



BRB No. 17-0393

RONNEIKA D. BUTLER)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: <u>Dec. 18, 2017</u>
)	
HUNTINGTON INGALLS,)	
INCORPORATED (PASCAGOULA)	
OPERATIONS))	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order on Remand, the Decision and Order on Reconsideration, and the Order Granting Employer’s Motion to Correct Decision and Order on Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster and Jeffrey P. Briscoe, Metairie, Louisiana, for claimant.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand, the Decision and Order on Reconsideration, and the Order Granting Employer’s Motion to Correct Decision and Order on Reconsideration (2014-LHC-01168) of Administrative Law Judge Clement J. Kennington 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O’Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. On August 16, 2013, claimant injured her left knee while working for employer as a third-class pipefitter at its Pascagoula facility.¹ EXs 2, 3. Claimant's primary care physician excused her from work the following two workdays, August 19 and 20, 2013, due to her injury. CX 6. Between August 21, 2013 and January 6, 2014, claimant performed light-duty work for employer, for which she was paid her third-class pipefitter rate of \$19.66 per hour. Tr. at 16-17, 29-31; CX 4 at 15. She was released to full-duty work on January 6, 2014.

Between the date of injury and her release to full-duty work, claimant alleged she suffered a loss in wage-earning capacity due to the injury, as she was restricted from working for two days and missed 61.8 hours of work over 16 days due to doctor and physical therapy appointments. CXs 2-5; EX 5. Claimant testified that she had to schedule these appointments during the workday and had to clock out of work to go to the appointments. Tr. at 1, 6-19, 34. Employer did not pay claimant wages or compensation for the time she missed work due to the medical appointments. Claimant filed a claim on November 1, 2013, seeking compensation for this missed time.

Claimant and employer disputed claimant's entitlement to benefits under Section 8(e) and Section 6(a), 33 U.S.C. §§908(e), 906(a). They agreed that her average weekly wage should be calculated under Section 10(c), 33 U.S.C. §910(c), however, as claimant worked only 27 weeks in the year before her injury, and there was insufficient evidence in the record to determine her average daily wage. Accepting claimant's method for calculating average weekly wage, which included the higher wages she earned as a first-class pipefitter at the Avondale shipyard, the administrative law judge found claimant's average weekly wage is \$816.51.² However, as employer provided claimant with light-duty work at her regular hourly wage, the administrative law judge found claimant was physically capable of earning her full-time pre-injury wages the entire time she was

¹ For approximately 19 weeks in the year prior to her injury, claimant worked as a first-class pipefitter for employer at its Avondale shipyard prior to employer's closing the facility. Claimant earned \$22.80 per hour in this position. EX 1; Tr. at 13. On or about June 14, 2013, claimant was rehired by employer as a third-class pipefitter for \$19.66 per hour at its Pascagoula shipyard. EX 2; Tr. at 14.

² Claimant calculated her average weekly wage by dividing her total earnings for services rendered in the year prior to her injury by the 27 weeks she was able to work that year, which yielded an average weekly wage of \$816.51 ($\$22,045.77 \div 27$). Approximately 19 of the 27 weeks were based upon claimant's work at the Avondale shipyard as a first-class pipefitter, when she earned \$22.80 per hour. The remaining eight weeks of the calculation were based on claimant's work at the Pascagoula shipyard as a third-class pipefitter, when she earned \$19.66 per hour.

restricted to light-duty work. Decision and Order at 9. Although the administrative law judge acknowledged claimant lost work time and wages due to her injury-related medical appointments, he attributed the loss to “scheduling convenience.” Finding that neither Section 7 nor Section 8 of the Act, 33 U.S.C. §§907, 908, provides for the payment of compensation for lost wages to attend medical appointments, the administrative law judge denied the claim for compensation. Decision and Order at 8-9. Moreover, as claimant did not establish an economic disability lasting more than 14 days, the administrative law judge found she is not entitled to be paid for the first three days of disability pursuant to Section 6(a).³ *Id.* at 9-10.

Claimant appealed the administrative law judge’s denial of benefits. The Board held the administrative law judge erred in assessing claimant’s post-injury wage-earning capacity solely in terms of her physical ability to work full time. The Board explained that “[a] reduction in work hours due to the work injury may result in a compensable loss in wage-earning capacity.” *Butler v. Huntington Ingalls, Inc.*, BRB No. 15-0458, slip op. at 5 (Mar. 21, 2016) (unpub.). Therefore, the Board vacated the administrative law judge’s finding that claimant did not have a loss in wage-earning capacity. *Id.* at 6. Additionally, as the administrative law judge’s denial of benefits under Section 6(a) was premised on this finding, the Board vacated the denial of benefits thereunder and remanded the case for further consideration. *Id.* at 8. With respect to calculating claimant’s post-injury wage-earning capacity, the Board directed the administrative law judge to address claimant’s testimony that she had to schedule her appointments during work hours and to make a specific dollar finding as to claimant’s post-injury wage-earning capacity for the period she was restricted to light-duty work. Further, with respect to assessing any loss, the Board directed the administrative law judge to bear in mind that only a loss in wage-earning capacity due to claimant’s work injury is compensable; any loss of earning capacity due to claimant’s pre-injury job change, which resulted in her receiving the lower wages of a third-class pipefitter, is not compensable.⁴

³ Section 6(a) of the Act states:

No compensation shall be allowed for the first three days of the disability, except the benefits provided for in section 907 of this title: *Provided, however,* That in case the injury results in disability of more than fourteen days the compensation shall be allowed from the date of the disability.

⁴ Thus, the Board noted that a strict computation of average weekly wage minus post-injury weekly earnings is not proper in this case where the administrative law judge’s average weekly wage calculation includes earnings from claimant’s higher-paying job, as the loss of those wages is unrelated to claimant’s work injury. *Butler*, slip op. at 6, n.10.

Id. at 6; *see* 33 U.S.C. §902(10). The Board additionally clarified that, as claimant was restricted to light-duty work for a finite period of approximately 20 weeks, “if claimant establishes a post-injury loss in wage-earning capacity due to her work injury, she also will have established ‘a disability of more than 14 days’ and her entitlement to payment of compensation for the first three days of disability pursuant to Section 6(a).” *Butler*, slip op. at 8.

On remand, the administrative law judge recalculated claimant’s average weekly wage under Section 10(c), 33 U.S.C. §910(c), to reflect that claimant did not have the opportunity to earn first-class pipefitter wages at the time of injury. The administrative law judge found that claimant’s average weekly wage was \$786.40, as she had opportunity to work 40 hours per week, earning \$19.66 an hour. Decision and Order on Remand at 8. Further, the administrative law judge found that claimant lost wages during the 19.86 weeks she was restricted to light-duty work as she “was unable to schedule medical appointments so as to avoid loss of work time.” *Id.* Thus, the administrative law judge found claimant entitled to temporary partial disability benefits pursuant to Section 8(e) for this period. In calculating the amount of benefits due claimant, the administrative law judge subtracted claimant’s adjusted actual earnings,⁵ in each of the ten weeks she alleged a loss of wage-earning capacity due to medical appointments, from her average weekly wage of \$786.40 and awarded two-thirds of the difference for a total award of \$1,498.18.⁶ As claimant’s period of disability exceeded 14 days, the

⁵ The administrative law judge used claimant’s actual earnings for nine of the ten weeks. However, the administrative law judge adjusted claimant’s earnings for the week ending November 10, 2013, to reflect the wages claimant had the opportunity to work but for her injury. Specifically, during that week, claimant missed 16 hours of work over two days and earned \$471.85 for the 24 hours that she worked. EX 19 at 1. However, the administrative law judge credited claimant with having earned \$629.12 for 32 hours of work as claimant had conceded she lost only 8 hours that week due to her injury. Decision and Order on Remand at 9; *see* Cl. Post Hr. Br. at 13.

⁶ The administrative law judge calculated claimant’s benefits as follows:

	Week Ending	Average Weekly Wage	Actual Post-Injury Earnings	Average Weekly Wage minus Actual Earnings	Difference x 2/3
	8/25/13	\$786.40	\$397.14	\$389.26	\$259.51
	9/8/13	\$786.40	\$723.49	\$62.91	\$41.94
	9/22/13	\$786.40	\$629.12	\$157.28	\$104.85
	9/29/13	\$786.40	\$629.12	\$157.28	\$104.85

administrative law judge found claimant entitled to compensation for the first three days of disability pursuant to Section 6(a). *Id.* at 10.

Employer moved for reconsideration, asserting the administrative law judge erred in calculating claimant's average weekly wage and post-injury wage-earning capacity. Claimant responded, urging the administrative law judge to deny employer's motion. Claimant also urged the administrative law judge to reinstate his prior average weekly wage calculation of \$816.51 because it was not appealed to the Board. Employer filed a reply brief.

In his Decision and Order on Reconsideration (hereinafter, First Order on Reconsideration), the administrative law judge reinstated his finding that claimant's average weekly wage is \$816.51, but reaffirmed his finding on remand that claimant was capable of earning only \$786.40 per week in her employment as a third-class pipefitter at the time of injury.⁷ First Order on Reconsideration at 4. Further, the administrative law judge implicitly found that claimant's actual post-injury earnings represented the amount she was capable of earning in her injured condition because her medical treatment caused her to miss work hours and lose wages. *Id.* As claimant's earnings in each of the ten weeks she missed work due to medical appointments was less than the \$786.40 she could have earned absent injury, the administrative law judge found claimant established a loss in wage-earning capacity due to injury. *Id.* at 5-6. Further noting that Section 8(e) mandates disability benefits be calculated using a claimant's "average weekly wage," the administrative law judge awarded two-thirds of the difference between claimant's average weekly wage of \$816.51 and her post-injury wage-earning capacity, for a total award of \$1,698.89 in temporary partial disability compensation. *Id.* at 6. Because

	10/13/13	\$786.40	\$629.12	\$157.28	\$104.85
	11/10/13	\$786.40	\$629.12	\$157.28	\$104.85
	11/17/13	\$786.40	\$613.41	\$172.99	\$115.37
	11/24/13	\$786.40	\$530.82	\$255.58	\$170.39
	12/1/13	\$786.40	\$212.32	\$574.08	\$382.72
	12/8/13	\$786.40	\$623.12	\$163.28	\$108.85
Total:					\$1,498.18

Decision and Order on Remand at 9. In awarding \$0 compensation for the remaining weeks that claimant was restricted to light-duty work, the administrative law judge implicitly credited claimant with having earned \$786.40 for 40 hours of work.

⁷ The administrative law judge referred to this calculation as claimant's pre-injury average weekly wage.

claimant's disability exceeded 14 days, the administrative law judge reaffirmed his finding that, pursuant to Section 6(a), claimant is entitled to compensation for the first three days of disability. The administrative law judge modified his Decision and Order on Remand accordingly. *Id.* at 8.

On April 5, 2017, pursuant to employer's second motion for reconsideration, the administrative law judge corrected a data-entry error which understated claimant's actual earnings for the week ending December 1, resulting in an inflated loss in wage-earning capacity.⁸ Applying the same calculations in his First Order on Reconsideration to the corrected numbers, the administrative law judge found claimant entitled to \$1,423.63 in temporary partial disability benefits pursuant to Sections 6(a) and 8(e), and modified the award accordingly.⁹ Order Granting Employer's Motion to Correct Decision and Order on Reconsideration (hereinafter Second Order on Reconsideration) at 1-3.

⁸ The administrative law judge's prior calculations were based on claimant's having earned \$212.32 for the week ending December 1, 2013. Decision and Order on Remand at 9; First Order on Reconsideration at 6. However, claimant's wage records indicate she earned \$625.19 that week. EX 19 at 1.

⁹ The administrative law judge calculated claimant's benefits as follows:

	Week Ending	Average Weekly Wage	Actual Post-Injury Earnings	Average Weekly Wage minus Actual Earnings	Difference x 2/3
	8/25/13	\$816.51	\$397.14	\$419.37	\$279.58
	9/8/13	\$816.51	\$723.49	\$93.02	\$62.01
	9/22/13	\$816.51	\$629.12	\$187.39	\$124.93
	9/29/13	\$816.51	\$629.12	\$187.39	\$124.93
	10/13/13	\$816.51	\$629.12	\$187.39	\$124.93
	11/10/13	\$816.51	\$629.12	\$187.39	\$124.93
	11/17/13	\$816.51	\$613.41	\$203.10	\$135.40
	11/24/13	\$816.51	\$530.82	\$285.69	\$190.46
	12/1/13	\$816.51	\$625.19	\$191.32	\$127.55
	12/8/13	\$816.51	\$623.12	\$193.39	\$128.93
Total:					\$1,423.63

Second Order on Reconsideration at 2.

Employer appeals all three orders, contending the administrative law judge erred in finding claimant had a loss in wage-earning capacity and in failing to follow the Board's remand instructions. Employer asserts that, in using his prior average weekly wage calculation of \$816.51 to calculate the compensation due claimant, the administrative law judge improperly compensated claimant for a loss in wages due to her pre-injury job change. Employer also asserts the administrative law judge erred in failing to arrive at a single dollar figure representing claimant's loss of wage-earning capacity.¹⁰ Claimant responds, urging affirmance.

Entitlement to temporary partial disability compensation is predicated on a loss of wage-earning capacity due to a claimant's work injury. 33 U.S.C. §908(e);¹¹ *see generally McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988). The claimant bears the burden of establishing that her loss of wage-earning capacity is related to her work injury. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985); *see also Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005). Section 8(h) of the Act, 33 U.S.C. §908(h),¹² provides that

¹⁰ Employer asserts the administrative law judge properly calculated claimant's pre- and post-injury wage-earning capacity as \$786.40.

¹¹ Section 8(e) of the Act provides:

Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

¹² Section 8(h) of the Act states:

The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the [administrative law judge] may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may

a claimant's wage-earning capacity shall be her actual post-injury earnings if these earnings fairly and reasonably represent her wage-earning capacity. See *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990).

In assessing an injured claimant's wage-earning capacity pursuant to Section 8(h), the administrative law judge may take into account "any other factors or circumstances in this case which may affect [claimant's] capacity to earn wages in [her] disabled condition. . . ." 33 U.S.C. §908(h). A reduction in work hours due to the work injury may result in a compensable loss in wage-earning capacity. See, e.g., *Newport News Shipbuilding & Dry Dock Co. v. Stallings*, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001), *aff'g in part* 33 BRBS 193 (1999) (holding that claimant's work-related injury diminished his post-injury wage-earning capacity, despite greater post-injury wages, where the injury prevented him from working indoors and the record established that, but for the injury, he would have the opportunity to work indoors on days of bad weather and to earn a full day's pay); see also *Kerch v. Air America Inc.*, 8 BRBS 490, 493-494 (1978), *aff'd in part sub nom. Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979) (compensation for temporary partial disability benefits was appropriately awarded where an employee's work hours were reduced to accommodate his many medical appointments); compare with *Sheek v. General Dynamics Corp.*, 18 BRBS 1 (1985), *modified on recon. on other grounds*, 18 BRBS 151 (1986) (affirming administrative law judge's calculation of post-injury wage-earning capacity based on a 40-hour workweek, where claimant worked only part-time and attended vocational classes 15 hours per week, because "if not for the class attendance, claimant could have worked more than part-time hours").

We agree with employer that the administrative law judge erred in calculating claimant's loss of wage-earning capacity using the average weekly wage calculation of \$816.51. As the Board previously explained, the Act compensates claimants only for losses in wage-earning capacity that are due to the work injury, and any loss due to claimant's pre-injury job change is not compensable. *Butler*, slip op. at 4, 6. As the administrative law judge found, claimant was capable of earning only her third-class pipefitter wages at the time of her injury; he erred in using an average weekly wage that included claimant's higher first-class pipefitter wages and in compensating her for the loss in wages due to her job change. We therefore vacate the administrative law judge's reinstatement of claimant's average weekly wage of \$816.51 and the attendant calculation of temporary partial disability benefits pursuant to Section 8(e). 33 U.S.C.

affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

§§902(10), 908(e); see *Penrod Drilling*, 905 F.2d 84, 23 BRBS 108(CRT). As neither party challenges the administrative law judge's finding that claimant's pre-injury wage-earning capacity is \$786.40, and as they agree this figure represents the starting point for assessing claimant's loss in wage-earning capacity,¹³ we reinstate the administrative law judge's finding, contained in his Decision and Order on Remand, that claimant's average weekly wage is \$786.40.¹⁴ The administrative law judge's decision to calculate this figure by multiplying claimant's hourly rate of \$19.66 by the 40 hours of time per week that employer made available to claimant is rational pursuant to Section 10(c). See *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989); *Jackson v. Potomac Temporaries Inc.*, 12 BRBS 410 (1980); see generally *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *S.K. [Khan] v. Service Employers Int'l, Inc.*, 41 BRBS 123 (2007).

However, we reject employer's assertion that claimant has no loss in wage-earning capacity. Although the administrative law judge stated he calculated claimant's "post-injury wage-earning capacity" as \$786.40, he also stated that this was the amount claimant could earn "if not for the effects of her injury and the accompanying necessary medical treatment."¹⁵ First Order on Reconsideration at 5. In comparing this figure with the wages claimant actually earned each week, the administrative law judge effectively found that claimant's actual earnings represented her true post-injury wage-earning capacity, as he rationally credited her testimony that she was unable to schedule medical appointments outside of work hours. *Stallings*, 250 F.3d 868, 35 BRBS 51(CRT); *Kerch*, 8 BRBS 490. As claimant's actual earnings were less than \$786.40 in each week she lost work time due to medical appointments for her work injury, the administrative law judge

¹³ Employer contends on appeal that the administrative law judge properly calculated claimant's pre-injury wage-earning capacity as \$786.40, and claimant argued before the administrative law judge that her adjusted actual earnings should be compared against this same sum in assessing any loss. Emp. Br. at 8; Cl. Br. on Remand at 3-5.

¹⁴ With respect to the administrative law judge's decision to reinstate his original average weekly wage calculation of \$816.51 because it was not appealed to the Board, we note that no party was adversely affected by this finding as the administrative law judge did not rely on it to assess claimant's loss in wage-earning capacity. Decision and Order at 9. Moreover, as the Board, pursuant to claimant's appeal, remanded the case for the administrative law judge to assess whether claimant established a loss in wage-earning capacity, it was within the administrative law judge's discretion to correct his average weekly wage calculation.

¹⁵ As this sum does not account for the effects of claimant's injury, it does not reflect her capacity to earn wages in her disabled condition. 33 U.S.C. §908(h).

properly found claimant suffered a loss in wage-earning capacity due to injury. *Stallings*, 250 F.3d 868, 35 BRBS 51(CRT); *Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT).

Therefore, in light of our decision to reinstate the administrative law judge's average weekly wage calculation of \$786.40 contained in his Decision and Order on Remand, we additionally reinstate his conclusion that claimant is entitled to benefits for two-thirds of the difference between this sum and claimant's actual earnings for each week she lost work time due to her injury.¹⁶ In so doing, we incorporate the data correction to claimant's actual earnings in the week ending December 1, 2013, contained in the administrative law judge's Second Order on Reconsideration. *See generally Phillip v. Marine Concrete Structures, Inc.*, 877 F.2d 1231, 22 BRBS 83(CRT) (5th Cir. 1989), *aff'g* 21 BRBS 233 (1988), *rev'd on other grounds*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (*en banc*). Thus, we modify the administrative law judge's award of temporary partial disability benefits to reflect claimant's entitlement to \$1,222.90¹⁷ under Sections 6(a) and 8(e).¹⁸

¹⁶ We reject employer's assertion that the administrative law judge erred in not arriving at a single dollar figure representing claimant's loss of wage-earning capacity. Although the administrative law judge could have averaged claimant's actual earnings over the entire disability period, which would have allowed the administrative law judge to award the same weekly compensation rate throughout the disability period, doing so would not affect the total amount awarded.

¹⁷ Specifically, we award benefits as follows:

	Week Ending	Average Weekly Wage	Actual Post-Injury Earnings	Average Weekly Wage minus Actual Earnings	Difference x 2/3
	8/25/13	\$786.40	\$397.14	\$389.25	\$259.51
	9/8/13	\$786.40	\$723.49	\$62.91	\$41.94
	9/22/13	\$786.40	\$629.12	\$157.28	\$104.85
	9/29/13	\$786.40	\$629.12	\$157.28	\$104.85
	10/13/13	\$786.40	\$629.12	\$157.28	\$104.85
	11/10/13	\$786.40	\$629.12	\$157.28	\$104.85
	11/17/13	\$786.40	\$613.41	\$172.99	\$115.33
	11/24/13	\$786.40	\$530.82	\$255.58	\$170.39
	12/1/13	\$786.40	\$625.19	\$161.21	\$107.47
	12/8/13	\$786.40	\$623.12	\$163.28	\$108.85
Total:					\$1,222.90

Accordingly, the administrative law judge's First Decision and Order on Reconsideration is vacated, and the average weekly wage calculation of \$786.40 and attendant compensation calculation contained in his Decision and Order on Remand are reinstated. We affirm the data correction contained in the administrative law judge's Second Order on Reconsideration.¹⁹ We modify the award to reflect claimant's entitlement to temporary partial disability benefits in the amount of \$1,222.90.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

¹⁸ Claimant has established a post-injury loss in wage-earning capacity due to her work injury and "a disability of more than 14 days" because she was restricted to light-duty work for approximately 20 weeks. *Butler*, slip op. at 8; *see* 33 U.S.C. §906(a); *see also* 33 U.S.C. §914(b).

¹⁹ With respect to the week ending November 17, 2013, we additionally correct the administrative law judge's calculation to reflect that two-thirds of \$172.99 is \$115.33, rather than \$115.37.