U.S. Department of Labor

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

BRB No. 23-0362

JENNIFER WESSON Claimant-Petitioner v. 3MC MOBILE & MECHANICAL REPAIR and ALMA MUTUAL c/o THE AMERICAN EQUITY UNDERWRITERS, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	**NOT-PUBLISHED** DATE ISSUED: 10/11/2024 DECISION and ORDER

Appeal of the Decision and Order, Orders Approving Joint Stipulations and Remanding, and Order Denying Claimant's Motion for Reconsideration of William P. Farley, Administrative Law Judge, United States Department of Labor.

Howard S. Grossman (Grossman Attorneys at Law), Boca Raton, Florida, for Claimant.

Robert B. Griffis (Law Office of Robert B. Griffis), Altamonte Springs, Florida, for Employer and its Carrier.

Eirik Cheverud (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.

Claimant appeals Administrative Law Judge (ALJ) William P. Farley's Decision and Order, Orders Approving Joint Stipulations and Remanding, and Order Denying Claimant's Motion for Reconsideration (2022-LHC-00198) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act).[1] 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).

Employer operates a ship repair shop located in Florida. It conducts business in different states and employs its own employees or subcontractors based on the number of projects it has. JX 28 (Emp. Depo.) at 2-3. Since 2019, Claimant worked for Employer as a laborer one to two months per year; her duties included cleaning, painting, sitting fire-watch, and picking up equipment and supplies. JX 26 (Cl. Depo.) at 5; JX 28 at 4-7, 16.[2] Michael Shawn McClinton, the sole owner and designated corporate representative of 3MC Mobile & Mechanical Repair, testified he hires skilled labor on a per-project basis and typically hires fire-watch labor through staffing companies. He testified he hired Claimant and offered her work sporadically because she is a friend and needed help financially. JX 28 at 6-7, 14, 16-17.

When working on a job for Employer, Claimant stated she worked up to seventy hours per week, seven days a week, and was paid $20 per hour for straight time and $30

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant sustained an injury in Virginia. 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); 20 C.F.R. §702.201(a).

[2] The deposition transcripts in the record are condensed to four transcript pages per exhibit page. Page number citations in this decision are to the exhibit page number and not the deposition transcript itself.

per hour for overtime.[3] JX 17 at 12; JX 26 at 5; JX 28 at 7; *see generally* JX 34; *but see* note 18, *infra*. In addition, while working away from her home in Florida she received a per diem of $50, reimbursement for work-related expenses,[4] and free lodging.[5] JX 26 at 5, 14; JX 28 at 9-10, 16; *see generally* JX 34. Mr. McClinton testified there were no specific contracts providing for the per diem with any of his employees, including Claimant. JX 28 at 16.

Claimant sustained a work-related injury to her left knee while working on fire-watch for Employer at NASSCO Shipyard in Portsmouth, Virginia, on April 16, 2021. After her injury, she remained in Virginia on light duty status until the job was completed, and she returned home to Florida on April 30, 2021. Since her injury, Claimant has not returned to work for Employer, though she has worked for other employers. JX 26 at 7, 10-11, 14.

On July 6, 2021, Claimant filed a claim for additional disability compensation and medical benefits,[6] and her case was referred to the Office of Administrative Law Judges (OALJ) for a formal hearing. At the hearing, the parties advised the ALJ they had resolved all but one remaining issue: whether Claimant's per diem should be included in her average weekly wage. TR at 5-11. They agreed to joint stipulations[7] and submitted briefs on the average weekly wage issue.

On April 28, 2023, the ALJ issued a Decision and Order (D&O) finding Claimant's $50 per diem was a "set sum of money" or "true per diem" and, therefore, excluded it from her average weekly wage. On May 19, 2023, the ALJ issued Orders Approving Joint

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[3] Claimant was paid $14 per hour when traveling from one job to another. JX 28 at 13; JX 34 at 5, 7-8, 13.

[4] These reimbursements were for the cost of fuel, materials, and supplies needed on a given job. JX 28 at 16.

[5] While working for Employer in Virginia, Claimant stayed in a condominium Mr. McClinton owned. JX 28 at 9-10, 16.

[6] Employer initially paid Claimant $408.18 per week in temporary total disability benefits and disputed the work-relatedness of certain medical treatment Claimant requested. JX 17 at 5; JX 33 at 1; Emp. Pre-Hearing Stmt. at 3.

[7] The parties stipulated to the compensability of Claimant's claimed injuries and her entitlement to reasonable and necessary medical treatment with her chosen physicians. *See* ALJ Orders Approving Joint Stipulation and Remanding at 2-3.

Stipulation and Remanding (Stip. Order). In those orders, the ALJ calculated Claimant's average weekly wage as $1,213.43 based on her earnings with Employer from February 22, 2021, through April 11, 2021. The ALJ excluded the $50 per diem and reimbursements Claimant received for work-related expenses.

On May 24, 2023, Claimant moved for reconsideration of the ALJ's Orders Approving Joint Stipulation and Remanding, arguing her average weekly wage should be calculated based on her earnings with Employer from February 22, 2021, through April 18, 2021, because she was injured on April 16, 2021. Employer opposed Claimant's motion. On June 26, 2023, the ALJ issued an Order Denying Claimant's Motion for Reconsideration (Recon. Order).

On appeal, Claimant challenges the ALJ's exclusion of her per diem and her final week of work from the average weekly wage calculation. Employer responds, urging affirmance of the ALJ's decision. Claimant filed a reply brief. The Director, Office of Workers' Compensation Programs (the Director), filed a response to Claimant's appeal, addressing only the per diem issue.

Per Diem

Claimant first contends the ALJ erred in excluding her per diem from the average weekly wage calculation. The Director agrees, urging the Board to reverse the ALJ's finding because the ALJ relied on a decision from the United States Court of Appeals for the Ninth Circuit as opposed to binding precedent from the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, and therefore remand the case for further proceedings.

Disability compensation for a traumatic work injury is based on the claimant's average weekly wage at the time of the injury. 33 U.S.C. §910. Under the Act, the term "wages" is defined as:

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of title 26 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. §902(13). In *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 325 (4th Cir. 1998), the Fourth Circuit interpreted Section 2(13)'s definition of "wage" as "a dollar measure of the compensation provided (1) for an employee's services (2) by an employer (3) under the contract of hiring in force at the time of the injury."

Claimant contends her per diem payments were a "disguised wage" pursuant to *Custom Ship Interiors v. Roberts*, 300 F.3d 510 (4th Cir. 2002), because they were paid in the same paycheck as her normal wages, and there were no restrictions on how she could spend the $50 per diem. Further, because Employer provided Claimant free lodging, she had no lodging expenses that the per diem reimbursed. Finally, she maintains the ALJ erred in relying on a Ninth Circuit decision, *McNutt v. Benefits Review Board*, 140 F.3d 1247 (9th Cir. 1998), while ignoring controlling Fourth Circuit precedent in *Roberts* in rendering his decision. The Director likewise contends Claimant's per diem payments more closely resemble actual wages under the Act rather than a per diem because there is no evidence that Claimant was required to submit expense reports or repay amounts not used for room and board, or any evidence otherwise tying the per diem payments to Claimant's expenses. Dir. Resp. at 4-5. He also contends the ALJ erred in applying the Ninth Circuit's decision in *McNutt* and asserts *Roberts* is controlling precedent which compels a different result. Dir. Resp. at 6-7. We agree Fourth Circuit law controls in this matter but disagree it compels a different outcome.

The Fourth Circuit interprets Section 2(13) as having three separate clauses. The first clause ("the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury") concerns the rate of pay at which a claimant is compensated for his services or work under the terms of the employment contract; the second clause broadens the scope of wages to include "the reasonable value" of any monetary or non-monetary advantages received from the employer and subject to tax withholding; the third clause excludes from the definition "fringe benefits whose value to the employee is too speculative to be readily converted into a cash equivalent." *Wright*, 155 F.3d at 323-324; 33 U.S.C. §902(13); *see Roberts*, 300 F.3d at 513-514; *see also B & D Contracting v. Pearley*, 548 F.3d 338, 341-342 (5th Cir. 2008); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 431 (5th Cir. 2000) (adopting the Fourth Circuit's definitions of "wages" and "fringe" benefits in determining container royalty payments are "wages" under the Act).

Following its *Wright* decision, the Fourth Circuit specifically addressed whether a "so-called per diem" met the definition of wages under the Act in *Roberts*. The claimant in *Roberts* was paid a $77.50 per diem in addition to his weekly salary and overtime pay. The employer argued the per diem was not taxable and was intended as reimbursement for the cost of food and lodging when the claimant was working jobs away from home and, therefore, should not be viewed as a wage pursuant to the second clause of Section 2(13),

33 U.S.C. §902(13). However, because the claimant had no actual food and lodging expenses but still regularly received the per diem as an unrestricted cash payment in his weekly paycheck based on the hours he worked, the court determined the "so-called per diem" was "virtually indistinguishable" from the claimant's regular hourly wages and categorized it as a "disguised wage" under the first clause of Section 2(13). *Roberts*, 300 F.3d at 514-15. The Fourth Circuit court explained:

> Whether a true per diem reimbursement payment should be includable as a 'wage' under the Act is not the relevant question here because these payments did not resemble reimbursements in any way. True per diem reimbursements generally bear at least some rough approximation to room and board expenses; however the payments here were not linked to actual expenses of any sort. Custom Ship knew that Carnival provided free food and lodging to ship remodelers. Thus, Custom Ship included the payments in Roberts' weekly pay checks despite knowing that he was not incurring any of the expenses the per diem was nominally to reimburse.

Id. at 514-15.

In a similar case, the United States Court of Appeals for the Fifth Circuit addressed whether an "untaxed hourly per diem" that constituted fifty percent of the claimant's gross income qualified as "wages" under the Act. *Pearley*, 548 F.3d at 339 n.1. Finding the Fourth Circuit's analysis in *Roberts* persuasive, the Fifth Circuit determined the per diem "played the role of money wages" given that the per diem payments were calculated based on the number of hours worked, paid as an "unrestricted payment, unrelated to actual costs of meals, lodging, or travel" in the same paycheck as the claimant's normal wage, and paid to all employees regardless of where they lived. *Pearley*, 548 F.3d at 343. Additionally, there was evidence that the employer utilized the per diem payment structure for reasons unrelated to reimbursement for meals and lodging: to maximize employees' take-home pay, to provide tax benefits to itself, and to remain competitive with other employers in the same industry who offered their employees a similar per diem pay structure. *Id.* 342-343. The Fifth Circuit therefore considered the per diem in *Pearley* as "wages" under the Act.

In the instant case, the ALJ similarly framed the issue as whether Claimant's per diem payments "are wages or tied to actual reimbursements for expenses while traveling." D&O at 2. He considered the Fourth Circuit's definition of a "true per diem reimbursement

payment" in *Roberts*[8] and the factors considered by the Fifth Circuit in *Pearley*.[9] In contrast to the purported per diem payments at issue in *Roberts* and *Pearley*, the ALJ found there was "no evidence the $50 per diem was based on hours worked" or that it was "not tied to the price of eating for one day." D&O at 3. From the testimony in the record, he inferred the $50 per diem represented "a rough approximation of a reasonable amount for food costs." *Id.*

The ALJ further noted the Ninth Circuit held in *McNutt* that the per diem in that case was not included in wages because, as in this case, the employee received a set sum of money from their employer, did not receive meals and could spend the money or, if they did not spend it all in a day, could keep the difference. D&O at 2-3 (citing *McNutt*, 140 F.3d at 1247-1248). Thus, although the Ninth Circuit found the per diem was an advantage under 33 U.S.C. §902(13), the ALJ noted the court found it was not subject to tax withholding and, ultimately, not a wage. D&O at 3 (citing *McNutt*, 140 F.3d at 1248). Consequently, in accordance with the Ninth Circuit's analysis in *McNutt*, the ALJ concluded Claimant's per diem in this case was a "true" per diem not includable as wages.

Substantial evidence in the record supports the ALJ's factual findings and inferences. Though Claimant received the per diem at the same time as her weekly pay, there is no evidence the $50 per diem was a "disguised wage" as was the case in *Roberts* and *Pearley*, or that Claimant and Employer treated the per diem as part of the "money rate at which the service rendered by [Claimant] is compensated under the contract of hiring."[10]

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[8] The Fourth Circuit stated: "True per diem reimbursements generally bear at least some rough approximation to room and board expenses." *Roberts*, 300 F.3d at 514.

[9] The Fifth Circuit considered the following factors when determining whether an "untaxed hourly per diem" was a true per diem: (1) whether the per diem payments were calculated based on the number of hours worked; (2) whether the claimant received the per diem in the same paycheck as his regular wages; (3) whether the per diem bore any connection to the costs of meals, lodging, or travel; (4) whether the per diem was given to all employees regardless of where they lived; and (5) the respective percentages of the claimant's hourly pay rate and per diem relative to his gross income as a whole. *Pearley*, 548 F.3d at 343-344.

[10] Claimant testified she knew her hourly and overtime money rate, and although the amount of Claimant's per diem was $50, she testified it was $30. JX 26 at 5; *see also* JX 28 at 10. Mr. McClinton also testified he did not have a contract with Claimant regarding the per diem. JX 28 at 16. *See Story v. Navy Exch. Serv. Ctr.*, 30 BRBS 225,

33 U.S.C. §902(13). Mr. McClinton testified he generally hired fire-watch labor from a staffing company that paid its employees $12 or $15 per hour and charged Mr. McClinton $25 per hour to realize a profit and cover the company's overhead. JX 28 at 16. This is consistent with Claimant's $20 hourly rate and $30 overtime rate without including the $50 per diem. Claimant's wage records and testimony show the $50 per diem correlated with her working away from her home in Florida and the number of days she worked versus the number of hours she worked. *See generally* JX 13.[11] While she presumably incurred expenses for food and incidentals when working away from home, there is no evidence the per diem was meant to reimburse lodging as well as food expenses. To the contrary, Mr. McClinton testified Claimant was provided free lodging when she worked in Virginia. JX 28 at 9. Specifically, because Mr. McClinton frequently had projects in Norfolk, Virginia, and had been paying $200 per week for lodging in the area, he purchased a condominium in Newport News, Virginia, to "save some money" on "put[ting] up everyone in hotels." *Id.* at 9-10. Thus, the fact that Claimant was provided free lodging in addition to the $50 per diem does not conflict with the ALJ's inference that the $50 per diem was a "rough approximation of a reasonable amount for food costs" per day and, therefore, was a "true" per diem. D&O at 3.

Claimant and the Director assert there is a difference in what the Fourth and Ninth Circuits consider is a "true" per diem under Section 2(13). But in both the Fourth and Ninth Circuits, the *value* of meals and lodging provided by the employer is considered a non-monetary "advantage" under Section 2(13) of the Act and, therefore, must trigger tax withholding under the Internal Revenue Code, 26 U.S.C. §119, to be considered as wages. *Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 121 (9th Cir. 1997), *rev'g Guthrie v. Holmes & Narvar, Inc.*, 30 BRBS 48 (1996);[12] *see Roberts*, 300 F.3d at 515

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227 (1999) (first question is whether per diem was "contemplated as part of the 'money rate' at which [Claimant] was to be compensated by employer under the contract of hire").

[11] Claimant's per diem payments coincide with her travel and the 2021 jobs she worked in New York and Virginia. JX 26 at 5, 14; JX 28 at 8-9. Her paystubs from 2019 when she worked near home in Florida show no travel pay or per diem payments. *Compare* JX 13 at 5-12 *with* JX 13 at 1-4.

[12] In *Guthrie v. Holmes & Narvar, Inc.*, 30 BRBS 48 (1996), the employer provided meals and lodging directly to the claimant while he was working at a remote location rather than make cash payments representing the value of the meals and lodging. Because the "subsistence and quarters" services were provided under the terms of the employment contract, and the value of the services was "readily ascertainable" and "readily calculable," the Board held the services were not a "fringe benefit" and instead satisfied the definition

(meals and lodging are "in kind compensation" that may be considered wages if they are subject to employment tax withholding (citing *Wright*, 155 F.3d at 319 & n.10)). In *McNutt*, the Ninth Circuit expanded its holding in *Wausau* to also include monetary advantages. The claimant in *McNutt* received a $100 per diem to pay for his own food and lodging and could keep whatever amounts he did not spend. The *McNutt* court considered the claimant's per diem an "advantage" under the Act, *i.e.*, a "true" per diem, rather than wages. Because there was no dispute that the per diem was not subject to tax withholding, the Ninth Circuit held it was not includable as wages. *McNutt*, 140 F.3d at 1248. Though the Fourth Circuit court distinguished *Roberts* from *Wausau* because *Wausau* concerned the *value* of the meals and lodging provided and the payment in *Roberts* concerned *monetary compensation* paid, the court's decision did not rest on whether food and lodging were offered monetarily or in-kind—the crux of the case was that the claimant had no food and lodging expenses for which the per diem purportedly reimbursed. *Roberts*, 300 F.3d at 514-515. For this reason, the *Roberts* court distinguished *McNutt*.[13]

In *Roberts*, the Fourth Circuit did not address "whether a true per diem reimbursement payment should be includable as a 'wage'" under the second clause of Section 2(13) because the payments at issue did not "bear at least some rough approximation to room and board expenses" and were instead considered the type of wage included under the first clause of Section 2(13). *Roberts*, 300 F.3d at 514.[14] But nothing in the *Roberts* decision suggests the Fourth Circuit would consider a "true" per diem under the first clause of Section 2(13) instead of the second clause or that it would treat a "true" per diem for food and lodging any differently than the Ninth Circuit. To the contrary, the

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of "wages" under the Act. *Guthrie*, 30 BRBS at 50. In reversing the Board's inclusion of the *value* of meals and lodging as wages, the Ninth Circuit held that the *value* of meals and lodging is a non-monetary "advantage" under the Act's definition of wages, 33 U.S.C. §902(13), and not "income" subject to tax withholding under 26 U.S.C. §119(a). *Wausau Ins. Companies*, 114 F.3d at 121 ("If it is not money, or an 'advantage' subject to withholding, it is not included.").

[13] Whereas the claimant in *McNutt* incurred actual food and lodging expenses and received a per diem reimbursement for those expenses, the claimant in *Roberts* had no food and lodging expenses as those were provided for free by the cruise line, yet the employer still paid the claimant a "so-called per diem" reimbursement. *Roberts*, 300 F.3d at 515

[14] Because the payments at issue were included as wages under the first clause of Section 2(13), the court specifically rejected the employer's argument that, under the second clause, the payments must be subject to tax withholding to be considered a wage. *Roberts*, 300 F.3d at 515.

Roberts court stated that while the second clause of Section 2(13) "primarily addresses nonmonetary benefits," it "encompasses both monetary and in-kind compensation." *Roberts*, 300 F.3d at 514. It further acknowledged that true per diem payments for food and lodging are generally not considered regular taxable wages. *Id.* Thus, under the circumstances of this case, the ALJ's apparent application of the Ninth Circuit's analysis in *McNutt* to hold that the $50 per diem Claimant received in this case was a "true" per diem to cover the amount for her daily food costs is not improper or unreasonable.

Because the ALJ's findings are supported by substantial evidence in the record and are in accordance with law, we affirm the ALJ's exclusion of Claimant's per diem in the calculation of her average weekly wage. *See Roberts*, 300 F.3d at 514; *McNutt*, 140 F.3d at 1248.

Calculating Claimant's Average Weekly Wage

Claimant also contends the ALJ erred in not including her earnings from April 12, 2021, through April 16, 2021, when calculating her average weekly wage under Section 10(c) of the Act, 33 U.S.C. §910(c).

Section 10 of the Act provides three different methods for calculating a claimant's average annual earnings "at the time of the injury," 33 U.S.C. §910(a)-(c), from which the average weekly wage is calculated pursuant to subsection (d), 33 U.S.C. §910(d). The method set forth at Section 10(c) of the Act, which the ALJ found and the parties agree is applicable here, allows for the calculation of average annual earnings based on "the previous earnings of the injured employee in the employment in which [s]he was working at the time of the injury" if such earnings "reasonably represent the annual earning capacity of the injured employee." 33 U.S.C. §910(c). The ALJ has considerable discretion in utilizing Section 10(c). His determination will be affirmed if it reflects a reasonable approximation of the claimant's earnings at the time of injury, is based on substantial evidence, is in accordance with law, and if the claimant fails to establish a basis for a higher award. *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855, 859 (1982); *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283, 286-287 (1980); *Bonner v. Nat'l Steel & Shipbuilding Co.*, 5 BRBS 290, 292 (1977), *rev'd on other grounds*, 600 F.2d 1288 (9th Cir. 1979).

As discussed, Claimant worked sporadically for Employer since 2019. In 2021 and prior to her April 16, 2021 injury, she worked for Employer from February 22, 2021, through April 15, 2021.[15] Claimant was paid on a weekly basis; seven paystubs precede her date of injury and show her actual earnings with Employer from February 22, 2021,

[15] After her injury, Claimant continued working until she returned home to Florida on April 30, 2021.

through April 11, 2021, during approximately seven weeks of work. JX 13 at 5-11; *see also* JX 28 at 10, 13. In sum, Claimant earned $8,494 in hourly, overtime, and travel pay during this period. During the week she sustained her injury, April 12, 2021, through April 18, 2021, she earned an additional $1,370 in hourly wages and overtime pay. Taken together, she had $9,864 in earnings from February 22, 2021, through April 18, 2021, for nearly eight weeks of work.

Claimant argued before the ALJ that her average weekly wage should be $1,679.28 per week, considering her total "base wage of $9,580" in addition to her per diem of $350 per week for seven weeks, totaling $11,755 and divided by seven weeks. Cl. Memo. at 4. Employer argued Claimant's average weekly wage should be $1,204.86, based on her total earnings of $8,494 from February 22, 2021, through April 11, 2021, excluding the per diem and other reimbursements, and divided by seven weeks. Emp. Memo. at 3.

The ALJ calculated Claimant's average weekly wage based on her total earnings from February 22, 2021, through April 11, 2021 ($8,494) and divided by seven weeks to arrive at an average weekly wage of $1,213.43. In doing so, he accepted Employer's proposed method for calculating Claimant's average weekly wage and rejected Claimant's method, noting Claimant did not explain how she arrived at a total base wage of $9,580. Stip. Order at 4.

In her Motion for Reconsideration, Claimant argued the ALJ erred in calculating her average weekly wage and requested he recalculate it based on her gross earnings from February 22, 2021, through April 18, 2021 ($9,864), divided by eight weeks, resulting in an average weekly wage of $1,233. Cl. M/Recon. at 2. The ALJ rejected Claimant's argument, finding Claimant did not present "new or exceptional circumstances" to warrant a new average weekly wage calculation, any authority to support her argument that her post-injury pay should be included, or any explanation for why she did not make this argument before the ALJ had issued his average weekly wage determination. Recon. Order at 2-3.

On appeal, Claimant argues she was paid for only one day of work and one day of travel pay during her first week of work with Employer.[16] Therefore, she contends the ALJ's inclusion of this week in the seven-week divisor does not reasonably represent her actual earnings during a normal week. She maintains that calculating her average weekly wage based on her $9,188 in total earnings from March 1, 2021, through April 16, 2021,

[16] From February 22, 2021, through February 28, 2021, Claimant worked ten hours of regular time, and was paid six hours for travel time, totaling $284. JX 13 at 5.

divided by seven weeks, would result in a "proper and more accurate reflection" of her earning capacity under Section 10(c).[17]

Claimant has failed to establish the ALJ abused his discretion in calculating her average weekly wage based solely on approximately seven weeks of earnings preceding her injury. The ALJ considered both parties' proposed average weekly wage calculations and adopted Employer's calculation over Claimant's un-explained calculation.[18] Generally, a claimant's average weekly wage is calculated using wages during the period prior to the injury to arrive at a reasonable representation of the claimant's earning capacity at the time of injury. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1030-1031 (5th Cir. 1998). Further, post-injury earnings are generally irrelevant to the average weekly wage calculation except on rare occasions where previous earnings "do not realistically reflect . . . [a claimant's] true earning potential." *Palacios v. Campbell Indus.*, 633 F.2d 840, 843 (9th Cir. 1980); *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41, 45 (2006). Given the evidence in this case, the ALJ considered the paystubs for Claimant's seven full weekly pay periods immediately preceding her injury and found her earnings from February 22, 2021, through April 11, 2021, reasonably reflect her earning potential at the time of her injury.[19] *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 408, *modified*

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[17] Claimant arrives at this amount by taking her total earnings from February 22, 2021, through April 11, 2021 ($8,494), calculating a daily rate from her total earnings between April 12, 2021, and April 18, 2021 ($1,370 divided by 7 days), multiplying the daily rate ($195.71) by five days, adding that amount ($978) to her total earnings, and then subtracting her earnings between February 22, 2021, and February 28, 2021 ($284). Cl. Brief at 13. This results in an average weekly wage of $1,619.71 and reflects earnings from March 1, 2021, through her date of injury, April 16, 2021.

[18] We note Claimant has asserted a different method for calculating her average weekly wage at every stage of these proceedings.

[19] The wage evidence does not specify which days Claimant worked during any pay period, particularly during both contested pay periods (February 22, 2021, through February 28, 2021, and April 12, 2021, through April 18, 2021). Claimant testified she typically worked 70 hours per week seven days per week, "at times" worked 70 hours per week, worked "more or less" than 70 hours per week prior to the injury, and she returned to light-duty work after her injury and worked less than 70 hours per week. JX 26 at 5, 11. However, the wage evidence does not necessarily corroborate Claimant's testimony. Her wage records from February 22, 2021, through April 18, 2021, reflect a variable work schedule from week-to-week:

on other grounds on reh'g, 237 F.3d 409 (5th Cir. 2000); *Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43, 45 (1987). It was a reasonable exercise of the ALJ's broad discretion to exclude all wages from the one-week pay period, April 12, 2021, through April 18, 2021, during which Claimant sustained her injury because the evidence does not establish how much of that pay was earned prior to her injury. As the purpose of Section 10 is to reach an approximation of Claimant's wages, and the ALJ's calculation under Section 10(c) is both reasonable and supported by substantial evidence, we affirm it.

February 22 through February 28, 2021:	16 hours (includes 6 hours travel time)
March 1 through March 7, 2021:	70 hours
March 8 through March 14, 2021:	87 hours
March 15 through March 21, 2021:	29 hours (includes 27 hours travel time)
March 22 through March 28, 2021:	49 hours
March 29 through April 4, 2021:	60 hours
April 5 through April 11, 2021:	70 hours
April 12 through April 18, 2021:	59 hours

In addition, the wage evidence reflects no hourly, overtime, or travel pay after April 18, 2021. JX 34.

Accordingly, we affirm the ALJ's Decision and Order, Orders Approving Joint Stipulations and Remanding, and Order Denying Claimant's Motion for Reconsideration.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge