

PAUL G. McGEE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 11/05/2006
	)	
Self-Insured	)	DECISION and ORDER
Employer-Respondent	)	on RECONSIDERATION

Employer has timely moved for reconsideration of the Board’s Decision and Order in this case. *McGee v. Northrop Grumman Ship Systems, Inc.*, BRB No. 05-0533 (Mar. 20, 2006)(unpub.); 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant has filed a response opposing employer’s motion. We deny employer’s motion for reconsideration.

In its Decision and Order, the Board held that, consistent with the decision of the United States Court of Appeals for the Fifth Circuit in *Wooley v. Ingalls Shipbuilding, Inc.*, 204 F.3d 616, 34 BRBS 12(CRT) (5<sup>th</sup> Cir. 2000), claimant’s paid vacation days and holidays taken in lieu of a work day are properly included in determining claimant’s average daily wage when calculating claimant’s average weekly wage pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a). The Board further held, however, that the administrative law judge’s conclusion in the instant case that claimant had worked 263 days in the year prior to his injury cannot be affirmed without additional findings, since this number of days exceeds the 260 days per year available to a five-day worker. The Board stated that the fact that the number of days calculated exceeds 260 raises the possibility that days have been created by dividing hours paid by eight, a result contrary to *Wooley*, or that claimant received vacation or holiday pay for time that was not in lieu of a regular work day, with the resulting calculation reducing claimant’s theoretical annual earnings under Section 10(a) to a figure below his actual earnings. Accordingly, the Board remanded the case for further findings consistent with *Wooley*, 204 F.3d 616, 34 BRBS 12(CRT). *McGee*, slip op. at 4-6.

On reconsideration, employer essentially raises arguments addressed in the Board’s prior decision. Employer has also attached an exhibit, claimant’s “Daily Wage Recap Report Depicting Hours and Earnings” to its brief, stating that this document is a

copy of Claimant's Trial Exhibit 1. Claimant, in response, contends that employer's attachment is an altered, not true and exact copy of his original exhibit. We will not address this exhibit attached to employer's brief. As stated in the Board's decision, the administrative law judge in the instant case did not make specific findings but relied on a purported agreement between the parties as to the number of vacation days and holidays for which claimant was paid. The decision of the administrative law judge makes no reference to Claimant's Trial Exhibit 1. Thus, even if this exhibit was properly entered into evidence before the administrative law judge, the Board does not have the authority to engage in *de novo* review of the evidence. See *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5<sup>th</sup> Cir. 1991). It is the duty of the administrative law judge to address this issue consistent with the Administrative Procedure Act, see generally *Garmon v. Aluminum Co. of America-Mobile Works*, 29 BRBS 15 (1995)(Decision and Order on Recon.); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). Accordingly, we reject employer's motion. As the parties appear to dispute the accuracy of Claimant's Exhibit 1, they may submit this exhibit, as well as any other evidence relevant to this issue, to the administrative law judge for consideration on remand. See generally *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2<sup>d</sup> Cir. 1989).

Employer has raised no arguments not previously considered by the Board. Accordingly, its motion for reconsideration is denied. 20 C.F.R. §802.409.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge