thus Section 10(i) is inapplicable in hearing loss cases. Claimant’s time of injury is the date of his last exposure to injurious noise, based on the Court’s reasoning that a hearing loss injury occurs simultaneously with exposure to excessive noise and therefore the injury is complete on the date of last exposure. Average weekly wage is thus calculated as of the date of last exposure. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993), *aff’g* 942 F.2d 811, 25 BRBS 30(CRT) (1st Cir. 1991). The cases leading up to the Court’s decision in *Bath Iron* are included in a separate digest at the end of this section and are of historical significance only.

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The Board held that neither present nor retroactive application of the voluntary retiree provisions enacted by the 1984 Amendments violates the Due Process Clause of the 5th Amendment of the U.S. Constitution. *Shaw v. Bath Iron Works Corp.*, 22 BRBS 73 (1989).

Where decedent suffered from mesothelioma, the Board vacated the deputy commissioner’s computation of decedent’s average weekly wage as of the date of last exposure and remanded for consideration under Section 10(i), which defines “injury” in an occupational disease case as the time the disease becomes manifest. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

The Board remanded the case for consideration of average weekly wage consistent with the 1984 Amendments, noting that under 10(i) the date of injury for average weekly wage purposes in an occupational disease case is the date of awareness. The parties’ specific contentions were not addressed. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987).

The Board vacated an award based on the parties’ stipulations and remanded the case for findings pursuant to the 1984 Amendments. If the date of injury under Section 10(i) occurred after retirement, and claimant left the workforce for reasons unrelated to his injury, disability is based on the degree of permanent impairment and economic factors are not considered. *Truitt v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 79 (1987).

The date the parties stipulated that claimant learned that his condition is work-related is the time of injury under Section 10(i). Inasmuch as this date occurred after retirement, claimant is limited to an award based on permanent impairment under the *AMA Guides*. *Coughlin v. Bethlehem Steel Corp.*, 20 BRBS 193 (1987).

The Board held that the administrative law judge erred in failing to apply Section 10, as amended in 1984, to a claim for death benefits where the employee’s death occurred in 1965, but his widow did not become aware of the relationship between his longshore employment and death until 1982, at which time she filed a claim. As the claim was

pending on the effective date of the 1984 Amendments, Section 10(i) applied in defining time of injury. *Taddeo v. Bethlehem Steel Corp.*, 22 BRBS 52 (1989).

The post-retirement provisions of Sections 2(10), 8(c)(23), and 10(d)(2) do not apply to claimants whose occupational diseases cause their involuntary retirement from the workforce. Under Section 10(i), in disability claims the time of injury is determined by the date the employee became aware of the work-related disability; however, in a Section 9 claim for death benefits, the time of injury is the date the claimant was aware of the work-related death. Accordingly, the time of injury in the latter instance cannot be prior to the employee's date of death, and the average weekly wage at that time is used. In a footnote, the Board noted that this construction of the statute is limited in retiree cases to those involving voluntary retirees. In cases of death benefit claims from survivors of involuntary retirees, death benefits must be based on the average weekly wage of the employee at the time of the initial injury, as otherwise there would be no earnings to base it on since Section 10(d)(2) would not apply to allow use of the national average weekly wage. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

In a death benefits case where the decedent voluntarily retired, the compensation rate for the award is based on the national average weekly wage in effect at the time the claimant became aware under Section 10(i) of the work-relatedness of the death, which can be no earlier than the date of death. It is not based on the national average weekly wage on the date of manifestation of the decedent's injury. *Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991), *aff'd sub nom. Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55(CRT) (1st Cir. 1991).

The Second Circuit reversed the Board's holding that as claimant's disability from an occupational disease predated awareness of the relationship between disability and employment, the average weekly wage should reflect earnings prior to the onset of disability rather than the subsequent earnings at the later time of awareness. While noting that use of Section 10(i) could produce anomalous results in some situations (for example, where claimant becomes disabled before suffering a wage loss attributable to his disease and recognizes the occupational nature of his disease only after retirement or accepting a lower-paying job), the court concluded that application of Section 10(i) on facts of this case did not produce an unjust result or contravene the statute's compensatory purpose. Claimant was earning more at the date of awareness under Section 10(i). However, in a footnote addressing the computation of claimant's loss in wage-earning capacity in the disability portion of the opinion, the court noted that the Section 10(i) date should not be used as the difference between pre-awareness and post-awareness wages in most cases will be too small to adequately compensate an employee. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989), *rev'g LaFaille v. Gen. Dynamics Corp.*, 18 BRBS 88 (1986).

In an occupational disease case where decedent was a voluntary retiree, claimant's award of death benefits should be based on the national average weekly wage in effect no earlier than the date of decedent's death, as claimant's date of awareness of the work-relatedness of decedent's death could have been no earlier. In cases where decedent was an involuntary retiree, claimant's award of death benefits should be based on decedent's actual average weekly wage at the time of injury, consistent with *Adams. Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990)(Dolder, J., concurring in the result).

The Board held that, although this case arose under the D.C. Act and the 1984 Amendments to the Longshore Act are not applicable, the administrative law judge properly determined that claimants were entitled to death benefits based on decedent's average weekly wage as of the year before his death. Long-standing precedent provides that the "time of injury" in an occupational disease case is the date on which the disability becomes manifest; thus, the "time of injury" for determining average weekly wage is the date on which the occupational disease becomes manifest through a loss of wage-earning capacity. As decedent was diagnosed with chronic active hepatitis in 1977 but continued working until his occupational disease hospitalized him and then caused his death 1992, it is consistent with case law to base his average weekly wage on the wages earned in the year preceding his death, and this compensates claimants for the full extent of decedent's wage loss. *Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997).

Claimant's back condition, degenerative facet disease, resulting from a fall from a ship ladder, was a traumatic injury, not an occupational disease, and compensation benefits should be based on claimant's average weekly wage at the time of the 1987 injury, *i.e.*, the date the incident occurred, rather than the higher average weekly wage at the time the condition was diagnosed in 1992. Degenerative facet disease resulted from traumatic physical impact, not exposure to external, environmentally hazardous conditions of employment. The Fifth Circuit expressed its disagreement with the Ninth Circuit's application of concept of latent trauma in non-occupational disease cases to calculate average weekly wage at the time of disability in *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997).

The First Circuit affirmed the administrative law judge's finding that under Section 10(i), claimant's time of injury with regard to his carpal tunnel syndrome was the date he first complained to employer of tingling in his hands and was put on light duty, not the subsequent date when claimant was laid off from a management position and was unable to return to his former job because of his injury. *Leathers v. Bath Iron Works & Birmingham Fire Ins.*, 135 F.3d 78, 32 BRBS 169(CRT) (1st Cir. 1998).

The Ninth Circuit rejected the Director's argument that claimant's disabling back condition, which was a natural and unavoidable progression of his work-related knee injury, qualified as an occupational disease. The court accepted the definition of

“occupational disease” set forth in *Gencarelle v. Gen. Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989), as “any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally.” As claimant’s back problems arose from walking on his injured knee, and not from any conditions or activities particular to his longshore job, his back condition did not represent an occupational disease and, thus, the provisions of Section 10(i) governing the time of injury in an occupational disease case for purposes of average weekly wage did not apply. *Port of Portland v. Director, OWCP [Ronne II]*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000).

The Board affirmed the administrative law judge’s finding that the claim is within the purview of Section 10(i) because claimant suffers from an occupational disease, PTSD, which did not immediately result in disability. Specifically, claimant’s PTSD is not due to a physical accident but is the result of exposure to the external environmentally hazardous conditions of his employment in Iraq; his working conditions were peculiar to work in a war zone, and there was a delayed onset. The dangers of claimant’s employment were not known to be harmful *to him* until he was diagnosed, and claimant’s awareness of his PTSD occurred a significant time after he last worked there. *Gindo v. AECOM Nat’l Sec. Programs, Inc.*, 52 BRBS 51 (2018), *vacated and remanded*, No. 4:19-CV-01745 (S.D. TX March 23, 2022).

## Section 10(i) and hearing loss

NOTE: Cases decided before *Bath Iron Works*, 506 U.S. 153, 26 BRBS 151(CRT) (1983), are of historical significance only.

The Board affirmed the administrative law judge's hearing loss award based on claimant's average weekly wage on the date an audiogram was administered indicating the full extent of his disability for which he filed this claim, applying Section 10(i). *Epps v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 1 (1986)(Brown, J., concurring).

The Board reaffirmed the notion that where, as here, a claimant's hearing loss results from prolonged on-the-job exposure to noise, the hearing loss constitutes an occupational disease under the Act. The Board accordingly held that, since claimant suffered from an occupational disease, Section 10(i) should have been applied in determining when claimant's injury "occurred" for purposes of determining average weekly wage. *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988).

The Board rejected carrier's contention that the "date of injury" for the computation of claimant's average weekly wage occurred several years before the date on which claimant received an audiogram showing a hearing loss and had knowledge of the causal connection between his hearing impairment and his employment. Section 10(i) applies in hearing loss claims. Since the administrative law judge properly concluded that claimant's stipulated January 1983 wage rate was the same as that on his awareness date under Section 10(i) in March 1983, the administrative law judge's determination was affirmed. *Grace v. Bath Iron Works Corp.*, 21 BRBS 244 (1988).

Where claimant did not suspect that a relationship existed between his hearing loss and his employment until some thirteen years after he voluntarily left the work force, the Board held that his average weekly wage should be calculated pursuant to Section 10(d)(2)(B), which provides for a calculation based on the national average weekly wage as of the time of injury under Section 10(i). *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988).

The Board rejected the Director's argument that hearing loss is not an occupational disease which does not immediately result in disability and thus that Section 10(i) does not apply. Average weekly wage is calculated pursuant to Section 10(i) in hearing loss cases. The Board noted the problems that could arise if the date of last exposure is used as the time of injury. *Machado v. Gen. Dynamics Corp.*, 22 BRBS 176 (1989) (en banc)(Brown, J., concurring).

The Fifth Circuit affirmed the Board's reasoning that Section 10(i) applies in retiree hearing loss cases, finding no congressional intent to treat hearing loss any different than other occupational diseases although the court acknowledged that hearing loss does not progress after the date of last exposure. The court reversed the Board's holding that

claimants are entitled to compensation under Section 8(c)(13), and held that they are entitled to compensation under Section 8(c)(23) pursuant to the 1984 Amendments. It remanded the case for the Board to make the appropriate adjustments under the retiree scheme embodied in Sections 8(c)(23), 10(d)(2), 10(i), and 2(10). *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990), *rev'g in part and aff'g in part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (en banc) (Brown, J., concurring), and *Gulley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 262 (1989) (en banc) (Brown, J., concurring).

The Board relied on *Machado*, 22 BRBS 179, for the propositions that under Section 10(i) the time of injury for the occupational disease of hearing loss is the date claimant becomes aware of the relationship between his employment, disease and disability, and that benefits for voluntary retirees who suffer from hearing loss should be calculated under Section 8(c)(13). *Fucci v. Gen. Dynamics Corp.*, 23 BRBS 161 (1990) (Brown, J., dissenting on other grounds).

The Eleventh Circuit held that Section 10(i) is applicable to hearing loss claims inasmuch as the legislative history of the 1984 Amendments does not reflect congressional intent to treat hearing loss differently than other occupational diseases. The court noted that the conference report specifically rejected the date of last exposure for purposes of determining average weekly wage, and the court rejected the Director's attempt to distinguish hearing loss as being a completed injury at the time of last exposure. *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229(CRT) (11th Cir. 1991).

For the reasons stated in *Machado*, 22 BRBS 176, and *Fairley*, 898 F.2d 1088, 23 BRBS 61(CRT), the Board reasserted the applicability of Section 10(i) in retiree hearing loss cases. *Brown v. Bath Iron Works Corp.*, 24 BRBS 89 (1990) (en banc) (Stage, C.J., concurring in the result)(Brown, J., dissenting on other grounds)(McGranery, J., dissenting), *rev'd sub nom. Bath Iron Works v. Director, OWCP*, 942 F.2d 811, 25 BRBS 30(CRT) (1st Cir. 1991), *aff'd*, 506 U.S. 153, 26 BRBS 151(CRT) (1993).

The First Circuit held that benefits for voluntary retirees with hearing loss are to be calculated pursuant to Section 8(c)(13), rejecting the position taken by the Fifth Circuit in *Fairley*, 898 F.2d 1088, 23 BRBS 61(CRT), that benefits are to be calculated under Section 8(c)(23). The court reasoned that unlike asbestosis, a disease with symptoms that often do not appear until after retirement, hearing loss symptoms occur before retirement, whether or not they are noticed by the worker, and thus, the "time of injury" is prior to retirement, rendering Section 10(i) and the post-retirement injury provisions inapplicable. Oddly, the court also stated that its holding "has no significance beyond this case." *Bath Iron Works v. Director, OWCP*, 942 F.2d 811, 25 BRBS 30(CRT) (1st Cir. 1991), *aff'd*, 506 U.S. 153, 26 BRBS 151(CRT) (1993).



In this hearing loss case, the date of injury for the purpose of determining claimant's average weekly wage was the date of awareness, which was the date when claimant received an audiogram and a medical report specifically linking his hearing loss to his employment. *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991).

The Board held that consistent with *Port of Portland*, 932 F.2d 836, 24 BRBS 137(CRT), for purposes of determining average weekly wage in occupational hearing loss cases arising in the Ninth Circuit, the date of injury under Section 10(i) is the date that the employee was or should have been aware of the relationship between the employment, the disease and disability demonstrated on the determinative audiogram. *Mauk v. Nw. Marine Iron Works*, 25 BRBS 118 (1991).

The Board stated it would continue to apply Section 10(i) to hearing loss cases consistent with *Machado*, *Fairley*, and *Sowell*, noting the contrary decision of the First Circuit in *Brown*. The Board noted that hearing loss injuries have consistently been treated the same as other occupational diseases, and that Congress specifically rejected the date of last exposure approach in enacting the 1984 Amendments. The Board further noted that the First Circuit erroneously believed that its pronouncement on the inapplicability of Section 10(i) would not have far reaching effects. *Harms v. Stevedoring Service of Am.*, 25 BRBS 375 (1992) (Smith, J., dissenting on other grounds), *rev'd in part. part mem.*, 17 F.3d 396 (9th Cir. 1994).

The Supreme Court held that hearing loss is not an occupational disease which "does not immediately result in death or disability," and thus Section 10(i) is inapplicable. The Court held that a hearing loss injury occurs simultaneously with exposure to excessive noise, and therefore the injury is complete on the date of last exposure. Average weekly wage is thus calculated from the date of last exposure. Inasmuch as Section 10(i) is inapplicable, Sections 10(d)(2) and 8(c)(23) also are inapplicable and all hearing loss is to be compensated pursuant to Section 8(c)(13). *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993), *aff'g* 942 F.2d 811, 25 BRBS 30(CRT) (1st Cir. 1991).

In light of *Bath Iron Works* and *Port of Portland*, the Ninth Circuit endorsed the Board's rule in *Mauk*, 25 BRBS 118, that, for occupational hearing loss claims, the date of the last exposure to injurious noise prior to the determinative audiogram is the date of injury for purposes of calculating average weekly wage. *Ramey v. Stevedoring Services of Am.*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).