

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 June 2012

Case No.: 2011-LHC-00802

OWCP No.: 07-189706

In the Matter of:

TED E. IVEY,
Claimant

v.

HUNTINGTON INGALLS, INC.,
Self-Insured Employer

APPEARANCES:

SUE ESTHER DULIN, ESQ.,
On Behalf of the Claimant

DONALD P. MOORE, ESQ.,
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER PURSUANT TO STIPULATIONS

PROCEDURAL STATUS

This matter arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act),¹ brought by Claimant against Employer.

The matter was referred to the Office of Administrative Law Judges for a formal hearing on 25 Jan 11. All parties were represented by counsel. A hearing was scheduled for 19 Mar 12, but was canceled because the parties agreed there was no factual dispute

¹ 33 U.S.C. §§901 *et seq.*

and they could submit a joint stipulation of facts. They accordingly waived their right to an in-person hearing.

My decision is based upon the entire record, which consists of the following:²

Exhibits³

Joint Stipulations of Fact and Law: JX-1⁴
Claimant's Exhibits (CX): 1-25
Employer's Exhibit (EX): 1-21

STIPULATIONS

1. Claimant sustained an injury to his low back and right shoulder on 24 May 10 when he fell from a ladder and was struck by a strongback, while acting in the course and scope of his employment for Employer, and under circumstances that bring him within the coverage of the Act.
2. Claimant was temporarily totally disabled as a result of that injury from 1 Sep 10 to 4 Jan 11, and 24 Mar 11 to 19 Jun 11. He was temporarily totally disabled from 24 Jan 12 to present and continuing.
3. Claimant has not reached maximum medical improvement.
4. Employer is responsible for Claimant's past and future causally-related Section 7 medical expenses.

ISSUES IN DISPUTE & POSITIONS OF THE PARTIES

The parties' only dispute is Claimant's AWW at the time of his injury. Claimant multiplies his hourly wage rate of \$21.85 by 40 hours to reach an AWW of \$874. In the alternative, Claimant argues his AWW should be no less than \$731.70 per week, based on his gross earnings of the 13 weeks worked prior to the accident. Employer argues that since Claimant rarely worked a 40-hour week, the more accurate means of calculating his AWW is to divide his gross earnings during the 52 weeks prior to his injury by the number of weeks he actually worked, yielding \$688.04. The parties agree Claimant's AWW should be determined using Section 10(c) of the Act.

² I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

³ Counsel were cautioned that they must cite the specific page of any exhibits of more than 20 pages (CX-9, 11, 13, 14, 24; and EX-7, 9-11, 17, 18, 20) for those pages to be considered a part of the record upon which the decision is based. Because the only issue before me was AWW, however, many of these documents were not relevant to my decision as they were medical records.

⁴ Employer submitted a document entitled "Joint Stipulations of Fact and Law" on 2 Apr 12, signed by its counsel, Claimant's counsel, and Claimant. This has been entitled JX-1 for the purposes of this Order.

LAW

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings,⁵ which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed toward establishing a claimant's earning power at the time of injury.⁶

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage.⁷ Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year.⁸ Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

If neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then Section 10(c) is appropriate.⁹

Section 10(c) of the Act provides:

If either [subsection 10(a) or 10(b)] can not 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 of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.¹⁰

According to the language of the Act, administrative law judges have broad discretion in determining annual earning capacity under subsection 10(c).¹¹ The objective of subsection 10 is to reach a fair and reasonable approximation of a claimant's

⁵ 33 U.S.C. § 910(a)-(c) (2011).

⁶ *SGS Control Servs. v. Dir.*, *OWCP*, 86 F.3d 438, 441 (5th Cir. 1996).

⁷ 33 U.S.C. § 910(a) (2011).

⁸ 33 U.S.C. § 910(b) (2011).

⁹ *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

¹⁰ 33 U.S.C. § 910(c) (2011).

¹¹ *Hicks v. Pac. Marine & Supply Co., Ltd.*, 14 BRBS 549, 550 (1981).

wage-earning capacity at the time of his injury.¹² Section 10(c) is used where a claimant's employment is seasonal, part-time, intermittent, or discontinuous.¹³

In calculating annual earning capacity under subsection 10(c), administrative law judges may consider: the actual earnings of the claimant at the time of injury,¹⁴ the earnings of other employees of the same or similar class of employment,¹⁵ the claimant's earning capacity over a period of years prior to the injury;¹⁶ or may multiply claimant's wage rate by a time variable¹⁷ and consider all other sources of income,¹⁸ overtime,¹⁹ vacation and holiday pay,²⁰ probable future earnings of claimant (in extraordinary circumstances),²¹ or any other fair and reasonable representation of the claimant's wage-earning capacity.²² A worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings if a calculation based on the wages at the employment where he was injured would best reflect his earning capacity at the time of the injury.²³ It should also consider a claimant's unwillingness to work or voluntary absence from the labor market.²⁴

¹² *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244, 249 (1976).

¹³ *Gatlin*, 936 F.2d at 822.

¹⁴ 33 U.S.C. § 910(c) (2011); *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); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 344-45 (1988).

¹⁵ 33 U.S.C. § 910(c) (2011); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir.1980).

¹⁶ *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58, 61 (1976) (all the earnings of all the years within that period must be taken into account).

¹⁷ *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, it must be one that reasonably represents the amount of work that normally would have been available to the claimant).

¹⁸ *Harper v. Office Movers/E.I. Kane Inc.*, 19 BRBS 128, 130 (1986) (additional sources of income are properly considered when the claimant's ability to earn wages in both the covered job and the other job was affected by the work-related injury); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052, 1057 (1978).

¹⁹ *Bury v. Joseph Smith & Sons*, 13 BRBS 694, 698 (1981).

²⁰ *Sproull v. Stevedoring Servs. of Am.*, 25 BRBS 100, 105 (1991).

²¹ *Walker v. Wash. Metro. Area Transit Auth.*, 793 F.2d 319, 321, (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987).

²² *See generally, Flanagan Stevedores, Inc. v. Gallagher, Dir. OWCP*, 219 F.3d 426, 434 (5th Cir. 2000).

²³ *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882, 886 (1981).

²⁴ *Conatser v. Pittsburgh Testing Laboratory*, 9 BRBS 541 (1978); *Geisler v. Continental Grain Co*, 20 BRBS 35 (1987).

EVIDENCE

*Various Department of Labor documents state in pertinent part:*²⁵

Claimant was injured at work at 8 am on 24 May 10 when he fell approximately four to six feet from a ladder, injuring his low back. A strongback then fell and struck him on his shoulder and back. His low back, left leg, neck, and both shoulders were injured. At the time, he was earning a weekly wage of \$1,100 from employer. Claimant usually worked Monday through Friday as a shipfitter.

Claimant's disability began 1 Sep 10, the first date he lost pay because of the injury. Employer paid compensation without an award at a rate of \$458.70, based on an AWW of \$688.04, beginning 4 Apr 11. Employer again paid compensation without an award at a rate of \$458.70, based on an AWW of \$688.04, beginning 24 Jan 12. Claimant's disability began 24 Jan 12.

Employer paid Claimant TTD from 1 Sep 10 to 24 Sep 10 at a rate of \$458.70 per week, and from 4 Apr 11 to 19 Jun 11 at the same rate. Employer paid a total of \$6,618.39 in disability benefits with a stated overpayment of \$4,849.11.

*Claimant's earning records with Employer state in pertinent part:*²⁶

Claimant was hired by Employer 26 Jun 07 and was terminated 17 Mar 11. From the pay periods of 9 Mar 08 to 1 Mar 09 he was paid at a rate of \$20.75 per hour. From the pay periods of 8 Mar 09 to 1 Nov 09 he was paid at a rate of \$21.30 per hour. He did not earn any wages from Employer between the periods of 8 Nov 09 to 28 Feb 10.

Claimant returned to work for Employer during the pay period of 7 Mar 10 at a rate of \$21.85 per hour. He worked from then through the pay period of 6 Mar 11 at the same rate and worked two pay periods after that at a rate of \$22.40 per hour.

Claimant's total hours worked for Employer from his date of hire through April 2011 were 5,011.7, for gross earnings of \$116,563.06.

Pre-injury, Claimant worked for Employer at an hourly rate of \$21.30 for 34 pay periods between 31 May 09 and 23 May 10. His gross pay during that period was \$24,081.14 for 1,011.4 hours completed.

²⁵ CX-1-6, 19; EX-1-4.

²⁶ CX-7-8; EX-15-16, 20.

Post-injury, Claimant worked for Employer at an hourly rate of \$21.30 for 23 pay periods between 30 May 10 and 6 Mar 11. He worked for Employer at an hourly rate of \$22.40 for 29 pay periods between 13 Mar 11 and 18 Dec 11. His post-injury gross pay with Employer was \$44,427 for 1,640.4 hours completed.

*Claimant testified in deposition in pertinent part:*²⁷

He is 27 years old, graduated from high school in 2003 and has no post-high school education. He has completed a shipfitter training course. He was hired by Employer right out of high school in 2003 as a shipfitter, and worked three or four years until Katrina hit. He worked as a shipfitter and rigger for other companies after that and in a post office and then returned to Employer on 26 Jun 07.

On the date of his incident, his supervisor was A.D. Johnson. He was correcting welding work that someone had done poorly. One of the strongbacks broke and hit him on his hard hat and knocked him off his ladder. He landed on his feet and the strongback landed on him on his upper back and shoulder blade. He was dizzy but was not knocked unconscious. The piece of metal was at least five feet long and five-eighths inch thick. Only the welder saw it happen, and he doesn't remember his name. He tried to finish the job. He told his boss about the accident and said he was going to finish, but he couldn't swing a hammer. It happened before lunch.

He told his boss he wanted to go to the hospital and went, to the Pascagoula hospital inside the shipyard. He saw Dr. Warfield. He's still treating with Dr. Tsang and Dr. Winters, and is not back at work. He had surgery 6 Feb 12.

He had injured his back or shoulder before, in a four-wheeler wreck that bulged some discs. That was two years before the incident at work, in 2007 or 2008. Someone hit him from behind and knocked him off his four-wheeler. He got treated at Singing River but didn't require surgery. After he went back to work, it still hurt, but it wasn't like it is now. Now it is constant pain.

He was assaulted on 9 Aug 09 at his apartment. Some guys who didn't like him came at him from behind, choked him, and beat his face. He went to the ER.

He got in car wrecks 14 Feb 03 and 25 Apr 05, and was driving in both of them. One of the wrecks totaled his vehicle. He didn't miss any significant time from work.

²⁷ EX-21.

He has had no claims for compensation prior to the incident 24 May 10. Before the incident, he was prescribed hydrocodone for his back. He took it after work sometimes. Now he takes hydrocodone and Norco four to five times per day.

He has not applied for Social Security.

ANALYSIS

The record establishes that Claimant was not a five or six day worker and the parties agreed that Section 10(c) applies. Employer does not contest that using an hourly wage rate of \$21.85 is proper.²⁸ The issue is how many hours he worked. Claimant's suggestion that his average weekly wage should be based upon an assumption that he averaged forty hours per week is unsupported by the record. He never worked 52 or even 50 weeks in a year and he never came close to averaging 40 hours for the weeks during which he did work.

For example, Claimant worked during 34 of the 52 weeks before his injury.²⁹ Over those 34 weeks, he worked an average of 29.7 hours per week. In the 52 weeks prior to that period, Claimant worked a total of 49 weeks for an average of 32.6 hours per week. In the year before that, Claimant worked a total of 48 weeks, with two weeks off over the winter holidays, averaging 37.2 hours per week he was working. I will not consider the number of weeks Claimant was working, as Employer conceded allowing for nonindustrial incidents and conditions that may have prevented him for working.

Focusing on the average hours per week Claimant accumulated when he was working, I note a decreasing trend over the three years preceding the injury. I find the most appropriate way to consider that trend is to calculate a weighted average.³⁰ That results in 31.92 hours per week of work. Multiplying the average hours per week by the hourly wage of \$21.85 results in a figure of \$697.45. Therefore I find Claimant's reasonably-calculated AWW is \$697.45.

²⁸ Claimant received a raise 12 weeks before his work injury, from \$21.30 to \$21.85 per hour.

²⁹ Employer eliminated from consideration 8 Nov 09 through 28 Feb 10 and argued in its brief that Claimant worked a total of 35 weeks in the 52 weeks prior to his injury. However, I also eliminated the week of 26 Jul 09 and arrived at 34 weeks.

³⁰ Giving the most recent year (29.7) a weight of three, the next year (32.6) a weight of two, and the first of the three years (37.2) a weight of one yields a weighted average of 31.92 hours per week.

ORDER AND DECISION

1. Claimant's AWW at the time of his injury was \$697.45.
2. Claimant was temporarily totally disabled for the periods of 1 Sep 10 to 4 Jan 11, and 24 Mar 11 to 19 Jun 11.
3. Claimant became temporarily totally disabled on 24 Jan 12 and remains so.
4. Employer shall receive credit for any compensation heretofore paid, as and when paid. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.³¹
5. Employer is responsible for all past and future necessary, reasonable, and appropriate medical expenses related to Claimant's work injury according to Section 7 of the Act.
6. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorneys' fees.³² A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application, it must serve a copy on Claimant's counsel, who shall then have fifteen (15) days from service to file an answer thereto.
7. The parties have 30 days from the receipt of this order to submit any other issues for adjudication or to request a remand for the resolution of those matters at the District Director's level.

ORDERED this 12th day of June, 2012 at Covington, Louisiana.

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PATRICK M. ROSENOW
Administrative Law Judge

³¹ Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267, 271 (1984).

³² Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524, 527 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 823 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after the date this matter was referred from the District Director.

