BRB No. 97-787

ROBERT G. BRIZENDINE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Order on Petition for Reconsideration of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Order on Petition for Reconsideration (96-LHC-1100) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a second class specialist at the shipyard, injured his cervical and lumbar spine when he was struck and pinned momentarily by a six ton crane on March 12, 1994. Employer voluntarily paid claimant temporary total disability benefits from March 15, 1994, through May 17, 1994, and from May 23, 1994, through April 24, 1995, and temporary partial disability benefits for a loss of overtime from April 25, 1995, and continuing. The parties stipulated that claimant's average weekly wage based on his shipyard earnings was

$609.40.

The only issue before the administrative law judge was whether claimant's wages from his non-shipyard employment should be included for purposes of calculating his average weekly wage. Claimant's non-shipyard employment was as a partner in a home improvement company called B&B Construction and Home Improvement, Incorporated (B&B), which he co-owned with Mr. Bloxom. Claimant testified he received $200 per week from B&B. The administrative law judge concluded that claimant's salary at B&B should not be included in his average weekly wage. Upon claimant's motion for reconsideration, the administrative law judge reaffirmed his decision. On appeal, claimant contends that the administrative law judge erred in concluding that claimant's salary at B&B should not be included in his average weekly wage. Employer responds in support of the administrative law judge's decision.

In determining average annual earnings under Section 10(c), regard must be given to (1) the previous earnings of claimant in the job at which he was injured, and (2) the previous earnings of similar employees, or (3) other employment of claimant, "including the reasonable value of the services of the employee if engaged in self-employment. . . ." 33 U.S.C. §910(c)*; Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980). Claimant's average weekly wage should generally reflect his earnings from all of his jobs at the time of the injury. *See Liberty Mutual Ins. Co. v. Britton*, 233 F.2d 699 (D.C. Cir. 1956); *Perry v. Carolina Shipping Co.*, 20 BRBS 90, 93 n. 2 (1987); *cf. Harper v. Office Movers/E.I. Kane, Inc.*, 19 BRBS 128 (1986)(*en banc).* Post-injury events are not generally relevant to average weekly wage determinations. *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT)(D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994).

In the instant case, the administrative law judge recognized the general rule that wages from "other employment" should be included in average weekly wage, but concluded that claimant's salary from B&B should not be included in his average weekly wage for three reasons: (1) claimant's salary from B&B on a long term basis was too speculative to qualify for inclusion in his average weekly wage as B&B was a startup business whose prospects were uncertain; (2) claimant's salary from B&B may have included compensation for his wife who performed administrative and bookkeeping duties; and (3) the company might not have succeeded even if claimant was not injured. Decision and Order at 6. The administrative law judge's determination cannot be upheld as the first and third of the administrative law judge's reasons for excluding the wages claimant earned at B&B are irrelevant to claimant's pre-injury average weekly wage because they involve post-injury events: namely, that claimant's salary from B&B on a long term basis was too speculative to qualify for inclusion in his average weekly wage as B&B was a startup business whose prospects were uncertain and that B&B might not have succeeded even if claimant was not injured. *See Walker*, 793 F.2d at 319, 18 BRBS at 100 (CRT)*; Simonds*, 27 BRBS at 120. Whether the business would have succeeded post-injury had claimant

not been injured is not dispositive of inclusion of pre-injury earnings from this work. Moreover, the administrative law judge also found that claimant's business failed in part because claimant was injured and unable to work. Claimant's earnings in the year prior to injury from his business are contained in the record and thus are not speculative.

The remaining reason the administrative law judge provided for not including in average weekly wage the wages claimant received from his home improvement business, *i.e.,* that claimant's earnings from B&B may have included compensation for his wife who performed administrative and bookkeeping duties, is not supported by the evidence. The administrative law judge reasoned that claimant failed to show that some of his salary should not be attributed to his wife after finding that it was unclear whether claimant's wife was fairly compensated for her administrative and bookkeeping duties for B&B. Decision and Order at 6. In so reasoning, the administrative law judge irrationally inquired into claimant's wife's salary. The inquiry before the administrative law judge was claimant's average weekly wage, and not his wife's wages. The record unequivocally established that claimant earned $200 per week with B&B, or a total of $1600, from January to March 1994. Cl. Exs. 1e, 3a-c, 4a-b. This evidence consists of checks made payable solely to claimant and not jointly to claimant and his wife, and claimant's W-2 showing payment to him. Taxes were withheld from claimant's earnings from B&B, and these earnings were included on his income tax return. Consequently, the administrative law judge had substantial and uncontradicted evidence before him to establish claimant's earnings from his "other employment," and his exclusion of these earnings is not based on evidence but on his speculation that some of claimant's salary may have included compensation for his wife.

As the plain language of Section 10(c) provides for the inclusion of earnings in "other employment," and as the administrative law judge's reasons for not including claimant's wages he earned at B&B in the average weekly wage determination are not supported by substantial evidence or in accordance with law, we reverse his decision. Consequently, the administrative law judge's decision must be modified to include the wages claimant earned at B&B prior to his injury in his average weekly wage.[1] In this regard, we note that, although claimant earned $200 per week at B&B, he is not entitled to an average weekly wage of $809.40 (*i.e.,* the stipulated shipyard average weekly wage of $609.40 plus the $200 per week he earned at B&B), as the average weekly wage is determined by reference to claimant's wages in the year preceding the injury, and claimant earned these wages only in 8 weeks. Claimant's annual earnings based on shipyard and other work are divided by 52 to arrive at his average weekly wage. *See Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990). Thus, claimant is entitled to an average weekly wage including an additional $30.77 ($1600 divided by 52). 33 U.S.C. §910(c).

Accordingly, the administrative law judge's exclusion of claimant's earnings in self

[1]Despite claimant's argument to the contrary, we need not determine what wages claimant could have earned on the open market as the evidence unequivocally establishes his actual earnings at B&B. *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991).

employment is reversed. The Decision and Order and Order on Petition for Reconsideration are modified to provide an average weekly wage of $640.17.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge