U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 August 2006

CASE №.: 2005-LHC-00322
OWCP №.: 14-138480

In the Matter of:

D. Q.,
Claimant,

vs.

SHAVER TRANSPORTATION,
Employer,

and

SAIF,
Carrier.

Appearances: Charles Robinowitz, Esq.
Law Offices of Charles Robinowitz
Portland, Oregon
For Claimant

Norman Cole, Esq.
Sather, Byerly & Holloway
Portland, Oregon
For Respondent

Before: William Dorsey
Administrative Law Judge

Decision and Order

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901*, et seq*., as amended by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 -1655 (1984) (the Act).

The parties disagree on how the Claimant's average weekly wage should be computed, and on whether he was entitled to temporary total disability benefits for the period he performed

modified work before the surgery to his injured knee. At trial, Claimant's Exhibits (CX) 1 through 10 and Employer's Exhibits (EX) 1 through 44 were admitted in evidence. Tr. 8.

Findings of Fact

The Claimant, a journeyman member of the Piledriver and Shipwright's union,[1] had worked for the Employer 12 years[2] repairing diesel engines, gearboxes, hydraulics, fuel systems, air systems, or anything that needed maintenance on the Employer's fleet of 12 tugboats and 16 barges. Tr. 30; 72. He injured his left knee when he tripped at work on August 22, 2002, for which he was first treated early the next morning at an emergency room. He told his foreman, Mr. Lee, of the injury when he arrived wearing a brace and using crutches the next morning, when he was placed on modified duty. John Di Paola, M.D. performed arthroscopic knee surgery on September 18, 2002. Tr. 32-33; 101. He was able to return to work at light duty on October 7, 2002, although a flare up kept him from working from December 18, 2002 to December 22, 2002. *Id.;* Tr. 46; CX 5, pgs. 52-53. He reached maximum medical improvement on May 30, 2003, with a 20% scheduled permanent disability of the left leg. Tr. 26; 37; CX 7 pg. 66.

On the day he was injured his hourly rate of pay was $21.43. CX 1 pg. 13. Typically he worked 5 days per week,[3] but he was on call as part of an overtime rotation 1 or 2 weekend days per month, and accepted overtime during the work week rarely. Tr. 38-39, 44, 47. Overtime primarily resulted from equipment failures that urgently required the Employer to schedule weekend maintenance, and occasionally immediate overtime if the repair could not be delayed to a weekend. Tr. 39, 55. The collective bargaining agreement permitted him to accumulate as many as 50 days of sick leave that he could use only if sick and unable to work. Tr. 42-43; 75. During the 365 days before the injury he attended work on a total of 243 days, for which he was paid $49,988.33, made up of the following pay categories:

Category	Days	Gross amount paid
Regular or Regular plus some other category that day	219	$39,425.83
Overtime only	24	$4,814.66
Vacation pay only	17	$2,877.04
Sick pay only	9	$1,521.12

[1] The collective bargaining agreement for his work is titled as if negotiated by the Carpenters and Joiners Union. Tr. 40.

[2] He began on October 23, 1990. Tr. 72.

[3] His work year consisted of 260 days for purposes of § 10 of the Act.

Holiday pay only	8	$1,349.68
Total	277	$49,988.33
Total work days minus holidays	269	
Total days at work (*i.e.*, minus holidays, vacation and sick days he was paid for)	243	

Tr. 16; 45; CX 1 pgs. 1-13.

The Claimant actually worked fewer days than the 277 he was paid for, which is, after all, the reason for holiday, sick and vacation pay. During that 365-day period before his injury, he became entitled to 6 (rather than 9) days of sick leave and 15 (rather than 17) days of vacation pay under the Employer's policies;[4] he was able to take more than that due to days carried forward in those categories from the prior year. Strictly speaking, the terms of the collective bargaining agreement did not allow him to accumulate vacation days from year to year, but the Employer allowed as much as one week of vacation to be rolled into a subsequent year, either as a matter of general practice (Tr. 41-42) or as an accommodation to the Claimant because his wife had a chronic health condition that could require him to care for her during work days. Tr. 59, 103. The reason is not as significant as the fact that roll-overs of vacation days were permitted.[5] He could not receive sick or vacation pay on a day he worked, to "cash out" unused vacation or sick leave. Tr. 43; 75-76.

No worker at the Employer typically works on holidays, and any that do are paid overtime in addition to holiday pay (in this respect holiday pay differs from vacation and sick pay). Tr. 76. Work on holidays would require that the company have work available and that the Claimant be willing to accept it. Holidays therefore are treated uniquely so in the average weekly wage calculation the earnings should be counted but not the days.

The statutory formula § 10(a) prescribes wages in such a way that the fewer days counted as days worked, the higher the average weekly wage becomes, so long the Claimant is credited with working 75% or more of the available days in the year before injury.[6] To most closely reflect the Claimant's earning capacity when his knee was injured, the formula should consider what he could have earned if he attended work on his regular Monday through Friday schedule, as well as the overtime earnings. Due to his wife's health, he ordinarily declined overtime

[4] He accrued 10 hours of vacation per month, and 4 hours of sick leave. Tr. 84; EX 3 pg. 21.

[5] As of the injury date the Claimant has used 15 vacation days, 2.5 more than he would have earned in that year (figured from the anniversary date of his employment which was Oct. 23). Tr. 72-74.

[6] A claimant not credited with work for at least 75% of the ordinary work days preceding the injury does not qualify as having worked "substantially the whole of the year." See, § 10(a), codified as 33 U.S.C. § 910(a). The average weekly wage then must be calculated under subsection 10(b) or 10(c).

Mondays through Fridays. Tr. 58-59. He is credited with overtime earnings of $4,814.66.[7] In the relevant 365-day period, he could have worked on the 26 days he was on vacation or sick leave. He had missed some work due to pneumonia and kidney stones in the year before his injury, but these had not been chronic conditions that limited his earning capacity or work availability. Tr. 45. He was not absent before August 22, 2002 due to a work-related injury.

To compute the average weekly wage all parties agree the 243 days the Claimant actually worked form the base. To that the 26 days he was paid for vacation or sick pay (but not holidays) should be added, for a total of 269 days. His average daily earnings were $185.83 ($49,988.23 / 269). Multiplied by 260 work days in a 5-day work week, and then divided by 52 weeks, the average weekly wage is $929.15. *See* § 10(d)(1) of the Act. His compensation rate is 66 2/3% of that, or $619.43. *See* § 8.

With respect to the Claimant's limitations from August 23, 2002 to September 17, 2002, the Employer paid the claimant temporary partial disability, based on a comparison between his earnings from the modified work and his average weekly wage. Having the Claimant do modified work required the Employer to contribute on the Claimant's behalf to the union Health and Welfare Fund for each of those hours. Tr. 71-72. The Employer's interest laid in assigning the Claimant meaningful tasks, for it would have been less expensive to send him home to receive temporary total disability benefits than to arrange modified duties for him. *Id.* The Employer reshuffled duties within its operations to provide the modified work, the tasks continued to be performed after the Claimant recovered.

The Claimant argues that even though he was paid for the modified work, he should be paid permanent total disability benefits too, because he was doing "sheltered" work. He wore a leg brace, walked with crutches, could not negotiate stairs or ramps, and elevated his knee as much as possible. Tr. 34-36. He was unable to do filing that required him to bend or kneel, or to do any computer work because there was a problem with the software. Tr. 106. For the period before the knee surgery, neither the Employer nor the Claimant had any reason to specifically record just what the Claimant did each day as modified work. *Cf.*, Tr. 53. He testified that he answered the telephone infrequently (once an hour) at work, but also that he did not know without guessing which or how many days he did this telephone answering. Tr. 35, 52. He also filed some logs on tugs and barges that could go in filing cabinets he could reach by standing. Tr. 106. The Employer was uncertain whether he stripped old files of non-essential material and shredded them before his surgery, or after it.[8] Tr. 77-80. That shredding needed to be done annually because the Employer had limited records storage. Tr. 79. If he was stripping and shredding files before his surgery, then it was appropriate, necessary work that other employees, including one with a graduate degree, would have done, perhaps on overtime. Tr. 66; 78. While the Claimant believes he did the three days of file stripping only after Thanksgiving (Tr. 106), I am not persuaded that his memory of specific tasks is that good.

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[7] I cannot understand the Claimant's complaint at p. 9 of his Closing Argument, that overtime days are not being counted, when (a) counting them would work against him by lowering the average weekly wage, and (b) the Employer does not claim they should be counted.

[8] The days involved appear to be Aug. 28 through Aug. 30, 2002. Tr. 78; EX 7 pg. 55 (entries for light duty).

Answering the telephone was light duty that had a value to the employer. Ordinarily any of the 8 workers who happened to be in the shop answered the telephone. Tr. 82; 88. Even before the Claimant's injury, the maintenance crew was somewhat short-staffed because the shop manager, Mr. Molloy, was out on vacation until mid to late September (Tr. 93-94, 98), and the Claimant's limitations from his injury exacerbated the labor shortage. The foreman, Mr. Lee, was likely to be out of the shop working aboard the tugs and barges under repair, unable to answer the phone when dispatch was trying to reach him, or another employee. The Claimant could answer the telephone in the shop, or take a message, freeing Mr. Lee from running back and forth 60 yards or more from a boat or barge being repaired to the telephone. Tr. 92, 100. I find the Claimant answered the phone intermittently, without making any finding about the average length of time between calls, because the evidence permits no more specific finding. What matters is that by answering the telephone the shop foreman was freer to devote himself to production. It makes no difference that no one was permanently assigned to telephone duty, it was an adjustment to deal with temporary short-staffing. The Claimant also performed inventories[9] and prepared parts lists and orders for parts before his surgery, work he was able to allocate to specific vessels. Tr. 62-63; 86-88.

When he returned to work after surgery the Claimant "agrees he was performing legitimate light duty work." (Claimant's Closing Argument at pg. 11). His pre-surgery duties were meaningful, rather than "sheltered," i.e., tasks that show the worker is treated with "kid gloves," have little or no benefit to the employer, and (or) do not justify the wage paid. His work differed from that in *CNA Insurance Co. v. Legrow,* 935 F.2d 430 (1st Cir. 1991), where that injured foreman for a steel erection company returned to work "only on an as-needed basis, averaging only approximately ten hours per week at the job, and he had a mattress in the office so that he could lie down during the day." *Id.*, at 434. The Claimant performed useful full time work; having the opportunity to elevate his leg is quite different that resting in bed at the job.

Time records the Claimant kept in his own handwriting show that in the first days following his injury he did general work that was not readily associated with a specific vessel. Tr. 61-62; EX 7, pgs. 56-57. Entries for Friday, Aug. 23 to Tuesday, Aug. 27 were allocated to "Worker's Compensation," a description that offers no useful information. From Wednesday, Aug. 28 to Friday, Aug. 30 he recorded he spent time at light duty, with no allocation to a specific vessel or task. The Claimant testified he performed inventory then (Tr. 50) but it may have been the time he devoted to file shredding. Tr. 80. As he could not go down to physically inventory items or parts on hand in the shop, I infer any work on inventory had to do with making entries on inventory reports. On Tuesday, Sept. 3 (after the Labor Day holiday), he allocated 2 hours to code 5013. It is difficult to know what that means, for the Claimant testified the code designated sick time or time away from work for doctor's appointments or family business (Tr. 51; 64), yet the shop supervisor, Mr. Molloy, testified it designated internal maintenance work on the shop itself (for example, painting the shop), work on the office itself, or work on company cars. Tr. 92-93. I treat it as an overhead category, for work not allocable to a specific barge or tugboat. Those code 5013 entries do not appear to represent time off. On

[9] The Claimant's testimony is inconsistent on this point. At some times he agreed he did inventory before the knee surgery (Tr. 60), and at other times he denied it. Tr. 61. I find it more likely than not that he did inventory or related paperwork such as parts lists or orders before his surgery. This is a type of work that pertains to a specific vessel, so it is consistent with the allocations he made in his time sheets. Tr. 62.

Wednesday, Sept. 4, he allocated 4 hours to work pertaining to the tug *Vancouver* and 4 hours more to the tug *Deschutes*. On Thursday, Sept. 5, he allocated 1 hour of his work to the *Vancouver*, and 4 to the *Willamette*. On Friday Sept. 6 he recorded he spent 4 hours on tasks related to the *Deschutes* and 4 hours to general overhead. From Monday, Sept. 9 to Monday, Sept. 16, all hours are allocated to code 5013, general overhead. EX 7, pgs 56-57. Some of the unallocated work was likely filing maintenance documents (to the extent he could) or doing other paperwork. Tr. 90-94.

Conclusions of Law

The parties agree that the average weekly wage here should be calculated according to §10(a) of the Act. *General Construction Co. v. Castro,* 401 F.3d 963 (9th Cir. 2005); *Stevedoring Services of Am. v. Price*, 382 F.3d 878 (9th Cir. 2005); *Matulic v. Director, O.W.C.P.*, 154 F.3d 1052 (9th Cir. 1998).

None of the reported decisions present facts that explicitly required the court to hold that vacation or sick pay should be excluded from the average weekly wage computations, but those that mention them include them as days counted toward whether the employee worked "substantially the whole of the year." *See*, § 10(a). All 6 weeks of the worker's vacation pay were counted as days worked in the Board's decision in *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990), the most explicit consideration of how to treat vacation time. The related issue of how to count vacation days "sold back" to the employer arose in *Wooley v. Ingalls Shipbuilding, Inc,* 204 F.3d 616 (5th Cir. 2000), but the 4 days of vacation actually taken were counted as days worked. More recently the trial judge in *McGee v. Northrup Grumman Ship Systems*, 39 BRBS 45 (ALJ) (2005) included vacation days taken as days that claimant worked.

In *Sproull v. Director, O.W.C.P.*, 86 F.3d 895(9th Cir. 1996), the court endorsed the trial judge's determination that the value of vacation time accrued from work done before the injury, which would result in payments after the injury, reflected the worker's capacity to earn wages. The average weekly wage calculation under consideration had not been made under §10(a), but under the more general standards of § 10(c), to identify the sum that "reasonably represent[s] the annual earning capacity of the injured employee."

When the Ninth Circuit applied §10(a) in *Matulic*, 154 F.3d 1052, it mentioned an earlier decision that recognized that "virtually no one in the country works every working day of every work week" due to "illnesses, vacations, strikes, unemployment, family emergencies, etc." and that Congress understood this when § 10 was enacted. *Duncanson-Harrelson v. Director, O.W.C.P.,* 686 F.2d 1336, 1342 (9th Cir. 1982). *Matulic* did not decide the issue presented here, but did approve a calculation of the average weekly wage using §10(a) even though it overstated the number of days actually worked by 18%, because it included in the count "vacation, holiday and sick days." 154 F.3d at 1057. I have already stated my reasons for not including holidays among the days counted as worked, given the Employer's specific policies on holiday pay.

The *Matulic* court accepted that some degree of overcompensation is inherent in the process of determining the average weekly wage under the §10(a) formula, and these will tend to favor the worker. *Id.* I do not believe *Matulic*, or any case, goes so far as to hold that it is a

"fundamental policy of Section 10(a) to 'overcompensate' injured workers." Claimant's Closing Argument at pg. 6 ln. 4-5. All the court accepted was that overcompensation would occur, not that a claimant enjoys a right to the interpretation of the Act that maximizes overcompensation.

Attorney's Fees

There was no informal conference in this matter. Both parties have altered positions more than once on how to calculate the Claimant's average weekly wage. The Employer/Carrier initially accepted the claim, but disputes developed over the amount of the benefits the Claimant was entitled to receive. The Carrier calculated the average weekly wage in the October 16, 2002 LS-208 as $956.02. (EX 19 pg. 121). It later rejected the higher rate the Claimant's attorney claimed (EX 39, pg. 149), but increased its own average weekly wage calculation to $968.68, and paid benefits on that basis on February 2, 2005 (EX 40 and 41, pgs. 152-156). Disagreement about the average weekly wage continued through the time of the trial. In the pretrial statements the Claimant asserted the correct figure was $1,026.80 and Employer/Carrier argued in its amended pretrial statement that the figure was $929.15. I have now accepted the Employer/Carrier's last position.

The entire amount the Claimant's lawyer succeeded in obtaining must be viewed in light of the payment rate, type of disability (temporary total disability or temporary partial disability) and days the Employer/Carrier paid as compensation before a dispute developed. If the Claimant obtained more or different types of compensation than Employer/Carrier offered by bringing the matter to the Office of Workers' Compensation Programs or by requesting the transfer of the matter to the Office of Administrative Law Judges for trial, there would be a successful prosecution of the claim. *See, National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 881-883 (9th Cir. 1979) (disputes over the categories and the extent of liability can give rise to fee liability under both §28(a) and (b) of the Act). The final computation by the District Director may assist in making this determination. The Employer/Carrier may have affected its fee liability by making an offer under *Armor v. Maryland Shipbuilding & Dry Dock Co.,* 19 BRBS 119 (1986) (*en banc*), but that will entail proof. It is not clear, however, that filing its form LS-208 on February 2, 2005 cut off fee liability, as the Employer/Carrier argued in its Amended Pretrial Statement at pg. 10.

The liability for fees may be asserted in a fee petition filed after the District Director has finalized the compensation benefits and any interest that may be due. The Employer/Carrier may serve any defenses or objections within 20 days thereafter, and the Claimant shall have 10 days to reply.

Order

Based on the foregoing it is ordered that:

1. The Claimant is entitled to compensation benefits based on an average weekly wage of $929.15, which equates to a weekly compensation rate of $619.43.

2. The Claimant is not entitled to permanent total disability for the period from August 23, 2002 to September 17, 2002 on the theory that he was performing sheltered work; he is entitled to temporary partial disability for that period.

3. The Claimant is entitled to temporary total disability immediately after his knee surgery, for the period from September 18, 2002 to October 7, 2002.

4. The Claimant is entitled to temporary partial disability from October 8, 2002 to May 30, 2003, with the exception of the period from December 18, 2002 to December 22, 2002 when he is entitled to temporary total disability.

5. The Claimant's entitlement to temporary partial disability ceased when he reached maximum medical improvement on May 30, 2003.

6. The claimant is entitled to a 20% permanent partial disability to his left leg.

7. The District Director shall calculate the payments due and those made.

8. Interest is payable on any amounts not paid when due at the statutory rate.

9. The Claimant may petition for attorney's fees and costs within 20 days from the date of the District Director's calculation of whether any additional moneys are due to the Claimant. The Employer/Carrier shall have 20 days to respond and the Claimant 10 days to reply.

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William Dorsey
Administrative Law Judge