

DONALD CRAWFORD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
GENERAL DYNAMICS CORPORATION)	DATE ISSUED:
)	
and)	
)	
INSURANCE COMPANY OF)	
NORTH AMERICA)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits Upon Remand of Martin J. Dolan, Jr.,
Administrative Law Judge, United States Department of Labor.

Richard D. Haviland (Rakosky, Smith, Miller & Papp, P.C.), New London, Connecticut, for
claimant.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits Upon Remand (87-LHC-21) of Administrative Law Judge Martin J. Dolan, 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 worked as a rigger for employer from August 31, 1952, to April 25, 1958, when he left to take other employment. Subsequent to 1958, claimant worked in a variety of jobs including fisherman, utilityman, timekeeper, metal cutter and lobsterman. Claimant testified that he first started having breathing problems in 1976, and was advised to give up offshore fishing in 1980 due to an asthmatic condition for which he had been hospitalized on several occasions. On September 21, 1981, claimant suffered a serious injury while fishing inshore which left him incapacitated until March 1983. In 1983, claimant became self-employed as a lobsterman. On June 14, 1984, Dr. Cullen diagnosed claimant as having pulmonary asbestosis. At the time of the August 14, 1987,

hearing, claimant was still self-employed as a lobsterman, but he testified that he had to hire a deckhand to do most of the work.

On June 27, 1984, claimant filed a claim for permanent partial disability compensation, alleging he suffered a lung injury caused by asbestos exposure during his tenure with employer. In his original Decision and Order dated August 14, 1987, the administrative law judge found that claimant did not suffer a work-related injury and denied benefits. Claimant appealed. In an unpublished decision, the Board summarily affirmed the denial of benefits, stating that the administrative law judge's Decision and Order was supported by substantial evidence. *Crawford v. General Dynamics Corp.*, BRB No. 88-3368 (June 27, 1990) (unpublished). Claimant's motion for reconsideration *en banc* was denied. Subsequently, on May 3, 1991, the United States Court of Appeals for the Second Circuit vacated the administrative law judge's Decision and Order and remanded the case for the administrative law judge to determine whether claimant sustained an injury due to asbestos exposure in accordance with *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989), and whether medical benefits or a *de minimis* award are warranted based on the analysis contained in *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989). *Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123 (CRT) (2d Cir. 1991). On July 16, 1991, the Board vacated its June 27, 1990, Decision and Order and remanded the case to the Office of Administrative Law Judges for further proceedings consistent with the Second Circuit's opinion.

In his Decision and Order Awarding Benefits Upon Remand, the administrative law judge concluded that claimant sustained a work-related injury as a result of asbestos exposure during claimant's employment with employer. He then determined that claimant's date of injury was June 14, 1984, when Dr. Cullen diagnosed his asbestosis, and determined that his average weekly wage was \$498.32, a figure derived by dividing claimant's \$25,944 in gross receipts as a lobsterman in calendar year 1983 by 52 weeks. Thereafter, he determined that claimant's post-injury wage-earning capacity was \$564.58 per week based on the average of claimant's actual gross earnings for the years 1984 through 1986. In light of claimant's higher post-injury earnings, the administrative law judge found that he had not sustained any loss of wage-earning capacity or economic disability within the meaning of Section 8(h) of the Act, 33 U.S.C. §908(h). However, the administrative law judge found a *de minimis* award of \$1.00 per week appropriate given the progressive nature of claimant's obstructive pulmonary impairment and the substantial likelihood that he would suffer a future loss of earnings. The administrative law judge also awarded claimant past medical expenses and future periodic monitoring.¹ Claimant appeals the administrative law judge's determination of his average weekly wage and the finding that he sustained only a *de minimis* loss in his wage-earning capacity on various grounds. Employer does not respond.

Pursuant to Section 8(c)(21), an award for permanent partial disability is based on 66 and 2/3 percent of the difference between claimant's pre-injury average weekly wage and his post-injury

¹On February 25, 1992, Administrative Law Judge Dolan summarily denied claimant's motion for reconsideration. He, however, modified Provision No. 1 in the order so that the *de minimis* award of \$1.00 would be paid weekly commencing on June 14, 1984.

wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192, 204 (1992), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994). Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if those earnings fairly and reasonably represent his wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). The objective of this inquiry is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Some factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *See LaFaille*, 884 F.2d at 61, 22 BRBS at 119-120 (CRT); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988).

Claimant's average weekly wage is determined at the time of injury by utilizing one of the three methods set forth in Section 10 of the Act. *See* 33 U.S.C. §910. Section 10(a) applies when claimant has worked in the same employment for substantially the whole year immediately preceding injury. *See Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133, 140 (1990). Section 10(b) also applies to permanent and continuous jobs, but applies where claimant has not been employed for substantially the whole year. Section 10(c) provides a general method for determining average weekly wage where Section 10(a) or (b) cannot fairly or reasonably be applied to calculate claimant's annual earning capacity at the time of injury. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). The administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in part*, 600 F.2d 1288 (9th Cir. 1979).

In the present case, after determining that June 14, 1984, the date claimant was first diagnosed with asbestosis, was the applicable date of injury for purposes of determining claimant's average weekly wage, the administrative law judge calculated claimant's average weekly wage based on claimant's gross receipts in 1983, the year prior to this date. Citing *LaFaille*, 884 F.2d at 54, 22 BRBS at 108 (CRT), claimant initially argues on appeal that the administrative law judge erred in using June 14, 1984, as the applicable date for purposes of determining his average weekly wage inasmuch as he experienced disability prior to this date. Although claimant maintains that the best proof that he suffered a wage loss prior to 1984 is his inability to perform jobs which he once had both in his old job with employer and as a offshore fisherman, he does not argue that his average weekly wage should have been based on some earlier date. Rather, claimant argues that his average annual earning capacity should have been calculated pursuant to Section 10(c) based on the 1983

and 1984 gross earnings of Mr. Grimshaw, another commercial lobsterman.

We agree with claimant that the administrative law judge's finding that June 14, 1984, is the applicable date of injury for purposes of average weekly wage cannot be affirmed, as the administrative law judge did not consider this aspect of the decision in *LaFaille*. In *LaFaille*, the United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, recognized that when a claimant suffers a wage loss prior to the date of awareness, the average weekly wage should be determined as of the date of the onset of the disability.² *Id.*, 884 F.2d at 59-60, 22 BRBS at 116-117 (CRT). In finding June 14, 1984 to be the operative date in the present case, the administrative law judge relied solely on a date of injury based on claimant's awareness of the relationship between his disease, employment and disability, *see* 33 U.S.C. §910(i), and did not address claimant's assertion of prior disability. Moreover, while the court in remanding the case specifically cited *LaFaille* with regard to a *de minimis* award, it also instructed the administrative law judge to address the nature and extent of disability, and *LaFaille* must be considered in resolving this issue.

Claimant testified that he first began experiencing breathing problems in 1976, and Dr. Cullen's June 4, 1981, medical report confirms claimant's testimony. In addition, claimant testified that he was forced to give up offshore fishing in 1980. This evidence suggests that claimant's disability may have preceded his June 14, 1984, awareness of the cause of his injury, and it was not considered by the administrative law judge. Inasmuch as *LaFaille* mandates consideration of such evidence and is controlling in this case, we vacate the administrative law judge's finding regarding the date of claimant's injury and remand for him to reconsider this issue.

Claimant also raises several arguments relating to the administrative law judge's calculation of his average weekly wage. In the present case, the administrative law judge reasonably employed Section 10(c) to calculate claimant's average weekly wage, inasmuch as claimant had not been employed for substantially the whole year prior to his injury,³ and Section 10(c) explicitly provides for consideration of "the reasonable value of the services of an employee if engaged in self-employment."⁴ The administrative law judge employed claimant's gross receipts in 1983 as the basis for his average weekly wage calculation. Claimant argues on appeal, however, that his average weekly wage should have been based on the average gross earnings in 1983 and 1984 of Mr. Grimshaw, a similarly situated employee, contending that Mr. Grimshaw's earnings best represent what claimant would have been earning had he not been injured.

²The court cited the Conference Report accompanying the 1984 Amendments, H.R. Rep. 98-1027, 98 Cong., 2d Sess. 29-30, 1984 U.S. Code Cong. & Admin. News 2771.

³Lobstering is a seasonal occupation which generally runs from June until January. Claimant worked from July until January in the year prior to his injury. Tr. at 45.

⁴In addition, Sections 10(a) and (b) could not be applied because the record does not contain any evidence from which claimant's average daily wage could be extrapolated. *See Browder v. Dillingham Ship Repair*, 24 BRBS 216, 219, *aff'd on recon.*, 25 BRBS 88 (1991).

While the earnings of a similarly situated employee can properly serve as the basis for an average weekly wage determination under Section 10(c), any other rational method may also be used. *See generally Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 n.3 (1992). The Board has held that where the claimant is self-employed, his average annual earning capacity under Section 10(c) must reflect the value of the services he performed; earning capacity should not include any portion of claimant's earnings which reflect factors other than the value of the employee's services, such as profits or goodwill. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd on other grounds*, 698 F.2d 743, 15 BRBS 94 (CRT)(5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT)(5th Cir. 1984), *cert. denied*, 469 U.S. 818 (1984).⁵ Since the administrative law judge summarily adopted claimant's gross receipts divided by 52 as his average weekly wage, he made no determination as to the reasonable value of claimant's services. We therefore vacate the administrative law judge's average weekly wage calculation on this basis and remand to allow him to reconsider this issue. The administrative law judge must calculate the applicable average weekly wage by determining the reasonable value of the services of claimant or a similarly situated employee in self-employment, based on the cost of hiring a worker of comparable skill and experience, or any other reasonable means.

Claimant also argues on appeal that the administrative law judge should have calculated his post-injury wage-earning capacity based on his average gross earnings in 1983 and 1984 instead of utilizing his average gross earnings for the years 1984 through 1986. The analysis of claimant's post-injury wage-earning capacity will be affected by the administrative law judge's reconsideration of claimant's date of injury consistent with *LaFaille*. It must also be addressed in the context of claimant's self-employment. The Board has stated that wage-earning capacity does not include profits of a business, but "refers to an injured employee's ability to command regular income as the result of his personal labor." *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 405 (1989). Income from a business owned by the employee should not be used to reduce disability compensation, but where the employee performs services such that the income represents salary, it should be considered. *Id.*; *see* 1C A. Larson *The Law of Workmen's Compensation*, §57.51(e) (1987). In this

⁵In its decision in *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd*, 698 F.2d 743, 15 BRBS 94 (CRT)(5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT)(5th Cir. 1984), *cert. denied*, 469 U.S. 818 (1984), the Board found that the administrative law judge properly analyzed the average weekly wage issue under Section 10(c), having reasonably determined that Section 10(a) and Section (b) could not fairly and reasonably be applied, but remanded the case for reconsideration under that section, discussing calculation of average weekly wage where claimant is self-employed. The United States Court of Appeals for the Fifth Circuit reversed the Board's decision to apply Section 10(c), finding that Section 10(b) could be applied and that where it could be applied, its application was mandatory. The court did not address the Board's determination that claimant's gross earnings in self-employment cannot properly be used as a basis for calculating his average weekly wage under Section 10(c). Subsequently, the court, sitting *en banc*, overturned the panel decision on the ground that the appeal was not of a final order in view of the Board's remand of the case.

case, the administrative law judge's use of claimant's average gross earnings in 1984 through 1986 as the basis for determining his post-injury wage-earning capacity cannot be upheld, as he did not consider these factors. Accordingly, the administrative law judge's determination of claimant's post-injury wage-earning capacity and his finding of no economic disability contingent thereon must also be vacated. In reconsidering claimant's post-injury wage-earning capacity on remand, the administrative law judge must limit his inquiry to those wages which claimant received as a result of his personal labor.

Claimant also argues that the administrative law judge erred in determining that he sustained no wage-earning capacity loss inasmuch as he incurred additional expenses in his business because he was required to hire a helper due to his work-related breathing condition. Claimant testified that his breathing problems progressed to the point that he needed to hire a deckhand part time in 1983 and full time in 1984. Tr. at 49-53. The Board has previously recognized in *Wayland v. Moore Dry Dock*, 21 BRBS 177, 182 (1988), that the fact that a self-employed claimant is forced to hire a helper due to his work-related ailments can properly serve as a basis for a finding of disability. Moreover, this fact is clearly relevant in determining what portion of claimant's receipts were due to his personal labor. Accordingly, the administrative law judge must consider the additional costs claimant incurred in hiring a helper in reassessing the extent of his disability on remand.

Claimant also contends that his business operated at a loss in 1983-84, and that in the absence of earnings, the 1983 national average weekly wage of \$274.17 should serve as the basis for determining that he sustained a loss of wage earning capacity. In light of our decision to remand this case for the administrative law judge to reassess both claimant's average weekly wage and his post-injury earning capacity, we decline to address this argument as it is premature.

Accordingly, the administrative law judge's findings regarding claimant's date of injury, the applicable average weekly wage, and claimant's post-injury wage-earning capacity are vacated and the case is remanded for additional consideration of these issues consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits Upon Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge