



Issue Date: 05 February 2008

In the matter of:
G.R.,

Claimant,

v.

Case No. 2007-LHC-00129

AAPM TERMINALS, INC.,
Employer,

and

SCHAFFER COMPANY, LTD.,
Carrier.

Appearances: Myles R. Eisenstein, Esq.
For Claimant

Lawrence P. Postol, Esq.
For Employer

Before: Daniel F. Solomon
Administrative Law Judge

DECISION AND ORDER ON RECONSIDERATION
Amended Award of Disability Compensation

This proceeding arose upon the filing of a claim for disability compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901-950 (2000) ("Act" or "LHWCA").

On December 7, 2007, I issued a Decision and Order awarding the Claimant disability benefits. Specifically, I found that Claimant was entitled to a disability rating of 27% for the injury to Claimant's left thumb. Consequently, I awarded compensation of \$29, 426.49 for permanent partial disability and \$28, 269.34 for temporary total disability from October 7, 2005 through March 10, 2006; the date of maximum medical improvement. In addition, I offset the Employer's liability by the amount of advance payments already made to the Claimant.

On December 19, 2007, Employer submitted a Motion for Reconsideration. On January 4, 2008, Claimant's Counsel submitted a letter indicating that a response to the Employer's Motion had not been filed because Claimant had no objections and that the Order "completely

covered the facts.”¹ Subsequently, on January 15, 2008, Claimant’s Counsel submitted a formal response to the Employer’s Motion for Reconsideration.

As a starting point, I note that at a hearing held on March 13, 2007, in Baltimore, Maryland, the parties stipulated to a number of facts.² After I rendered my Decision and Order and received the Motion for Reconsideration and the responses, I held a telephone hearing on January 22, 2008. At that time, I asked the parties whether I had jurisdiction since both had filed appeals to the Benefits Review Board (“Board”). I was advised that both parties had filed precautionary appeals and that they would so advise the Board.

EMPLOYER’S OBJECTIONS

The Employer objects to several of the findings I issued in my Decision and Order. Specifically, the Employer submits the following:

- 1) The accident date was October 6, 2005, not October 7, 2005, and that the date of maximum medical improvement (MMI) was March 10, 2006, not March 13, 2006.
- 2) The Claimant’s average weekly wage is \$1517.77 with a corresponding compensation rate of \$1031.43
- 3) Claimant is entitled to a disability of 20% pursuant to section 8(c)(6), and a compensation for permanent partial disability in the amount of \$15,177.71
- 4) Claimant is entitled to a compensation of \$22,838.81 for a total disability from October 7, 2005 through March 10, 2006.

Claimant’s Counsel submitted a formal response that did not address the issues raised in Employer’s Motion for Reconsideration, but instead argued about my finding that Claimant was presented with suitable alternative employment and that Claimant had failed to diligently pursue employment.

DISCUSSION

In my prior Decision and Order, I found Dr. Segalman’s disability rating of 20% to be the most reasonable, (Decision and Order at 13), but inadvertently referenced the 27% figure in several sections of the Decision. (Decision and Order at 17, 24, 25). The prior Decision and Order is amended to reflect my acceptance of Dr. Segalman’s disability rating of 20%.

Employer asserts that the injury occurred on October 7, 2005. Claimant testified that he was employed as a lasher until October 6, 2005. (TR³ at 22) Employer’s Counsel submitted a signed pre-hearing statement (form LS-18) stating the date of the injury as October 6, 2005. The emergency room report is also dated October 6, 2005. (EX 9) The evidence supports the finding of October 6, 2005 as the date of injury. Regardless, the discrepancy is of little consequence on the ultimate determination of Employer liability.

¹ See Claimant’s letter of January 11, 2008.

² See pages 5-9 of transcript of hearing held on March 13, 2007, in Baltimore, Maryland (1. The parties are subject to the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §§ 901-950 (2000) (“Act” or “LHWCA”), 2. That a work-related accident occurred on October 6, 2005, 3. There existed an employer/employee relationship at the time of the accident, 4. The injury occurred within the scope of employment, 5. The Employer was timely notified of the thumb injury, 6. There was disability to the thumb, 7. The injury resulted in permanent partial disability, 8. Employer paid Claimant temporary total disability compensation of \$22,833.81 for the period October 7, 2005 through March 10, 2006. Claimant stipulated to a period of temporary total disability from October 7, 2005 through March 10, 2006, 9. That the Claimant reached maximum medical improvement on March 13, 2006.)

³ TR1 refers to the transcript of the hearing held on August 21, 2007, in Baltimore, Maryland.

Employer also disputes my finding as to the date of maximum medical improvement. Employer asserts that March 10, 2006 was the date of MMI. I had based my finding of MMI, in part, to Dr. Innis' conclusion that the Claimant had reached maximum medical improvement. Employer correctly points out that, while Dr. Innis' report was dated March 13, 2006, the examination of the Claimant by Dr. Innis occurred on March 10, 2006. Claimant's Counsel contends that although Dr. Innis examined the Claimant on March 10, 2006, he did not make public his report and assessment until March 13, 2006. I note that neither the Claimant nor the Employer directs me to any statutory authority or relevant case law that supports their position and I am not aware of any authority which addresses this issue. Considering the evidence as a whole, I amend my prior Decision and Order and find the date of maximum medical improvement to be March 10, 2006. I find that relying on the date of the actual physical examination as opposed to the date of the published medical report is more reasonable and yields a more accurate date of the actual maximum medical improvement.

Employer argues for an average weekly wage of \$1517.77 with a corresponding compensation rate of \$1031.43.

There are 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. See *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).

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. 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). The Claimant worked a total of approximately 2073 hours in the year immediately preceding the injury, from October 6, 2004 through October 5, 2005. (EX 10) A full-time employee working 40 hours per week for 52 weeks accumulates 2080 hours of compensable time. Based on the Claimant's reported work history for the year preceding his injury he worked during substantially the whole year immediately preceding his injury. Therefore, calculation of the Claimant's average weekly wage according to 10(a) is appropriate.

To calculate average weekly wage under this Section 10(a), the Claimant's actual earnings for the 52 weeks prior to the injury are divided by the number of days he actually worked during that period, to determine an average daily wage. This average daily wage is then multiplied by 300 for a six-day worker or 260 for a five-day worker, and the product divided by 52 pursuant to Section 10(d) to determine the average weekly wage. In my prior Decision and Order, I had calculated the average weekly wage according to the number of days worked by a 5-day-worker. In the phone hearing held on January 22, 2008, both parties agreed that Claimant's average weekly wage by dividing the Claimant's wages by 52:⁴

[Judge]: So now I do understand. I do have a question for both of you, let's start with whether he was a five-day worker or a

⁴ See page 7 of transcript of telephone hearing held on January 11, 2008.

three-day worker.
[Mr. Postol]: I don't think he was any of those. I mean, the fact is, the longshoremen work when the ships are in, and they come in sporadically, and I think that's why the correct way to calculate it is, you divide what they earned by 52 weeks.
[Judge]: Mr. Eisenstein?
[Mr. Eisenstein]: I agree with the 52 weeks. But you don't exclude fringe benefits. I never heard of that.

I accept the parties' stipulation and will calculate the Claimant's average weekly wage accordingly. The Claimant earned \$65896.16 in wages during the 52 weeks immediately preceding his injury. An additional payment of \$7204.00 was made to the Claimant from the Container Royalty Fund. (EX 36) Container royalty payments are included in the computation of average weekly wages. *See Lopez v. Southern Stevedores*, 23 BRBS 295 (1990) Therefore, the Claimant's 52 week earnings preceding the date of the injury total \$73,100.16. Based on the parties' stipulation, Claimant's weekly average wage is derived by dividing the total wages of \$73,100.16 by 52, which results in a weekly average wage of \$1405.77.

The Claimant was temporary totally disabled from October 6, 2005 through March 10, 2006 – a period of 22 weeks. Temporary total disability is paid at 66^{2/3} percent of the Claimant's actual weekly wages which results in a compensation rate of \$937.09, considering a weekly average wage of \$1405.77.⁵ Sections 906(b)(1) and 906(b)(2) set maximum and minimum compensation rates, respectively, based on the national average weekly wage.⁶ The Claimant's compensation rate is in compliance with both sections of the statute. The Claimant's compensation rate, paid for a period of 22 weeks for temporary total disability, yields a sum of \$20,615.98. The Employer has made advance payments of \$22,833.31. The Employer's overpayment of \$2217.33 for temporary total disability is to be credited and offset against the Employer's total liability.

In the case of permanent partial disability, Claimant shall be compensated at 66^{2/3} percent of the Claimant's actual weekly wages which results in a compensation rate of 937.09.⁷ Compensation for a permanent partial disability must be determined in one of two ways. *First*, if the permanent disability is to a member identified in the schedule, as in the instant case, the injured employee is entitled to receive two-thirds of his average weekly wage for a specific number of weeks, regardless of whether his earning capacity has been impaired. *See Henry v. George Hyman Construction Co.*, 749 F.2d 65, 17 BRBS 39 (CRT) (D.C. Cir. 1984). The injury was to the Claimant's left thumb. Compensation shall be paid at 75 weeks according to the schedule specified at § 908(c)(6).⁸ Claimant's average weekly wage of \$937.09 paid for 75 weeks yields a sum \$70,281.75, 20% of which results in a compensation amount of \$14,056.35. Claimant is also to be compensated in the amount of \$14,056.35 for the 20% disability rating to

⁵ 33 U.S.C. § 908(b)

⁶ 33 U.S.C. §§ 906(b)(1) and 906(b)(2) (compensation for disability or death shall not exceed 200% of the applicable national average weekly wage, nor fall below 50% of the national average weekly wage.)

⁷ 33 U.S.C. § 908(c).

⁸ 33 U.S.C. § 908(c)(6).

his injured left thumb.⁹ The Employer has made advance payments to the Claimant in the amount of \$20,866.46, yielding an overpayment of \$6810.11.

CONCLUSION

My prior Decision and Order is amended to reflect the new compensation rate and correct the scrivener's error. All other aspects of the prior Decision and Order remain in full force and effect.

AMENDED ORDER

Based upon the foregoing findings of fact, conclusions of law, and upon the entire record, my prior Decision and Order is amended as follows:

1. The date of maximum medical improvement (MMI) with respect to Claimant's left thumb is March 10, 2006.
2. Claimant is entitled to compensation of \$14,056.35 for Permanent partial disability at a rating of 20%.
3. Claimant is entitled to compensation of \$20,615.98 for temporary total disability from October 6, 2005 through March 10, 2006, at the average weekly wage of \$937.09.
4. Employer shall receive credit of \$22,833.81 paid to the Claimant for temporary total disability. Employer's excess compensation of \$2217.33 for temporary total disability shall be combined with the \$20,866.46 paid to Claimant for permanent partial disability, resulting in a credit of \$23,083.79 to be applied against the \$20,334.82 due Claimant for permanent partial disability. Employer shall receive credit for all compensation heretofore paid, as and when paid.
5. The District Director shall make all necessary calculations to effectuate this **ORDER.**

SO ORDERED

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DANIEL F. SOLOMON
Administrative Law Judge

⁹ This figure results from multiplying the percentage loss of the disability (20%) by the number of weeks awarded according to schedule 33 U.S.C. §908(C)(6) – 75 weeks. This result, 15 weeks, is then multiplied by the Claimant's average weekly wage of \$937.09.