

BRB No. 96-0969A

DAVID C. AUFANG)	
)	
Claimant-Respondent)	DATE ISSUED: _____)
v.)	
)	
TACOMA BOATBUILDING COMPANY)	
)	
and)	
)	
LIBERTY NORTHWEST INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Cross-Petitioners)	
)	
PACIFIC MARINE INSURANCE)	
COMPANY)	
)	
Carrier-)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order After Remand -- Denying Benefits of Edward C. Burch,
Administrative Law Judge, United States Department of Labor.

Robert H. Madden (Madden & Crockett), Seattle, Washington, for employer and carrier
Liberty Northwest Insurance Company.

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

PER CURIAM:

Employer and its carrier, Liberty Northwest Insurance Company, appeal the Decision and Order After Remand -- Denying Benefits (89-LHC-1218, 89-LHC-1219) of Administrative Law Judge Edward C. Burch 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 welder-fitter for employer, sustained a work-related back injury in 1982 and ultimately settled his claim for compensation for the injury under an approved Section 8(i)

settlement. *See* 33 U.S.C. §908(i). In 1983, claimant returned to work with employer performing modified work and remained employed in that capacity until July 1985, when he was terminated as part of a general reduction-in-force. Upon recalling its employees in November 1985, employer advised claimant that modified work was no longer available for him and thus, claimant did not return to work at that time. Thereafter, on July 1, 1986, claimant returned to work for employer, although the work to which he was assigned proved to be beyond his medical restrictions. Claimant worked for three days despite experiencing increasing back pain. On his fourth day of work, July 7, 1986, while carrying a flat bar on his shoulder, claimant suffered sharp back pain causing him to drop the flat bar. Claimant immediately sought medical attention at a hospital emergency room and has not returned to work since that day.

Claimant filed a claim for benefits under the Act, contending that he became permanently totally disabled as a result of his July 1986 injury. In his Decision and Order, Administrative Law Judge James J. Butler denied the claim on the grounds that claimant did not sustain a work-related injury in July 1986. On appeal, claimant challenged Judge Butler's finding that he did not sustain a work-related injury causing permanent total disability. In addition, claimant averred that Judge Butler erroneously incorporated employer's post-hearing brief into his decision without independently analyzing the evidence.

In its Decision and Order dated January 26, 1994, the Board determined that Judge Butler did not adequately support the rationale behind his decision. *Aufang v. Tacoma Boatbuilding Co.*, BRB No. 90-1776 (Jan. 26, 1994)(unpub.). The Board therefore vacated Judge Butler's denial of benefits and remanded the case with instructions for Judge Butler to independently consider the medical evidence of record, consistent with the applicable legal standards, regarding the issue of whether claimant sustained a work-related aggravation of his back condition in July 1986, and if necessary, discern the nature and extent of said injury. *Id.*

On remand, Administrative Law Judge Edward C. Burch¹ (the administrative law judge) initially determined that claimant is entitled to the Section 20(a) presumption, and that employer could not establish rebuttal thereof. Accordingly, the administrative law judge concluded that claimant suffered a work-related injury. The administrative law judge then found, upon consideration of the relevant evidence of record, that claimant is not permanently and totally disabled as a result of the July 7, 1986, injury.² Consequently, permanent total disability benefits were denied. In addition, the administrative law judge determined that employer is not liable for any medical treatment beyond July 16, 1986. Lastly, calculating claimant's average annual earnings pursuant to Section 10(c), 33 U.S.C. §910(c), the administrative law judge awarded claimant temporary total disability benefits totalling \$373.33 for the period between July 8, 1986 and July 16, 1986.

¹The record reflects that the case was reassigned to Judge Burch because of the retirement of Judge Butler in 1993.

²The administrative law judge found that the record supports the proposition that claimant is no more disabled than he would have been had he never returned to work on July 1, 1986.

Claimant appealed and employer/carrier cross-appealed the administrative law judge's Decision and Order After Remand -- Denying Benefits. By Order dated August 22, 1996, the Board ordered claimant to show cause within ten days why his appeal, BRB No. 96-0969, should not be dismissed for failure to file a Petition for Review and brief. In response to that Order, claimant referenced a previously mailed motion to remand the case to the administrative law judge for adjudication of his claim for disability compensation arising out of incidents occurring prior to 1986. Claimant also responded that "he has elected not to submit a brief on appeal to the Board." The Board, by Order dated November 19, 1996, granted claimant's motion to remand³ and dismissed claimant's appeal, BRB No. 96-0969, with prejudice based on his representation that he does not wish to challenge the administrative law judge's findings with regard to any disability for which carrier may be liable. The Board therefore concluded that the administrative law judge's finding that carrier is liable only for temporary total disability benefits from July 8, 1986, through July 16, 1986, is final. Lastly, the Board ordered carrier to show cause whether it wished to pursue its cross-appeal, BRB No. 96-0969A, of the administrative law judge's average weekly wage determination. By letter dated December 4, 1996, carrier requests that the Board determine its cross-appeal on the merits. Accordingly, the instant case involves the consideration and resolution of carrier's cross-appeal, in which it challenges the administrative law judge's calculation of claimant's average weekly wage.

Carrier contends that the wages used by the administrative law judge to calculate claimant's average annual earnings under Section 10(c), notably the income claimant accrued in his modified work position in the year preceding his termination on July 15, 1985, are not representative of claimant's realistic wage-earning capacity at the time of his injury, because the evidence of record establishes that claimant was, in essence, already totally disabled from any employment prior to his four-day attempt to return to work with employer in July 1986. Carrier maintains that claimant's total earnings of \$1,149.93, during the one year immediately preceding the injury in July 1986, more accurately reflect claimant's average annual earnings. Consequently, carrier argues that upon application of Section 10(d)(1), claimant's average weekly wage for compensation purposes in the instant case is \$22.11.

Section 10, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. As the administrative law judge acknowledged, the parties in the instant case readily agreed that claimant's average annual earnings for the period in which he was temporarily totally disabled should be calculated using Section 10(c) of the Act. The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26

³The Board specifically remanded the case so that the administrative law judge may address claimant's contentions that he is disabled as a result of injuries occurring before carrier was on the risk. The Board recognized that claimant had properly raised these claims before Judge Butler in the initial adjudication, but they were not addressed. Moreover, the Board noted that employer's prior carrier, Pacific Marine, was separately represented and present at the hearing.

(CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). It is well-established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). See *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in part, part*, 600 F.2d 1288 (9th Cir. 1979). The Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. See *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981).

In the instant case, the administrative law judge determined that the appropriate time period for arriving at claimant's average annual earnings pursuant to Section 10(c), is the one year preceding the July 15, 1985, reduction-in-force, because the light-duty bench work which claimant performed at that time was suited to his post-1982 physical requirements. In addition, the administrative law judge acknowledged that a majority of medical personnel evaluating claimant opined that he was still capable of performing light to medium work⁴ and thus, remained capable of performing this previous employment with employer. In contrast, the administrative law judge found that the wages earned by claimant upon his return to employment in July 1986 were for a position which claimant admittedly could not physically handle and that the wages he earned prior to his February 1982 injury, were for a position that did not take into account claimant's subsequent physical restrictions. The administrative law judge therefore concluded that neither of these wages accurately represent claimant's earning capacity at the time of his July 1986 injury. The administrative law judge then found that the record establishes that claimant earned \$400 per week from July 15, 1984, through May 15, 1985, and extrapolated that figure to the period between May 15, 1985 and July 15, 1985, a time period for which the record contains no information regarding claimant's wages. Accordingly, the administrative law judge awarded temporary total disability benefits based on this figure.

Inasmuch as the result reached by the administrative law judge is reasonable, supported by substantial evidence, and is consistent with the goal of arriving at a sum which reasonably represents claimant's earning capacity at the time of his injury, it is affirmed. See *Gatlin*, 935 F.2d at 819, 25 BRBS at 26 (CRT); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Hicks*, 14 BRBS at 549. The administrative law judge appropriately accounted for the fact that claimant was in lay-off status for most of the year preceding the July 1986 injury. See *Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978). Consequently, we affirm the administrative law judge's award of temporary total disability benefits for the period between July 8, 1986 and July 16, 1986, based on an average weekly wage of \$400.

Accordingly, the administrative law judge's Decision and Order After Remand -- Denying Benefits is affirmed.

⁴Drs. Emmons and Levy, as well both physical therapists who evaluated claimant, concurred on this issue. Only Dr. Reese's opinion supports a determination that claimant sustained a permanent worsening of his condition following the July 7, 1986 injury; however, his opinion was discredited by the administrative law judge on the grounds that it is ambiguous and unsupported and because Dr. Reese is a nephrologist rather than an orthopedist.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge