BRB No. 10-0455

STEVE M. DOWHY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TIDEWATER TERMINAL CORPORATION	)	DATE ISSUED: 01/31/2011
	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Steven B. Berlin, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2009-LHC-0997) of Administrative Law Judge Steven B. Berlin 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).

Claimant injured his shoulder on January 12, 2007, while manually closing a tank valve at employer's facility. He was diagnosed with labral and tendon tears and bursitis, and he underwent arthroscopic surgery. The parties stipulated that claimant was temporarily totally disabled from January 13 through January 15, 2007, and from August 8 through August 19, 2007, temporarily partially disabled from January 16 through August 7, 2007, and from August 20, 2007, through January 16, 2008, and permanently partially disabled from January 17, 2008, and continuing. Decision and Order at 3. The parties disputed the calculation of claimant's average weekly wage and post-injury wage-earning capacity. The administrative law judge found that claimant's average weekly wage is $1,636.56. Decision and Order at 7-9. He then found that, due to raises and claimant's changing jobs, claimant had four different post-injury wage-earning capacities: 1) from January 16 through August 31, 2007, claimant's wage-earning capacity was $1,352.11; 2) from September 3, 2007, through January 16, 2008, claimant's wage-earning capacity wage $1,061.67; 3) from January 17, 2008, through June 21, 2009, claimant's wage-earning capacity was $1,197.53; and 4) from June 22, 2009, and continuing, claimant's wage-earning capacity was $1,185.59. Decision and Order at 10-12. Employer appeals the administrative law judge's award of benefits, specifically challenging the average weekly wage and wage-earning capacity calculations. Claimant responds, urging affirmance. Employer has filed a reply brief.

Average Weekly Wage

Employer contends the administrative law judge erred in calculating claimant's average weekly wage because he improperly used Section 10(a), 33 U.S.C. §910(a), by miscounting the number of days for which claimant was paid and erroneously concluding that claimant was a six-day worker instead of a five-day worker. Section 10(a) of the Act states:

> If 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, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

Section 10(a) provides a method for calculating average weekly wage based on the worker's average daily wage and can be applied unless such application would be unreasonable or unfair or if the facts necessary for application of Section 10(a) are not

available. 33 U.S.C. §910(a), (c).[1] *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). If Section 10(a) is otherwise applicable, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has adopted a bright-line rule that Section 10(a) must be applied where the claimant works 75 percent of the available workdays in a year. *General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006) (77.4 percent of the available days); *Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005) (75.77 percent of the available days); *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998) (82 percent of the available days); *see also Trachsel v. Rogers Terminal & Shipping Corp.*, 597 F.3d 947, 43 BRBS 73(CRT) (9th Cir. 2009); *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000). The Ninth Circuit stated that if a claimant works 75 percent of the available days, and an average daily wage can be calculated, average weekly wage cannot be calculated under Section 10(c), 33 U.S.C. §910(c), merely because use of Section 10(a) would inflate the claimant's earnings. *Matulic*, 154 F.3d at 1058, 32 BRBS at 151-152(CRT).

In this case, the administrative law judge found that claimant's employment was continuous and that he worked substantially the whole of the year prior to his injury. He also found that claimant's daily wage was readily calculable from the facts. Therefore, the administrative law judge found that Section 10(a) applies to this case. Decision and Order at 7-8. The administrative law judge next determined that claimant worked or was paid for a total of 280 days in the year preceding his injury. He concluded that, as 280 days "well exceeds the 260 days of a five-day worker[,]" categorizing claimant as a five-day worker would undercompensate him, though categorizing him as a six-day worker would overcompensate him. Pursuant to the decisions in *Castro* and *Matulic*, which he stated acknowledged the humanitarian purposes of the Act and permit "over-compensation," the administrative law judge found that, as "[c]laimant worked more than 93 percent of the days for a six-day worker[,]" Section 10(a) should be applied using the six-day worker calculation. Decision and Order at 8-9. Accordingly, the administrative law judge determined that claimant's earnings, $79,427.71, divided by the number of days worked, 280, multiplied by 300 for a six-day worker, and divided by 52, equals an average weekly wage of $1,636.56. Decision and Order at 9; *see* 33 U.S.C. §910(a), (d).

[1]Section 10(c) applies if either Section 10(a) or Section 10(b), 33 U.S.C. §910(b), "cannot reasonably and fairly be applied." 33 U.S.C. §910(c). In seeking remand to determine whether Section 10(a) can fairly be applied employer implies that it may be more proper to apply Section 10(c); however, employer raises no real arguments in this regard. In its post-hearing brief before the administrative law judge, employer argued that Section 10(a) applies.

Employer first challenges the administrative law judge's law judge's findings that claimant was paid for 280 days during the year preceding his injury and that his gross earnings were $79,427.71. It argues that he was paid $79,256.66 for 277 days. We reject employer's assertions. Claimant submitted a calendar whereby he identified his work status of every day of that year. At the hearing, he explained that there were a few errors on the calendar, and after thorough cross-examination at the hearing, claimant and employer agreed that claimant was paid for 280 days.[2] *See* Emp. Post-Hearing Brief at 2-4; Cl. Ex. 5; Tr. at 44-60. The administrative law judge rationally used the parties' figure in making his calculations. Similarly, we reject employer's assertion that the administrative law judge incorrectly calculated claimant's gross wages. The administrative law judge explained that claimant earned $78,003.52 during 2006 less the $1,615.68 claimant earned from January 1-13, 2006, plus the $3,039.57 he earned from January 1-12, 2007; this equals $79,427.71. Decision and Order at 5 n.3. The administrative law judge's finding is supported by substantial evidence and properly reflects claimant's earnings in the 52 weeks prior to his injury on January 12, 2007. *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); Cl. Exs. 4-6.

Employer also challenges the administrative law judge's conclusion that claimant is a six-day worker instead of a five-day worker, as the resulting calculation overcompensates claimant by paying him for 20 days he did not work. Employer asserts that there is no evidence to support the finding that claimant is a six-day worker.[3] Although the administrative law judge did not address claimant's testimony that he considered himself a five-day worker, we decline to disturb the administrative law judge's finding.

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[2]This number constitutes actual days worked or days paid in lieu of work and not hours converted to days. *Trachsel*, 597 F.3d 947, 43 BRBS 73(CRT); *Wooley*, 204 F.3d 616, 34 BRBS 12(CRT). Claimant worked 241 days and was paid for 13 sick days, 6 holidays, 12 vacation days, and 8 other days. Decision and Order at 4-5; Cl. Exs. 4-6; Tr. at 44-49. Employer retained different counsel following the hearing, and, on appeal, contends claimant actually worked 236 days. This contention does not take into account the credited testimony or the parties' apparent consensus.

[3]Employer's appellate attorney created a chart based on claimant's work records, summarizing claimant's employment for the 51 weeks prior to the injury, demonstrating that claimant worked 24 five-day weeks and 18 six-day weeks. The remainder of the chart shows that claimant worked one two-day week, five four-day weeks, and three seven-day weeks. Emp. Brief at 5, 9, 22-24. Employer's trial attorney appears to have presumed claimant was a five-day worker based on claimant's testimony, and she made no arguments as to how to derive a claimant's five-day versus six-day status.

There is no set formula on how to determine whether a claimant is a five-day worker or a six-day worker. Nevertheless, the mere statement that he is one or the other is not sufficient, alone, to establish him as such if the facts warrant a different determination. *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986) (where 71 percent of the claimant's work weeks were six-day weeks, the stipulation that the employer classified him as a five-day worker was irrelevant). In this case, claimant testified that he was "normally" a five-day worker. However, he then explained his repeating work schedule: four weeks of five days per week and then ten days on and four days off. Tr. at 25-26. Claimant also stated that he worked overtime – longer hours on regular days as well as hours on weekends. Tr. at 26; *see* Cl. Ex. 4. The total number of days for which he was paid, which we have affirmed, is 280 – the bulk of that time in five-, six-, and seven-day weeks. The administrative law judge rejected employer's argument that claimant is a five-day worker because he worked 20 days more than the 260 days a five-day worker can work and 93 percent of the 300 days allotted a six-day worker under Section 10(a). Decision and Order at 9. Citing *Castro* and *Matulic*, the administrative law judge stated that his conclusion comports with the fact that workers will not work every day possible and that "overcompensating" a claimant falls within the scheme contemplated by Congress. Decision and Order at 6-8; *see Castro*, 401 F.3d 963, 39 BRBS 13(CRT); *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT).

A Section 10(a) calculation arrives at a theoretical approximation of what a claimant would have earned if he worked every available work day. *Trachsel*, 597 F.3d 951, 43 BRBS 75(CRT); *Wooley*, 204 F.3d 618, 34 BRBS 13(CRT); *Duncanson-Harrelson Co. v. Director, OWCP [Freer]*, 686 F.2d 1336 (9th Cir. 1982), *vacated on other grounds and remanded*, 462 U.S. 1101, *on remand*, 713 F.2d 462 (1983). In this case, claimant's work exceeded the 260 days allotted to a five-day worker, and the administrative law judge, therefore, found that claimant was not such an employee. Claimant worked 93 percent of the possible days allotted for a six-day worker under Section 10(a). In addition, claimant worked a significant number of six-day weeks. Accordingly, it was reasonable for the administrative law judge to conclude that claimant should be considered a six-day worker. *Matthews*, 18 BRBS at 190. Claimant's percentage of days worked exceeds the 75 percent threshold established by the Ninth Circuit. As the administrative law judge's calculation of claimant's average weekly wage is rational, supported by substantial evidence, and in accordance with law, it is affirmed. *Castro*, 401 F.3d 963, 39 BRBS 13(CRT); *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT).

Wage-earning Capacity

Employer also contends the administrative law judge erred in calculating claimant's post-injury wage-earning capacity because he failed to consider claimant's first raise in his alternate employment with Calpine as a "merit" raise which would

increase his wage-earning capacity. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that the post-injury wage-earning capacity of a partially disabled employee under Section 8(c)(21), 33 U.S.C. §908(c)(21), shall be equal to his actual earnings if they fairly and reasonably represent his wage-earning capacity. Long-standing law interprets Section 8(h) as requiring the administrative law judge to compare the claimant's average weekly wage at the time of the injury with the wages his post-injury job paid at the time of the injury. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). This assures that the calculation of lost wage-earning capacity is not distorted by inflation or depression. *Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984); *see also Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

In this case, the administrative law judge found that claimant was earning $23.55 per hour when he was injured in January 2007. While working for employer post-injury, claimant received a raise to $24.55 per hour. When claimant started working for Calpine in September 2007, he earned $23.55 per hour. In January 2008, his wages increased to $24.55 per hour. Decision and Order at 5. To determine claimant's wage-earning capacity, the administrative law judge adjusted the earnings so as to compare them with the earnings at the date of injury. *Id.* at 11-12. Employer asserts that the January 2008 increase constituted a "merit" increase because it occurred after claimant completed training and proved he could perform the job; therefore, it asserts that claimant's post-injury wage-earning capacity actually increased such that claimant is entitled to a lower award.

Claimant testified that, in negotiating for the Calpine job, the supervisor stated: "we'll pay you a dollar less than what you're making at Tidewater. But when you get trained up within the six months, and prove to me that you can do the job, and have the ability, we'll bump that up to $24.55." Tr. at 42. Claimant further explained that Calpine employees were paid "on [their] ability[,]" and:

> There's not a specific wage that they give you there. [The supervisor] looks at your ability and what you've done in the past and what you're making at the time." *** "[T]here's a variety of wages that they can give you. There's an A, B, and C, and I was kind of in between. So it wasn't a set amount like a Union job. It was whatever your skills were. So he – he felt that he was going to give me a dollar less than the Tidewater job, and he'd give me that dollar back when I was trained, which was fair to me, too.

Tr. at 43. Claimant stated that he took the Calpine job because co-workers with injured shoulders advised him to change to a lighter duty job to prevent further injury. Tr. at 32-33. Although there is mention of "training," claimant testified that his duties at Calpine were lighter than those he performed for employer because Calpine is an automated plant run by computers. Valves are opened and closed by motors, chemicals are added by pumps, and claimant only had to manually open valves when the plant was shut down. Tr. at 32-34, 36-37, 42; *see also* Decision and Order at 5 n.4; Cl. Ex. 11.

In addressing claimant's post-injury wage-earning capacity, the administrative law judge set forth the proper law and, in particular, acknowledged that he may give consideration to wage increases but that there is no exact formula for determining wage-earning capacity provided he accounts for inflation by adjusting post-injury wages to the rate those jobs paid at the time of the injury. Decision and Order at 9. As the administrative law judge adjusted claimant's wages back to the date of injury, he implicitly found that this raise did not constitute an increase in claimant's wage-earning capacity. We affirm his finding as it is rational and accords with law. The evidence reflects that claimant's one-dollar pay raise was nothing more than the result of the Calpine supervisor increasing claimant's pay to that which he was receiving when he left employer's employ. Claimant did not receive a promotion such that his physical restrictions were no longer a factor in his job performance. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Owens v. Traynor*, 274 F.Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Therefore, we affirm the administrative law judge's decision to adjust claimant's post-injury wages to the rate paid as of the time of his injury. As employer does not challenge the administrative law judge's wage-earning capacity calculations, we affirm those findings.[4] *Carpenter v. California United Terminals*, 37 BRBS 149 (2003), *vacated on other grounds on recon.*, 38 BRBS 56 (2004).

[4]Employer also argues that the administrative law judge failed to determine whether the second and third raises at Calpine were merit raises. Contrary to employer's argument, there is nothing in the record to support the assertion that they were anything other than cost-of-living raises. Therefore, it was proper for the administrative law judge to adjust claimant's post-injury wages back to the date of 2007 injury. *See generally Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT); *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001). Additionally, employer does not challenge the administrative law judge's finding regarding claimant's wage-earning capacity after he obtained employment at Chevron. Decision and Order at 10-12. This finding is affirmed as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge