BRB No. 03-0528

CURTIS P. MELANCON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VOLKS CONSTRUCTORS, INCORPORATED	)	DATE ISSUED:April 22, 2004
	)	
and	)	
	)	
THE GRAY INSURANCE COMPANY	)	
	)	
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.

W. Alan Lilley (Goforth & Lilley, PLC), Lafayette, Louisiana, for claimant.

Douglas M. Moragass, Harahan, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2002-LHC-1716) of Administrative Law Judge Clement J. Kennington awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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).

Claimant was working as a pile driver for employer on October 17, 1994, when he sustained a thoracic compression fracture. At the time of his injury, claimant had been working for employer for six weeks. Prior to working for employer, claimant was

employed as an auto mechanic from 1963-1982, and then opened his own auto repair shop, which was in business from 1982-1992. After selling his auto repair business, claimant sought to become a full-time crawfish farmer. After two seasons as a crawfish farmer, claimant took a job with employer, where he was earning $13.35 per hour as a pile driver. From October 19, 1994, through the February 13, 2003, date of the formal hearing, employer voluntarily paid claimant temporary total disability benefits totaling $111,149.03. Claimant's Exhibit (CX) 1. On January 26, 2000, employer determined that it had overpaid claimant a total of $28,915.788 and thus took a credit against additional compensation owed. Claimant subsequently filed the instant claim, arguing that employer's calculation of his average weekly wage was incorrect.

In his decision, the administrative law judge found Section 10(a) 33 U.S.C. §910(a), and Section 10(b), 33 U.S.C. §910(b), of the Act inapplicable, and calculated claimant's average annual earning capacity pursuant to Section 10(c), 33 U.S.C. §910(c). In calculating claimant's average weekly wage, the administrative law judge found that claimant's actual earnings from his self-employment as an auto mechanic and crawfish farmer were "not indicative of his overall wage earning capacity," as claimant derived "other things of value from his business." Decision and Order at 10. He further found that the record supported a finding that claimant had the ability and willingness to work for employer as a pile driver and that based on employer's growing business, claimant would have worked for employer nine to ten months a year. Consequently, extrapolating claimant's earnings as a five-day a week worker for employer over a nine-month period, the administrative law judge calculated claimant's average weekly wage at $577.45, and thus, awarded total disability compensation at the corresponding rate of $384.97.[1] The

[1]In calculating claimant's average weekly wage, the administrative law judge made the following conclusions:

> Claimant testified that he was a five-day worker, (TR 13), he began his employment on September 6, 1994, (CX 8, p.4), and during his 41 days of employment (5.8 weeks), Claimant earned $4,465.58, (CX 7, p.2), or an average of $769.93 per week. Working nine months a year, Claimant could expect to work for thirty-nine weeks (52 weeks a year) 12 months = 4.33 weeks per month. 9 months x 4.33 weeks per month = 39 weeks). Working thirty-nine weeks per year equates to an average annual earning capacity of $30,027.27.(39 weeks x $769.93 per week = $30,027.27). Under Section 10(d), Claimant's average weekly earnings are one fifty-second part of his average annual earnings, which equates to an average weekly rate of $577.45. ($30,027.27 divided by 52 = $577.45). Claimant's corresponding compensation rate is $384.97. 33 U.S.C. §908.

Decision and Order at 12.

administrative law judge also assessed a ten percent penalty against employer, pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), on all compensation due between January 26, 2000, and January 25, 2001.

On appeal, employer challenges the administrative law judge's findings regarding claimant's average weekly wage. Claimant responds and urges affirmance of the administrative law judge's Decision and Order.

Employer initially asserts that in considering claimant's average weekly wage, the administrative law judge demonstrated a "clear intent or bias toward using only" the income claimant earned from employer in his calculations. Employer argues that neither claimant's employment as a self-employed auto mechanic, nor his employment for the short period of time with employer should have been considered in the administrative law judge's calculation of claimant's average weekly wage, but rather that the best measuring device of claimant's average weekly wage was his 1993 and 1994 earnings as a crawfish farmer. Employer additionally contends that the administrative law judge's reliance on the holding of the United States Court of Appeals for the Seventh Circuit in *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979), is erroneous as the facts of that case may be distinguished from the instant case.

In the instant case, the parties agree that Section 10(c) is the relevant provision for determining claimant's average weekly wage. *See Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). It is well established that the object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury, s*ee James J. Flanagan Stevedores, Inc. v. Gallagher,* 219 F.3d 426, 34 BRBS 35(CRT)(5th Cir. 2000); *SGS Control Serv. v. Director*, OWCP, 86 F.3d 438, 30 BRBS 57(CRT)(5th Cir. 1996); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT)(5th Cir. 1991)*; Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982), and that the administrative law judge has broad discretion in determining a claimant's annual earning capacity under Section 10(c). *See Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT)(5th Cir. 2000). Accordingly, the Board will affirm an administrative law'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 Fox v. West State, Inc.*, 31 BRBS 118 (1997).

In reviewing the evidence of record, the administrative law judge concluded that based on the testimony provided by claimant, and a co-worker, Mr. Thierot, claimant had the ability and willingness to work for employer as a pile driver. Hearing Transcript (HT) at 40-45; 99-100; Decision and Order at 11. The administrative law further found that,

based on claimant's testimony, claimant no longer wished to engage in full-time crawfishing, nor did he wish to resume work as an auto mechanic, HT at 37-42; Decision and Order at 12. The administrative law judge further found that, while there was no guarantee that claimant would be retained by employer for work on other projects, HT at 106-107, the testimony of employer's Director of Safety and Human Resources, Mr. Morgan, supported a conclusion that employer's business had grown substantially, and additional testimony by employer's Construction Supervisor, Mr. Schexsnayder, supported a conclusion that employer attempted to "retain good workers" and that nine to ten months of employment per year would be "good" for employees of claimant's status. HT at 136-137; Decision and Order at 12. The administrative law thus found that absent his injury, claimant would have had nine months of work available to him with employer. Decision and Order at 12. Further, based on statements of claimant's counsel, see HT at 13, the administrative law determined that claimant was a five-day worker.[2]

The administrative law judge's average weekly wage determination is supported by substantial evidence and is affirmed. Contrary to the assertions of employer, and consistent with the holding in *Jesse*, 596 F.2d 752, 10 BRBS 700, the administrative law rationally concluded that claimant was willing to work for employer and that employer had work available for him. The administrative law judge also reasonably concluded that claimant had no plans to return to crawfish farming or automotive repair. Thus, the administrative law judge reasonably concluded that claimant's earnings as a pile driver best represented his earning capacity at the time of injury. Moreover, the administrative law judge reasonably determined that workers of claimant's status could expect at least nine months of employment. We thus affirm the administrative law judge's average weekly wage determination. In so doing, we reject employer's claim that the administrative law judge was biased, as he considered all of the relevant evidence under Section 10(c), and in an exercise of his discretion under that provision, made a reasonable determination of claimant's annual earning capacity at the time of his injury. *See Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT); *SGS Control Serv.*, 86 F.3d 438, 30 BRBS 57(CRT); *Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT); *see also Fox*, 31 BRBS 118 (1997). Consequently, the administrative law judge's determination regarding claimant's average

[2]At the hearing, the administrative law judge asked claimant's counsel "And how many days a week worker was he? Five, six, seven?" Counsel responded "Five—although occasionally, I think, they did work more than five." HT at 13. Based on this statement, the administrative law judge concluded that claimant was a five-day worker. While employer is correct in asserting that claimant did not specifically "testify" that he was a five-day a week worker, there is no evidentiary support for any alternative conclusion.

weekly wage is affirmed.[3] *See Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT); *SGS Control Serv.*, 86 F.3d 438, 30 BRBS 57(CRT); *Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT); *see also Fox*, 31 BRBS 118 (1997).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]We also affirm, as rational and supported by substantial evidence, the administrative law judge's determination that claimant's employment with employer was for 41 days, and not, as employer suggests, 42 days. While the period from September 6, 1994 through October 17, 1994, does in fact encompass a total of 42 days, the record indicates that claimant's last payment day for work was October 16, and that employer began paying compensation as of October 17, Claimant's Exhibit 7. Moreover, the record does not demonstrate at what time of day claimant sustained his injury, and thus does not establish whether claimant worked extensively on the 42nd day. Moreover, we reject employer's assertion that the administrative law erred in his analysis of claimant's tax returns, as he did not use these previous earnings in determining claimant's average weekly wage. Rather, the administrative law judge merely recited such evidence as part of his review of all of the evidence of record as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A).