BRB No. 12-0671

BYRON ADAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRAPAC, INCORPORATED	)	DATE ISSUED: 06/24/2013
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order on Reconsideration Amending Decision and Order of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Eric A. Dupree and Paul R. Myers (Dupree Law, APLC), Coronado, California, for claimant.

William N. Brooks II (Law Offices of William N. Brooks), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Order on Reconsideration Amending Decision and Order (2010-LHC-01481) of Administrative Law Judge Russell D. Pulver 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On March 20, 2009, claimant sustained an injury to his left leg in the course of his employment as a longshoreman with employer. Claimant returned to his usual employment duties on March 16, 2010. In his Decision and Order, the administrative law judge awarded claimant temporary total disability benefits from March 21, 2009 through March 15, 2010, and permanent partial disability benefits for a 19 percent impairment to his left lower extremity. 33 U.S.C. §908(b), (c)(2), (19). In determining claimant's average weekly wage, the administrative law judge purported to apply Section 10(a), 33 U.S.C. §910(a), in calculating claimant's average weekly wage as $933.33.

Claimant appeals, contending that the administrative law judge erred in calculating his average weekly wage. Employer responds that the administrative law judge's mistaken reference to a calculation under Section 10(a) is harmless error as his ultimate average weekly wage calculation is affirmable under Section 10(c), 33 U.S.C. §910(c). Claimant has filed a reply brief, contending the administrative law judge's average weekly wage calculation cannot be affirmed under Section 10(c).

A claimant's average weekly wage at the time of injury is determined by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. §910(a)-(c). *See Stevedoring Services of America, Inc. v. Price*, 382 F.3d 878, 884, 38 BRBS 51, 53(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005). Section 10(a) applies when claimant worked in the same or comparable employment for substantially the whole of the year immediately preceding his injury, and provides a specific formula for calculating annual earnings. *Id.* Section 10(c) provides a general method for determining annual earning capacity where neither Section 10(a) nor Section 10(b) can fairly or reasonably be applied to calculate claimant's average weekly wage at the time of the injury.[1] *Id.* The objective of Section 10(c) is to arrive at a figure which is a reasonable representation of the claimant's annual earning capacity at the time of injury. *See Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

In this case, the administrative law judge calculated claimant's average weekly wage, purportedly under Section 10(a), by dividing claimant's total earnings during the 52-week period prior to his injury by 49, the number of weeks claimant actually worked during that period,[2] to arrive at an average weekly wage of $933.33. Decision and Order at 29. On appeal, the parties agree that the administrative law judge's professed use of

[1]No party contends that Section 10(b) should be applied in this case.

[2]The administrative law judge deducted from the divisor a three-week period during which claimant was off work as the result of a non-work-related injury. Decision and Order at 29.

Section 10(a) to calculate claimant's average weekly wage is erroneous.[3] *See* Cl. Br. at 4; Emp. Resp. Br. at 4. We agree that Section 10(a) cannot be applied in this case. First, as noted by the parties, the evidence in this record reflects that claimant did not work "during substantially the whole of the year immediately preceding his injury," as required for application of Section 10(a). *See* CX 3. In *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held that Section 10(a) presumptively applies when a claimant works more than 75 percent of the workdays available in the year before his injury. *See also General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Price*, 382 F.3d 878, 38 BRBS 51(CRT). The administrative law judge in this case did not determine the actual number of days claimant worked during the 52-week period immediately preceding his work injury. The record, however, includes claimant's wage records listing the specific dates and hours claimant worked during this period. CX 3. Our review of these records reveals that the percentage of available workdays worked by claimant during this period falls considerably short of the Ninth Circuit's test for the presumptive applicability of Section 10(a). *Id.; see Matulic*, 154 F.3d at 1058, 32 BRBS at 151(CRT). Thus, as the record supports the parties' position that claimant did not work "substantially the whole of the year immediately preceding the injury," Section 10(a) cannot be applied. Moreover, Section 10(a) prescribes a specific formula by which the administrative law judge must calculate claimant's average annual earnings.[4] *See Price*, 382 F.3d at 884, 38 BRBS at 53(CRT); *Matulic*, 154 F.3d at 1055-56, 32 BRBS at

[3]The administrative law judge mistakenly stated that employer argued in its post-trial brief that claimant's average weekly wage should be calculated pursuant to Section 10(a). Decision and Order at 29. Contrary to the administrative law judge's statement, employer stated in its post-trial brief that although the parties disputed how claimant's average weekly wage should be calculated, they agreed that Section 10(c) is the applicable subsection. *See* Respondents' Post Trial Brief at 18.

[4]Section 10(a) of the Act states that a claimant's average weekly wage shall be determined as follows:

> 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.

33 U.S.C. §910(a).

149(CRT); *Patterson v. Omniplex World Services*, 36 BRBS 149, 156 (2003). In this case, the administrative law judge did not follow this formula but, instead, calculated claimant's average weekly wage by dividing claimant's earnings in the year prior to his injury by 49, the number of weeks claimant worked during that year. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 265, 31 BRBS 119, 125-26(CRT) (4th Cir. 1997).

As Section 10(a) cannot be reasonably and fairly applied in this case, we vacate the administrative law judge's average weekly wage determination and remand the case for the administrative law judge to calculate claimant's average weekly wage under Section 10(c) of the Act, 33 U.S.C. §910(c). In remanding the case, we reject employer's contention that the administrative law judge's professed application of Section 10(a) constitutes harmless error. Employer is correct in stating that the Board has held that where the administrative law judge's average weekly wage determination, which was incorrectly made under Section 10(a), nonetheless reflects a reasonable method of calculation under Section 10(c), his error in citing to Section 10(a) may be viewed as harmless. *See Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Patterson*, 36 BRBS at 156. For the following reasons, however, we conclude that, in this case, the administrative law judge's average weekly wage determination cannot be upheld as a reasonable method of calculation under Section 10(c). *Cf. Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 648, 44 BRBS 47, 48(CRT) (9th Cir. 2010)("we may overturn the administrative law judge's decision only if . . . it reasonably can be concluded that absent such error there would have been a contrary result."). Therefore, we must vacate the administrative law judge's average weekly wage calculation and remand this case for further findings.

In determining claimant's average weekly wage, the administrative law judge relied exclusively on claimant's earnings during the year immediately preceding his injury. Decision and Order at 29. The administrative law judge noted claimant's contention that his earnings during the year preceding his injury were not representative of his earning capacity in view of the economic downturn which led to a drastic, but temporary, reduction in claimant's work hours during that year. *Id.; see* CXs 3, 8; EX 14 at 14-15, 22; Tr. at 36-37. The administrative law judge also acknowledged claimant's proposed average weekly wage calculation, which was based on the greater number of hours claimant worked during 2006 and 2007, prior to the economic downturn. Decision and Order at 29; *see* Cl. Post Trial Brief at 24. Although the administrative law judge concluded that claimant "presented strong evidence to support the economic [downturn during the year preceding his injury]," he rejected claimant's contention that his average weekly wage should be calculated with reference to the hours he typically worked prior to the temporary economic downturn. Decision and Order at 29. Specifically, the administrative law judge concluded that pursuant to Section 10(a), he was required to determine claimant's average weekly wage with sole reference to claimant's earnings during the year prior to his injury. *Id.*

Unlike Sections 10(a) and (b) of the Act, Section 10(c) does not limit the time period used to determine a claimant's average weekly wage to the 52-week period immediately preceding the injury.[5] *See Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980); *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); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Anderson v. Todd Shipyards, Inc.*, 13 BRBS 593 (1981). Rather, the administrative law judge may compute average annual earnings under Section 10(c) based on the claimant's earning pattern over a period of years prior to the injury; when employing this method, however, the administrative law judge must take into account the earnings of all the years within that period. *See Meehan Seaway Service Co. v. Director, OWCP [Hizinski]*, 125 F.3d 1163, 1170, 31 BRBS 114, 118(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Gatlin*, 936 F.3d at 823, 25 BRBS at 29(CRT); *Anderson*, 13 BRBS at 596. The objective of Section 10(c) is to arrive at a figure that reasonably represents the claimant's earning capacity at the time of injury, an amount that reflects the claimant's potential and opportunity to earn absent injury. *See Palacios*, 633 F.2d 840, 12 BRBS 806; *see also Hizinski*, 125 F.3d at 1169, 31 BRBS at 118(CRT); *Gatlin*, 936 F.3d at 823, 25 BRBS at 29(CRT); *Jesse*, 596 F.2d at 757, 10 BRBS at 706-707; *Siminiski v. Ceres Marine Terminals*, 35 BRBS 136 (2001). Thus, as the Ninth Circuit has observed, an administrative law judge is afforded more flexibility in determining annual earning capacity under Section 10(c) than when applying subsections 10(a) and (b). *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 1165, 44 BRBS 9, 10(CRT) (9th Cir. 2010).

[5]Section 10(c) of the Act states that a claimant's average weekly wage shall be determined as follows:

> 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.

33 U.S.C. §910(c).

In this case, the administrative law judge concluded that he was constrained by Section 10(a) to base his average weekly wage determination solely on claimant's earnings during the 52-week period prior to claimant's injury. Decision and Order at 29. Thus, although acknowledging that claimant presented probative evidence of an economic downturn during that period, the administrative law judge did not address whether claimant's earnings during the year preceding his injury fairly and reasonably represent his earning capacity at the time of his injury. On remand, the administrative law judge must address claimant's evidence and calculate claimant's average weekly wage under Section 10(c) consistent with the principles set forth in the foregoing discussion. *See* CXs 3, 8; EX 14 at 14-15, 22; Tr. at 36-37.

Accordingly, the administrative law judge's average weekly wage calculation is vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and the Order on Reconsideration Amending Decision and Order are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge