U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0373

KANE K. AHUNA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SSA PACIFIC, INCORPORATED	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	DATE ISSUED: 07/29/2024
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Susan Hoffman, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz (Law Office of Charles Robinowitz), Portland, Oregon, for Claimant.

John R. Dudrey (John R. Dudrey, LLC), Lake Oswego, Oregon, for Employer/Carrier.

Amanda Torres (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD and JONES, Administrative Appeals Judges

BOGGS and JONES, Administrative Appeals Judges:

Claimant appeals Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Denying Benefits (2020-LHC-00072) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act or LHWCA). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a neck injury while working for Employer as a longshore mechanic on February 19, 2016.[1] HT at 55. This work accident, in part,[2] led to his having cervical disc replacement surgery performed by Dr. Bret Ball, a neurosurgeon, on May 12, 2016. *Id.* at 57-58. Claimant did not work from February 20, 2016, through November

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained his injuries in Portland, Oregon. 33 U.S.C. 921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[2] Claimant previously injured his neck in a 2014 non-work-related car crash. HT at 47. He was off work for three to four months before returning to his usual work through the longshore mechanics' board, though he continued to experience some numbness in his left hand and arm. *Id.* at 48-49. On February 10, 2016, Claimant sought an assessment of his ongoing neck pain from Dr. Robert Tatsumi, a neurosurgeon, who recommended an anterior fusion in Claimant's neck from the C5 through C7 vertebrae. *Id.* at 49, 54; RX 7A. Claimant stated, despite proceeding with pre-authorization for the procedure, he hoped to find other non-invasive treatment options. HT at 54-55.

15, 2016, the day after Dr. Ball deemed it reasonable for him to return to work. RX 23;[3] CX 31 at 3. At that time, Claimant returned to his prior job through the longshore mechanics' board. HT at 58. However, he stated the work "seemed to be getting tougher" than before his 2016 work injury because he was progressively having more difficultly with certain physical aspects of the job. *Id.* at 58-59, 61. As a result, on November 9, 2017, he switched to lighter duty work through the union's winch board, *id.* at 61-64, which he alleged resulted in his working fewer hours and being paid based on a lower skill rate, *id.* at 63-64.

Meanwhile, Employer voluntarily paid temporary total disability (TTD) benefits and medical benefits, from the date of injury through November 14, 2016.[4] ALJ D&O at 4, J. Stip. Nos. 11-15. Because the parties disputed Claimant's entitlement to permanent partial disability (PPD) benefits beginning November 9, 2017, when Claimant switched from the mechanics' board to the winch board, and the manner for calculating his average weekly wage (AWW), Claimant filed a claim for additional benefits. HT at 10-13.

Claimant maintained his inability to continue his usual work as a full-time longshore mechanic was due to his work-related injury, and his transfer to light-duty work resulted in a loss in wage-earning capacity (WEC), entitling him to PPD benefits. He also asserted his AWW should be calculated pursuant to 33 U.S.C. §910(c). In contrast, Employer asserted Claimant is not entitled to any PPD award because his WEC, based on the totality

[3] In a report dated July 17, 2020, Dr. Ball opined Claimant was "medically stationary" without "any specific permanent limitations" on November 15, 2016. However, he cautioned Claimant to try to avoid repetitive and heavy exertion activities involving his neck and avoid awkward positions. CX 31 at 3. He also indicated there is "a reasonable probability" that Claimant will require additional surgery on his neck at some point which, Dr. Ball opined, also "would be in part related to his work injury on February 19, 2016." *Id.*

[4] Initially, Employer paid Claimant TTD benefits from February 20, 2016, to May 13, 2016, at the maximum compensation rate but controverted his ongoing entitlement to benefits on the ground that he had fully recovered from his work injury. ALJ D&O at 4, J. Stip. No. 11. The ILWU-PMA Welfare Plan (the Welfare Plan) paid Claimant TTD benefits from May 14, 2016, to November 14, 2016, albeit at a reduced compensation rate, as well as $63,489.99 in medical benefits. *Id.*, Nos. 12, 13. In the joint stipulations, Employer agreed to fully reimburse the Welfare Plan and to compensate Claimant for the underpayment in TTD benefits from May 14, 2016, to November 14, 2016. *Id.*, Nos. 14, 15.

of his post-injury income, exceeds his AWW as calculated under 33 U.S.C. §910(a).[5] Emp.'s Closing Arg. at 15. The ALJ held a formal hearing by video conference on August 5, 2020.

In her May 6, 2022 decision, the ALJ found Claimant's return to his usual work through the mechanics' board without restrictions on November 15, 2016, precluded his entitlement to any permanent total disability (PTD) benefits.[6] D&O at 22. Because the parties' stipulated that Claimant's switch to the winch board on November 9, 2017, was to allow him "to take less physical jobs due to his neck injury," she next addressed Claimant's entitlement to ongoing PPD benefits while performing that work. *Id.* Applying Section 10(a), 33 U.S.C. §910(a), the ALJ calculated Claimant's AWW at $2,158.29. Using his actual post-injury earnings from November 15, 2016, through June 26, 2020, she computed his WEC at $2,196.60 per week. Based on those calculations, she concluded Claimant is not entitled to PPD benefits and, therefore, denied his claim for additional benefits.[7] D&O at 27-33.

On appeal, Claimant challenges the ALJ's AWW and WEC findings and her corresponding denial of PPD benefits. The Director, Office of Workers' Compensation Programs (the Director), responds asserting the ALJ should have determined Claimant's AWW using Section 10(c) rather than Section 10(a) of the Act.[8] Employer responds separately to Claimant and the Director, urging affirmance of the ALJ's decision. Claimant has replied to Employer's response brief.

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[5] Employer maintained the evidence does not support a separate WEC calculation from November 9, 2017, and that alternatively, even if it did, the calculations would establish Claimant's entitlement to, at best, weekly PPD benefits of $30.74. Emp.'s Closing Arg. at 15.

[6] Based on the parties' stipulation, the ALJ found Claimant's work-related neck injury reached maximum medical improvement (MMI) on November 14, 2016. D&O at 15.

[7] The ALJ ordered Employer to: provide Claimant all reasonable and necessary medical benefits under Section 7 of the Act, 33 U.S.C. §907; comply with the parties' stipulations to pay Claimant additional TTD benefits plus interest; and reimburse the Welfare Plan $56,000 for its advanced payments of disability and medical benefits to Claimant. D&O at 34.

[8] The Director did not address Claimant's other arguments.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's AWW. Section 10(a) of the Act, 33 U.S.C. §910(a), looks to the actual wages of the injured worker who is employed for substantially the whole of the year prior to the injury. It states:

> If the injured employee shall have worked in the employment in which he was working at the time of his 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 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).[9] Section 10(a) thus requires the ALJ to determine the average daily wage the claimant earned during the preceding 12 months. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). This average daily wage is multiplied by 260 if the claimant was a five-day per week worker, or 300 if he was a six-day per week worker. The resulting figure is then divided by 52 pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), to yield the claimant's statutory AWW.

Section 10(c) of the Act, 33 U.S.C. §910(c), on the other hand, is a catchall provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[10] *See Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir. 1998); *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155, 157 (1988). Under Section 10(c), a claimant's AWW may be based on: (1) the previous earnings of the injured employee in the employment in which he was working at the time of the injury; and (2) the earnings of other employees of the same or most similar class working in the same or most similar employment; or (3) the other employment of the injured employee if it reasonably represents the annual earning capacity of the injured employee. *Palacios v. Campbell Indus.*, 633 F.2d 840, 842 (9th Cir. 1980). The objective

[9] Use of Section 10(a) arrives at a *theoretical* approximation of a claimant's AWW, as if he worked every available workday in the year preceding his injury. *See generally Trachsel v. Rogers Terminal & Shipping Corp.*, 597 F.3d 947, 951 (9th Cir. 2009).

[10] No party contends Section 10(b) should be applied in this case.

under Section 10(c) is to arrive at a fair and reasonable approximation of the claimant's earning capacity as of the time of his injury. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 433 (5th Cir. 2000). The ALJ has broad discretion in making this determination. *Rhine v. Stevedoring Services of Am.*, 596 F.3d 1161, 1164-1165 (9th Cir. 2010); *Bonner v. Nat'l Steel & Shipbuilding Co.*, 5 BRBS 290, 293 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979).

The ALJ applied Section 10(a) rather than Section 10(c) to compute Claimant's AWW because: Ninth Circuit case law mandates "a presumption in favor" of using Section 10(a) "when a worker, such as Claimant, is paid for over 75 percent of the available workdays;" Claimant "worked substantially the whole of the year preceding his injury;" and the record contains sufficient evidence "to determine whether Claimant was predominantly a five-day or six-day worker." D&O at 27. She found Claimant's payroll records indicated the days and hours he worked which enabled her to "extrapolate Claimant's work schedule" and conclude he was predominantly a five-day worker. *Id.* at 27-29.

The ALJ also noted the parties' stipulation that Claimant's number of days "when so employed" is 268, which exceeds the 260-day threshold for five-day workers under Section 10(a). However, citing *Martin v. Sundial Marine Tug & Barge Works, Inc.*, 12 F.4th 915, 920 (9th Cir. 2021), she found eight days over is not "substantially more than 260" so as to require a calculation of Claimant's AWW under Section 10(c) rather than 10(a). D&O at 29.

The ALJ found Claimant is a five-day worker[11] and Section 10(a) "can be reasonably and fairly" applied under the circumstances to estimate his AWW.[12] Consequently, she calculated Claimant's AWW in accordance with Section 10(a) by

[11] In reaching this conclusion, the ALJ rejected Claimant's argument that the inclusion of 18 alleged vacation days in May and December 2015, unreported in his payroll records, made him a six-day worker. She also found, contrary to Claimant's assertion, the eight weekend overtime days he worked did not make those overtime days "a regular and normal part of his employment." D&O at 29. Nevertheless, she found these eight weekend days are already included in the Section 10(a) divisor of 268, and Claimant's increased earnings from overtime "are also naturally included in the AWW calculation, as the starting point is the total amount of compensation earned in the previous year." *Id.*

[12] The ALJ found Section 10(c) inapplicable and declined to address Claimant's argument concerning adjustments in earnings due to contract wage increases because it "requires a finding of Section 10(c) applicability." D&O at 28.

dividing his actual earnings in the year immediately preceding his work injury, $115,684.43 as the parties had stipulated, by 268 to derive his average daily wage.[13] She multiplied that figure by 260 days, then divided it by 52 weeks to get an AWW of $2,158.29. 33 U.S.C. §910(a), (d).

Is there a presumption of Section 10(a) applicability?

Claimant contends the ALJ's rationale for applying Section 10(a) is incorrect because, contrary to her statement, there is no presumption favoring its use in cases like this where the claimant worked for more than the statutorily prescribed 260-day threshold for five-day per week workers. In contrast, Employer maintains the ALJ's presumptive application of Section 10(a) to calculate Claimant's AWW is supported by the facts and in accordance with Ninth Circuit precedent, including *Martin*, 12 F.4th 915, and *Matulic*, 154 F.3d at 1056.

The Act requires application of Section 10(a) over Section 10(c) in calculating an injured employee's AWW unless it "cannot reasonably and fairly be applied." 33 U.S.C. §910(a), (c). The Ninth Circuit has stated Section 10(a) cannot reasonably and fairly be applied when employment in the industry is "casual, irregular, seasonal, intermittent, and discontinuous," *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir.1932); when applying it would result in "excessive compensation" in light of the injured worker's actual employment record,[14] *Duncanson–Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982), *vacated on other grounds*, 462 U.S. 1101 (1983); or when there is insufficient evidence in the record to enable the ALJ to make an accurate calculation under Section 10(a), *id*.

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[13] The ALJ, again citing *Martin*, 12 F.4th at 921, recognized:

> The Ninth Circuit clarified that the Act does not imply that the claimant always wins, and was designed 'to strike a balance between the concerns of the longshoremen and harborworkers on the one hand, and their employers on the other.'

D&O at 30.

[14] The court stated, however, that because "some 'overcompensation' is built into the [LHWCA] system institutionally," that fact alone is an insufficient basis for rejecting the use of Section 10(a). *Matulic*, 154 F.3d at 1057; *see also General Constr. Co. v. Castro*, 401 F.3d 963, 974 (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006).

The Ninth Circuit has adopted a bright-line rule that Section 10(a) must be applied when a claimant works more than 75 percent of the workdays in the year immediately preceding the date of injury. *Trachsel v. Rogers Terminal & Shipping Corp.*, 597 F.3d 947 (9th Cir. 2009) (86 percent of the available days); *General Constr. Co. v. Castro*, 401 F.3d 963, 976 (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006) (77.4 percent of 260 working days); *Stevedoring Services of America v. Price*, 382 F.3d 878, 884 (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005) (75.77 percent of the available days); *Matulic*, 154 F.3d at 1056 (82 percent of the available days). In this case, there is no dispute the record contains sufficient information to meet the initial threshold for application of Section 10(a), i.e., Claimant "worked substantially the whole of the year preceding his injury,"[15] and the record contains ample evidence from which the ALJ could calculate an average daily wage.[16] *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 618 (9th Cir. 1999).

In *Martin*, 12 F.4th 915, the Ninth Circuit addressed the novel issue of whether Section 10(a) can "reasonably and fairly be applied" in instances where a five-day worker works more than 260 days.[17] Reiterating that "the Section 10(a) formula *presumptively applies* in calculating a five-day worker's average weekly wage," the court stated, "[b]eing a five-day worker is not the end of the inquiry; we still must analyze whether use of §910(a) would be unreasonable or unfair under the circumstances of the case before us." *Id.* at 920 (emphasis added). Nevertheless, there is a "high threshold" that "must be met to overcome the statutory presumption." *Id.* The court explained:

> We find the statutory presumption is not rebutted as a matter of law simply because § 910(a) would slightly underestimate earning capacity because the claimant worked in excess of 260 days. The statute plainly contemplates some inaccuracy in calculating the average weekly wage. And it does not provide that § 910(a) is inapplicable if more than 260 days were worked. Nor does the fact that Martin worked 264 days by itself make use of the § 910(a)

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[15] The parties' stipulated 268 is the appropriate number of days "when so employed," and this clearly satisfies the Ninth Circuit's 75% bright-line rule (268 is 103% of 260 working days). Additionally, it is undisputed Claimant's work for Employer was not "casual, irregular, seasonal, intermittent, and discontinuous," and there is no concern that application of Section 10(a) would result in "excessive compensation."

[16] As the ALJ found, Claimant's payroll records enabled her to ultimately calculate an average daily wage. D&O at 27.

[17] The Ninth Circuit recognized, "[t]he question whether § 910(a) can 'reasonably and fairly be applied,' when a five-day worker works more than 260 days" is "one of first impression." *Martin*, 12 F.4th at 920.

> formula unreasonable or unfair. Martin is incorrect that the § 910(a) formula entirely fails to account for his increased earnings, as the starting point for the § 910(a) calculation is the total amount of compensation earned in the previous year.

Id. at 920-921. The court further stated the legislative history of Section 10 suggests "Congress did not choose simply to discard a presumptive multiplier for full-time employees in favor of the *actual* days worked"[18] or "to have envisioned application of § 910(c) to a claimant who worked full-time for a single employer during the previous year."[19] *Id.* at 921 (emphasis in original). It therefore held that use of Section 10(a) in *Martin* did not produce the kind of "harsh result" Congress sought to avoid in enacting Section 10(c).[20]

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[18] The court noted prior to 1948, the Act included "only a formula employing a 300-day multiplier for six-day workers," but "[i]n 1948, responding to the rise of five-day work weeks, Congress amended the Act to provide a 260-day multiplier 'so that the particular provision can be made useful in the 5-day week employments.'" *Martin*, 12 F.4th at 921. The court surmised, "[t]ellingly, in enacting this amendment, Congress did not choose simply to discard a presumptive multiplier for full-time employees in favor of the *actual* days worked." *Id.* (emphasis in original).

[19] The court stated the Senate Report concerning the 1948 amendments indicates Section 10(c) is intended for use if the "employment itself . . . does not afford a full year of work;" if the work week is shorter than 5 or 6 days; or if there is "seasonal, intermittent, discontinuous, and like employment which affords less than a full workyear or workweek." *Martin*, 12 F.4th at 921 (citing S.REP. NO. 80-1315, at 6 (1948), *as reprinted in* 1948 U.S.C.C.A.N. 1979, 1982). The court further referenced, 1 Robert Force & Martin J. Norris, The Law of Maritime Personal Injuries §5:7 (5th ed. 2020) ("Although 33 U.S.C.A. § 910(c) provides for unusual situations, it should not be resorted to when the employee has an established earnings record."). *Id.*

[20] The Ninth Circuit also rejected Martin's position that the Act should be construed to favor claimants in the resolution of benefits cases, noting the Supreme Court of the United States articulated: the Act is "not a simple remedial statute intended for the benefit of the workers," but was instead "designed to strike a balance between the concerns of the longshoremen and harborworkers on the one hand, and their employers on the other." *Martin*, 12 F.4th at 921 (quoting *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 636 (1983)). The court further observed: the Supreme Court "stressed that the maxim that 'the statute at hand should be liberally construed to achieve its purposes' does not provide courts the freedom to 'add features that will achieve the statutory purposes

For these reasons, the Ninth Circuit rejected the claimant's request that it "effectively amend" Section 10 to provide that Section 10(a) does not apply "if the claimant worked more than 260 days." *Martin*, 12 F.4th at 922. The Ninth Circuit was "also mindful" that the Act was designed to provide for efficient resolution of disputes and "the presumption that Section 10(a) – whose fixed multiplier serves 'administrative convenience' – applies is a critical statutory element of that program." *Id.* at 922 (internal citations omitted). Consequently, the court held neither the ALJ nor the Board erred in using the Section 10(a) formula to calculate Martin's AWW.

Thus, in *Martin*, the Ninth Circuit articulated that Section 10(a) presumptively applies, the threshold to overcome it is high, and its application is not defeated simply because the claimant worked in excess of 260 days. *Martin*, 12 F.4th at 920; *see also Price*, 382 F.3d at 884.[21] This is consistent with the Ninth Circuit's bright-line rule to apply Section 10(a) if the worker has worked 75% of the year. *Matulic*, 154 F.3d at 1056. We therefore reject Claimant's contentions that the ALJ improperly stated there is a presumption in favor of using Section 10(a) and that his stipulated 268 days "when so employed" precludes its application. *Martin*, 12 F.4th at 920-922.

Was Claimant a Five-day Per Week Worker?

As stated above, the ALJ concluded Claimant was a five-day worker. Claimant disagrees and contends the ALJ erred in relying on Section 10(a) because it is "undisputed" he was neither a five- nor six-day per week worker. He states that had the ALJ properly added his 18 to 20 paid vacation days to his agreed-upon 268 days "when so employed," she would have found he is more than a five-day per week worker and less than a six day per week worker, which he avers precludes use of Section 10(a) over Section 10(c).[22] In response, Employer asserts the ALJ correctly found Claimant is a five-day per week worker.

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more effectively.'" *Id.* (citing *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-136 (1995)).

[21] We reject Claimant's contention that *Martin* is distinguishable because, unlike the claimant in that case, he has not conceded he was a five-day per week worker. As previously noted, all the preliminary factors for application of Section 10(a) in this case exist.

[22] Alternatively, Claimant avers if Section 10(a) is to be applied, he is a six-day worker.

In *Wooley v. Ingalls Shipbuilding, Inc.*, the United States Court of Appeals for the Fifth Circuit affirmed the Board's holding that vacation days the claimant "sold back" to his employer, and did not actually take off, were not additional "days worked" for purposes of calculating his average daily wage under Section 10(a). *Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 88, 89-90 (1999) (decision on recon.), *aff'd,* 204 F.3d 616, 618 (5th Cir. 2000). The court thus determined that payments the claimant received for 11 unused vacation days were correctly treated as compensation and added to his annual wage but were not additional days worked for purposes of calculating his average daily wage. *Wooley*, 204 F.3d at 618.

Similarly, in *Trachsel*, the Ninth Circuit, following *Wooley's* rationale,[23] held that a holiday, similar to a day of vacation, should be included as a "day employed" under Section 10(a) if the claimant is paid for that day even though he did not actually work it.[24] *Trachsel*, 597 F.3d at 951. However, on days the employee "received vacation pay and also worked," he is to be credited for the day "worked" but not the additional vacation day he sold back to the employer and did not use. *Id.*

In addressing whether the 18 to 20 days Claimant was off in May and December 2015 should be considered "days when so employed" and thus added to the agreed-upon 268 such days, the ALJ, citing *Wooley*, 33 BRBS at 89-90, correctly stated, "[v]acation days a claimant has actually taken can be treated as days worked, but the rest of the vacation days that were not taken and were 'sold back' to the employer cannot be counted as days worked." D&O at 29. Given the absence of information in the record about the 18 to 20 days Claimant was off in May and December 2015, the ALJ found she could not "rationally include those days as vacation days." *Id.*

Although Claimant alleged these days represented paid vacation, the ALJ found nothing in the record, such as timecards or testimony, established this was actually time spent on leave.[25] *Id.* She further found Claimant's testimony significant that "he was not

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[23] In *Trachsel*, the Ninth Circuit stated it was "following" the "closely analogous" *Wooley* to conclude that paid, unworked, holidays are "days when so employed" under Section 10(a). *Trachsel*, 597 F.3d at 950. The Ninth Circuit did not address the precise issue, i.e., whether vacation days are days worked, raised in *Wooley* and in this case.

[24] In the 52 weeks preceding his injury, Trachsel appeared at work on 223 days, was paid for 14 holidays, and worked four of those holidays, leaving 10 unworked paid holidays. *Trachsel,* 597 F.3d at 949.

[25] At the hearing, Claimant's counsel stated Claimant "did not receive any pay for at least 19 days, it was 12 days in May of 2015, and 7 days in December of 2015, when he

required to take any vacation time and would receive his vacation as a lump sum payment, covering the prior year, around February every year." *Id.* The ALJ reiterated that had Claimant's "payroll included the exact days Claimant took off as vacation time" she "could have included those days." *Id.* Due to the absence of such information, however, she rejected Claimant's argument that any pay he may have received for those days represented payments for vacation leave he took rather than a lump sum for essentially "selling it back" to Employer. *Id.*

As the ALJ found, Claimant's testimony about the nature of his vacation pay, HT at 44, and the payroll records lack any details about the specific days in question, i.e., May 12-23, 2015, and December 9-14, 2015. EX 25 at 79, 88. Pursuant to *Wooley* and *Trachsel*, only the days a claimant chooses not to work and actually takes as paid leave may be counted as days worked; payment of a lump sum in lieu of vacation may not be converted into additional days worked. The ALJ permissibly found the record devoid of evidence to support a finding that Claimant's 18 to 20 days of vacation pay represented time spent on paid leave. *See Jordan v. SSA Terminals, LLC*, 973 F.3d 930, 940 (9th Cir. 2020); *Hawaii Stevedores Inc. v. Ogawa*, 608 F.3d 642, 650 (9th Cir. 2010). Consequently, we affirm the ALJ's rational decision not to count the additional 18 to 20 days as days "when so employed" for purposes of determining the applicability of Section 10(a). *Wooley*, 33 BRBS at 89-90; *see generally Trachsel*, 597 F.3d at 950.

Furthermore, while Section 10(a) provides multipliers for five- and six-day workers, there is no set formula for determining whether a claimant is a five-day or a six-day worker. All that is necessary is that the record contains evidence from which the ALJ can determine the average daily wage the claimant earned during the preceding 12 months. *See generally Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41, 43 (2006) (Section 10(a) cannot be applied where the claimant's W-2 statements and payroll records in the year preceding his injury fail to show the actual number of days he worked). In this case, Claimant's payroll records during the year prior to his injury show the actual number of days he worked for Employer, EX 25, thereby providing the ALJ with the requisite information to make a Section 10(a) calculation.[26]

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was not working at all, presumably those are vacation days." HT at 17. The ALJ found these days "are not included on Claimant's payroll at all" and "[n]o testimony was provided [by Claimant] about these vacation days." D&O at 29 (citing EX 25 at 79, 88); *see generally Fernandez v. Chardon*, 681 F.2d 42, 56 n.10 (1st Cir.1982) (statements by counsel are no substitute for admissible evidence), *aff'd*, 462 U.S. 650 (1983).

[26] This perhaps is best exemplified by Claimant's counsel noting at the hearing that the record contains Claimant's "daily earnings" up through June 26, 2020, HT at 19, as well as the fact the parties' stipulated if Section 10(a) applies, 268 is the appropriate "[days]

Addressing Claimant's contention that he is not a five-day per week worker, the ALJ initially noted Claimant's assertion that he worked six days per week for 21 weeks, or approximately 40 percent of the time in the year immediately preceding his work injury. D&O at 24, 25, 29. Based on her own assessment of Claimant's payroll records, however, the ALJ found Claimant worked six days per week for 18 weeks, or about 35 percent of the time, during the same time frame. *Id.* at 29. She then stated, regardless of which calculation is used, Claimant worked "about 60 to 65 percent of the time, or the majority of the year" as a five-day per week worker.[27] *Id.* We affirm the ALJ's designation of Claimant as a five-day per week worker as it is supported by substantial evidence. *See generally Castro*, 401 F.3d at 976.

Can Section 10(a) be fairly and reasonably applied?

Both Claimant and the Director contend Section 10(a) cannot be fairly applied in this case because it does not allow for applying Claimant's mid-year hourly raise to all hours worked during the year preceding his injury or, that is, factoring it into his pre-raise wages. They assert Section 10(c) permits such a calculation and should be applied instead.

Employer responds, initially averring Claimant's argument for a backward adjustment of his mid-2015 pay increase in the calculation of his AWW is not properly before the Board as it was an argument he made before the ALJ premised entirely on her finding Section 10(c) applicable.[28] It states because the ALJ correctly employed Section

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when so employed divisor" to be used in determining his average daily wage. HT at 12; D&O at 5, J. Stip. at 17. Moreover, at the hearing, Claimant's counsel stated Claimant "will testify that he did not consider himself a six-day a week worker." HT at 12. In this regard, Claimant and his wife each testified he preferred to work Monday through Friday but oftentimes "chose to" also work on weekends. *Id.*, at 28-29, 42-44.

[27] Claimant's payroll records reveal the following: 22 five-day weeks (42%); 18 six-day weeks (35%); 4 four-day weeks (8%); 2 each of 3-day (4%) and 2-day weeks (4%); and 1 seven-day week (2%). This 49-week total coincides with the 3 weeks (5%) or approximately 18-20 days Claimant did not work which are not reflected in his payroll records. As such, a more precise summary is that Claimant's schedule involved non-six-day work weeks 65% of the time, six-day work weeks 35% of the time, and more five-day work weeks than any other configuration, including six-day work weeks. This, coupled with Claimant's and his wife's testimony that he tried to limit his schedule, when possible, to work only Monday through Friday, supports the ALJ's ultimate conclusion.

[28] Employer explains Claimant focused this retroactive application argument entirely on his contention that the adjustment was mandatory under Section 10(c). As he

10(a) to compute Claimant's AWW, this adjustment argument is being raised for the first time on appeal. Further, it asserts Claimant's request for a backward adjustment to his pre-injury wages lacks any legal support because the raise resulted from union bargaining for industry-wide pay rates which are not indicative of any particular employee's true earning capacity for calculating his AWW. Employer contends the Director's "litigating positions" are flawed because: 1) he does not address on-point Ninth Circuit decisions regarding how pre-injury wage changes may impact AWW computations under Section 10(c);[29] 2) he incorrectly argues *Matulic* requires a preliminary AWW "fairness" comparison be made between Section 10(a) or 10(b) and Section 10(c) in every case; and 3) he "entirely disregards" how Section 10(a) computations must be made under *Trachsel*, 597 F.3d 947.

First, as Employer notes, Claimant's argument that his July 2015 pay raise should have been extended to cover the entire year preceding his February 2016 injury was, as raised below, entirely premised on his argument to use Section 10(c) to calculate his AWW.[30] Second, although the ALJ declined to address "Claimant's argument concerning

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argued the use of Section 10(a) would be unfair, thereby requiring the use of Section 10(c), he never argued the retroactive application of his raise is also mandatory under Section 10(a).

[29] Employer asserts the backward projection of a pre-injury wage increase is only appropriate if it occurred either shortly before the claimant's injury or death or when the claimant began working a new higher paying or more skilled job. Employer further asserts the cases the Director relies upon, *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986), *Miranda v. Excavation Constr. Inc.*, 13 BRBS 882 (1981), *Eckstein v. General Dynamics Corp.*, 11 BRBS 781, 784 (1980), and *Feagin v. General Dynamics Corp.*, 10 BRBS 664, 667 (1979), fall into one or both categories and are factually distinguishable. As neither situation explains Claimant's wage increase in this case, Employer urges the Board to reject the Director's position that Claimant's hourly rate increase should be applied to the entire year's earnings prior to the work injury.

[30] At the hearing, Claimant's counsel identified "one of the issues" as Employer "wants to use [Section] 10(a) and contend that [Claimant] was a five-day a week worker, and I want to use [Section] 10(c), because he wasn't either a five or six-day per week worker." HT at 11. At that time, Claimant did not mention using his July 2015 pay raise to retroactively adjust his AWW for the entire year preceding his injury. In his post-hearing brief, however, Claimant explicitly argued, "[i]f the ALJ decides to determine [Claimant's] average weekly wage under [Section] 10(c), which is the only fair and reasonable method because [he] was neither a five-day nor six day per week worker, she must adjust his earnings from February 20, 2015 to July 4, 2015 to account for a contract wage increase on July 4, 2015." Cl. Closing Arg. at 5; *see also* D&O at 24. He further stated, "if the ALJ

adjustments in earnings due to contract wage increases," she nevertheless was cognizant of the issue in concluding Section 10(a) "can be reasonably and fairly applied to estimate Claimant's AWW," and its use in this case represents "the exact kind of slight underestimation that the Ninth Circuit determined was not unreasonable or unfair in *Martin*."[31] D&O at 28-29. Third, even assuming Section 10(c) is applicable, the circumstances of this case do not fall within the parameters under which the Board has held such an adjustment to actual wages would be appropriate, let alone held it would render application of Section 10(a) unreasonable and unfair.

Under Section 10(c), actual earnings may not reasonably represent a claimant's WEC in a variety of situations.[32] Actual wages in the year prior to injury may not be representative if the claimant: received a pay raise shortly before the injury, *Le*, 18 BRBS

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chooses to use Section 10(a), it is legally necessary to consider [him] a six day per week worker." Cl. Closing Arg. at 8. Because "this inflates his average weekly wage by 10.7 percent," he averred "it is somewhat unfair or unreasonable to use Section 10(a) in the present case." *Id.* In raising this alternative Section 10(a) argument, Claimant made no mention regarding extending the July 2015 pay raise backwards to cover the entire year preceding his work injury – presumably because he argued if Section 10(a) applies, he should be considered a six-day worker, and such calculation itself would increase his wages by 10.7%.

[31] The ALJ, therefore, rejected Claimant's argument that Section 10(c) is the most reasonable and fair calculation method. Moreover, we note Claimant's argument is largely unsupported because the statute is meant to reach an approximation of a claimant's wages and itself looks back to the amount "earned . . . during the days when so employed." 33 U.S.C. §910(a); *see also Trachsel*, 597 F.3d at 951.

[32] For example, in *Hastings v. Earth Satellite Corp.*, the United States Court of Appeals for the District of Columbia Circuit considered the amount of disability compensation due a claimant who was recovering from a stroke in the year before his injury and demonstrated he "could work an increasing number of hours" over that time period. The court held that where a claimant demonstrates a progressive increase (or decrease) in earnings in the year immediately preceding the injury, his AWW should not be based on the earnings he received as much as 12 months before the injury but, instead, should be based on earnings more immediately preceding the injury. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980). This scenario is not applicable to this case.

at 177; *Miranda*, 13 BRBS at 886; *Eckstein*, 11 BRBS at 784; *Feagin*, 10 BRBS at 666;[33] received a promotion shortly before the injury, *Feagin*, 10 BRBS at 666; started a new job at higher wages shortly before his injury, *Bonner v. Nat'l Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979); or was extensively absent from work due to a non-work-related illness, *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855, 860 (1982), a personal matter, *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218 *aff'd on recon.*, 25 BRBS 88 (1991), or a strike, *LeBatard v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 10 BRBS 317, 325 (1979); *Duzant v. Gen. Dynamics Corp.*, 8 BRBS 670, 673 (1978).[34]

In this case, the ALJ thoroughly considered the parties' contentions and pertinent case law in concluding Section 10(a) applies to calculate Claimant's AWW. As noted above, in accordance with Ninth Circuit precedent, she found all the factors were present to enable an AWW calculation under Section 10(a) – Claimant worked substantially the whole of the year preceding his work injury (his work for Employer was not "casual, irregular, seasonal, intermittent, and discontinuous"); the record contains sufficient evidence, notably Claimant's daily payroll records, from which the ALJ could fairly and reasonably determine his average daily wage in the year preceding his injury; and there is no concern that application of Section 10(a) would result in "excessive" over- or under-compensation. Moreover, she rationally declined to consider Claimant's contention that his July 2015 raise should have been applied to calculate his earnings for the entirety of the

[33] Although the Director stated, "[t]here exists *significant evidence* that 910(a) would be unfair or unreasonable in that Claimant received his hourly pay raise approximately 33 weeks prior to his injury," Dir. Br. at 4 (emphasis added), he does not identify any "significant evidence" beyond, perhaps, the pay raise itself. He maintains use of Section 10(a) and exclusion of that raise from the other 19 weeks of the year would do more than "'slightly underestimate' Claimant's earning capacity." *Id.* In suggesting this, the Director apparently believes a 4.2% difference in Claimant's AWW is significant and far greater than the approximate 1.5% difference in *Martin*. Comparing it directly to the percentage difference deemed insignificant by the Ninth Circuit, it appears somewhat substantial – the percentage is almost three times greater than that approved by the *Martin* court. However, we note in the bigger picture, the percentage difference does not appear, on its face, to be so significant as to clearly preclude the ALJ from exercising judgment as to the matter.

[34] Because 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, etc., "is not deducted from the computation." *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133 (1990); *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290 (1978).

year preceding his injury, as it was raised only if she had found Section 10(c), rather than Section 10(a), applicable.[35]

We have already affirmed the ALJ's finding that Claimant is a five-day per week worker, and we now affirm her finding that Section 10(a) "can be reasonably and fairly applied" to calculate Claimant's AWW as it is supported by substantial evidence and in accordance with Ninth Circuit precedent. *See, e.g.*, *Martin*, 12 F.4th at 920-922; *Duhagon*, 169 F.3d at 618; *Matulic*, 154 F.3d at 1056. The ALJ therefore appropriately calculated Claimant's average daily wage by dividing his stipulated earnings in the year immediately preceding his work injury, $115,684.43, by the stipulated 268 days "when so employed." 33 U.S.C. §10(a). She then properly multiplied that figure by 260 days and divided that sum by 52 weeks, resulting in an AWW of $2,158.29. 33 U.S.C. §910(a), (d). Accordingly, we affirm her conclusion.

Post-Injury Wage-Earning Capacity

Claimant contends the ALJ erred in computing his post-injury WEC. Specifically, Claimant argues the ALJ inappropriately included his mechanics' board post-injury wages from November 15, 2016, to November 9, 2017, in her computations. He maintains the

[35] We also reject the Director's position that application of Section 10(a) is unreasonable and unfair without a complete inclusion of the pay raise, as the cases he cites, *see* n.33 *supra*, are factually distinguishable. In *Le*, the wage increase occurred only five weeks before the claimant's death, and in *Miranda* there was no contention Section 10(a) controlled, and the claimant had worked only seven or eight weeks in a new, higher paying job when he was injured. *Eckstein* and *Feagin* are likewise distinguishable because in the former the claimant "did not work substantially the entire year preceding his injury" thereby rendering the Board's comments about Section 10(a) as dictum and in the latter the wage increase appeared to have occurred "just before the injury," and it may have been due in part to a promotion. In *Feagin*, the Board also remanded the case for consideration of either a Section 10(a) or 10(c) calculation because the ALJ did not address facts relevant to the claimant's lost time due to a strike and the possibility that a work-related respiratory condition may have precluded him from taking available overtime. In contrast, Claimant's pay raise in this case was not received shortly before his injury, but instead covered a significant portion of the year preceding the date of his injury (approximately 64 percent of that year) and was the result of a collective bargaining agreement clause. Moreover, the increased earnings for 33 of the 52 weeks are already reflected in the parties' stipulated earnings for that time frame.

record establishes he tried the mechanics' board jobs when he first returned to work but found his neck was worsening such that once lighter duty positions on the winch board became available, he took them. He states his winch board work involved fewer hours, lower hourly rates, and lighter work than the jobs he performed through the mechanics' board, a distinction recognized by the parties' stipulation that Claimant changed jobs because of his neck injury and desire to prolong his longshore career. Therefore, Claimant states the ALJ should have excluded the mechanics' board wages from her computations.

Claimant also avers the ALJ erred by including the extra 40 hours of vacation pay he began to receive as of January 1, 2020, in her residual WEC determination, because those hours constituted "a raise due solely to his seniority as a longshoreman." He states the Ninth Circuit, in *Petitt v. Sause Bros.*, 730 F.3d 1173 (9th Cir. 2013), explicitly held seniority raises are not merit increases such that an ALJ must discount seniority raises in determining an injured worker's post-injury WEC. Thus, Claimant asserts the ALJ should have calculated his WEC based on 160 rather than 200 hours of vacation pay. Claimant states, upon correction of the ALJ's errors, using only the earnings on and after November 9, 2017, when he switched to lighter duty, and including only 160 hours of vacation pay, his post-injury WEC should be $2,077.56 per week.

Employer disputes these arguments and states the ALJ's calculation of Claimant's WEC using the entirety of his post-injury wages is rational, supported by substantial evidence, and must be affirmed. It asserts the ALJ properly rejected Claimant's position that his post-injury earnings should be reduced by $1,926.40, representing the additional "seniority based" week of vacation pay he received in January 2020, because they represent what Claimant would have been paid in the labor market under normal employment conditions. Employer also states the ALJ correctly declined to bifurcate Claimant's post-injury wages into separate mechanics' board and winch board periods. It maintains the ALJ permissibly weighed the relevant evidence in concluding Claimant's decision to change jobs in November 2017 was voluntary and not necessitated by any medical restrictions or symptomatology relating to his work injury. Employer thus asserts the ALJ properly calculated Claimant's WEC.

To determine the rate of a claimant's partial disability entitlement under Section 8(c)(21) of the Act, the ALJ must first determine the claimant's lost WEC, which is established by comparing his pre-injury AWW with his post-injury WEC. 33 U.S.C. §908(c)(21); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1160 (9th Cir. 2002); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 652 (1979). WEC is determined under Section 8(h), 33 U.S.C. §908(h),[36] which provides a claimant's WEC

[36] Section 8(h) provides:

shall be his actual post-injury wages if they fairly and reasonably represent his earning capacity. In making this determination, relevant considerations include the employee's physical condition, age, education, industrial history, earning power on the open market, and any other reasonable variable that could form a factual basis for the decision. *See Deweert v. Stevedoring Services of Am.*, 272 F.3d 1241, 1246-1247 (9th Cir. 2002); *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 1549 (9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 1582-83 (9th Cir. 1985); *Devillier*, 10 BRBS at 655-657.

The party contending the claimant's actual wages do not represent his WEC bears the burden of so proving. *Gross*, 935 F.2d at 1551; *see also Penrod Drilling Co. v. Johnson*, 905 F.2d 84, (5th Cir. 1990). If the claimant's actual post-injury wages do not fairly and reasonably represent his WEC, the ALJ must, "in the interest of justice, fix such wage-earning capacity as shall be reasonable." 33 U.S.C. §908(h); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982). An ALJ's WEC findings may be overturned only if unsupported by substantial evidence. 33 U.S.C. §921(b)(3); *Long*, 767 F.2d at 1582; *Portland Stevedoring Co. v. Johnson*, 442 F.2d 411, 412 (9th Cir. 1971).

After considering the pertinent case law and the parties' positions, the ALJ found Claimant's actual earnings, from the date of his return to work on November 15, 2016, through June 26, 2020, "fairly and reasonably represent his WEC." D&O at 32. She determined Claimant's change of jobs from the mechanics' board to the winch board in November 2017 was not "required by medical restrictions or symptomology resulting" from his work-related injury, but found it was his own choice because the record is devoid

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> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. §908(h).

of any physician's opinion advising Claimant to stop taking jobs off the mechanics' board or change to the winch board. Additionally, she found Claimant's and his wife's testimony that he changed jobs because of his neck injury not credible.

The ALJ also rejected Claimant's assertion that his post-injury earnings should be reduced by the $1,926.40 in vacation pay he received starting in January 2020 because it represented a seniority increase. In this regard, she found Claimant's citation to *Petitt* is "not on point here" as that case "concerns seniority wage increases," whereas the vacation pay in this case, which Claimant "earned . . . in 2019 for 23 years as a longshoreman, . . . represent[s] what Claimant would have been paid in the labor market under normal employment conditions."[37] *Id.* at 33. She thereafter took Claimant's actual earnings from November 16, 2016, to June 26, 2020, $412,775, and divided it by the 188.43 weeks covering that period, to arrive at a post-injury WEC of $2,190.60 per week. Because that figure is higher than his AWW of $2,158.29, she concluded Claimant did not establish entitlement to PPD benefits.

The ALJ's findings regarding Claimant's decision to switch from the mechanics' board to the lighter duty winch board jobs on November 9, 2017, are inconsistent and call into question her calculation of Claimant's WEC. The ALJ found the record established Claimant's rationale for switching to the winch board revolved around "quality of life" decisions unrelated to his work-related neck injury. However, she also explicitly recognized the parties' stipulation that "Claimant's move to the Winch Board was due to the neck injury," prompting her "analysis of the remaining elements of a claim for permanent partial disability as of [the date he switched to that job on] November 9, 2017." She further found the winch job represented suitable alternate employment as of that date. Nevertheless, the ALJ ultimately concluded Claimant's WEC should be calculated based on the entirety of his wages since his November 16, 2016 return to work, declining to distinguish between the mechanics' board and winch board jobs. D&O at 22.

[37] The ALJ rationally rejected Claimant's argument that *Petitt* precludes inclusion of his vacation pay in his WEC, because she found his vacation "earnings represent what [he] would have been paid in the labor market under normal employment conditions." D&O at 33. As such, the ALJ concluded Claimant's vacation pay in this case makes him generally more valuable "on the open market under normal employment conditions," rather than, as the seniority raise in *Petitt*, "more valuable only" to his present employer. *Id.*, citing *Petitt,* 730 F.3d at 1177. Additionally, it is undisputed Claimant's vacation pay was included in his AWW – thus, it stands to reason his post-injury vacation pay should be included in his WEC to make a "meaningful" comparison between those figures. *See generally Sestich,* 289 F.3d at 1161.

Generally, stipulations are binding upon those who make them. *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985). Stipulations are offered in lieu of evidence and may be relied upon to establish an element of the claim. *See Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999). In this case, the ALJ accepted the parties' stipulation that Claimant "made the change [from the mechanics' board to the winch board] in order to take less physical jobs due to his neck injury with a goal of prolonging his longshore working career." D&O at 4, J. Stip. No. 9. She also relied in part on that stipulation to find Claimant's work beginning November 9, 2017, represented suitable alternate employment. *Id.* at 22-23. As such, Claimant's post-injury WEC should have been calculated from that date.[38] Additionally, Employer does not dispute Claimant's actual winch board earnings as of November 9, 2017, are less than those he previously earned in his usual work off the mechanics' board.[39] Given this, it is unreasonable to include Claimant's earnings from his temporary return to his usual employment off the mechanics' board in the post-injury WEC calculation for assessing "the extent" of his partial disability as of his switch to the winch board on November 9, 2017. D&O at 23.

For these reasons, we vacate the ALJ's finding that Claimant sustained no loss in WEC and her corresponding denial of PPD benefits beginning November 9, 2017. On remand, the ALJ must first explain whether she accepts the parties' stipulation or, if necessary, her reasons for deviating from that stipulation. 29 C.F.R. §18.83(a). If she accepts the stipulation, then, in conjunction with her additional findings that Claimant's work from November 9, 2017, constituted suitable alternate employment, she must calculate Claimant's WEC based on his earnings exclusively after that date to discern whether he sustained a compensable loss in WEC while working off the winch board, thereby entitling him to an award of PPD benefits. 33 U.S.C. §908(c)(21); *Sestich*, 289 F.3d at 1160; *Devillier*, 10 BRBS at 652.

Accordingly, we vacate the ALJ's finding that Claimant sustained no loss in WEC after November 9, 2017, and remand the case for further consideration of the WEC issue

[38] In setting out the case law on WEC, the ALJ explicitly stated a determination as to Claimant's "lost earning capacity" involves comparing his AWW "with his retained earning capacity in the identified suitable alternate employment." D&O at 30. Moreover, we note the ALJ is not limited to finding only one post-injury WEC. *See generally, e.g.*, *Petitt*, 730 F.3d at 1176; *Long*, 767 F.2d at 1582.

[39] Employer argued Claimant's actual earnings yield a WEC off the mechanics' board from November 15, 2016, through November 8, 2017, of $2,385.84 per week and a WEC off the winch board from November 9, 2017, through June 25, 2020, of $2,112.19.

consistent with this opinion. In all other respects, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring:

I concur in the majority decision and its analysis, with one clarification. Claimant was injured in February 2016. Approximately thirty-three weeks before his injury, in July 2015, he received an hourly raise. Before the ALJ, Claimant argued that applying Section 910(c) is "legally necessary" under these circumstances because it allows the ALJ to upwardly adjust his first nineteen weeks of earnings as if they had been paid at the higher hourly rate, while Section 910(a) does not. Cl.'s Closing Arg. at 9-10. The Director has similarly argued on appeal that applying Section 910(c) is required as a matter of law because Claimant's hourly raise during the 52 weeks before his injury "qualifies as an unusual circumstance *precluding* the application of 910(a) and warranting instead, the application of 910(c)." Dr.'s Resp. Br. at 4 (emphasis added).

Because Claimant's argument, and by extension the Director's, was raised to the ALJ and involves the "legal question" of "whether § 910(a) or (c) applies," it was not forfeited. *Martin v. Sundial Marine Tug & Barge Works, Inc.*, 12 F.4th 915, 919 (9th Cir. 2021) (a claimant's stipulation that Section 910(a) applied did not preclude appellate argument that the ALJ should instead have applied Section 910(c)). That said, neither he nor the Director persuasively explains why the fact of a mid-year raise or the amount in question constitutes the type of "unusual situation" or "harsh result" that meets the "high threshold . . . to overcome the statutory presumption" that Section 910(a) applies to five-

day workers such as Claimant.[40] *Id.* at 920 (quoting *Matulic v. Director, OWCP*, 154 F.3d 1052, 1057 (9th Cir. 1998)).

Claimant did, however, forfeit his separate argument, raised for the first time on appeal, that *even if* Section 910(a) applies to this claim the ALJ erred by not upwardly adjusting some of his earlier wages to account for his mid-year raise. As noted, Claimant's argument to the ALJ, and the Director's argument on appeal, is that Section 910(a) legally *cannot* apply because only Section 910(c) permits the ALJ to account for Claimant's mid-year raise. But Claimant did not allege before the ALJ that, when Section 910(a) applies, as here, the ALJ must determine his AWW based on adjusted versus actual wages. Nor did he in any way suggest the ALJ could do so under Section 910(a) until filing this appeal. *Johnston v. Hayward Baker*, 48 BRBS 59, 63 (2014); *Z.S. v. Science Applications Int'l Corp.*, 42 BRBS 87, 89 (2008).

GREG J. BUZZARD
Administrative Appeals Judge

[40] In *Martin*, the Ninth Circuit held that Section 910(a) did not lead to harsh results overcoming its presumptive application. The Director distinguishes *Martin* on the basis that using Section 910(a) over 910(c) reduced Martin's AWW by only $13.84 ($913.43 - $899.59), whereas in the present claim it reduced Claimant's AWW by $91.83 ($2,250.12 - $2,158.29). This represents a 1.5 percent difference for Martin ($13.84/$913.43) and a 4.1 percent difference for Claimant ($91.83/$2,250.12).