BRB No. 92-2290

THOMAS D. HAMILTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	
	)	
and	)	
	)	
AETNA CASUALTY AND SURETY COMPANY	)	DATE ISSUED:
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Additional Benefits of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

Stephen M. Vaughan (Mandell & Wright, P.C.), Houston, Texas, for claimant.

Michael D. Murphy (Fulbright & Jaworski), Houston, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Additional Benefits (91-LHC-447) of Administrative Law Judge Kenneth A. Jennings 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 if they 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).

While working for employer as an electrician, claimant injured his back on January 27, 1987, and suffers from recurring back pain. Employer laid claimant off on February 9, 1987, due to a reduction in force, and claimant has not worked for employer since that date. Claimant subsequently obtained a job as a supervisor trainee with RTK Construction Company in San Antonio where he worked at an hourly rate of $7.50 from June 15, 1987 to September 1988, when the company filed for bankruptcy. Claimant then obtained work as a construction supervisor in a company started by his wife and another individual, called the Sterling Group, and he worked there from the end of 1988 until some time in 1989, when the Sterling Group filed for bankruptcy. On May 9, 1990 claimant obtained a job as a subcontractor cable installer with Rainbow Cable Company for whom he continues to work, six days a week, 65 to 80 hours a week. He does not have an hourly wage but is compensated based on the job he performs. Employer voluntarily paid claimant temporary total disability benefits from February 9, 1987 through June 8, 1987, and from October 16, 1989 through November 12, 1989 at a weekly rate of $390.70. 33 U.S.C. §908(b).

The administrative law judge found that claimant cannot perform his usual work and that he reached maximum medical improvement on June 15, 1987, when he returned to work for RTK Construction. The administrative law judge also found that claimant's average weekly wage is $602.50 pursuant to Section 10(a), 33 U.S.C. §910(a), of the Act, and that claimant's post-injury wage-earning capacity is $255.15 per week based on his cumulative post-injury employment. The administrative law judge therefore awarded claimant benefits for temporary total disability from February 9, 1987 through June 14, 1987, based on an average weekly wage of $602.50, and for permanent partial disability from June 15, 1987, and continuing based on claimant's loss in wage-earning capacity.

On appeal, employer contends that the administrative law judge erred in applying Section 10(a) instead of Section 10(c) to calculate claimant's average weekly wage, and in calculating claimant's post-injury wage-earning capacity. Claimant responds, urging affirmance.

The administrative law judge determined that Section 10(a) was applicable because claimant's job in the year preceding his January 1987 injury was permanent and full-time. The administrative law judge noted that the parties agreed that in the 52-week period preceding his injury, claimant earned $22,653.89 and worked 188 days or 37.6 weeks. Applying Section 10(a), the administrative law judge divided $22,653.89 by 188 yielding an average daily wage of $120.50. He then multiplied $120.50 by 260 yielding average annual earnings of $31,329.85, and divided $31,329.85 by 52 to obtain claimant's average weekly wage of $602.50.

On appeal, employer contends that the administrative law judge erred in applying Section 10(a) because he failed to consider that claimant was laid off from September 30, 1986 [actually, from October 5, 1986] through January 4, 1987, the period immediately preceding claimant's injury. Employer contends that under Section 10(c), claimant's average weekly wage would be $435.52, obtained by dividing $22,653.89 by 52. Employer contends that applying Section 10(a) instead of Section 10(c) under these circumstances significantly inflates claimant's average weekly wage.

Claimant's average weekly wage is determined at the time of injury by determining claimant's average annual earnings utilizing one of three methods set forth in Section 10 of the Act and then dividing claimant's annual earnings by 52. 33 U.S.C. §910. Section 10(a) applies when claimant has worked in the same or comparable employment for substantially the whole of the year immediately preceding injury and provides a specific formula for calculating annual earnings. Section 10(b) also applies to permanent and continuous jobs, but applies where claimant has not been employed for substantially the whole of the year within the meaning of subsection (a) and submits the wages of similarly situated employees who have worked substantially the whole of the year. Section 10(c) provides a general method for determining annual earnings where Section 10(a) or (b) cannot fairly or reasonably be applied to calculate claimant's annual earning capacity at the time of injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1991); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1991).

We hold that the administrative law judge's use of Section 10(a) is proper on the facts of this case. The administrative law judge rationally determined that claimant, who worked 37.6 weeks in the year prior to his January 1987 injury, worked substantially the whole of the year. *Compare Duncan*, 24 BRBS at 135-136 (34.5 weeks is substantially the whole of the year where claimant's employment is permanent); *Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980), *rev'd on other grounds*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981) (41 weeks with a 10-week absence is substantially the whole of the year); *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1990) (33 weeks with an eight-week absence is not substantially the whole of the year). The administrative law judge noted in his decision that claimant had a 14-week absence due to a reduction in force, and while he did not consider this fact in his Section 10(a) analysis, he rationally determined that claimant's work record of 37.6 weeks established that his job was permanent and warranted the application of Section 10(a). Moreover, that claimant's average weekly wage is greater under Section 10(a) than it would be under Section 10(c) in this case,[1] does not undermine the validity of the administrative law judge's calculation as Section 10(a) seeks to arrive at a theoretical approximation of what claimant would have earned based on actual earnings. *Mulcare v. E. C. Ernest, Inc.*, 18 BRBS 158 (1986). We therefore affirm the administrative law judge's determination of claimant's average weekly wage.

In calculating claimant's post-injury wage-earning capacity, the administrative law judge considered that after his January 1987 injury, claimant diligently searched for work and was successful in obtaining three jobs.[2] The administrative law judge found that claimant worked 210

[1]A Section 10(c) calculation would not necessarily yield a lower figure, as that section does not require that claimant's actual earnings be divided by 52. Rather, the administrative law judge may use any reasonable means to determine claimant's annual earning capacity, and that figure is divided by 52.

[2]The administrative law judge also found that employer's identification of available cable installer positions met its burden of establishing suitable alternate employment given that claimant actually

weeks and 1 day from 1987 through 1991 and that he earned $53,618.05 during this time period. The administrative law judge therefore divided $53,618.05 by 210 weeks and 1 day yielding a post-injury wage-earning capacity of $255.15 per week. The administrative law judge found that $255.15 "persuasively demonstrates claimant's earning power on the open market, given his motivation to work, age (39), vocational background and physical condition." Decision and Order at 17. The administrative law judge also found that the opinion of the vocational rehabilitation counsellor, Viola Lopez, that claimant had "done everything possible" in completing the medical rehabilitation program and following through with his physician and recommendations corroborates his finding.

On appeal, employer contends that the administrative law judge should use the median hourly wages of a cable installer in 1990, scaled back to 1987 rates to account for inflation, in calculating claimant's post-injury wage-earning capacity. Employer states that the median hourly wage for cable installers for a six month period in 1990 was $12.77 in Houston, $12.41 in Dallas, and $12.66 in Fort Worth. Employer contends that these median wages may be reduced to 1987 rates by multiplying them by a ratio of the National Average Weekly Wage in 1991 and in 1987. Employer contends that the National Average Weekly wage was $341.07 in 1991 and $302.66 in 1987 yielding a percentage increase of 88.74 ($302.66/$341.07). Employer therefore contends that in 1987 the median hourly pay of a cable installer in Houston was $11.33 ($12.77 x 88.74 percent) and in Fort Worth, $11.23 ($12.66 x 88.74 percent).

In the alternative, employer contends claimant's actual wages as a cable installer from May 1990 through June 1991 should be used to reflect his post-injury wage-earning capacity because the cable installer was essentially claimant's first "real job" following his January 1987 injury.[3] Cl. Ex. 15 at 5, 7. Based on claimant's 1990 and 1991 tax returns, employer contends that using claimant's actual wages, his post-injury wage-earning capacity is $380.42.[4]

Section 8(h) provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. 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. *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT)(5th Cir. 1990);

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secured a position similar to those identified by employer.

[3]Employer avers that RTK Construction went bankrupt and claimant's pay in the Sterling Group originated from his wife.

[4]Employer obtained $380.42 by dividing claimant's salary of $32,341.25 in the 1990-1991 period by 60, the number of weeks claimant worked, yielding $539.02. Employer determined claimant's average weekly expenses were $158.60 ($9,515.52 gross expenses divided by 60), and deducted $158.60 from $539.02 to arrive at claimant's post-injury wage-earning capacity.

Wayland v. Moore Dry Dock, 25 BRBS 53 (1991). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *Wayland*, 25 BRBS at 57.

Some of the 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 variables that form a factual basis for the decision. *Wayland*, 25 BRBS at 58; *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Section 8(h) permits the fact-finder significant discretion in fashioning a reasonable post-injury wage-earning capacity for the injured worker. *Abbott*, 40 F.3d at 129, 29 BRBS at 27 (CRT).

We hold that the administrative law judge acted within his discretion as fact-finder in calculating claimant's post-injury wage-earning capacity based on an average of the cumulative salary of the three jobs he held from 1987 through 1991. *See id.* The administrative law judge specifically rejected use of the median scale wages for a cable installer as cited by employer as being too vague and general, and this is within his discretion. *Id.* The administrative law judge noted that a median salary, by definition, is the salary representing that point in a salary range where 50 percent of the salaries fall above and 50 percent of the salaries fall below, *i.e.*, an average salary. The administrative law judge found that employer did not present any evidence to demonstrate the scope of the salary ranges for the jobs employer identified, and therefore employer had not successfully proven that claimant's actual earnings fall below the expected range. The administrative law judge concluded that because 50 percent of the expected salaries must fall below the figures cited by employer, and employer did not cite an expected salary range, employer failed to prove that claimant's actual wages did not represent his wage-earning capacity.

Moreover, in calculating claimant's wage-earning capacity, the administrative law judge considered many of the relevant factors, consisting of claimant's earning power on the open market, his motivation to work, age, vocational background and physical condition. The administrative law judge found employer's suggestion that claimant's true wage-earning capacity is $380.42, representing his wages as a cable installer, overstates claimant's true earning power because the figure does not account for claimant's wage-earning capacity in the years preceding 1990. The administrative law judge found that the three jobs claimant obtained prior to 1990 were significant and needed to be considered in a calculation of claimant's post-injury wage-earning capacity. The administrative law judge therefore rationally determined that claimant's cumulative wages best represent the overall market value of claimant's earning power. The Board will not disturb the administrative law judge's findings if they are not inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Ship*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Inasmuch as the administrative law judge's findings are reasonable and in accordance with law, we affirm the administrative law judge's determination of claimant's post-injury wage-earning capacity. *See generally Penrod Drilling*, 905 F.2d at 87, 23 BRBS at 111 (CRT).

Accordingly, the administrative law judge's Decision and Order Awarding Additional Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge