U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0660

JERRY BURNETTE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FRED WAHL MARINE CONSTRUCTION	)	
	)	DATE ISSUED: May 18, 2017
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH and CHARTIS CLAIMS, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz (Law Offices of Charles Robinowitz), Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway LLP), Portland, Oregon, for employer/carrier.

Before: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2012-LHC-00182) of Administrative Law Judge Jennifer Gee rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*.,

(the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in

accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer in the paint department from 1997 until his injury in 2010. Tr. at 46-47. On February 23, 2010, claimant was moving buckets of paint from the storage area onto a wooden pallet and then into the boat barn. *Id.* at 48. Each bucket weighed about 60 pounds. Claimant had to lift the cans up to the paint tray, open them, and mix the paint, tasks that involved twisting and lifting. After he finished this job, his back was "quite sore and tired" and he was in pain. He continued to work until the end of his shift but, by then, he was in a great deal of pain and could barely walk. *Id.*

Claimant eventually saw Dr. Curcin, an orthopedic surgeon, and was diagnosed with multilevel degenerative disc disease, large herniation and severe stenosis. On August 31, 2010, claimant underwent back surgery. CX 27 at 1. Claimant was released for a trial of full-duty work without restrictions on January 3, 2011. EX 112 at 18. Employer told him they did not have enough work and did not take him back. Tr. at 50-51. Claimant started to work for Giddings Boat Works on March 7, 2011 as a paint supervisor, training beginning painters. *Id.* at 113. Giddings laid claimant off on June 8, 2012. *Id.* at 63. Claimant has not worked since Giddings laid him off.

The administrative law judge awarded claimant temporary total disability benefits from February 24, 2010 until February 21, 2011, and permanent total disability benefits from February 22, 2011, the date he reached maximum medical improvement, to March 6, 2011. 33 U.S.C. §908(a), (b). The administrative law judge awarded permanent partial disability benefits from March 7, 2011 to June 8, 2012, while claimant worked at Giddings, at a compensation rate of $291.49 per week; from June 9, 2012 to September 15, 2013, at a compensation rate of $464.63 per week; and from September 16, 2013 onwards at a compensation rate of $408.63 per week. 33 U.S.C. §908(c)(21); Decision and Order at 47-48.[1]

With respect to claimant's average weekly wage, Kimberly Clardy, an office manager for employer, testified regarding employer's vacation policy. Vacation was not awarded until an employee worked 1,975 hours. An employee's years of employment were measured by hours, not calendar years, with each 1,975 hours constituting 1 year. Employees were encouraged to cash out their vacation around the time that they rolled over to another 1,975 hour year. EX 123 at 10-12. When they did so, as claimant did in

[1] The administrative law judge found that employer established suitable alternate employment with a bridge tender position available in June 2012 and with a janitorial potion available in June 2013. Decision and Order at 32.

September 2009, the vacation pay would show up as extra hours worked, even though the employee had not actually worked. *Id.* at 12.

Between February 24, 2009 and February 26, 2010, claimant was paid $46,012.00, including a bonus of $850, 24 hours/$432 of holiday pay, and 100 hours/$1,800 of vacation pay. EX 3 at 9. For the time between February 24, 2009 and February 23, 2010, claimant's last day of work, claimant received gross pay of $44,545.00, including 24 hours/$432 of holiday pay, 84 hours/$1,512 of vacation pay, and a bonus of $850. *Id.* at 10.

In calculating claimant's average weekly wage, the administrative law judge included the eight hours claimant worked on February 23, 2010 and arrived at a base annual wage of $44,689.00 for the 52 weeks preceding claimant's injury. Decision and Order at 42. The administrative law judge addressed vacation pay, noting that claimant wanted to include the 120 hours of vacation pay per year that he earned, while employer wanted to include only the actual vacation pay received in the year prior to his injury. The administrative law judge concluded that the amount of vacation pay claimant actually received should be included, not the amount of vacation pay earned. Decision and Order at 42-43. The administrative law judge thus included 84 hours of vacation pay received in the year prior to injury, as well as 16 hours of vacation pay claimant received for February 24, 2010 and February 25, 2010,[2] to arrive at a new yearly total of $44,977.00. Dividing this sum by 52, the administrative law judge determined that claimant's average weekly wage is $864.94.[3] *Id.* at 44; *see* 33 U.S.C. §910(d)(1).

Claimant raises a single issue on appeal, namely that the administrative law judge erred in including only the vacation pay claimant received in the year before the injury rather than using the vacation pay claimant actually earned in that period to calculate his average weekly wage. Employer filed a response brief, urging affirmance. Claimant filed a reply brief.

Section 10(c) directs that an administrative law judge determine an amount which "reasonably represent[s] the annual earning capacity of the injured employee." 33 U.S.C.

[2] The administrative law judge apparently included these two days of vacation pay because employer included them in its proposed calculation of claimant's average weekly wage. *See* Decision and Order at 43.

[3] The administrative law judge included the bonus of $850 in the calculation of claimant's salary to calculate his average weekly wage because she reasoned that the bonus was regularly paid and it would be reasonable to expect the bonuses to continue. Decision and Order at 43.

§910(c).[4] An administrative law judge has broad discretion in determining average weekly wage under Section 10(c). *See generally Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979). It is well settled that vacation and holiday pay is to be included in determining claimant's average weekly wage. *See Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990); *see also Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000).

The administrative law judge based her decision to include the vacation pay claimant received in the year before his injury on the Board's decision in *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991), *aff'd in pert. part and modified in part on recon. en banc*, 28 BRBS 271 (1994), wherein the Board held that the vacation pay earned before the injury but paid to claimant after the injury, should not be used in calculating claimant's average weekly wage. The administrative law judge, however, failed to recognize that the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, reversed the Board's decision and held that the administrative law judge reasonably included the vacation pay earned in the year prior to the claimant's injury, but paid after the date of injury, in the calculation of the claimant's average weekly wage. The court noted there was no evidence of confusion or inconvenience associated with such a calculation in that case. *Sproull v. Director, OWCP*, 86 F.3d 895, 899, 30 BRBS 49, 51(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). Because the administrative law judge based her decision on a case that was overturned, we must vacate her calculation of claimant's average weekly wage. On remand, the administrative law judge should address the Ninth Circuit's decision in *Sproull*, 86 F.3d at 899, 30 BRBS at 51(CRT), and recalculate claimant's average weekly wage if necessary.

[4] It is uncontested in this case that Section 10(c) applies. *See* 33 U.S.C. §910(a)-(c).

Accordingly, the administrative law judge's calculation of claimant's average weekly wage is vacated and the case is remanded for further proceedings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge