

TOPIC 10 DETERMINATION OF PAY

10.1 AVERAGE WEEKLY WAGE IN GENERAL

Section 10 sets forth three alternative methods for determining a claimant's average **annual** earnings, which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp. of Baltimore, 24 BRBS 137 (1990); Orkney v. General Dynamics Corp., 8 BRBS 543 (1978); Barber v. Tri-State Terminals, 3 BRBS 244 (1976), aff'd sub nom. Tri-State Terminals v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Sections 10(a) and 10(b) are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's **work is regular and continuous**. The computation of average annual earnings must be made pursuant to subsection (c) if subsections (a) or (b) cannot be reasonably and fairly applied. Nonetheless, note that in practical application the most commonly applied computation of average weekly wages involves dividing all the payroll earnings received during the year preceding the injury by 52. Robert Babcock, Compensation - Section 10, The Longshore Textbook 42 (D. Cisek ed., 1991).

A percentage of the employee's average weekly wage is the claimant's compensation rate, subject to the maximum and minimum compensation rates established under Section 6. See, e.g., Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Duncanson-Harrelson Co. v. Director, OWCP, 686 F.2d 1336 (9th Cir. 1982), vacated in part on other grounds, 462 U.S. 1101 (1983); Turney v. Bethlehem Steel Corp., 17 BRBS 232 (1985).

There is only one average weekly wage upon which payments of compensation for a **single** injury may be based, whether the disability for which compensation is payable is characterized as temporary or permanent, partial or total. James v. Sol Salins, Inc., 13 BRBS 762 (1981) (reversing separate average weekly wage findings for temporary total and permanent partial disability). See Thompson v. Northwest Enviro Servs., 26 BRBS 53 (1992); Merrill v. Todd Pac. Shipyards Corp., 25 BRBS 140, 150 (1991).

The average weekly wage should not be reduced by the effective income tax rate. Denton v. Northrop Corp., 21 BRBS 37, 47 (1988); see 26 U.S.C. § 104 (a)(1) (personal injury awards are excluded from gross income for federal personal income tax purposes).

***[ED NOTE:** Recently the Board rejected a claimant's contention that, in determining her average weekly wage, the ALJ was required to exclude the entire time her family physician certified that she was disabled due to the deaths in her family. Scudder v. Maersk Pacific, Ltd., (BRB No. 00-1063)(July 24, 2001)(Unpublished), citing generally Preziosi v. Controlled Industries, Inc., 22 BRBS 468, 473 (1989); Greene v. J.O. Hartman Meats, 21 BRBS 214, 217 (1988). In Scudder, the Board*

noted that it was taking this position absent any indication from Congress that the LHWCA should be interpreted consistently with the Family and Medical Leave Act, 29 U.S.C. §2611 et. seq. (1993).]

10.1.1 Time of Injury

In **traumatic injury cases**, an employee's average weekly wage is determined as of the time of injury for which compensation is claimed. 33 U.S.C. § 910; Hall v. Consolidated Employment Systems, Inc., 139 F.3d 1025, 32 BRBS 91 (CRT) (**5th Cir.** 1998); Merrill v. Todd Pac. Shipyards Corp., 25 BRBS 140, 149 (1991); Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991); Finch v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 196, 200 (1989); Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190, 193 (1984); Hastings v. Earth-Satellite Corp., 8 BRBS 519, 524 (1978), aff'd in pertinent part, 628 F.2d 85, 14 BRBS 345 (**D.C. Cir.**), cert. denied, 449 U.S. 905 (1980).

Unlike Sections 12 and 13, Section 10 does not contain an awareness provision for traumatic injuries. Accordingly, the time of injury is not synonymous with the date the claimant discovered the injury. Merrill v. Todd Pac. Shipyards Corp., 25 BRBS 140, 149 (1991); Matthews v. Jeffboat, Inc., 18 BRBS 185, 190 (1986). Contra Johnson v. Director, OWCP, 911 F.2d 247, 24 BRBS 3 (CRT) (**9th Cir.** 1990), cert. denied, 449 U.S. 959 (1991) (see discussion, infra).

Aggravation of a previous traumatic injury constitutes a new injury, which entitles the claimant to benefits based on the wages earned immediately prior to that injury. Kooley v. Marine Indus. N.W., 22 BRBS 142, 146 (1989); Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190, 193 (1984); Chiarella v. Bethlehem Steel Corp., 13 BRBS 91 (1981).

The **Ninth Circuit** has determined that, in a case involving a latent traumatic injury, a claimant's average weekly wage is to be calculated at the time the permanent disability becomes manifest, rather than at the time of the accident. Johnson v. Director, OWCP, 911 F.2d 247, 24 BRBS 3 (CRT) (**9th Cir.** 1990), cert. denied, 499 U.S. 959 (1991) (worker injured her hand in an accident in 1979; in 1983, she was unable to work due to increased swelling and continued pain in that hand—time of injury was when the disability attributable to the injury became manifest, in a case involving an injury which only manifested symptoms several years later.). See also Kubin v. Pro-Football, Inc., 29 BRBS 117 (1995). Kubin is a District of Columbia Workmen's Compensation Act case wherein the Board affirmed the ALJ's use of a claimant's earnings at the time his injury became disabling, reasoning this result was consistent with Johnson. The Johnson court had relied upon the definition of injury enunciated by the **District of Columbia Circuit** in Stancil v. Massey, 436 F. 2d 234 (**D.C. Cir.** 1970). The **Ninth Circuit**, in Johnson, reasoned that latent traumatic injuries are similar to occupational diseases as the effect of the injury or disease is not known until a disability becomes manifest.

In a later Board case arising in the **Ninth Circuit**, however, the Board applied Johnson narrowly. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991) (Where a claimant's disability was caused by an aggravation due to the claimant's return to work, the average weekly

wage was determined at the time of the last aggravation.). If the claimant's condition is the natural and unavoidable result of only **one injury**, Johnson applies. If it was the result of a subsequent aggravation, such as in Merill where the claimant's return to work caused the aggravation, constituting a **new injury**, the average weekly wage should be calculated as of the time of that injury. The Board has specifically rejected applying the **Ninth Circuit** position beyond that circuit. McKnight v. Carolina Shipping Co., 32 BRBS 165(1998)(en banc).

While acknowledging that there is conflicting circuit law regarding the time period during which the average weekly wage is to be calculated in a case of latent disability due to a traumatic injury, the Board held that outside of the **Ninth Circuit**, it would follow the law espoused by the **Second** and **Fifth Circuits**. LeBlanc v. Cooper/T Smith Stevedoring, Inc., 130 F.3d 157, 31 BRBS 195 (CRT)(**5th Cir.** 1997); Director, OWCP v. General Dynamics Corp. [Morales], 769 F.2d 66, 17 BRBS 130 (CRT) (**2d. Cir.** 1985) (In latent disability cases, benefits are to be based on the average weekly wage at the time of the accident which caused the injury, better applies the language of Section 10 than does the **9th Circuit** position.). See also Hawthorne v. Ingalls Shipbuilding, Inc., 28 BRBS 73 (1994), modified on other grounds on recon., 29 BRBS 103 (1995). The Board agreed with the **Fifth Circuit** in noted that in enacting Section 10(i) in 1984, Congress specifically defined a different "time of injury" for occupational diseases, but did not change the approach to "time of injury" in traumatic injury cases. Thus, the Board rejected the "manifest approach" taken by the **Ninth Circuit**.

[ED. NOTE: In the mention of "occupational injuries" above, the jurisprudence is referring to those injuries in which there is not an immediate result in disability. These should be considered separate from hearing loss cases which, though technically classified as occupational injury cases, are NOT occupational injury cases for purposes of the LHWCA. See Bath Iron Works Corp. v. Director, OWCP, 506 U.S. 153, 26 BRBS 151 (CRT) (1993).]

An **occupational disease**, which does not immediately result in disability or death, is distinguished from a traumatic injury under the terms of the LHWCA. The time of injury is "the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability." 33 U.S.C. § 910(i). See discussion of Section 10(i), infra.

10.1.2 Evidentiary Requirements

A determination of an employee's annual earnings must be based on substantial evidence. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991); Lobus v. I.T.O. Corp. of Baltimore, 24 BRBS 137, 140 (1990) (insufficient evidence for Section 10(a)); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 135 (1990) (insufficient evidence for Section 10(b)); Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981) (insufficient evidence for Sections 10(a) and (b)); Wise v. Horace Allen Excavating Co., 7 BRBS 1052 (1978) (insufficient evidence for Section 10(c)).

The party contending actual wages are not representative bears the burden of producing supporting evidence. Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 5 BRBS 23, 25 (9th Cir. 1976), affg and remanding in part 1 BRBS 159 (1974); Riddle v. Smith & Kelly Co., 13 BRBS 416, 418 (1981). The claimant's testimony may be considered substantial evidence. Carle v. Georgetown Builders, 14 BRBS 45, 51 (1980); Smith v. Terminal Stevedores, 11 BRBS 635, 638 (1979). But see Mattera v. M/V Mary Antoinette, Pac. King, Inc., 20 BRBS 43, 45 (1987) (ALJ rejected claimant's testimony due to his lack of credibility).

An ALJ can also rely on a voluntary stipulation as to average weekly wage which is based on a reasonable method of calculation under the LHWCA. Such a stipulation is not a waiver of compensation under Section 15(b). Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133 (1990); Fox v. Melville Shoe Corp., 17 BRBS 71 (1985). The judge is not bound to accept the stipulations where the law has been incorrectly applied. Belton v. Traynor, 381 F.2d 82 (4th Cir. 1967) (deputy commissioner erred in awarding compensation based on rate set in agreement between union and employer's association, rather than relying on claimant's actual wages); Duncan, 24 BRBS at 135 (parties stipulated to the average weekly wage calculated under Section 10(a); judge rejected the stipulation on the basis of the inapplicability of Section 10(a)); Lobus v. I.T.O. Corp. of Baltimore, 24 BRBS 137, 139 (1990).

The parties' stipulation as to Section 10(a) average weekly wage was properly relied on: post-injury are events not generally relevant to average weekly wage inquiry (post-injury wage reductions for Seattle longshoremen), and argument that stipulated average weekly wage is appropriate for short-term temporary total disability benefits awarded, but long-term permanent partial should be based on average weekly wage which considers lower post-injury wages, was not persuasive. Thompson v. Northwest Enviro Servs., 26 BRBS 53 (1992).

In New Thoughts Finishing Co. v. Chilton, 118 F.3d 1028, 31 BRBS 51 (CRT) (5th Cir. 1997), the **Fifth Circuit** found that no evidence existed which supported the conclusion that claimant at the time of the injury, unlike the preceding three years, had the opportunity to be employed year-round. Therefore, the court reversed an ALJ's average weekly wage calculation which was based on earnings in 1988, four years prior to the 1992 injury, omitting the intervening years when claimant's earnings were depressed.

10.1.3 Definition of Wages (See also Topic 2.13, supra)

Under Section 2(13), wages are defined as

... the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C.A. § 3101 et seq.]

(relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. § 902(13).

The above-stated definition of "wages," as amended in 1984, codified the **United States Supreme Court** holding in Morrison-Knudsen Construction Co. v. Director, OWCP, 461 U.S. 624, 15 BRBS 155 (CRT) (1983), rev'g Hilyer v. Morrison-Knudsen Construction Co., 670 F.2d 208, 14 BRBS 671 (D.C. Cir. 1981); see Denton v. Northrop Corp., 21 BRBS 37, 46 (1988). It is likely that cases decided under the Morrison-Knudsen decision comply with the current statutory scheme. McMennamy v. Young & Co., 21 BRBS 351, 354 (1988). Prior to the 1984 Amendments, wages were defined as "including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer." 33 U.S.C. § 902(13) (1972).

A "**wage**" is a money rate received as compensation from an employer, for services rendered by the employee. Thus, the money rate paid to an employee must be traceable to an employer and not to a social program administered by the state. Rayner v. Maritime Terminals, 22 BRBS 5, 9 (1988); McMennamy v. Young & Co., 21 BRBS 351, 354 (1988); see Morrison-Knudsen, 461 U.S. at 155. Whether the money rate is received under the contract of hire is also a factor of determination. Lopez v. Southern Stevedores, 23 BRBS 295 (1990) (container royalty payments were considered wages, partly because the payments were received under the contract of hire).

This definition includes the reasonable value of any advantage received, if: (1) the advantage either flows directly or indirectly from the employer to the employee; (2) the advantage is easily ascertainable or readily calculable; (3) taxes are withheld; and (4) the advantage is not considered a fringe benefit. (See discussion on fringe benefits, infra.)

The LHWCA dictates that **the advantage must be received from the employer**. 33 U.S.C. § 902(13). The Board further specifies that the advantage received must flow directly or indirectly from the employer to the employee. Lopez v. Southern Stevedores, 23 BRBS 295, 301 (1990); Rayner v. Maritime Terminals, 22 BRBS 5, 9 (1988); McMennamy v. Young & Co., 21 BRBS 351, 354 (1988). Note that wages may flow indirectly from the employer to the employee. In McMennamy, the Board qualified as "wages" a Guaranteed Annual Income [GAI] payment, from a fund amounting from payments the employer made to the West Coast Maritime Association, who in turn distributed the GAI payment to the employee.

The advantage must be ascertainable or readily calculable. Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 632, 15 BRBS 155, 157 (CRT) (1983); McMennamy, 21

BRBS at 353; Denton v. Northrop Corp., 21 BRBS 37, 47 (1988); Thompson v. McDonnell Douglas Corp., 17 BRBS 6, 8 (1984). To make this determination, the Board has looked to whether the benefit is fluid (i.e., has "a present value that can be readily converted into a cash equivalent on the basis of their market value"). Morrison-Knudsen, 461 U.S. at 632 (employer's contributions to union trust funds for health and welfare, pension, and training could not be obtained on the open market through private insurance, and receiving benefits required the earning of pension credits relating to hours worked and therefore constituted a fringe benefit rather than a wage); Cretan v. Bethlehem Steel Corp., 24 BRBS 35, 44 (1990) (tax shelter annuity was considered wages, because it has an open market value, immediately vests, and is earned when paid); McMennamy, 21 BRBS at 353 (employer contributions to a fund for Guaranteed Annual Income payments to employees when they were not working constituted wages, because the GAI had a present market value). See generally Lopez v. Southern Stevedores, 23 BRBS 295 (1990).

Regarding the requirement that **taxes be withheld**, the Board notes that the plain language of the code does "not mandate that a benefit not subject to a tax withholding is not a wage *per se*." Cretan v. Bethlehem Steel Corp., 24 BRBS 35, 43 (1990) (emphasis added) (portion of claimant's salary paid into tax-sheltered annuity was considered "wages" even though it was deducted from claimant's salary before he received it and income tax was not paid on the sum until the year it was withdrawn from the account). Although the LHWCA clarifies the term "tax" as "relating to employment tax," the Board notes that it is not singularly determinative of whether social security and unemployment taxes are withheld from the benefit since **any** withholding of tax can fulfill the requirement. McMennamy, 21 BRBS at 354. Furthermore, while the Internal Revenue Code's definition of wages is instructive in making a determination, it is not dispositive. Cretan 24 BRBS at 43. Cf. Universal Maritime Service Corp. v. Wright, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998) ("Wages" also include the reasonable value of "any advantage" which is received from employer and is included for purposes of tax withholding.).

In computing wages, the following have been included: overseas additives or overseas allowances, including **foreign housing allowance** and **cost of living adjustment**. See Denton v. Northrop Corp., 21 BRBS 37 (1988); Thompson v. McDonnell Douglas Corp., 17 BRBS 6, 8 (1984), **completion awards**, Denton, 21 BRBS at 47, **vacation or holiday pay** (calculated the year it is received rather than the year it is earned). See also Sproull v. Stevedoring Servs. of America, 25 BRBS 100 (1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 136 (1990); Rayner v. Maritime Terminals, 22 BRBS 5 (1988); Waters v. Farmers Export Co., 14 BRBS 102 (1981), aff'd per curiam, 710 F.2d 836 (5th Cir. 1983). However, a claimant is not entitled to have both per diem and the value of room and board included in his wage calculation. Roberts v. Custom Ship Interiors, ___ BRBS ___ (2001) (BRB No. 00-823) (May 15, 2001).

Also included are: the pay for **overtime hours** (when the hours are a regular and normal part of claimant's employment), Brown v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 110, 112 (1989); Bury v. Joseph Smith & Sons, 13 BRBS 694, 698 (1981); **tax shelter annuities**, Cretan v. Bethlehem Steel Corp., 24 BRBS 35, 44 (1990), aff'd in part, rev'd in part, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993) (employee's contribution from his salary to a tax-sheltered annuity was

included for wage calculating purposes although income tax was not paid on it until he withdrew the money) **container royalty payments** (compensation paid by shipping companies in lieu of work lost by longshoremen due to **containerization**). Lopez v. Southern Stevedores, 23 BRBS 295 (1990); Parks, 9 BRBS at 462.

Additionally included are: **guaranteed annual income payments** (guaranteed payment of up to a guaranteed number of hours of work each year, i.e., an individual only works 1500 hours because of the bad economy, but is guaranteed 2000 hours and accordingly receives pay for 2000 hours of work), Rayner, 22 BRBS at 9; McMennamy, 21 BRBS at 354, earnings from a second **part-time job**, Lawson v. Atlantic & Gulf Grain Stevedores Co., 6 BRBS 770 (1977); Stutz v. Independent Stevedore Co., 3 BRBS 72 (1975) (decided prior to the 1984 Amendments to the LHWCA), and **payment in kind** (automobile parts), rather than in cash. Carter v. General Elevator Co., 14 BRBS 90 (1981) (decided prior to the 1984 Amendments to the LHWCA).

Any advantage that an employee receives from an employer, that does not fit the statutory definition of wages, must be characterized as a "**fringe benefit**" to be excluded from the statutory definition. McMennamy, 21 BRBS at 354. The LHWCA defines a "fringe benefit" as "including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement." This provision is in effect a codification of the Morrison-Knudsen holding. Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 15 BRBS 155 (CRT) (1983), *rev'g* Hilyer v. Morrison-Knudsen Constr. Co., 670 F.2d 208, 14 BRBS 671 (D.C. Cir. 1981). For the most part, "fringe benefits are not "easily convertible into cash or are speculative," Id., or are not "readily calculable." McMennamy, 21 BRBS at 353. *See* Denton v. Northrop Corp., 21 BRBS 37, 46 (1988); Thompson v. McDonnell Douglas Corp., 17 BRBS 6 (1984).

The following have been **characterized as or found similar to a "fringe benefit" and have not been included as earnings in the calculation of wages: employer contributions to a union trust fund**, Morrison-Knudsen, 461 U.S. at 624, **rest and relaxation payments, payment of Social Security insurance, excess income tax reimbursements, payment for storage**, Denton, 21 BRBS 37, and the **contingent right to a bonus**. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992) (contingent right to a bonus to be paid in the future was found to be like a fringe benefit, in that it was too speculative to be considered part of the money rate at which the employee was being compensated).

In the following cases, the 1984 Amendment to Section 2(13) was not in existence or was inapplicable. Therefore, a specific determination of whether the benefit qualified as a "fringe benefit" was not made. Nonetheless, the rationale used may be helpful in making that determination. The case law has excluded the following from the statutory definition of wages:

- (1) **tax benefits** (from financial losses), Newby v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 155, 157 (1988) (claimant's tax losses could not

be readily converted into a cash equivalent on the basis of their market value);

- (2) **posthumous cash gifts**, Waters v. Farmers Export Co., 14 BRBS 102 (1981), aff'd per curiam, 710 F.2d 836 (5th Cir. 1983) (cash gifts were not in exchange for services rendered since gifts were made after employee's death);
- (3) **unemployment compensation**, Strand v. Hansen Seaway Serv., 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980), remanding 9 BRBS 847 (1979) (the amount received was not for services rendered); Barber v. Tri-State Terminals, 3 BRBS 244, 250-51 (1976), aff'd sub nom. Tri-State Terminals v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); see McMennamy 21 BRBS at 354; and,
- (4) **overtime** which may have been earned in the year following the injury, McDonough v. General Dynamics Corp., 8 BRBS 303 (1978) (the facts did not justify inclusion of a hypothetical overtime figure as a component in claimant's average weekly wage).

10.2 SECTION 10(a)

10.2.1 Generally

Calculations under Sections 10(a) and 10(b) are similar in that they both are a **theoretical approximation** of what the employee could ideally be expected to earn, ignoring time lost due to strikes, illness, personal business, etc., thus tending to give a higher figure than what the employee actually earned. Both sections apply to **employment that is permanent and continuous** rather than seasonal and intermittent. Duncanson-Harrelson Co. v. Director, OWCP, 686 F.2d 1336, 1342 (9th Cir. 1982), vacated in part on other grounds, 462 U.S. 1101 (1983).

Section 10(a) of the LHWCA provides:

Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) 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.

33 U.S.C. § 910(a).

Section 10(a) applies if the employee "**worked in the employment ... whether for the same or another employer, during substantially the whole of the year immediately preceding**" the injury. 33 U.S.C. § 910(a); Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 135-36 (1990); Mulcare v. E.C. Ernst, Inc., 18 BRBS 158 (1986).

10.2.2 Actual Wages of the Claimant

Section 10(a) differs from 10(b) and (c) in that it looks to the **actual wages of the injured worker** as the monetary base for determination of the amount of compensation. Thus, Section 10(a) cannot be applied where there is no evidence in the record from which an average daily wage can be calculated. Lobus v. I.T.O. Corp. of Baltimore, 24 BRBS 137, 140 (1990); Taylor v. Smith & Kelly Co., 14 BRBS 489, 495 (1981).

The record need not contain all supporting wage records, however, as "Section 10(a) refers to the nature of claimant's employment, not whether his actual wage records for substantially the whole of the year prior to his injury are available." Eleazer v. General Dynamics Corp., 7 BRBS 75, 79 (1977).

In Hall v. Consolidated Equipment Systems, Inc., 139 F. 3d 1025, 32 BRBS 91 (CRT) (5th Cir. 1998), the **Fifth Circuit** stated that it will be an "exceedingly rare case" where the claimant's actual earnings at the date of injury are wholly disregarded and that "typically," a claimant's wages at the date of injury will best reflect his earning capacity.

Where the actual wages for the year preceding the injury do not reflect the claimant's pre-injury earning capacity (due, for example, to changes in employment status such as promotions, demotions, or facility closures or expansion), Sections 10(b) or 10(c) would be more equitably applied in most cases. Robert Babcock, Compensation - Section 10, The Longshore Textbook 46 (D. Cisek ed., 1991). Contra Mulcare v. E.C. Ernst, Inc., 18 BRBS 158 (1986) (Board approved of a calculation under 10(a), based on actual wages, where claimant earned considerably more in the year preceding his injury than in past years because he spent six months working in Saudi Arabia).

A bonus a claimant would have received but for her work-related injury cannot be considered in calculating her pre-injury average weekly wage; only actual wages may be used. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992).

10.2.3 Work in Full-Time Employment

Section 10(a), like 10(b), is applicable only where the injured employee **worked full time** in the employment in which he was injured. Duncanson-Harrelson Co. v. Director, OWCP, 686 F.2d 1336, 1342 (9th Cir. 1982), vacated in part on other grounds, 462 U.S. 1101 (1983), decision on remand, 713 F.2d 462 (1983). Thus, Section 10(a) presupposes that work would be available to the claimant **each day**. Gilliam v. Addison Crane Co., 21 BRBS 91, 92 (1987) (Section 10(c) was properly applied where bad weather conditions had caused work to be available to claimant only on intermittent basis).

Section 10(a) is not applicable where the claimant was self-employed in the year prior to the injury. Roundtree v. Newport Shipbuilding & Repair, 13 BRBS 862, 867 n.6 (1981), rev'd, 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), panel decision rev'd en banc, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.), cert. denied, 469 U.S. 818 (1984) (panel decision of **Fifth Circuit** was subsequently overruled en banc because the appeal was interlocutory; the Board later noted that the overruled panel decision in Roundtree is not binding precedent, Mijangos v. Avondale Shipyards, 19 BRBS 15, 20 n.2 (1986), and therefore, the 1981 Board decision remains good law).

10.2.4 "Substantially the Whole of the Year"

Section 10(a) is distinguished from 10(b) in that the section is applicable only when the employee worked "**substantially the whole of the year**" preceding the injury. Conversely, Section 10(b) is applicable when he did not work for substantially the whole of the year. Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (**5th Cir.** 1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 136 (1990); Lozupone v. Lozupone & Sons, 12 BRBS 148, 153 (1979).

"**Substantially the whole of the year**" refers to the nature of the claimant's employment. Mulcare v. E.C. Ernst, Inc., 18 BRBS 158, 159-60 (1986); Eleazer v. General Dynamics Corp., 7 BRBS 75, 79 (1977). That is to say, whether the employment is intermittent or permanent. Duncan, 24 BRBS at 136. See also Gilliam v. Addison Crane Co., 21 BRBS 91 (1987). In Duncan, the Board considered 34.5 weeks of work to be "substantially the whole of the year," where the work was characterized as "full time" and "steady" or "regular." Id.

Accordingly, the amount of time a claimant worked is not singularly dispositive in determining the applicability of Section 10(a). Both the nature of the claimant's work and the amount of time worked must be balanced in making that determination. Id. See Lozupone v. Lozupone & Sons, 12 BRBS 148, 153-56 (1979) (claimant did not work for eight weeks of the preceding year because no work was available for his employer during that time; the employment was not considered as permanent or steady in nature).

"The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness, [periods of disability from prior disability] or other reasons is not deducted from the computation." Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 136 (1990); see O'Connor v. Jeffboat, Inc., 8 BRBS 290 (1978). See also Brien v. Precision Valve/Bayley Marine, 23 BRBS 207 (1990); Klubnikin v. Crescent Wharf & Warehouse Co., 16 BRBS 182, 186 (1984).

On balance, time lost due to voluntary withdrawal from the labor market is deducted in a proper calculation of average weekly wage. Robert Babcock, Compensation - Section 10, The Longshore Textbook 46 (D. Cisek ed., 1991). See Geisler v. Continental Grain Co., 20 BRBS 35, 38 (1987). See generally Nordstrom v. General Dynamics Corp., 25 BRBS 28 (ALJ) (1990) (claimant's work at part-time job for 17 weeks within the year prior to his accident was not included by the judge in a Section 10(a) computation as claimant was not employed at this second job at the time of his accident and had left the job voluntarily).

A substantial part of the year may be composed of work for **two different employers** where the skills used in the two jobs are highly comparable. Hole v. Miami Shipyards Corp., 12 BRBS 38 (1980), rev'd on other grounds, 640 F.2d 769 (**5th Cir.** 1981). See Mulcare v. E.C. Ernst, Inc., 18 BRBS 158, 159-60 (1986); Waters v. Farmers Export Co., 14 BRBS 102 (1981), aff'd per curiam, 710 F.2d 836 (**5th Cir.** 1983). See generally Nordstrom v. General Dynamics Corp., 25 BRBS 28

(ALJ) (1990). Wages earned by a claimant in employment outside the coverage of the LHWCA may therefore fall within Section 10(a) if they are earned in the same employment as at the time of the injury, regardless of whether it is maritime employment, or employment with an employer covered by the LHWCA. Roundtree, 13 BRBS at 866 n.6 (see procedural history of case, supra).

Application of Section 10(a) when the employee has not worked "substantially the whole of the year" can distort the projection of annual earnings beyond the amount which he could actually have earned at his job had he not been employed. Thus, Section 10(a) should not be applied over 10(b) and (c) where application "would yield an unfair and unreasonable approximation of claimant's annual wage-earning capacity." Gilliam V. Addison Crane Co., 21 BRBS 91, 93 (1987); Lozupone v. Lozupone & Sons, 12 BRBS 148, 156-57 (1979).

However, the **Ninth Circuit** has acknowledged that some "overcompensation" is built into the system institutionally. Matulic v. Director, OWCP, 154 F.3d 1052 (**9th Cir.** 1998). In Matulic the claimant had worked 82 percent of the total possible working days in stable and continuous employment. The evidence indicated that, during that year, the claimant had moved and spent time working on his house. The **Ninth Circuit** held that there is a presumption that Section 10(a) is applied when a claimant works more than 75 percent of the workdays during the measuring year. The **Ninth Circuit** cautioned however, that it does not mean to suggest that a figure that is 75 percent or lower will necessarily result in the application of 10(c) as "[t]here may be other circumstances which demonstrate that a reduction in working days during the one-year period preceding that worker's injury is atypical of the worker's actual earning capacity." The **Ninth Circuit** held that Section 10(c) may not be invoked in cases in which the only significant evidence that the application of Section 10(a) would be unfair or unreasonable is that the claimant worked more than 75 percent of the days in the year preceding his injury.

10.2.5 Calculation of Average Weekly Wages Under § 10(a)

To calculate average weekly wage under this Section, divide the claimant's actual earnings for the 52 weeks prior to the injury by the number of days he actually worked during that period, to determine an average daily wage. Then multiply the average daily wage by 300 for a six-day worker or 260 for a five-day worker, and divide the product by 52 pursuant to Section 10(d) to determine the average weekly wage.

The following computation is **illustrative**. Claimant earned \$7,912.40 in the 52 weeks preceding injury. He worked 241 days in that period. Thus, his daily wage is \$32.83. Under the formula for a five-day worker his average annual earnings are \$8,535.80, substantially more than the \$7,912.40 he actually earned. His average weekly wage is \$164.15. Le Batard v. Ingalls Shipbuilding Div., Litton Sys., 10 BRBS 317, 324 (1979).

In Ingalls Shipbuilding, Inc. v. Wooley, 204 F.3d 616, (**5th Cir.** March 2, 2000), a claimant was permitted to treat 120 hours as four "vacation days," by which his total annual earnings would be divided to determine average weekly wage and "sell back" eleven days to his employer which

would not be treated as “days worked.” The **Fifth Circuit** determined that Section 10(a) of the LHWCA envisions an average weekly wage calculation that will allow the employee LHWCA benefits based on the amount that the employee could have ideally been expected to earn. The court, however, declined to create a bright-line rule concerning how all vacation compensation will be treated under Section 10(a). Rather, the court found it more appropriate to charge the ALJ with making fact-finding concerning whether a particular instance of vacation compensation counts as a “day worked” or whether it was “sold back” to the employer for additional pay.

10.3 SECTION 10(b)

10.3.1 Generally

Where Section 10(a) is inapplicable, application of Section 10(b) must be explored before resorting to application of Section 10(c). Palacios v. Campbell Indus., 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), rev'g 8 BRBS 692 (1978).

Section 10(b) of the LHWCA provides:

Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings if a six-day worker, shall consist of three hundred times the average daily wage or salary and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

33 U.S.C. § 910(b).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but **did not work for "substantially the whole of the year"** (within the meaning of Section 10(a)), prior to his injury. Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Duncanson-Harrelson Co. v. Director, OWCP, 686 F.2d 1336, 1342 (9th Cir. 1982), vac'd in part on other grounds, 462 U.S. 1101 (1983); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 136 (1990); Lozupone v. Lozupone & Sons, 12 BRBS 148, 153 (1979). See discussion on "substantially the whole of the year," supra at 10.2.3. For example, subsection (b) applies if a worker had been recently hired after having been unemployed, or after having been in a lower paying position.

10.3.2 Wages Based on the Earnings of a Comparable Employee

Section 10(b) looks to the wages of other workers in the same employment situation and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment,

in the same or neighboring place. 33 U.S.C. § 910(b). Where the wages of a comparable employee or employees do not fairly and reasonably approximate the pre-injury earning capacity of the claimant, resort to Section 10(c). Palacios v. Campbell Indus., 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), rev'g 8 BRBS 692 (1978); Hayes v. P & M Crane Co., 23 BRBS 389, 393 (1990), vac'd in part on other grounds, 24 BRBS 116 (CRT) (5th Cir. 1991); Lozupone v. Lozupone & Sons, 12 BRBS 148, 153 (1979). Where there are no employees of the same class, who have worked substantially the whole of the year, resort to Section 10(c). Walker v. Washington Metro. Area Transit Auth., 793 F.2d 319, 321, 18 BRBS 100 (CRT) (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987).

Accordingly, the record must contain evidence of the substitute employee's wages. Palacios v. Campbell Indus., 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), rev'g 8 BRBS 692 (1978); Sprull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 135 (1990); Jones v. U.S. Steel Corp., 22 BRBS 229 (1989); Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981). The employer's introduction of the evidence required by Section 10(b), however, does not mandate the use of that section where the alternate wages are unrepresentative of the claimant's wage-earning capacity as a self-employed worker. Roundtree v. Newport Shipbuilding & Repair, 13 BRBS 862, 868 (1981), rev'd, 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), panel decision rev'd en banc, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.), cert. denied, 469 U.S. 818 (1984) (panel decision of the Fifth Circuit was subsequently overruled en banc because the appeal was interlocutory; the Board later noted that the overruled panel decision in Roundtree is not binding precedent, Mijangos v. Avondale Shipyards, 19 BRBS 15, 20 n.2 (1986), and therefore, the 1981 Board decision remains good law).

Application of Section 10(b) does not require the claimant to be available for work in the open labor market during every part of the year preceding the injury. Daugherty v. Los Angeles Container Terminals, 8 BRBS 363 (1978) (claimant was in prison).

10.3.3 Calculation of Average Weekly Wage Under § 10(b)

To calculate average weekly wage under this section, divide the earnings of an employee, who worked in the same or similar employment as the claimant in the same or a neighboring locale, for the 52 weeks prior to the claimant's injury by the number of days that the employee worked during that period, to determine average daily wage. Multiply the average daily wage by 300 for a six-day worker, or 260 for a five-day worker, and divide the product by 52, pursuant to Section 10(d), to determine the average weekly wage.

Caveat: In a claim for **death benefits**, see Section 9(e) for determination of the average weekly wage. Buck v. General Dynamics Corp. Elec. Boat Div., 22 BRBS 111, 114 (1989).

10.4 SECTION 10(c)

10.4.1 Application of Section 10(c)

Section 10(c) of the LHWCA provides:

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services off the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

Section 10(c) is a general, **catch-all provision applicable to cases where the methods at subsections (a) and (b) cannot realistically be applied.** Theoretically, Section 10(c) should be used in cases when actual earnings during the year preceding the injury do not reasonably and fairly represent the pre-injury wage-earning capacity of the claimant. Gilliam v. Addison Crane Co., 21 BRBS 91, 92-93 (1987).

Section 10(c) is used in the following situations:

(1) Where the claimant's employment is **seasonal, part-time, intermittent, or discontinuous.** Empire United Stevedores v. Gatlin, 936 F.2d 819, 822, 25 BRBS 26 (CRT) (**5th Cir.** 1991) (claimant's earnings from a prior year where he worked as a salesman/manager more accurately reflected his actual earning capacity than his sporadic employment from the year prior to the injury); Palacios v. Campbell Indus., 633 F.2d 840, 841-42, 12 BRBS 806 (CRT) (**9th Cir.** 1980); Guthrie v. Holmes & Narver, Inc., 30 BRBS 48 (1996); Lobus v. I.T.O. Corp. of Baltimore, 24 BRBS 137 (1990) (use 10(c) for real estate earnings paid on a commission basis upon completion of a sale); Gilliam v. Addison Crane Co., 21 BRBS 91, 93 (1987) (claimant worked "substantially the whole of the year," yet 10(a) did not apply as claimant was laid off twice in the year preceding the injury due to weather-induced unavailability of work); Mattera v. M/V Mary Antoinette Pac. King, Inc., 20 BRBS 43, 45 (1987) (claimant only worked when fishing boats were in the harbor). [The **Ninth Circuit** has held that Section 10(c) may not be invoked in cases in which the only significant evidence that the application of Section 10(a) would be unfair or

unreasonable is that the claimant worked more than 75 percent of the days in the year preceding his injury. Matulic v. Director, OWCP, 154 F.3d 1052 (9th Cir. 1998).]

(2) Where there is **insufficient evidence** in the record to make a determination of average daily wage under either subsections (a) or (b). Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 5 BRBS 23, 25 (9th Cir. 1976), aff'g and remanding in part 1 BRBS 159 (1974); Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991); Lobus, 24 BRBS at 140; Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981).

(3) Whenever Sections 10(a) or 10(b) **cannot reasonably and fairly be applied** and therefore do not yield an average weekly wage that reflects the claimant's earning capacity at the time of the injury, Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Walker v. Washington Metro. Area Transit Auth., 793 F.2d 319 (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987); Browder v. Dillingham Ship Repair, 24 BRBS 216, 218 (1991); Lobus v. I.T.O. Corp., 24 BRBS 137, 139 (1990); Gilliam v. Addison Crane Co., 21 BRBS 91, 93 (1987); Barber v. Tri-State Terminals, 3 BRBS 244, 249 (1976), aff'd sub nom. Tri-State Terminals v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979), or use of Section 10(a) or (b) would result in overcompensation to the claimant, Duncanson-Harrelson Co. v. Director, OWCP, 686 F.2d 1336, 1342 (9th Cir. 1982), vacated in part on other grounds, 462 U.S. 1101 (1983); Gilliam, 21 BRBS at 93.

(4) Where the claimant **had various employments in the years prior to injury**, including non-longshoring activities and self-employment. 33 U.S.C. § 910(c); Hayes v. P & M Crane Co., 23 BRBS 389, 393 (1990) (focus on short-term recent earnings rather than earlier self-employment earnings is proper); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339, 344-45 (1988) (frequent job changes, tendency to get fired, previous convictions, plus good fortune in being hired by employer two months before injury are all appropriate considerations only under § 10(c)); Roundtree v. Newport Shipbuilding & Repair, 13 BRBS 862 (1981), rev'd, 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), panel decision rev'd en banc, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.), cert. denied, 469 U.S. 818 (1984) (panel decision of the **Fifth Circuit** was subsequently overruled en banc because the appeal was interlocutory; the Board later noted that the overruled panel decision in Roundtree is not binding precedent, Mijangos v. Avondale Shipyards, 19 BRBS 15, 20 n.2 (1986), and therefore, the 1981 Board decision remains good law).

(5) Where the claimant's wages or hours worked increased shortly before his injury. Hastings v. Earth Satellite Corp., 628 F.2d 85, 94-96 (D.C. Cir.), cert. denied, 449 U.S. 905 (1980); Le v. Sioux City and New Orleans Terminal Corp., 18 BRBS 175, 177 (1986); but see dissenting opinion in Roundtree, 13 BRBS at 871-72.

(6) Section 10(c) does not apply to voluntarily-retired workers who suffer injury or death from an occupational disease; Section 10(d) applies in those cases. Section 10(c) does apply, however, in **occupational disease cases** where the work-related disability predated the awareness of the relationship between the disability and employment as discussed in Section 10(i), *infra*. The calculation of average weekly wage should reflect the earnings prior to the onset of disability rather than the subsequent earnings at the later time of awareness under Section 10(c), based on the "other employment" language of the statute. Wayland v. Moore Dry Dock, 21 BRBS 177, 183 (1988) (the onset of claimant's disability preceded his retirement, as well as the date of awareness); LaFaille v. General Dynamics Corp., 18 BRBS 88, 90-91 (1986).

10.4.2 Judicial Deference Regarding Application of § 10(c)

The judge has **broad discretion** in determining annual earning capacity under Section 10(c). Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 105 (1991); Wayland v. Moore Dry Dock, 25 BRBS 53, 59 (1991); Lobus v. I.T.O. Corp. of Baltimore, 24 BRBS 137, 139 (1990); Bonner v. National Steel & Shipbuilding Co., 5 BRBS 290, 293 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979). For example, in Flanagan Stevedores, Inc. v. Gallagher and Director, OWCP, 219 F.3d 426 (5th Cir. 2000), the **Fifth Circuit** found that the ALJ's decision to carve out a four-week period of lost work [divide the previous year's wages by 48 instead of 52] facilitated the goal of "making a fair and accurate assessment" of the amount that the claimant would have the potential and opportunity of earning absent a previous injury.

A definition of "**earning capacity**" for purposes of this subsection is the "ability, willingness, and opportunity to work," or "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." Jackson v. Potomac Temporaries, Inc., 12 BRBS 410, 413 (1980). See Walker v. Washington Metro Area Transit Auth., 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); Tri-State Terminals v. Jesse, 596 F.2d 752, 757, 10 BRBS 700, 706-07 (7th Cir. 1979); Marshall v. Andrew F. Mahony Co., 56 F.2d 74, 78 (9th Cir. 1932); Mijangos v. Avondale Shipyards, 19 BRBS 15, 20 (1986). In keeping with this definition of earning capacity, the Board has held that for a claimant to go outside the statutory language and base his average weekly wage on other than his previous earnings or those of employees similarly situated, the claimant must show that he has the ability, willingness, and opportunity to do the work for the wages which he is claiming. Jackson, 12 BRBS at 415.

The objective of Section 10(c) is to reach a **fair and reasonable approximation** of the claimant's annual wage-earning capacity at the time of the injury. Empire United Stevedores v. Gatlin, 936 F.2d 819, 823, 25 BRBS 26 (CRT) (5th Cir. 1991); Wayland v. Moore Dry Dock, 25 BRBS 53, 59 (1991); Richardson v. Safeway Stores, 14 BRBS 855, 859 (1982). That amount is then divided by 52, in accordance with Section 10(d), to arrive at the average weekly wage. Note that all sources of employment income should be considered in a fair and reasonable determination of wage earning capacity. Wayland, 25 BRBS at 59; Lobus v. I.T.O. Corp., 24 BRBS 137, 139 (1990);

Lawson v. Atlantic & Gulf Grain Stevedores Co., 6 BRBS 770, 777 (1977). Section 10(c) determinations will be affirmed if they reflect a reasonable representation of earning capacity and the claimant has failed to establish the basis for a higher award. Richardson, 14 BRBS at 859.

10.4.3 Actual Earnings Immediately Preceding the Injury Are Not Controlling

Unlike Sections 10(a) and (b), subsection (c) contains **no requirement that the previous earnings considered be within the year immediately preceding the injury**. Empire United Stevedores v. Gatlin, 936 F.2d 819, 823, 25 BRBS 26 (CRT) (5th Cir. 1991); Tri-State Terminals v. Jesse, 596 F.2d 752, 756 (7th Cir. 1979); Anderson v. Todd Shipyards, 13 BRBS 593, 596 (1981). It would be unfair to look only at the one year preceding the injury when the work is slow one year and then busy the next, or vice versa. Walker v. Washington Metro. Area Transit Auth., 793 F.2d 319, 321, 18 BRBS 100 (CRT) (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987).

Actual earnings are not controlling. National Steel & Shipbuilding v. Bonner, 600 F.2d 1288 (1979), aff'g in relevant part 5 BRBS 290 (1977). Thus, the amount actually earned by the employee at the time of injury is a factor but is not the over-riding concern in calculating wages under 10(c). Empire, 936 F.2d at 823.

10.4.4 Calculation of Annual Earning Capacity Under Section 10(c)

In calculating annual earning capacity under Section 10(c), the judge may consider: the actual earnings of the claimant at the time of injury; the average annual earnings of others; the earning pattern of the claimant over a period of years prior to the injury; the claimant's typical wage rate multiplied by a time variable; all sources of income including earnings from other employment in the year preceding injury, overtime, vacation or holiday pay, and commissions; the probable future earnings of the claimant; or any fair and reasonable alternative.

Section 10(c) "explicitly provides that a claimant's average annual earnings under this subsection shall have regard for his earnings at the time of the injury...." Hayes v. P & M Crane Co., 23 BRBS 389, 393 (1990), vac'd in part on other grounds, 24 BRBS 116 (CRT) (5th Cir. 1991); 33 U.S.C. § 910(c). Accordingly, it may be reasonable to focus only on the **actual earnings of the claimant** at the time of injury. Hayes, 23 BRBS at 393; Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339, 344-45 (1988). See also Dangerfield v. Todd Pac. Shipyards Corp., 22 BRBS 104 (1989).

Actual wages should be used where a claimant shows his unwillingness to work at higher wage levels by **rejecting work opportunities**, Conatser v. Pittsburgh Testing Laboratory, 9 BRBS 541 (1978) (claimant rejected work opportunities because he refused to travel), or **voluntarily leaves the labor market** and, therefore, has earnings lower than his earning capacity. Geisler v. Continental Grain Co., 20 BRBS 35 (1987) (claimant voluntarily undertook a 30-hour-a-week trainee job without compensation before he sustained his injury, thus this expenditure of time was irrelevant to a calculation of average weekly wage). To hold an employer responsible for a claimant's pre-

injury removal of self from the work force would be manifestly unfair. See Id.; Harper v. Office Movers/E.I Kane, 19 BRBS 128, 130 (1986).

Section 10(c) explicitly provides that the **earnings of other employees of the same or similar class of employment** may be considered in computation of annual wage. Palacios v. Campbell Indus., 633 F.2d 840, 842-43, 12 BRBS 806 (9th Cir. 1980); Hayes, 23 BRBS at 393; Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988); 33 U.S.C. § 910(c).

A computation of annual wage under Section 10(c) may be based on a claimant's **earning capacity over a period of years** prior to the injury. Konda v. Bethlehem Steel Corp., 5 BRBS 58 (1976). All the earnings of all the years within that period must be taken into account. Empire United Stevedores v. Gatlin, 936 F.2d 819, 823, 25 BRBS 26, 29 (CRT) (5th Cir. 1991); Anderson v. Todd Shipyards, 13 BRBS 593, 596 (1981). But see Lozupone v. Stephano Lozupone & Son, 14 BRBS 462 (1981) (Board found that judge erred in using a mathematical average of claimant's salaries over the past five years because this computation did not account for wage increases prior to the injury and remanded for a determination of the wage rate at the time of injury, multiplied by a variable which represents the number of hours normally available to claimant).

An additional way to compute a claimant's annual earning capacity under Section 10(c) is to **multiply claimant's wage rate by a time variable**. The Board has approved this use of the claimant's contract hourly wage. Lozupone v. Stephano Lozupone & Sons, 14 BRBS 462, 465 (1981); Cummins v. Todd Shipyards Corp., 12 BRBS 283, 287 (1980). If this method is used, however, the time variable must be one which reasonably represents the amount of work which normally would have been available to the claimant. Matthews v. Mid-States Stevedoring Corp., 11 BRBS 509, 513 (1979).

All sources of employment income are considered in a Section 10(c) computation. Accordingly, both earnings from the employment engaged in when injured and **any other earnings from employment**, including part-time and self-employment, in which the claimant was engaged prior to the injury can be included in the computation. Harper v. Office Movers/E.I Kane, 19 BRBS 128, 130 (1986); Wise v. Horace Allen Excavating Co., 7 BRBS 1052, 1057 (1978). Wages earned in other employment, **unaffected** by the claimant's injury, are excluded in a calculation of annual wage-earning capacity. Accordingly, the administrative law judge must determine whether the injury disables the claimant from all sources of income or only from his longshore employment. Id.

In computing average annual earnings under Section 10(c), **overtime** should be included if it is a regular and normal part of the claimant's employment. Bury v. Joseph Smith & Sons, 13 BRBS 694, 698 (1981); Ward v. General Dynamics Corp., 9 BRBS 569 (1978); Gray v. General Dynamics Corp., Elec. Boat Div., 5 BRBS 279 (1976), aff'd on other grounds sub nom. General Dynamics Corp., Elec. Boat Div. v. Benefits Review Bd., 565 F.2d 208, 7 BRBS 831 (2d Cir. 1977). **Vacation and holiday pay** (calculated the year it is received rather than the year it is earned) should also be included in a computation of average weekly wage under Section 10(c). Sproull v. Stevedoring Servs. of America, 25 BRBS 100 (1991). See also Duncan v. Washington Metro. Area

Transit Auth., 24 BRBS 133 (1990). All **commissions** are also to be included in determining average weekly wage. Wayland v. Moore Dry Dock, 25 BRBS 53, 59 (1991); Lobus v. I.T.O. Corp. of Baltimore, 24 BRBS 137 (1990) (commissions from real estate employment were calculated into average weekly wage under Section 10(c)).

Consideration of the **probable future earnings** of the claimant is appropriate in extraordinary circumstances, where previous earnings do not realistically reflect wage-earning potential. Walker v. Washington Metro. Area Transit Auth., 793 F.2d 319, 321, 18 BRBS 100 (CRT) (**D.C. Cir.** 1986), *cert. denied*, 479 U.S. 1094 (1987); Palacios v. Campbell Indus., 633 F.2d 840, 842-43, 12 BRBS 806 (**9th Cir.** 1980); Gilliam v. Addison Crane Co., 21 BRBS 91, 93 (1987). The Board has allowed the consideration of probable future earnings where the claimant was involved in seasonal work and there was evidence of opportunities of increased work in the future. Klubnikin v. Crescent Wharf & Warehouse Co., 16 BRBS 182, 187 (1984); Barber v. Tri-State Terminals, 3 BRBS 244, 250 (1976), *aff'd sub nom. Tri-State Terminals v. Jesse*, 596 F.2d 752, 10 BRBS 700 (**7th Cir.** 1979).

An employer may try to persuade a judge to minimize the weight given to actual wages and look to ability to earn future wages where the industry is economically doomed (such as the ship building and ship repair industry, whose role in the national economy is declining). Wages available to similarly skilled employees on the "open labor market" are lower and therefore are more representative of true earning capacity. R. Babcock, Compensation - Section 10, The Longshore Textbook 47 (D. Cisek ed. 1991). See Hayes v. P & M Crane Co., 23 BRBS 389, 393 (1990) (employer was unsuccessful in persuading the ALJ that his business was suffering economic trauma).

Actual earnings in the year preceding the claimant's injury may not be a **fair and reasonable representation** of the claimant's wage-earning capacity where the claimant's wages were reduced for reasons such as personal injury, strikes, layoffs, or the unavailability of work; or the claimant's wages increased prior to the injury due to a promotion, pay raise, or working an increased number of hours. For example, in Flanagan Stevedores, Inc. v. Gallagher and Director, OWCP, 219 F.3d 426 (**5th Cir.** 2000), the **Fifth Circuit** found that the ALJ's decision to carve out a four-week period of lost work [divide the previous year's wages by 48 instead of 52] facilitated the goal of "making a fair and accurate assessment" of the amount that the claimant would have the potential and opportunity of earning absent a **previous injury**.

Where the claimant **has earned less in the year prior to the injury due to the unavailability of work** (often as a result of a decline in the employer's business), the Board has noted that actual earnings in the year prior to claimant's injury may not reasonably represent a claimant's wage-earning capacity. Hayes v. P & M Crane Co., 23 BRBS 389, 393 (1990); Lozupone v. Stephano Lozupone & Sons, 14 BRBS 462, 464 (1981); Cummins v. Todd Shipyard Corp., 12 BRBS 283, 286 (1981). A judge may make up for the loss of earnings only when it is clear that work would be available in the future. Lozupone, 14 BRBS at 464; Pruner v. Ferma Corp., 11 BRBS 201, 208 (1979).

The judge may compute annual wages using the wages the claimant would have earned in the year preceding injury but for **personal business**, or a **personal illness** or **injury**, such as an **automobile accident**. Browder v. Dillingham Ship Repair, 24 BRBS 216, 219 (1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 136 (1990); Brien v. Precision Valve/Bayley Marine, 23 BRBS 207, 211 (1990); Klubnikin v. Crescent Wharf & Warehouse Co., 16 BRBS 182, 186 (1984) (claimant lost time from work due to an automobile accident); Richardson v. Safeway Stores, 14 BRBS 855, 860 (1982) (claimant missed work due to a gall bladder operation). See also Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 107 (1991) (time lost due to a hand injury was not considered as claimant received holiday pay during that time; however, the holiday pay received was calculated into the wages). The Board cautioned, however, that in computing Section 10(c) earning capacity, the judge must take into account any permanent reduction in earnings caused by the non-work-related accident, since it is unfair to hold employer responsible for any reduced earning capacity resulting from the non-work-related injury. Klubnikin, 16 BRBS at 186.

Section 10(c) computations may make up for **time lost in the year prior to the injury due to strikes**. Hawthorne v. Director, OWCP, 844 F.2d 318, 21 BRBS 22 (CRT) (6th Cir. 1988); Toraiff v. Triple A Mach. Shop, 1 BRBS 465 (1975). Similarly, the Board has allowed a judge's computation to make up for **time lost due to a layoff**. Gilliam v. Addison Crane Co., 21 BRBS 91, 93 (1987); Le Batard v. Ingalls Shipbuilding Div., Litton Sys., 10 BRBS 317, 324 (1979); Holmes v. Tampa Ship Repair & Dry Dock Co., 8 BRBS 455, 461-62 (1978). Note that in these cases the use of an actual earnings figure would not fully reflect the wage-earning capacity of a claimant who, although he had lost time and earnings in the year prior to the injury, was again working. By working, he had shown the willingness, ability, and opportunity necessary to the definition of wage-earning capacity.

Time lost from work due to a relative's **funeral** was a non-reoccurring event comparable to a personal injury or a strike and the salary theoretically earned during this time was included in the computation of wages. Browder v. Dillingham Ship Repair, 24 BRBS 216 (1991) (claimant missed seven weeks of work due to her mother's funeral).

Actual earnings should not be used where the claimant was **working an increasing number of hours**, showing his increasing physical ability, at the time of the injury. Walker v. Washington Metro. Area Transit Auth., 793 F.2d 319, 321, 18 BRBS 100 (CRT) (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987); Hastings v. Earth Satellite Corp., 628 F.2d 85, 95-96 (D.C. Cir.), cert. denied, 449 U.S. 905 (1980). Likewise actual wages may not be representative where a claimant received **a promotion** shortly before her injury. Feagin v. General Dynamics Corp., Elec. Boat Div., 10 BRBS 664, 666 (1979). Actual wages are also not binding where they reflect the claimant's earlier work in a lower-paying job. Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339, 345 (1988) (although claimant had only worked a short time, at higher wages, with the employer, his average weekly wage was calculated to reflect his "good fortune" in obtaining a higher paying job with the employer); Bonner v. National Steel & Shipbuilding Co., 5 BRBS 290 (1977). A Section 10(c) computation should reflect **a pay raise received shortly before the injury**. Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986) (claimant had a history of yearly pay raises); Le v. Sioux City & New

Orleans Terminal Corp., 18 BRBS 175, 177 (1986) (claimant received a raise five weeks before his death); Esquivel v. Fairway Terminals, (BRB No. 99-0404)(Jan. 6, 2000) (Unpublished).

The Board has further held that there is no authority in the LHWCA for reducing the compensation base because of **criminal or other socially undesirable activities** which may have affected the claimant's earning history. Daugherty v. Los Angeles Container Terminals, 8 BRBS 363 (1978) (claimant removed himself from the labor market by his criminal activities, resulting in incarceration, and worked for the employer only a short time before his disabling accident).

10.4.5 Calculation of Average Weekly Wage Under Section 10(c)

The ALJ must arrive at a figure which approximates an entire year of work (the average annual earnings). That figure is then divided by 52, as required by Section 10(d), to arrive at the average weekly wage. Wayland v. Moore Dry Dock, 25 BRBS 53, 59 (1991); Brien v. Precision Valve/Bayley Marine, 23 BRBS 207, 211 (1990).

10.5 AVERAGE ANNUAL EARNINGS

10.5.1 52 Week Divisor Under Section 10(d)(1)

Section 10(d)(1) of the LHWCA provides:

(d)(1) The average weekly wages of an employee shall be one-fifty second part of his average annual earnings.

33 U.S.C. § 910(d)(1).

Section 10(d)(1) mandates that the claimant's average annual earnings be divided by 52 to arrive at an average weekly wage. The Board reiterates the mandatory application of the 52-week divisor. Klubnikin v. Crescent Wharf & Warehouse Co., 16 BRBS 182 (1984); Roundtree v. Newport Shipbuilding & Repair, 13 BRBS 862 (1981), rev'd, 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), panel decision rev'd en banc, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.), cert. denied, 469 U.S. 818 (1984); Eckstein v. General Dynamics Corp., 11 BRBS 781 (1980); Strand v. Hansen Seaway Serv., 9 BRBS 847 (1979), rev'd and remanded in part on other grounds, 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980). See the discussions on the computation of average weekly wage under Sections 10(a), 10(b), and 10(c), supra.

10.5.2 Occupational Disease--Sections 10(d)(2) and 8(c)(23); 1984 Retiree Provisions

Section 10(d)(2) of the LHWCA provides:

(2) Notwithstanding paragraph (1), with respect to any claim based on a death or disability due to an occupational disease for which the time of injury (as determined under subsection (i)) occurs--

(A) within the first year after the employee has retired, the average weekly wages shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement; or

(B) more than one year after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage (as determined by the Secretary pursuant to section 6(b) applicable at the time of the injury.

33 U.S.C. § 10(d)(2).

When an employee's occupational disease becomes manifest subsequent to his voluntary retirement, benefits are calculated pursuant to Sections 10(d)(2) and 8(c)(23), added by the 1984 Amendments.

The legislative history of the 1984 Amendments makes it clear that Congress intended to provide relief to those whose occupational diseases manifest themselves after retirement and to the survivors of such retirees. H.R. Rep. No. 98-1027, 98th Cong., 2d Sess. at 30; Cong. Rec. H9730, Sept. 18, 1984; Cong. Rec. S11625, Sept. 20, 1984. The Amendments specifically overruled Aduddell v. Owens-Corning Fiberglass, 16 BRBS 131 (1984), as well as other cases denying benefits to persons who were retired when their occupational disease became manifest.

Section 8(c)(23) of the LHWCA provides:

Compensation for disability shall be paid to the employee as follows:

...

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively and shall be paid to the employee, as follows:

...

(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 10(d)(2), the compensation shall be 66 2/3 per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 2(10), payable during the continuance of such impairment.

Under Section 8(c)(23), compensable disability for retirees whose injuries did not become manifest until after the retirement is based on the degree of permanent physical impairment. The claimant need not establish economic loss. Frawley v. Savannah Shipyard Co., 22 BRBS 328 (1989); Coughlin v. Bethlehem Steel Corp., 20 BRBS 193, 195 (1988); Barlow v. Western Asbestos Co., 20 BRBS 179, 183 (1988); Kellis v. Newport News Shipbuilding & Dry Dock Co., 17 BRBS 109 (1985); Woods v. Bethlehem Steel Corp., 17 BRBS 243 (1985) (claimant may be compensated under voluntary retiree provisions when a non-work-related disability causes employment cessation).

Section 8(c)(23) is applied to a retired worker with a permanent partial disability in situations where the average weekly wage is determined under Section 10(d)(2). The compensation shall be 66 2/3 percent of such average weekly wage multiplied by the percentage of permanent impairment, as determined by Section 2(10). 33 U.S.C. § 908(c); 20 C.F.R. § 601.

Section 2(10) bases post-retirement disability on the degree of physical impairment, under guidelines established by the American Medical Association (AMA). 33 U.S.C. § 902(10). The regulations provide that if the AMA Guides do not evaluate impairment of the affected part of the body, other professionally recognized standards may be utilized. 20 C.F.R. § 702.601(b).

The disability is specifically limited to permanent partial disability. Donnell v. Bath Iron Works Corp., 22 BRBS 136, 140 (1989); Barlow v. Western Asbestos Co., 20 BRBS 179, 183 (1988); Stone v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 1 (1987); 33 U.S.C. § 908(c)(23); 20 C.F.R. § 601(b). Note that the Board has determined that this includes an award for a permanent partial disability for 100 percent physical impairment, as the statute does not limit the percentage of impairment. Donnell, 22 BRBS at 136 (distinguishing an award for total disability where 100 percent physical impairment signifies that claimant is deceased). Since the disability is limited to permanent partial disability, compensation is not subject to adjustment under Section 10(f). 20 C.F.R. § 601(b).

Section 10(d)(2) details the average weekly wage with respect to a post-retirement situation where "the claim is based on death or disability due to an occupational disease." 33 U.S.C. § 910(d)(2). Retirement shall mean that the claimant, or decedent in cases involving survivor's benefits, has voluntarily withdrawn from the work force and that there is no realistic expectation that such person will return to the work force. 20 C.F.R. § 702.601(c). The LHWCA and Regulations "should be interpreted so as to not automatically exclude, from 'retirement' status, employees who engage in part-time work to supplement their retirement income." Jones v. U.S. Steel Corp., 22 BRBS 229 (1989) (claimant stopped working to retire at age 62 and began receiving Social Security benefits; seven months after his retirement he began working for his son to supplement his retirement income).

It is mandatory that the claimant be a **voluntary retiree**. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). "The determination of whether a claimant's retirement is 'voluntary' or 'involuntary' should be based on whether a work-related condition caused him to leave the work force, or whether his departure was due to other considerations." Johnson v. Ingalls Shipbuilding Div., Litton Sys., 22 BRBS 160 (1989) (claimant voluntarily retired as he filed for Social Security benefits just prior to leaving employer; his separation papers upon leaving employer indicated voluntary retirement and medical evidence failed to establish that he was suffering from a breathing impairment prior to his retirement).

"The administrative law judge may find voluntary retirement established based on claimant's testimony that he did not seek employment after leaving employer." Id. See Ponder v. Peter Kiewit Sons Co., 24 BRBS 46 (1990); Manders v. Alabama Dry Dock & Shipbuilding Corp., 23 BRBS 19 (1989); Frawley v. Savannah Shipyard Corp., 22 BRBS 328 (1989); Smith v. Ingalls Shipbuilding Div., Litton Sys., 22 BRBS 46, 49 (1989) (claimant voluntarily retired as he was not having serious health problems when he asked to be laid off; he never sought medical attention for his condition from employer; he had a good attendance record and did not seek other employment or attempt to be rehired by employer); Coughlin v. Bethlehem Steel Corp., 20 BRBS 193, 197 (1988).

Where an employee **involuntarily** withdraws from the work force due to his occupational disability, the post-retirement provisions at Sections 2(10), 8(c)(23), and 10(d)(2) do **not** apply. Rather, the claimant's average weekly wage should reflect wages prior to the date of retirement under Section 10(c). Martin v. Kaiser Co., 24 BRBS 112 (1990); Frawley v. Savannah Shipyard Co., 22

BRBS 328, 330 (1989); Truitt v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 79, 82 (1987); MacDonald v. Bethlehem Steel Corp., 18 BRBS 181 (1986).

When “a claimant’s retirement is due, at least in part, to his occupational disease, claimant is not a voluntary retiree and the post-injury provisions at Sections 2(10), 8(c)(23), and 10(d)(2) do not apply.” Hansen v. Container Stevedoring Co., 31 BRBS 155 (1997).

10.5.3 Section 10(d)(2)(A)

Sections 10(d)(2)(A) specifies that if the employee's time of injury occurs **within the first year of voluntary retirement**, the average weekly wage shall be one fifty-second of his average annual earnings during the 52-week period preceding retirement. Johnson v. Ingalls Shipbuilding Div., Litton Sys., 22 BRBS 160, 162 (1989); Coughlin v. Bethlehem Steel Corp., 20 BRBS 193, 197 (1988).

10.5.4 Section 10(d)(2)(B)

Section 10(d)(2)(B) is employed where the injury occurs **more than one year after voluntary retirement** and specifies that the average weekly wage shall be deemed to be the national average weekly wage [as determined under 6(b)] applicable at the time of injury. Taddeo v. Bethlehem Steel Corp., 22 BRBS 52, 54-55 (1989); Shaw v. Bath Iron Works Corp., 22 BRBS 73 (1989) (retroactive application constitutional); Machado v. General Dynamics Corp., 22 BRBS 176 (1989); Jones v. U.S. Steel Corp., 22 BRBS 229, 233 (1989); Macleod v. Bethlehem Steel Corp., 20 BRBS 234, 236-37 (1988). "**Injury**" in this context is defined as the date on which the employee or the claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78 (1989). See Section 10(i), infra.

For the award of **death benefits**, the national average weekly wage in effect at the date of the decedent's death is the proper average weekly wage. Bailey v. Bath Iron Works Corp., 24 BRBS 229, 231 (1991); Martin v. Kaiser Co., 24 BRBS 112 (1990); Jones v. U.S. Steel Corp., 22 BRBS 229 (1989).

See Bath Iron Works Corp. v. Director, OWCP, 506 U.S. 153, 26 BRBS 151 (CRT) (1993), which resolved the conflict in the circuits on Section 10(i); see Section 10(i) infra, on the non-application of Sections 10(i), 10(d)(2)(A) and (B), in voluntary retiree hearing loss cases.

10.6 WHEN THE EMPLOYEE IS A MINOR

Section 10(e) of the LHWCA provides:

(e) If it be established that the injured employee was a minor when injured and that under normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages.

33 U.S.C. § 910(e).

Section 10(e) provides that, if an employee is a minor when injured and under normal conditions his wages should be expected to increase during the period of disability, that fact may be considered in determining his average weekly wage. The Board established 21 years as the uniform age of majority for purposes of Section 10(e). Stokes v. George Hyman Constr. Co., 14 BRBS 698 (1981), aff'd in pertinent part, 19 BRBS 110 (1986) (exception to this general rule being in the District of Columbia, where age determinations of majority should be based on the DCW Act).

10.7 ANNUAL INCREASE

10.7.1 Generally

Section 10(f) of the LHWCA provides:

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be increased by the lesser of--

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable average weekly wage, as so determined, for the period beginning with the preceding October 1; or

(2) 5 per centum.

33 U.S.C. § 10(f).

Section 10(f), as amended in 1972, provides that in all post-Amendment injuries where the injury resulted in permanent total disability or death, the compensation shall be adjusted annually to reflect the rise in the national average weekly wage. 33 U.S.C. § 910(f). Section 10(h)(3) provides that the compensation paid as a result of pre-1972 Amendment injuries which resulted in permanent total disability or death shall be annually adjusted under Section 10(f) just as if the injuries had occurred post-Amendment.

Section 10(g) dictates:

The weekly compensation after adjustment under subsection (f) shall be **fixed at the nearest dollar**. No adjustment of less than \$1 shall be made, but in no event shall compensation for death benefits be reduced.

33 U.S.C. 910(g) (Emphasis added.)

The Board has held that annual adjustments under Section 10(f) and Section 10(h)(3) **do not apply to death benefits if the death was not causally related to the employment injury.** Bingham v. General Dynamics Corp., 20 BRBS 198 (1988); Witthuhn v. Todd Shipyards Corp., 3 BRBS 146 (1976), aff'd on other grounds, 596 F.2d 899, 10 BRBS 517 (9th Cir. 1979); Egger v. Willamette Iron & Steel Co., 2 BRBS 247 (1975).

Section 10(f) is also **not applicable to temporary total disability benefits.** Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981). **Nor to permanent partial disability benefits.** Allison v. Washington Soc'y for the Blind, 24 BRBS 150 (1988).

It has been held that there is no requirement that, in order for Section 10(f) to apply, the total permanent disability must be due solely to the work injury. Marko v. Morris Boney Co., 23 BRBS 353 (1990) (where occupational hernias and non-occupational heart diseases resulted in total permanent disability).

The **Fifth Circuit**, in Holliday v. Todd Shipyards Corp., 654 F.2d 415, 13 BRBS 741 (**5th Cir.** 1981), overruled by Phillips v. Marine Concrete Structures, 895 F.2d 1033 (**5th Cir.** 1990) without discussion, held that the permanent total disability rate should include all intervening Section 10(f) adjustments occurring during the period of previous temporary total disability. The Board declined to follow the method of computation of Holliday, finding it to be an indirect means of providing Section 10(f) adjustments during periods of temporary total disability, contrary to the express language of the statute. Brandt v. Stidham Tire Co., 16 BRBS 277 (1984), rev'd in pertinent part, 785 F.2d 329, 18 BRBS 73 (CRT) (**D.C. Cir.** 1986).

The **D.C. Circuit** in Brandt, 785 F.2d 329, reversed the Board's holding, which had refused to follow Holliday, 654 F.2d 415. The court stated it would follow Holliday until the precedent was overruled in the **Fifth Circuit** or until the Director publicly announced that, prospectively, he would seek to apply his current interpretation evenhandedly to all similarly-situated claimants in all circuits. The Board continued to express its disagreement with the **Fifth and D.C. Circuits** regarding annual adjustments, and stated it would apply Holliday only in those circuits. Scott v. Lockheed Shipbuilding & Constr. Co., 18 BRBS 246 (1986). See also Bailey v. Pepperidge Farm, Inc., 32 BRBS 76 (1998) (also holding that Holliday no longer applies to cases arising under the District of Columbia Workers' Compensation Act). Since Section 10(f) adjustments are authorized by law in the circuit having jurisdiction (**Fifth Circuit**), although the Board disagreed, it is compelled to apply announced law. Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

In Phillips v. Marine Concrete Structures, 21 BRBS 233 (1988), another case arising in the **Fifth Circuit**, the Board again applied Holliday, as it did in Hamilton v. Crowder Construction Co., 22 BRBS 121 (1989), within the **Eleventh Circuit's** jurisdiction. The **Eleventh Circuit**, in Director, OWCP v. Hamilton, 890 F.2d 1143 (**11th Cir.** 1989), stated it was bound to the **Fifth Circuit** precedent of Holliday, unless the court sitting en banc overruled. The **Eleventh Circuit** subsequently reaffirmed this position, and declined to grant rehearing en banc on this issue. Southeastern Maritime Co. Brown, 121 F.3d 648, 31 BRBS 140 (CRT), reh'g en banc denied, 132 F.3d 48 (**11th Cir.** 1997), cert. denied, 524 U.S. 951 (1998).

In Phillips v. Marine Concrete Structures, 877 F.2d 1231, 22 BRBS 83 (CRT) (**5th Cir.** 1989), the **Fifth Circuit** affirmed the Board's holding in Phillips, which had followed Holliday's authority. However, the circuit panel invited en banc review of the correctness of Holliday.

The **Fifth Circuit**, in Phillips v. Marine Concrete Structures, 895 F.2d 1033, 23 BRBS 36 (CRT) (**5th Cir.** 1990) (en banc), vacated Phillips, 22 BRBS 233, and overruled Holliday, stating Holliday was wrongly decided. The **Fifth Circuit** found from the plain and unambiguous words of Section 10(f) that the only cost of living adjustments Section 10(f) provided were for permanent total

disability. There are no cost of living (Section 10(f)) adjustments for periods of temporary total disability, or for the Section 10(f) adjustments that accrued during the worker's period of temporary total disability.

The **Second Circuit** found the reasoning in Phillips, 895 F.2d 1035, persuasive and adopted its holding in Lozada v. Director, OWCP, 23 BRBS 78 (CRT) (**2d Cir.** 1990), as did the **Ninth Circuit** in Bowen v. Director, OWCP, 24 BRBS 9 (CRT) (**9th Cir.** 1990). Subsequent to Holliday's Fifth Circuit overruling by Phillips, 895 F.2d 1033, the Board held Section 10(f) adjustments were not applicable to temporary total disability in Stanfield v. Fortis Corp., 23 BRBS 230 (1990) (an **Eleventh Circuit** case) the Board stating it incongruous to do otherwise.

10.7.2 Computation Under Section 10(f)

Section 10(f) adjustments begin the first October 1 following the date the claimant's condition became permanent. Phillips v. Marine Concrete Structures, 21 BRBS 233 (1988). Inclusion of all intervening Section 10(f) adjustments occurring during the previous periods of temporary total disability was reversed in Phillips v. Marine Concrete Structures, 895 F.2d 1033.

The computation under Section 10(f) has been further amended by the LHWCA Amendments of 1984, 98 Stat. at 1648. New Section 10(f) limits the annual adjustments to the lesser of the yearly increase of the national average weekly wage or 5 percent. The 1984 Amendments to Section 10(f), however, do not apply to cases pending on appeal before the Board. See Taddeo v. Bethlehem Steel Corp., 22 BRBS 52 (1989); Scott v. Lockheed Shipbuilding & Constr. Co., 18 BRBS 246 (1986).

A claimant's right to pre-1984 enactment Section 10(f) increases, vested prior to enactment, precludes retroactive application of amended Section 10(f). Post-1984 enactment Section 10(f) limitations apply prospectively, beginning October 1, 1984. Phillips v. Marine Concrete Structures, 21 BRBS 233 (1988).

Retroactive application of the 1984 Amendments to Section 10(f) was precluded where a widow's right to pre-1984 Section 10(f) increases vested prior to the 1984 Amendments' enactment on a 1982 injury claim. Taddeo v. Bethlehem Steel Corp., 22 BRBS 52 (1989).

The Board has held that Section 9(e)(1) does not bar the application of Section 10(f) where adjustments to death benefits would increase compensation above the employee's average weekly wage, as the maximum ceiling on death benefits is the amount equal to 200 percent of the applicable national average weekly wage, pursuant to Section 6(b)(1) of the LHWCA. Donovan v. Newport News Shipbuilding & Dry Dock Co., 31 BRBS 2 (1997).

10.8 ADJUSTMENTS TO COMPENSATION FOR PERMANENT TOTAL DISABILITY OR DEATH PRIOR TO 1972 AMENDMENTS

10.8.1 Generally

Section 10(h) of the LHWCA provides:

(h)(1) Not later than ninety days after the date of enactment of this subsection, the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to enactment of this subsection shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's average weekly wage the applicable national average weekly wage determined under section 6(b) and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following such enactment date and (B) subtracting therefrom the compensation to which such employee or survivor was entitled on such enactment date; except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on such enactment date. Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability at less than the maximum rate that was provided in this Act at the time of the injury which resulted in the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following the enactment of this section. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems relevant, the amount by which the employee's average weekly wage shall be increased for the pre-1947 period.

(2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 44 of this Act, and 50 per centum shall be paid from appropriations.

(3) For the purposes of subsections (f) and (g) an injury which resulted in permanent total disability or death which occurred prior to the date of enactment of this subsection shall be considered to have occurred on the day following such enactment date.

33 U.S.C. § 910(h).

Section 10(h), originally enacted in the 1972 Amendments, provides for adjustments to compensation for permanent total disability or death which commenced or occurred before October 27, 1972, the date of enactment of the 1972 Amendments. Silberstein v. Service Printing Co., 2 BRBS 143 (1975). The intent of Section 10(h) is to upgrade benefits in such cases. Subsections 10(h)(1) and (3) upgrade the benefits payable for pre-Amendment total permanent disability and death beyond the pre-Amendment maximum. Subsection 10(h)(2) shifts liability for the increase from the employer to the Special Fund and government appropriations.

A determination of Section 10(h) applicability is contingent on the occurrence of a pre-1972 Amendment injury. Pitts v. Bethlehem Steel Corp., 17 BRBS 17, aff'd on recon., 17 BRBS 166 (1985). In the case of an occupational disease, for Section 10(h) to apply, the employee's injury must have been manifest before 1972. Littrell v. Oregon Shipbuilding Co., 17 BRBS 84 (1985). This holding is based on Section 10(i), infra, which defines "injury" in occupational disease cases for purposes of Section 10.

The Director is not bound to the stipulations of private parties that benefits were to be based on the claimant's average weekly wage as of last asbestos exposure (in 1968), and that Section 10(h) limited employer's liability to the pre-1972 Act's \$70 a week maximum (which effectively shifted liability for excess compensation to the Special Fund). Truitt v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 79 (1987). Furthermore, Section 10(i) was applicable rather than Section 10(h), since the case was pending on the enactment date of 1984 Amendments. Id.

In American Stevedores v. Salzano, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976), aff'g 2 BRBS 178 (1975), it was held that Sections 10(h)(1) and (3) are constitutional even though given retroactive effect.

10.8.2 Section 10(h)(1)

Section 10(h)(1) provides for an initial adjustment to the compensation being paid to an injured employee or his survivors. Luke v. Petro-Weld, Inc., 8 BRBS 369 (1978), aff'd in pertinent part, 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980). After the initial adjustment, annual adjustments are made pursuant to Sections 10(h)(3) and 10(f).

Benefits for pre-1972 Amendment injuries **must** be calculated pursuant to Section 10(h)(1); the employee's actual average weekly wage is no longer relevant for post-1972 payments. Landrum

v. Air America, Inc., 534 F.2d 67, 4 BRBS 152 (5th Cir. 1976), aff'd 1 BRBS 268 (1975); Lebel v. Bath Iron Works Corp., 3 BRBS 216 (1976), aff'd on other grounds, 544 F.2d 1112, 5 BRBS 90 (1st Cir. 1976).

The Board has also held that the adjustments do not apply to compensation payments for permanent partial disability, Sursum Corda, Inc. v. Cooper, 1 BRBS 60 (1974), aff'd on other grounds, 521 F.2d 324, 3 BRBS 3 (D.C. Cir. 1975), or for temporary total disability. Delgado v. Universal Terminal & Stevedoring Co., 1 BRBS 233 (1974).

Where a worker was found to be entitled to benefits commencing in 1964, he was also entitled to interest payments on the 50 percent portion of Section 10(h) compensation which is the Special Fund's liability, the Special Fund having had the use of his compensation payments. The 50 percent government appropriations were not subject to interest in the absence of express statutory authority. Evangelista v. Bethlehem Steel Corp., 19 BRBS 174 (1986).

Section 10(h) is inapplicable where an injury occurred after the amended 1972 LHWCA, and the employer rather than Special Fund is liable for Section 10(f) annual adjustments. Where a Section 9 compensation right was pursuant to Section 10(d) and (i), with a 1982 date of injury, the average weekly wage should have been based on the national average weekly wage as of 1982 injury subject to the limitations on the amount of compensation a widow is entitled to as set forth in Section 9. Amended Section 9 provisions were applicable (entitled to 50% of national average weekly wage) rather than pre-1972 provisions, where there was a 1982 injury date. Taddeo v. Bethlehem Steel Corp., 22 BRBS 52 (1989).

The Board has held that the adjustments are available in cases where the injury occurs prior to the enactment of the 1972 Amendments, but total disability or death does not occur until afterwards. Hernandez v. Base Billeting Fund, Laughlin Air Force Base, 13 BRBS 214 (1980), modified on recon., 13 BRBS 220 (1981); Silberstein v. Service Printing Co., 2 BRBS 143 (1975).

This provision has also been held applicable where the claimant's decedent was injured prior to the 1972 Amendments but died as a result of the injury after the date of the Amendments. Fox v. Pacific Ship Repair, 21 BRBS 171 (1988); Dennis v. Detroit Harbor Terminals, 18 BRBS 250 (1986), aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, 21 BRBS 85 (CRT) (6th Cir. 1988) (although claimant's death benefits were greater under Section 9(e) than the Section 10(h)(1) adjustment would provide, Section 10(h) still applies and the Section 10(h)(2) sources were liable for part of the payments); Alford v. Lear Siegler, Inc., 4 BRBS 217 (1976).

As to the Section 10(h)(2) issue in Director, OWCP v. Detroit Harbor Terminals, 21 BRBS 85 (CRT) (6th Cir. 1988), the **Sixth Circuit** afforded particular deference to neither the Director nor the Board's interpretation of Sections 10(h)(1)-(h)(3). The **Sixth Circuit** held that Section 10(h)(1) was ambiguous, looked to inconclusive and unclear legislative history and underlying intent, and concluded that Section 10(h) allows the employer/carrier to be reimbursed for post-1972 Amendment increases in death cases where death arose from pre-1972 Amendment injury.

The **First Circuit's** holding on this issue, however, in Director, OWCP v. Bath Iron Works Corp., 22 BRBS 131 (CRT) (**1st Cir.** 1989), has resulted in a split in the circuits. The **First Circuit** was more convinced by the dissent in Detroit. On the issue of whether Section 10(h)(1), termed the "gap closing" adjustment of the 1972 Amendments, applies in the case of a survivor of a worker injured before October 17, 1972, but who died after the 1972 Amendments, the **First Circuit**, on its consideration of the legislative history of the 1972 Amendments and the clearly exclusive language of Section 10(h)(1), held it did not so apply. Section 10(h)(2) was held inapplicable, the entire death benefit payable by the employer.

The **First Circuit** held post-1972 disability cases resulting from pre-1972 injuries were within the Section 10(h)(1) "gap closing" adjustment provision, but post-1972 deaths from pre-1972 injuries are not within this provision; where death post-dated the 1972 Amendments, survivors received the "generous" amended Section 9 rates, with death benefits a percentage of the worker's average weekly wage at post-1972 death, not pre-1972 injury.

10.8.3 Section 10(h)(2)

Section 10(h)(2) provides that the initial adjustment under Section 10(h)(1) and the annual adjustments under Section 10(h)(3) are to be paid from the Special Fund and appropriations, Ness v. Todd Shipyards Corp., 10 BRBS 726 (1978), thereby relieving employer of liability for the additional compensation. Fox v. Pacific Ship Repair, 21 BRBS 171 (1988). Before Section 10(h)(2) is invoked, two pre-conditions must be satisfied: (1) there must be a pre-1972 Amendment injury, and (2) additional compensation for this injury must be awarded as a result of adjustments required by subsections 10(h)(1) and (3). Pitts, 17 BRBS 17. See also Director, OWCP v. Bath Iron Works Corp., 22 BRBS 131 (CRT) (**1st Cir.** 1989); Director, OWCP v. Detroit Harbor Terminals, 21 BRBS 85 (CRT) (**6th Cir.** 1988).

Annual adjustments arising out of post-Amendment injuries, however, are to be paid by the employer/carrier, not the Special Fund and appropriations. Balderson v. Maurice P. Foley Co., 4 BRBS 401 (1976), aff'd on other grounds, 569 F.2d 132, 7 BRBS 69 (**D.C. Cir.** 1977), cert. denied, 439 U.S. 818 (1978).

Once the Special Fund becomes liable for payments of compensation under Section 8(f), it is also liable for adjustments under Section 10. Spencer v. Bethlehem Steel Corp., 7 BRBS 675 (1978). In Waganer v. Alabama Dry Dock & Shipbuilding Co., 12 BRBS 582 (1980), aff'd in pertinent part and rev'd in part sub nom. Director, OWCP v. Alabama Dry Dock & Shipbuilding Co., 672 F.2d 847, 14 BRBS 669 (**11th Cir.** 1982), the Board held that the liability of Section 10(h)(2) sources could be offset against the claimant's third-party recovery.

10.8.4 Determining Amount of Adjustment

Under Section 10(h)(1), compensation is calculated as if death occurred prior to the enactment of the 1972 Amendments. In Dennis v. Detroit Harbor Terminals, 18 BRBS 250 (1986) and Director, OWCP v. Detroit Harbor Terminals, 21 BRBS 85 (CRT) (6th Cir. 1988), 35 percent of the deceased worker's average weekly wage was subject to the \$105.00 maximum limit on the average weekly wage (here \$105.00 maximum applicable) and the widow was entitled to \$36.75 weekly, or 35 percent. This amount is subtracted from the compensation the widow is entitled to receive under the 1972 Amendments.

10.9 PAYMENT OF ADJUSTMENTS BY SPECIAL FUND

10.9.1 Generally

Special Fund repayments to an employer of Section 10(f) overpayment adjustments made to a claimant while temporarily totally disabled are to be repaid under Section 14(j), by increment withholding of the claimant's periodic payments. (Earlier date of permanency modified Special Fund's liability date under Section 10(f)). Phillips v. Marine Concrete Structures, 21 BRBS 233 (1988), reversed in part on other grounds, 895 F.2d 1033 (**5th Cir.** 1990).

The **Fifth Circuit** in Phillips v. Director, OWCP, 877 F.2d 1231, 22 BRBS 83 (CRT) (**5th Cir.** 1989), held that the Board did not err, in interpreting Section 14(j) to allow the employer to be reimbursed from the worker's future benefits for Section 10(f) overpayments to worker by Special Fund. A worker overpaid under Section 10(f) did not meet the Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) burden of entitlement to an exception to the presumption of retroactivity.

10.10 TIME OF INJURY IN OCCUPATIONAL DISEASE CASES

10.10.1 Generally

Section 10(i) of the LHWCA provides:

(i) For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

33 U.S.C. § 910(i).

Section 10(i), added by the 1984 Amendments to the LHWCA, resolved the problem of choosing a time of injury for purposes of Section 10 in occupational disease cases. 1984 Amendments, 98 Stat. at 1647. The 1984 Amendments were a response to the Board's holding in Aduddell v. Owens-Corning Fiberglass, 16 BRBS 131 (1984). That is, the 1984 Amendments were to provide benefits to a class of claimants excluded by this Board decision, i.e., those who retired for reasons unrelated to their work injury.

For background on case law history which preceded this new Section 10(i), see Dunn v. Todd Shipyards Corp., 18 BRBS 125 (1986), which reversed the Board's holding in Dunn v. Todd Shipyards Corp., 13 BRBS 647 (1981) (employed the date of last exposure rule). See also SAIF Corp./Oregon Ship v. Johnson, 23 BRBS 113 (CRT) (9th Cir. 1990); Todd Shipyards Corp. v. Black, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984); Morales v. General Dynamics Corp., 16 BRBS 293 (1984), rev'd sub nom. Director, OWCP v. General Dynamics Corp., 769 F.2d 66, 17 BRBS 130 (CRT) (2d Cir. 1985).

New Section 10(i) is applicable to pending claims, i.e., cases on appeal to the Board. Yalowchuk v. General Dynamics Corp., 17 BRBS 131 (1985). See generally Truitt v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 79 (1987); Kellis v. Newport News Shipbuilding & Dry Dock Co., 17 BRBS 109 (1985); Dolowich v. West Side Iron Works, 17 BRBS 197 (1985); Hoey v. General Dynamics Corp., 17 BRBS 229 (1985). But see McDonald v. Todd Shipyards Corp., 21 BRBS 184 (1988), where the claimant was unsuccessful in an attempt to use the Section 22 modification procedure to apply amended Section 10(i) to a pre-Amendment final decision.

New Section 10(i) **applies to compensation claims for death or disability due to an occupational disease which does not immediately result in death.** This Section defines "time of injury" for purposes of Section 10 as the date on which the **claimant or employee** becomes

aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, **and** the death **or** disability. Coughlin v. Bethlehem Steel Corp., 20 BRBS 193 (1988) (asbestos exposure); Stone v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 1 (1987) (asbestos exposure).

In cases of a **voluntary retiree** whose occupational disease causes death or disability more than one year after retirement, the applicable average weekly wage used to calculate the weekly benefit payable under Section 8(c)(23) is the national average weekly wage in effect at the time of injury (as determined by Section 10(i)), the time of awareness of the occupational disability, or death. 33 U.S.C. § 910(d)(2). Section 10(d)(1) is applicable if the Section 10(i) "time of injury" is **within one year** of voluntary retirement. Shaw v. Bath Iron Works Corp., 22 BRBS 73 (1989); Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78 (1989); Johnson v. Ingalls Shipbuilding Div., Litton Sys., 22 BRBS 160 (1989).

If the employee involuntarily withdraws from the work force due to occupational disease, however, he is not a voluntary retiree, and the post-retirement provisions of Sections 2(10), 8(c)(23), and 10(d)(1) and (2), do not apply, and the claimant is entitled to an award based on loss of wage-earning capacity.

In determining the date of injury and the appropriate national average weekly wage, for purposes of Sections 9 and 10(d), the issue is governed by the decedent's retiree status. If the decedent is a **voluntary retiree**, the survivor's death benefit award is based on the national average weekly wage in effect no earlier than the date of death, as the Section 10(i) **claimant's** date of awareness could be no earlier. Ponder v. Peter Kiewit Sons Co., 24 BRBS 46 (1990) (asbestos related disease); Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78 (1989) (asbestos exposure).

If the decedent was an **involuntary retiree**, Section 10(i) is inapplicable and the survivor's death benefit award is based on the average weekly wage at the time of injury. Martin v. Kaiser Co., 24 BRBS 112 (1990) (asbestos exposure); Bailey v. Bath Iron Works Corp., 24 BRBS 229 (1991) (asbestos exposure).

In claims filed under the Section 8(c)(23) and 10(d)(2) retiree provisions, the Board held claimant cannot be held to be aware of the relationship between his occupational disease, employment, and disability prior to the date he became disabled. Carver v. Ingalls Shipbuilding, Inc., 24 BRBS 243 (1991); Lindsay v. Bethlehem Steel Corp., 18 BRBS 20 (1986).

Date of injury, for purposes of determining whether employer is entitled to Special Fund relief, is determined under Section 10(i): the date of awareness of occupational disability or death; not the date of last hazardous exposure. Newport News Shipbuilding & Dry Dock Co. v. Harris, 24 BRBS 190 (CRT) (4th Cir. 1991).

This same principle applies to the determination of “situs” also. The expanded situs requirement (after the 1972 Amendments) applies to employees and their survivors, even though the employee was exposed to the hazardous stimuli before the effective date of the Amendments, in an area that was not a covered situs before the 1972 Amendments. Insurance Co. of North America v. U.S. Dep’t of Labor, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), cert. denied, 507 U.S. 909 (1993) (Date of manifestation of occupational disease with long latency period, rather than date of last exposure, determines whether LHWCA as amended, applies to employee or survivor seeking benefits.).

10.10.2 Work-related Loss Pre-dates Awareness

In occupational disease cases **where the work-related wage loss pre-dates awareness of the relationship between disability and employment**, the average weekly wage should reflect earnings prior to the onset of disability, rather than the subsequent earnings at the later time of awareness. Wayland v. Moore Dry Dock, 21 BRBS 177 (1988) (asbestos exposure); Stone v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 1 (1987) (asbestos exposure); LaFaille v. General Dynamics Corp., 18 BRBS 88 (1986). See Section 10(c), *supra*.

Section 10(i) addresses time of injury for purposes of calculating average weekly wage, not for determining when benefits should commence. Adams v. Newport News Shipbuilding & Dry Dock, 22 BRBS 78 (1989); Barlow v. Western Asbestos Co., 20 BRBS 179 (1988).

10.10.3 Inapplicability of Section 10(i) to Traumatic Injuries

Although the Board has held that Section 10(i) does not apply to traumatic injuries, see Matthews v. Jeffboat, Inc., 18 BRBS 185 (1986), a **hearing loss may be an occupational disease, where it results from prolonged on-the-job noise exposure**. Machado v. General Dynamics Corp., 22 BRBS 176 (1989); Cox v. Brady-Hamilton Stevedore Co., 18 BRBS 10 (1985).

Under these circumstances, awareness for purposes of Section 10(i) may be the date an audiogram was administered, consistent with the 1984 Amendments, which mandate that the claimant's awareness can occur no earlier than the date on which he receives an audiogram with accompanying report and knows of the causal relationship between his employment and the hearing loss. See Epps v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 1 (1986); Byrd v. J.F. Shea Constr. Co., 18 BRBS 48 (1986). This date is the date for calculating average weekly wage under Section 10(i). Mauk v. Northwest Marine Iron Works, 25 BRBS 118 (1991) (hearing loss); Peterson v. General Dynamics Corp., 25 BRBS 71 (1991) (lung cancer); Dubar v. Bath Iron Works Corp., 25 BRBS 5 (1991) (hearing loss); Grace v. Bath Iron Works Corp., 21 BRBS 244 (1988) (hearing loss). See also Sections 8(c)(13), *supra*, Sections 12 and 13, *infra*. For Section 13 awareness in post-retirement Section 8(c)(23), Section 10(i) pulmonary claim, see Lombardi v. General Dynamics Corp., 22 BRBS 323 (1989).

The Board has held in voluntary retiree hearing loss cases, where the Section 10(i) time of injury post-dates retirement (so that Section 10(d)(2)(B) is applicable in determining the average weekly wage) that this average weekly wage is to be based on national average weekly wage at the time of the post-retirement injury. Macleod v. Bethlehem Steel Corp., 20 BRBS 234 (1988) (retired in 1967, Section 10 hearing loss injury in 1980).

In Machado v. General Dynamics Corp., 22 BRBS 176 (1989) (en banc), the Board rejected the Director's argument that prolonged exposure hearing loss is an occupational disease which results in immediate disability, so as to hold Section 10(i) inapplicable in determining the time of injury, with the average weekly wage to be determined as of the last day of employment in the noisy environment. The Board held Sections 10(i) and 10(d)(2)(B) applicable to such voluntary retirees who suffer hearing loss, and further held their benefits should be calculated under Section 8(c)(13). Fucci v. General Dynamics Corp., 23 BRBS 161 (1990) (en banc).

Essentially, the Board held there was no basis for distinguishing hearing loss claims from other occupational diseases for purposes of determining the Section 10(i) time of injury.

In Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT) (**5th Cir.** 1990), the **Fifth Circuit** was persuaded by the Board's Machado decision on the Sections 10(i) and 10(d)(2) issues. The court reversed the Board, however, on the issue of whether hearing loss retirees are to be compensated under the schedule of Section 8(c)(13) or Section 8(c)(23), and held they are to be compensated under Section 8(c)(23).

On the Section 10(i) issue, the court stated that Congress did not intend to establish a wholly separate occupational disease scheme for retirees with hearing losses, and in its Section 10(i) language did not intend to make a distinction between occupational hearing loss (and possibly other occupational diseases that get no worse after retirement), and other types of occupational disease.

In Alabama Dry Dock & Shipbuilding Corp. v. Sowell, 933 F.2d 1561, 24 BRBS 229 (CRT) (**11th Cir.** 1991), the **Eleventh Circuit** followed the **Fifth Circuit** in Ingalls Shipbuilding, Inc. and also rejected the Director's Machado Section 10(i) time-of-injury arguments in hearing loss cases. The **Eleventh Circuit** held that, for purposes of fixing compensation in hearing loss cases, the time of injury under Section 10(i) is the time when the employee is or should be aware of the relationship between the employment, the disease, and the disability.

Conflict in the circuits resulted from the **First Circuit's** decision in Bath Iron Works Corp. v. Director, OWCP, 942 F.2d 811, 25 BRBS 30 (CRT) (**1st Cir.** 1991), aff'd, 113 S. Ct. 692 (1993). The court in Bath Iron Works, convinced by the Director's Machado statutory interpretation arguments and its account of how deafness occurs (at last exposure), held the Section 10(i) time of injury in the case of a retired worker who goes deaf on the job is the time he loses his hearing (at last exposure), even if he did not notice loss until later and after retirement; and that he should be compensated under Section 8(c)(13). Section 10(d)(2) was held not to apply since the Section 10(i) time of injury preceded retirement.

The **Supreme Court** resolved this conflict in Bath Iron Works Corp. v. Director, OWCP, 506 U.S. 153, 26 BRBS 151 (CRT) (1993). The **Court** held occupational hearing loss, unlike a long-latency disease such as asbestosis, is not an occupational disease that does not immediately result in disability within Section 10(i)'s definition; loss of hearing is suffered simultaneously with occupational exposure and results in immediate disability. Under Section 10(i)'s plain language, a retiree's claim for occupational hearing loss does not fall under Section 8(c)(23). Date of last exposure, the date on which the injury was complete, was held to be the time of injury for calculating a retiree's benefits in occupational hearing loss cases. (See also Topic 8.13 Hearing Loss, supra.)