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Issue Date: 25 June 2012

OALJ CASE №: 2011-LHC-00891
OWCP CASE №: 14-150190

In the Matter of:

JERRY HILL,
Claimant,

v.

CLD PACIFIC GRAIN,
Employer,

and

AMERICAN HOME ASSURANCE COMPANY / CHARTIS CLAIMS, INC.,
Carrier.

Appearances: Charles Robinowitz, Esq.
For the Claimant

Stephen Verotsky, Esq.
For the Employer / Carrier

Decision and Order Granting Temporary Total Disability Benefits

This decision awards temporary total disability compensation under the Longshore and Harbor Worker's Compensation Act[1] (the Act). The issue is whether the Claimant is a five day per week worker, which affects the determination of his average weekly wage (AWW) and therefore his weekly compensation rate. This order does not address issues of permanent impairment or ongoing medical care, which will be resolved later.

[1] 33 U.S.C. § 901, *et seq.*

The evidence persuades me the Claimant is a five day worker for purposes of calculating his average weekly wage under § 10(a) of the Act. Although he didn't work five days in every week, he tried to work at least five days a week, and worked an average of more than five days a week in the weeks he worked.

I. Background

This case was heard on December 7, 2011, in Portland, Oregon. The trial transcript includes testimony from the Claimant,[2] and I admitted Claimant's exhibits 1 through 11 into evidence. The parties submitted posttrial briefs.[3]

II. Summary of Agreed Facts

At trial and in their briefs, the parties agreed the Claimant hurt his left groin while working for the Employer on June 19, 2008.[4] He then was a B-list registered ILWU longshoreman working on the Portland docks; he had been since November 18, 2006.[5] They agree the PMA records[6] accurately reflect the Claimant's work for the year before his injury. They also agree that during the one year before his injury, the Claimant:

1. worked 5 days a week 12 weeks of that year;
2. worked 6 days a week 14 weeks of that year;
3. worked 4 or less days of work 10 weeks of that year; and
4. did not work at all for 16 weeks of the year, for various reasons unrelated to work.[7]

The Employer admits the Claimant's injury is compensable under the Act,[8] and the Employer has already paid the Claimant some compensation based on its own AWW calculation.[9] Based on the

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[2] Tr. at 17– 30. This Decision and Order cites to the record this way: citations to the trial transcript are abbreviated as Tr. at [page number]; the Claimant's exhibits are abbreviated as C. Ex.-[exhibit number] at [page number].

[3] Claimant's Closing Brief [hereinafter Claimant's Posttrial Brief]; Employer/Carrier's Closing Argument [hereinafter Employer's Posttrial Brief].

[4] *See, e.g.,* C. Ex.-3.

[5] Tr. at 18.

[6] C. Ex.-1.

[7] Claimant's Posttrial Brief at 3; Employer's Posttrial Brief at 2.

[8] Employer's Pretrial Statement at 4(a)–(f).

[9] Tr. at 5.

Proposed Partial Order submitted,[10] the parties agree the Employer is liable for temporary total disability payments from June 20, 2008 to January 7, 2009.[11] If I determine the Claimant is a five day worker, his AWW determined under § 10(a) is $1,740.41;[12] if he is not a five day worker, they agree his AWW determined under § 10(c) is $1,372.25 or $1,359.98.[13]

III. Issue

The sole issue is whether the Claimant is a five day per week worker whose AWW should be determined under § 10(a)[14] of the Act.

IV. Analysis

Under § 8(a), the compensation rate for permanent total disability is 66 2/3% of a claimant's AWW.[15] The AWW is calculated as of the time the claimant was injured.[16] Section 10 of Act sets three ways to calculate the Claimant's average annual earnings at the time of injury: § 10(a), § 10(b)[17] and § 10(c),[18] respectively. All look at a claimant's wages in the 365 days preceding the injury.[19] Under § 10(d), the annual earnings divided by 52 become the AWW.[20]

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[10] Mr. Robinowitz included a "Proposed Partial Order" with his Posttrial Brief, detailing agreed facts necessary for me to issue a compensation order as the decision in *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011) requires. Although the Proposed Partial Order was not signed by the Employer, both parties agreed at trial they only disagreed about whether the Claimant was a five day worker. *See* Tr. at 32. The Proposed Partial Order was served on Employer's counsel. The Employer hasn't objected to it. I have no reason to believe the figures, facts or representations in the Proposed Partial Order are inaccurate.

[11] Proposed Partial Order at 1.

[12] *Id.* at 1.

[13] The $1,372.25 figure comes from the Proposed Partial Order at 1; the $1,359.25 comes from the Employer's Posttrial Brief at 2–3. The Employer doesn't explain its different calculation, but the yearly difference of $249.45 is exactly equal to one day of holiday pay. Based on my findings below the different § 10(c) calculations become irrelevant, so I needn't determine which is correct.

[14] 33 U.S.C. § 910(a).

[15] 33 U.S.C. § 908(a).

[16] 33 U.S.C. § 910.

[17] 33 U.S.C. § 910(b).

[18] 33 U.S.C. § 910(c).

[19] 33 U.S.C. § 910(a)–(c).

[20] 33 U.S.C. § 910(d). Even when calculating a claimant's AWW under § 10(c), an adjudicator must calculate the claimant's average annual earnings and then divide by 52. *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve / Bayley Marine*, 23 BRBS 207, 211 (1990).

The dispute in this case revolves around whether to use § 10(a) or § 10(c).[21] Section 10(c) governs only when "either of [§ 10(a) and § 10(b)] cannot reasonably and fairly be applied."[22] I must first determine whether I can apply § 10(a), which states:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding the 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.[23]

As the statutory text suggests, case decisions establish that a claimant must be either a five day per week or a six day per week worker in order to use § 10(a).[24] There appears to be virtually no precedential decisions on how to determine how many days per week a worker has worked for purposes of applying § 10(a). The Claimant cites no authority, and the Employer mentions only two cases.

In the first, *Matthews v. Jeffboat, Inc.,* 18 BRBS 185 (1986), that employer stipulated the claimant was a five day per week worker who worked 50 of 52 weeks in the year before his injury.[25] However, the ALJ found the claimant was a six day per week worker, based on the claimant's testimony he worked six days per week in 71% of the 52 weeks before his injury; the BRB affirmed.[26] This decision endorses the idea that someone who works six days per week 71% of the time is a six day per week worker.

In the Employer's second case, *Irvin v. Crowley American Transport*, 35 BRBS 422 (ALJ 2001), an ALJ determined a claimant was a four-and-a-half day per week worker, and tried to apply § 10(a).[27]

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[21] Section 10(b) is applicable only when the claimant's employment has been regular and continuous, but the claimant didn't work for substantially the whole of the year. 33 U.S.C. § 910(b). The parties implicitly agree the Claimant worked for substantially the whole of the year before his injury, so it can't apply in this case. *See* Employer's Posttrial brief at 4–5.

[22] 33 U.S.C. § 910(c).

[23] 33 U.S.C. § 910(a).

[24] *See Duhagon v. Metropolitan Stevedoring Co.,* 31 BRBS 98 (1997), *aff'd* 169 F.3d. 615 (9th Cir. 1999).

[25] *See Matthews* at 190.

[26] *Id.*

[27] *Irvin*, 35 BRBS at 425–27 (ALJ).

In an unpublished decision, the BRB reversed, holding § 10(a) applies only to five- and six-day per week workers.[28] The Board also faulted the ALJ's calculations, finding the data suggested only an average of 3.8 days per week worked, without actually finding the worker worked 3.8 days per week for the purposes of the Act.[29] The case offers scant guidance, as an unpublished reversal where the Board made no finding about the days per week worked.

This Claimant worked 36 weeks out of the 52 weeks preceding his injury; the other 16 weeks he didn't work because he was unavailable for personal reasons.[30] He worked at least five days per week in 26 of the 36 weeks he worked, or 72% of the time. Based on the data, the Claimant averaged above five days per week in the weeks he worked.[31]

The charts I asked the parties to prepare plot the Claimant's work days in the 52 weeks before his injuries on a calendar.[32] These visual aids reinforce what the figures above show: in most weeks the Claimant worked, he worked at least five days per week. Occasionally he worked fewer than five days per week, and frequently he worked six or seven days per week.

As a B-registered longshoreman, the Claimant couldn't always work five days per week because his priority wasn't always high enough to get a job.[33] However, the Claimant always tried to work at least five days per week to avoid potentially being dropped from the B-list for insufficient hours.[34]

The Employer prefers to break out only those weeks the Claimant worked exactly five days per week, pointing out these weeks made up only 23% of the 52 weeks before the Claimant's injury.[35] Although accurate, this figure bears little relationship to reality of the

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[28] *Irvin*, BRB No. 01-0627, ALJ No. 99-LHC-3100 (April 24, 2002) slip op. at 3.

[29] *See Irvin,* BRB No. 01-0627, at fn. 2.

[30] *See* Employer's Posttrial Brief at 2.

[31] The parties didn't break down exactly how many days the Claimant worked in the weeks the Claimant worked fewer than 4 days, or how many days he worked in the weeks he worked six or more days. However, using his total days worked of 205, divided by 252, the days in the 36 weeks he was available to work, results in an average of 5.7 days per week in the weeks he did work.

[32] I rely on the Claimant's chart, which accurately corresponds to the PMA records. The Employer's chart appears to be accurate but reversed, indicating the Claimant worked on the days he didn't, and didn't work on the days he did. It's the mirror image of his work.

[33] Tr. at 18–19.

[34] Tr. at 19–20.

[35] Employer's Posttrial Brief at 5.

Claimant's industry. The Claimant worked more than five days more often than he worked fewer than five days per week.[36] The Employer's position is tantamount to arguing he isn't a five day per week worker because he often worked six or seven days per week, and this means he is entitled to less disability compensation than if he had simply worked five days per week during those weeks. It doesn't make sense. If anything, the Claimant might have argued he was a six day per week worker, because he worked at least six days per week more often than he worked any other number of days per week, and because he averaged more than five-and-a-half days per week in the weeks he worked.[37] It is hard to see how finding the Claimant is a five day per week worker treats the Employer unfairly, when he averaged more than five days per week in the weeks he worked, and when he worked at least five days per week in over 70% of the weeks he worked.

The weight of the evidence shows the Claimant ought to be categorized as a five day per week worker whose AWW should be determined under § 10(a). The parties appear to agree the calculation results in an AWW of $1,740.41.[38] Because 66.6% of that number is more than twice the national average weekly wage for 2008, when the Claimant was injured, he is due compensation at the maximum rate of $1,160.36.

V. Conclusion

The Claimant suffered a compensable work-related injury for which the Employer is liable. He was temporarily totally disabled from July 20, 2008 to January 7, 2009. It is ORDERED that:

1. The Employer and its Carrier must pay the Claimant temporary total disability from July 20, 2008 until January 7, 2009 at the rate of $1,160.36 per week, plus interest on any unpaid installments from the time they became due;

2. The Employer and its Carrier are entitled to a credit for any compensation already paid;

3. The District Director must make all calculations necessary to carry out this Order and the parties must submit any additional documents needed to aid the District Director in this calculation; and

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[36] C. Ex.-1 at 1–9.

[37] *See* C. Ex.-1 at 1–9.

[38] *See supra*, fn. 10; Proposed Partial Order at 1.

4. The Claimant's counsel is entitled to reasonable attorney's fees and costs for benefits procured on the Claimant's behalf. A fee petition that comports with 20 C.F.R. § 702.132 must be filed within 21 days from the date this order is served by the District Director. The Employer must file his objections within 14 days after the fee petition is served. The parties must meet in person or voice-to-voice to discuss and attempt to resolve any objections within 14 days after objections are served. Both parties are charged with the duty to arrange the meeting. The Claimant's counsel must file a report within 7 days thereafter that identifies the objections have been resolved, those that have been narrowed, and those that remain unresolved. The report also may reply to any unresolved objections.

So Ordered.

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William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California