FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICK J. MARTIN, *Petitioner*, v. SUNDIAL MARINE TUG AND BARGE WORKS, INCORPORATED; SAIF CORPORATION; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, *Respondents.*	No. 20-70147 BRB No. 19-0009 OPINION

On Petition for Review of an Order of the
Benefits Review Board

Argued and Submitted June 7, 2021
Portland, Oregon

Filed September 2, 2021

Before: Kim McLane Wardlaw and Andrew D. Hurwitz, Circuit Judges, and Susan R. Bolton,[*] District Judge.

Opinion by Judge Hurwitz

[*] The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

SUMMARY[**]

Longshore and Harbor Workers' Compensation Act

The panel denied a petition for review of a decision of the Benefits Review Board ("BRB") affirming an administrative law judge's award of benefits to claimant under the Longshore and Harbor Workers' Compensation Act.

Under the Act, a benefits award is based on the claimant's "average weekly wage," and the statute sets forth three different formulas for determining the average weekly wage. 33 U.S.C. § 910. At issue is whether claimant's average weekly wage should have been calculated under § 910(a) or § 910(c). § 910(a) provides that the "average weekly wage is calculated by: 1) dividing the total earnings of the claimant during the fifty-two weeks preceding the injury by the number of days actually worked; 2) multiplying that figure by either 260 or 300, depending on whether the claimant worked a five- or six-day week . . .; and 3) dividing that figure by fifty-two." *Matulic v. Dir. Off. Of Workers' Comp. Programs*, 154 F.3d 1052, 1056 (9th Cir. 1998). In contrast, § 910(c) does not prescribe a fixed formula, and the ALJ must consider the employee's ability, willingness, and opportunity to work with regard to "(1) the previous earnings of the injured employee in the job at which the employee was injured, and (2) previous earnings of similar employees, or (3) other employment of the inured employee." *Palacios v. Campbell Indus.*, 633 F.2d 840, 843 (9th Cir. 1980).

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that claimant was not bound by his initial stipulation that § 910(a) applied.

Claimant contended that using § 910(a) to determine the average weekly wage for a five-day worker who worked 264 days during the relevant year violated the statutory scheme. The panel held that this was an issue of first impression. The § 910(a) formula presumptively applies to calculating a five-day workers' average weekly wage, but the panel analyzed whether the use of § 910(a) would be unreasonable or unfair under the circumstances of the case. The panel held that the statutory presumption was 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 legislative history of the Act suggested that Congress did not envision application of § 910(c) under these circumstances. The use of § 910(a) in this case was not the kind of "harsh result" that Congress sought to avoid in enacting § 910(c). The panel concluded that the ALJ and the BRB did not err in using the § 910(a) formula to calculate claimant's weekly wage.

The panel addressed the remaining issues in a concurrently filed memorandum.

COUNSEL

Joshua T. Gillelan II (argued), Longshore Claimants' National Law Center, Mitchellville, Maryland; Charles Robinowitz, Law Office of Charles Robinowitz, Portland, Oregon; for Petitioner.

James R. Babcock (argued), Babcock Holloway Caldwell & Stires, Lake Oswego, Oregon, for Respondents.

OPINION

HURWITZ, Circuit Judge:

Rick Martin applied for disability and medical benefits under the Longshore and Harbor Workers' Compensation Act (the "Act"), 33 U.S.C. §§ 901–950, after injuring both knees while working for Sundial Marine Tug & Barge Works, Inc. After extended agency proceedings, the Benefits Review Board ("BRB") affirmed a decision of an administrative law judge ("ALJ") awarding Martin benefits and relying on § 910(a) to calculate Martin's average weekly wage. This petition for review from Martin followed. We have jurisdiction under 33 U.S.C. § 921(c) and we hold that the ALJ did not err in applying § 910(a) to calculate Martin's average weekly wage at the time of injury.[1]

I

"We review BRB decisions for errors of law and for adherence to the statutory standard governing the Board's review of the administrative law judge's factual determinations." *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1284 (9th Cir. 1983) (cleaned up). "The BRB must accept the ALJ's findings unless they are contrary to the law, irrational, or unsupported by substantial evidence." *Id.*

[1] In a separate memorandum disposition filed contemporaneously with this opinion, we address Martin's challenge to the BRB decision insofar as it denies reimbursement of certain medical expenses.

II

A

Under the Act, a benefits award is based on the claimant's "average weekly wage." 33 U.S.C. § 910. The statute sets forth three different formulas for determining the average weekly wage:

> Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> **(a)** If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding 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 and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.
>
> **(b)** If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred

> times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.
>
> **(c)** If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

Id.

At issue is whether Martin's average weekly wage should have been calculated under § 910(a) or § 910(c); the parties agree that § 910(b) does not apply. The ALJ and the BRB applied § 910(a), under which the

> average weekly wage is calculated by: 1) dividing the total earnings of the claimant during the fifty-two weeks preceding the injury by the number of days actually worked; 2) multiplying that figure by either 260 or 300, depending on whether the claimant worked a five- or six-day week (in this case, five); and 3) dividing that figure by fifty-two.

Matulic v. Dir., Off. of Workers' Comp. Programs, 154 F.3d 1052, 1056 (9th Cir. 1998). In contrast, § 910(c) "does not prescribe a fixed formula." *Id.* Under that subsection, which Martin claims should apply, the ALJ must "consider the employee's ability, willingness and opportunity to work," *Palacios v. Campbell Indus*., 633 F.2d 840, 843 (9th Cir. 1980) (cleaned up), with regard to "(1) the previous earnings of the injured employee in the job at which the employee was injured, and (2) previous earnings of similar employees, or (3) other employment of the injured employee," *id.* at 842.

B

Sundial made weekend work available on a voluntary basis. Martin testified that he generally worked five days per week but worked overtime on weekends when possible. The parties initially stipulated to the use of § 910(a) before the ALJ. But, in a reply brief filed after the record closed, Martin's counsel sought a wage determination under § 910(c) to account for days worked in excess of 260 after "rechecking the calculations."

The ALJ found that in the 52 weeks before his injury, Martin had earned $47,498.41 and had worked 264 days (including four days of overtime). Notwithstanding Martin's invocation of § 910(c), the ALJ used § 910(a) to

calculate Martin's average weekly wage, citing the stipulation and noting that "[t]here is no requirement that a 5-day worker work exactly 260 days in the preceding year."

On appeal, citing *Stevedoring Services of America v. Price*, 382 F.3d 878 (9th Cir. 2004), the BRB affirmed the ALJ's use of § 910(a) because Martin had worked more than 75 percent of the available working days for a five-day worker, but increased the average weekly wage to correct a calculation error. The BRB also held that the ALJ "properly held claimant to his stipulation that his average weekly wage for his 2004 injuries should be calculated pursuant to Section 10(a), as that stipulation is not contrary to law." The BRB vacated a portion of the ALJ's opinion treating a separate issue and remanded for further consideration of that issue. In a subsequent appeal, Martin renewed his objections to the ALJ's use of § 910(a) to calculate his average weekly wage, and the BRB affirmed the ALJ's calculation as law of the case. This timely petition for review followed.

III

A

Sundial first argues that Martin is bound by his initial stipulation that § 910(a) applies. Because whether § 910(a) or (c) applies is a legal question, *see Matulic,* 154 F.3d at 1057, we decline to find Martin bound by the stipulation. *See Sanford's Est. v. Comm'r of Internal Rev.*, 308 U.S. 39, 51 (1939). The "policies underlying the exhaustion doctrine" are satisfied here; the BRB determined that the stipulation was "not contrary to law" only after concluding on the merits that § 910(c) did not apply. *See W. Radio Servs., Co. v. Qwest Corp.*, 530 F.3d 1186, 1203 (9th Cir. 2008).

B

Martin does not dispute that he was a five-day worker. But he contends that using § 910(a) to determine the average weekly wage of a five-day worker who worked 264 days during the relevant year violates the statutory scheme.

As an initial matter, we reject both parties' contentions that our decisions in *Matulic* and *Price* resolve this question. *Matulic*, upon which *Price* relies, held that § 910(a) presumptively applies when a claimant works more than 75 percent of the 260-day measuring year for five-day workers. *Matulic*, 154 F.3d at 1058. But, no prior Ninth Circuit case addresses whether a five-day worker who worked *more* than 260 days should have his average weekly wage calculated under § 910(a). *See, e.g., Matulic*, 154 F.3d at 1056 (claimant worked 82 percent of 260 working days); *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 976 (9th Cir. 2005) (77 percent); *Price*, 382 F.3d at 884 (76 percent).

Nor does *Matulic* resolve the issue now before us in Martin's favor. The holding in *Matulic* that § 910(a) could be reasonably and fairly applied when a claimant "works more than 75% of the workdays of the measuring year," 154 F.3d at 1058, recognized that the Act is to be construed "in favor of the worker" and that "some 'overcompensation' is built into the [the Act's] system institutionally," *id.* at 1057. It thus found that using the statutory presumption in § 910(a) for a five-day worker who had worked more than 75 percent of 260 days in the previous year "well within the realm of theoretical or actual 'overcompensation' that Congress contemplated." *Id.* at 1058. But that does not mean that § 910(a), whose formula employs a multiplier of 260 for five-day workers, does not apply whenever a five-day worker works more than 260 days. Nor does the general statement in *Matulic* that "the statutory formula may benefit

the employer," *id.* at 1057, compel a particular outcome here. The portion of the statute *Matulic* referred to in making that observation was § 906(b)(1), which contains a formula that sets a ceiling for compensation for disability for a high-earnings claimant at twice the applicable fiscal year's national average weekly wage. *See id.* at 1057 n.3. That subsection is not implicated here. The question whether § 910(a) can "reasonably and fairly be applied," *id*. § 910(c), when a five-day worker works more than 260 days is thus one of first impression.

We have stated that the § 910(a) formula "presumptively applies" in calculating a five-day worker's average weekly wage. *Trachsel v. Rogers Terminal & Shipping Corp*., 597 F.3d 947, 950 (9th Cir. 2010). Being 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. *Matulic*, 154 F.3d at 1057; *see also Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 756 (7th Cir. 1979) ("Even if a claimant is engaged in full-time employment, however, [910(a)] will not apply if [it] can not reasonably and fairly be applied.") (cleaned up). There is a "high threshold," however, that must be met to overcome the statutory presumption. *Matulic*, 154 F.3d at 1057.

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. *See id.* (describing congressional intent to create "an efficient," but not "entirely accurate" method of calculating earning capacity). 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) 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.

The legislative history of the Act suggests that Congress did not envision application of § 910(c) under these circumstances. Prior to 1948, the Act included only a formula employing a 300-day multiplier for six-day workers. *See* S. REP. NO. 80-1315, at 6 (1948), *as reprinted in* 1948 U.S.C.C.A.N. 1979, 1982. In 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." *Id.* Tellingly, 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.

Congress also appears not to have envisioned application of § 910(c) to a claimant who worked full-time for a single employer during the previous year. The Senate Report concerning the 1948 amendments indicates that § 910(c) is intended for use where the "employment itself . . . does not afford a full year of work"; where the work week is shorter than 5 or 6 days; or where there is "seasonal, intermittent, discontinuous, and like employment which affords less than a full workyear or workweek." 1948 U.S.C.C.A.N. at 1982. The report also provides:

> The measurement of an employee's capacity to earn should not be limited to his earnings in the particular employment in which he was engaged when injured, but should be gaged

> [sic] by what the employee is capable of earning in all employments in which he was employed during the year prior to injury, otherwise harsh results necessarily follow.

Id. at 1983. None of the situations Congress spoke to are present here. The use of § 910(a) in this case is thus not the kind of "harsh result" Congress sought to avoid in enacting § 910(c). *See* 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.").

Martin emphasizes that we should "construe broadly [the Act's] provisions so as to favor claimants in the resolution of benefits cases." *Price v. Stevedoring Servs. of Am.*, 697 F.3d 820, 843 (9th Cir. 2012) (en banc). But that does not mean that the claimant always wins. As the Supreme Court has noted, 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." *Morrison-Knudsen Constr. Co. v. Dir., Off. of Workers' Comp. Programs*, 461 U.S. 624, 636 (1983). The Court has also 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' more effectively." *Dir., Off. of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135–36 (1995) (cleaned up). Martin asks us to do just that, effectively amend § 910 to add language providing that § 910(a) does not apply "if the claimant worked more than 260 days."

We are also mindful that the Act was designed to provide for "efficient resolution of a class of private disputes." *Id.* at 131. The presumption that § 910(a)—whose fixed multiplier serves "administrative convenience," *Matulic*, 154 F.3d at 1057 (quoting *Duncanson-Harrelson Co. v. Dir., Off. of Workers' Comp. Programs*, 686 F.2d 1336, 1342 (9th Cir. 1982))—applies is a critical statutory element of that program. We therefore hold that the ALJ and BRB did not err in using the § 910(a) formula to calculate Martin's weekly wage.[2]

PETITION FOR REVIEW DENIED.

[2] We do not address whether the use of § 910(a) would be unreasonable if a nominal five-day worker worked substantially more days than 260 or whether such a worker effectively becomes a six-day worker.