BRB No. 01-0666

BICKETT THEOPHILE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MASSE CONTRACTING, INCORPORATED	)	DATE ISSUED: May 10, 2002
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Scott W. McQuaig and W. Chad Stelly (McQuaig & Stelly), Metairie, Louisiana, for claimant.

Ted Williams (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for claimant.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2000-LHC-3333) of Administrative Law Judge Clement J. Kennington 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 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 pipefitter, sustained a work-related injury on August 25, 1995. The parties stipulated that claimant has been temporarily totally disabled as a result of his injury, and that employer has paid compensation benefits of $190.23 per week since August 26, 1995. In his decision, the administrative law judge found that claimant's average weekly wage could not be calculated under Section 10(a), 33 U.S.C. §910(a), because he did not work a substantial part of the

year as a pipefitter, as he worked a total of 25.2 weeks during the preceding 52 weeks, of which only 13.8 were as a pipefitter. Next, the administrative law judge found that he could not calculate claimant's average weekly wage under Section 10(b), 33 U.S.C. §910(b), because there is no evidence of the wages of any comparable employee. Thus, the administrative law judge found that neither of the above sections can be "reasonably and fairly" applied and that therefore claimant's average weekly wage is appropriately determined under Section 10(c), 33 U.S.C. §910(c). Pursuant to Section 10(c), the administrative law judge found that a reasonable estimation of claimant's earning potential is the salary that employer agreed to pay claimant, *i.e.*, $10 per hour, 40 hours per week, for an average weekly wage of $400. Decision and Order at 6-7.

On appeal, employer contends that the administrative law judge erred in determining claimant's average weekly wage without taking into account claimant's sporadic work history or the fact that claimant did not work any 40-hour weeks for employer prior to his injury. Claimant responds, urging affirmance.

Section 10(c) of the Act is to be used, as here, when neither Section 10(a) nor 10(b) can be "reasonably and fairly applied." 33 U.S.C. §910(c). The objective of Section 10(c) is to insure that compensation awards are based on an accurate assessment of the claimant's earning capacity at the time of injury. *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *see also Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). The administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *See, e.g., Hall*, 139 F.3d 1025, 32 BRBS 91(CRT). In determining earning capacity under Section 10(c), it is appropriate to consider the employee's "ability, willingness and opportunity to work," *Jackson v. Potomac Temporaries Inc.*, 12 BRBS 410, 413 (1980), or "the amount of earnings the claimant would have the potential and opportunity to earn absent injury," *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 757, 10 BRBS 700, 706-707 (7th Cir. 1979). *See also Empire United Stevedores*, 936 F.2d 819, 25 BRBS 26(CRT).

We vacate the administrative law judge's average weekly wage determination, and remand for further findings in light of all relevant evidence. The administrative law judge may, as in the instant case, set claimant's average weekly wage at a figure higher than claimant earned in the past, due to claimant's "good fortune" in obtaining a higher paying job. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). The administrative law judge, in utilizing claimant's higher earnings, however, did not accurately state claimant's brief work history with employer. Claimant was to commence working for employer on August 14, 1995. The wage records in evidence indicate that claimant did not work that day. EX 8. Indeed, contrary to the administrative law judge's finding that claimant worked an eight-hour day on six of the seven days claimant worked, the wage records indicate that claimant worked an eight-hour day on only six out of ten days he was scheduled to work, plus one four-hour day. EX 8. Thus, although claimant was hired to work a 40-hour week, his brief work history with employer does not demonstrate that he did

so. On remand, the administrative law judge should reconsider claimant's average weekly wage in light of this fact, and determine if claimant had the potential to earn $400 a week absent injury. *Jesse*, 596 F.2d at 757, 10 BRBS at 706-707.

In this regard, as employer contends, the administrative law judge may find relevant claimant's work history prior to his obtaining the job with employer. The calculation of average weekly wage under Section 10(c) is not limited to the wages claimant earned at the time of injury or in the 52 weeks preceding the injury. *Empire United Stevedores*, 936 F.2d at 822-823, 25 BRBS at 29(CRT). Claimant's Social Security earnings statement shows that claimant earned $7,123.80 in 1990, $11,283.57 in 1991, $1,347.85 in 1992, $19,543.73 in 1994, and $2,587.50 in 1995, in addition to his wages earned from employer.[1] EX 1, 8. Claimant earned approximately $10,700 in the 52 weeks prior to his injury; he testified he was unable to find much work for the first five months of 1995. Tr. at 26-27. While the administrative law judge is not required to base an average weekly wage finding on these past wages, *see Hall*, 139 F.3d 1025, 32 BRBS 91(CRT), claimant's past work history may be relevant in determining whether claimant had the potential, absent injury, to earn wages for a full 40-hour week. Consequently, we vacate the administrative law judge's average weekly wage calculation, and remand the case for reconsideration in light of all relevant factors.

[1]The records do not reflect any earnings for 1993. Claimant was incarcerated for most of that year.

Accordingly, the Decision and Order Awarding Benefits is vacated as to claimant's average weekly wage, and the case is remanded to the administrative law judge for consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge