

HOPE IRVIN)
(Survivor of AARON BELL))
)
 Claimant-Respondent)
)
 v.)
)
 CROWLEY AMERICAN TRANSPORT) DATE ISSUED: April 24, 2002
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 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION, LTD.)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits and Remanding for Determination of Adjustment and Payment of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Marc R. Silverstein (Silverstein & Silverstein), Miami, Florida, for claimant.

Lawrence Craig and Frank Sioli (Valle & Craig), Miami, Florida, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits and Remanding for Determination of Adjustment and Payment (99-LHC-3100) of Administrative Law Judge Thomas M. Burke rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Decedent, Aaron Bell, worked as a lasher for employer. On June 26, 1997, he was

struck and crushed to death by a container. Claimant is the mother of Abionca Bell, decedent's natural child. She is also the mother of Diamond Irvin, who was not fathered by decedent.¹ Nevertheless, decedent provided support for Diamond as well as for Abionca. Claimant sought death benefits under the Act. Employer voluntarily paid death benefits to the decedent's children, but the parties could not reach an agreement as to the decedent's average weekly wage.

In his Decision and Order, the administrative law judge found that decedent earned \$26,889.61 in the 12 months preceding his death, working 1,599.75 hours over 186 days. The administrative law judge found that as decedent's work was permanent and continuous, it was appropriate to determine his average weekly wage pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a). He calculated that decedent's daily wage supports an average annual salary finding of \$35,309.59, which, considering that decedent worked a four and one-half day week, yields an average weekly wage of \$650.56.

On appeal, employer contends that the administrative law judge erred in calculating decedent's average weekly wage pursuant to Section 10(a), rather than Section 10(c), 33 U.S.C. §910(c), as decedent was not a full-time worker and application of Section 10(a) results in a \$8,500 over-estimate of decedent's average annual earnings. Claimant responds, urging affirmance of the administrative law judge's decision.

Section 10(a) applies where an employee worked substantially the whole of the year preceding the injury and looks to the actual wages of the injured worker as the monetary base for a determination of the amount of compensation. 33 U.S.C. §910(a); *see Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). To calculate average weekly wage under this section, the employee'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 an average daily wage. 33 U.S.C. §910(a). The average daily wage is then multiplied by 260 for a five-day per week worker and 300 for a six-day per week worker and the quotient is divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to determine the employee's average weekly wage.

¹The parties agreed that decedent stood in *loco parentis* to Diamond Marie Irvin. 33 U.S.C. §902(14).

In the present case, the administrative law judge determined decedent's average daily wage, \$144.57, by dividing his actual wages, \$26,889.61, by the number of days he worked, 186. The administrative law judge then accepted claimant's contention that decedent worked, on average, four and a half days per week, and thus he multiplied the average daily wage by 234, concluding that decedent had an average weekly wage of \$650.56 ($\$144.57 \times 234 = \$33,829.38 / 52 = \650.56). Employer's argument that this calculation cannot be affirmed has merit. While the evidence of record does support the administrative law judge's finding that decedent's employment was continuous and regular, and that decedent was employed for "substantially the whole of the year," see *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 80 BRBS 57(CRT)(5th Cir. 1996), the administrative law judge's application of Section 10(a) does not comport with the requirements of the Act. Section 10(a) requires that the employee's average daily wage be multiplied by 260 for a 5-day per week worker or 300 for 6-day per week worker. 33 U.S.C. §910(a). The administrative law judge's findings here establish that claimant did not work a full 5-day week. Section 10(a) is not applicable on these facts as it does not contain a statutory provision for multiplying an employee's wages by a 4 ½- day factor as the administrative law judge did in the instant case.²

²Moreover, the figures relied upon by the administrative law judge indicate that decedent worked an average of 8.5 hours a day ($1583.25/186$) and 32 hours per week ($1583.25/50$ weeks). Jt. Ex. 1. This results in an average of 3.8 days per week (32 hours per week/8.5 hours per day), as opposed to the administrative law judge's finding that decedent

averaged 4.5 days per week. Furthermore, the administrative law judge's reliance on the decision of the United States Court of Appeals for the Ninth Circuit in *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), is misplaced in this case. In *Matulic*, the court held that the use of Section 10(a) is required if the employee worked at least 75 percent of the available work days and the number of days the employee worked is a known factor. As this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, application of *Matulic* is not mandated. In addition, the administrative law judge found that decedent worked 72 percent of days available to a 5-day per week worker (186/260). By dividing the actual number of hours decedent worked by an 8-hour day, rather than by the 8.5 hours per day decedent worked, the administrative law judge figured that decedent worked 76 percent of available days. The administrative law judge cannot "create" days in this manner. *Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 89 (1999), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT)(5th Cir. 2000). Thus, as decedent worked fewer than 75 percent of arguably available work days, *Matulic* would not require use of Section 10(a) based on the facts of this case.

In addition, Section 10(a) aims at a theoretical approximation of what an employee working five or six days a week during the work year could have been expected to earn during the period in question. In this case, however, as decedent did not work a 5-day week for most of the year, the administrative law judge's calculation under Section 10(a) yields average annual earnings of \$33,829.38, which is significantly higher than decedent's actual earnings of \$26,889.61 or the amount he would reasonably have earned working a 4½-day week. Consequently, we hold that the application of Section 10(a) in this case does not result in a fair and reasonable approximation of decedent's annual wage-earning capacity, as it distorts the projection of his annual earnings beyond the amount which he could realistically have been expected to earn given the hours he normally worked. *Duncanson-Harrelson Co. v. Director*, 686 F.2d 1336 (9th Cir. 1982), *vacated and remanded on other grounds*, 462 U.S. 1101, *on remand*, 713 F.2d 462 (1983); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985); *but see Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998)(court held that application of Section 10(a) is not precluded in cases where the claimant works fewer than 75 percent of the workdays if other relevant factors are present). Therefore, we vacate the administrative law judge's determination of decedent's average weekly wage under Section 10(a) and we remand the case to the administrative law judge to compute decedent's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), as it is appropriate to use Section 10(c) where Section 10(a) does not apply.³ *See SGS Control Services*, 86 F.3d at 443, 30 BRBS at 61(CRT).

³Section 10(c) is a catch-all provision to be used in instances when, as here, neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(a), (b), can be reasonably and fairly applied. *See Story v. Navy Exchange Service Center*, 30 BRBS 225 (1997); *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the employee's annual earning capacity at the time of the injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). No party argues that Section 10(b) is applicable in this case.

Accordingly, the administrative law judge's average weekly wage calculation pursuant to Section 10(a) is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge