BRB No. 14-0189

MICHAEL D. DALTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARITIME SERVICES CORPORATION	)	DATE ISSUED: Dec. 15, 2014
	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Following Remand of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, L.L.P.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Following Remand (2011-LHC-00053) of Administrative Law Judge Richard M. Clark 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has been before the Board. The basic facts are not in dispute. Claimant injured his neck and back while working for employer as a

laborer on March 17, 2001. He underwent a triple-level fusion in January 2002, and he filed a claim for benefits. Employer voluntarily paid benefits from the date of the injury; however, disputes arose over the date claimant's condition reached maximum medical improvement and the amount of claimant's average weekly wage.

The administrative law judge found that claimant's condition reached maximum medical improvement on March 4, 2004, and not on February 23, 2003, as claimant had asserted. He also calculated claimant's average weekly wage as $527.73 pursuant to Section 10(c), 33 U.S.C. §910(c), by averaging claimant's earnings over the two years immediately prior to claimant's injury. The administrative law judge awarded claimant temporary total disability benefits from March 17, 2001, through March 4, 2004, and permanent total disability benefits thereafter. Decision and Order Awarding Compensation and Benefits (July 22, 2011). On reconsideration, the administrative law judge amended the award to reflect an average weekly wage of $523.57 and a closed period of temporary partial disability benefits, as claimant had worked intermittently between June 6, 2001, and May 5, 2002. Order Granting Reconsideration and Modifying July 22 Decision and Order (Sept. 16, 2011). Claimant appealed these decisions, arguing that maximum medical improvement occurred earlier than March 4, 2004, and that the administrative law judge erred in calculating claimant's average weekly wage by using earnings over a two-year period and by omitting the bonus claimant had received in 1999.

The Board affirmed the administrative law judge's finding regarding the date of maximum medical improvement, as well as his use of the average earnings over the two-year period prior to claimant's injury to calculate his average weekly wage. However, the Board held that the administrative law judge should have included claimant's 1999 bonus, received during the relevant two-year period, in his average weekly wage calculation. Therefore, the Board remanded the case for him to recalculate claimant's average weekly wage. *Dalton v. Maritime Services Corp.*, BRB No. 11-0868 (Aug. 30, 2012) (Boggs, J., concurring and dissenting). Subsequently, the Board denied claimant's motion for reconsideration of the maximum medical improvement issue but granted his motion as to average weekly wage. Specifically, the Board reaffirmed its determinations that the administrative law judge acted within his discretion under Section 10(c) by using the average of claimant's earnings over the two-year period prior to his injury as well as that claimant's average weekly wage should include his 1999 bonus. However, the Board modified its decision to clarify that the gross amount, or some prorated portion, of the 1999 bonus, and not the net amount, is to be included in the average weekly wage calculation. The Board remanded the case for the administrative law judge to determine the amount of the 1999 bonus to be included in claimant's average weekly wage. *Dalton v. Maritime Services Corp.*, BRB No. 11-0868 (Feb. 27, 2013) (Boggs, J., concurring and dissenting).

On remand, the administrative law judge found that the 1999 bonus was given purely at the discretion of the owner of the company, that there was no basis to assume claimant had earned the bonus equally over the course of the year, and that the bonus was not tied to production but was related only to employment. Thus, he rejected employer's argument that a portion of the bonus should be excluded from the calculation. As the administrative law judge concluded that the entire bonus should be included in claimant's average weekly wage, claimant's average weekly wage increased from $523.57 to $561.55. Decision and Order Following Remand at 4. The administrative law judge ordered the district director to make new calculations for benefits accordingly.

Claimant filed a timely notice of appeal following the administrative law judge's decision on remand. However, the issues claimant raises are those which he unsuccessfully appealed previously in BRB No. 11-0868; specifically, claimant requests that the Board issue a final order so that he may file an appeal with the United States Court of Appeals for the Ninth Circuit. Claimant states that he does not contest the administrative law judge's calculation of average weekly wage on remand. Thus, claimant's contentions on appeal are: 1) that the administrative law judge erred in finding March 4, 2004, to be the date of maximum medical improvement; and, 2) that the administrative law judge erred in using the average of claimant's earnings during the two years prior to his injury to calculate average weekly wage. Employer responds, urging affirmance on both issues.

When a case is before the Board for a second time, and the same issue is raised in the second appeal, the Board generally holds that its prior decision is "the law of the case," and it will not reexamine that issue. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002); *Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998); *Cooper v. John T. Clark & Son of Maryland, Inc.*, 14 BRBS 154 (1981), *aff'd*, 687 F.2d 39, 15 BRBS 5(CRT) (4th Cir. 1982). No exception to the law of the case rule applies in this case, as there has not been a change in the underlying factual situation, there has been no intervening controlling case authority, nor has claimant demonstrated that the Board's first decision was clearly erroneous. *Kirkpatrick*, 39 BRBS at 70 n.4. As the Board addressed and affirmed as supported by substantial evidence the average weekly wage and maximum medical improvement issues in its first decision, and the parties make no new assertions that would warrant disturbing that decision, we hold that the prior decision is the law of the case. *Id.* As the sole issue on remand was resolved in claimant's favor, and he does not challenge it, we affirm the administrative law judge's Decision and Order Following Remand.

Accordingly, the administrative law judge's Decision and Order Following Remand is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge