

BRB No. 14-0017

RICHARD SHIRROD)
)
 Claimant-Petitioner)
)
 v.)
)
 PACIFIC RIM ENVIRONMENTAL)
 RESOURCES, LLC)
)
 Employer-Respondent)
)
 and) DATE ISSUED: Aug. 25, 2014
)
 TY ROSS and MAKAI PARTNERS, LLC,)
 INDIVIDUALLY)
)
 Members of Pacific Rim)
 Environmental Resources,)
 LLC-Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Interim Decision and Order on Remand, the Decision and Order on Remand, and the Order Denying Reconsideration on Attorney's Fees of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson LLC), Portland, Oregon, for employer.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Interim Decision and Order on Remand, the Decision and Order on Remand, and the Order Denying Reconsideration on Attorney's Fees (2008-LHC-01585, 2012-LHC-01162) of Administrative Law Judge Steven B. Berlin 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case, which has previously been before the Board, has a complicated procedural history. To summarize the background, claimant began working for employer in August 2005 on a barge-refitting project. On November 1, 2005, he suffered a work-related injury to his left knee and right ankle, and ceased work. Claimant filed a claim for benefits. While the case was before the administrative law judge, the private parties agreed that claimant is entitled to compensation and medical benefits and that his condition was permanent.¹ However, they disputed the date of maximum medical improvement, the extent of claimant's disability, and claimant's average weekly wage. In a Decision and Order dated February 14, 2011, the administrative law judge awarded claimant temporary total disability benefits from November 1, 2005 through January 21, 2007, and permanent total disability benefits from January 22, 2007, and continuing, based on an average weekly wage of \$569.23. 33 U.S.C. §§908(a), (b), 910(c). The administrative law judge denied claimant's motion for reconsideration and claimant appealed to the Board, challenging the administrative law judge's average weekly wage calculation. The Board remanded the case to the administrative law judge for further consideration of the average weekly wage issue. *Shirrod v. Pac. Rim Env'tl. Res., LLC*, BRB No. 11-0487 (Feb. 14, 2012), *recon. denied* (July 16, 2012).

In the interim, claimant's counsel submitted a fee petition to the administrative law judge seeking an attorney's fee of \$38,786.17. In an Order Awarding Attorney's Fees and Costs dated November 1, 2011, the administrative law judge reduced counsel's requested hourly rate of \$400 to \$340, and approved the requested fee in all other

¹ The Director, Office of Workers' Compensation Programs, did not participate in the initial proceedings before the administrative law judge or in the previous appeals to the Board.

respects. The administrative law judge accordingly awarded claimant's counsel a fee in the amount of \$33,581.17, payable by employer. 33 U.S.C. §928(b). Claimant appealed the administrative law judge's fee award to the Board, challenging the hourly rate determination. The Board affirmed the administrative law judge's attorney's fee award. *Shirrod v. Pac. Rim Envtl. Res., LLC*, BRB No. 12-0085 (Sept. 18, 2012), *recon. denied* (Dec. 19, 2012). Claimant appealed the Board's decision affirming the administrative law judge's fee award to the United States Court of Appeals for the Ninth Circuit, where the matter is pending, No. 13-70613.

While claimant's appeal regarding the average weekly wage issue was pending before the Board, claimant filed a new claim, seeking to join employer's principals, Ty Ross and Makai Partners, LLC, as individually liable for the payment of claimant's compensation pursuant to Section 38(a) of the Act, 33 U.S.C. §938(a); claimant asserted in this regard that employer failed to secure Longshore Act insurance and lacked assets sufficient to pay the compensation awarded to claimant. By Order dated November 12, 2012, the administrative law judge consolidated the two claims.² In an Interim Decision and Order on Remand issued on May 2, 2013, the administrative law judge reconsidered his previous average weekly wage determination in light of employer's new evidence, EXs 27, 28, and his further review of the record, and determined that claimant's average weekly wage is \$551.07.³ Thereafter, the administrative law judge issued a Decision and Order on Remand on August 15, 2013, which incorporated by reference the factual findings, legal analysis and average weekly wage determination he had made in his May 2, 2013 Interim Decision and Order. *See* August 15, 2013 Decision and Order on Remand at 2-3. The administrative law judge's Decision and Order on Remand also set forth the voluntary agreement of the Director, Office of Workers' Compensation Programs (the Director), to exercise his discretion under Section 18(b) of the Act, 33

² Subsequently, the parties, including the Director, Office of Workers' Compensation Programs, advised the administrative law judge that if he first resolved the average weekly wage issue, it was likely that the claim relating to the individual liability of employer's principals pursuant to Section 38(a) could be voluntarily resolved by the Director's exercise of his discretion to pay claimant's compensation out of the Special Fund pursuant to Section 18(b) of the Act, 33 U.S.C. §918(b). To facilitate the parties' settlement process, the administrative law judge agreed to bifurcate the average weekly wage and Section 38(a) issues; he also accepted employer's additional evidence regarding the average weekly wage issue, EXs 27, 28. *See* January 3, 2013 Order.

³ In an Order dated May 17, 2013, the administrative law judge vacated the section of his May 2, 2013 Interim Decision and Order entitled "Conclusion and Order," thus relieving employer of its obligation to pay claimant's compensation. The administrative law judge stated, however, that if the parties were unable to settle the case, he would issue a final compensation order incorporating the average weekly wage determination made in his May 2, 2013 Interim Decision and Order. *See* May 17, 2013 Order at 2-3.

U.S.C. §918(b), to pay claimant's compensation and future medical benefits out of the Special Fund, as well as employer's agreement to pay claimant interest and to reimburse claimant for his out-of-pocket medical expenses totaling \$3,172.48. *See id.* at 2-4. The administrative law judge found that, in view of the parties' agreements, the issue of the individual liability of employer's principals under Section 38(a) was moot. *See id.* at 3. The administrative law judge noted that claimant's counsel is not entitled to an attorney's fee on remand due to his lack of success in increasing the average weekly wage,⁴ and that, as claimant's appeal of the administrative law judge's November 1, 2011 fee award is pending before the Ninth Circuit, there was no issue concerning attorney's fees before him. *See id.* at 3 n.5. Claimant moved for reconsideration, requesting that the administrative law judge rule on the issue of employer's principals' individual liability for the payment of the previously-awarded attorney's fee. The administrative law judge denied claimant's motion for reconsideration on the basis that he lacked jurisdiction to modify that award because claimant's appeal of the November 1, 2011 fee award is pending before the Ninth Circuit.

On appeal, claimant assigns error to the administrative law judge's average weekly wage determination and to the administrative law judge's failure to rule on the issue of employer's principals' individual liability for the payment of claimant's attorney's fees. The Director responds, urging affirmance of the administrative law judge's average weekly wage determination.⁵ Employer also responds, urging affirmance of the administrative law judge's denial of reconsideration with respect to the issue of employer's principals' liability for claimant's attorney's fees. Claimant has filed briefs replying to the Director's and employer's response briefs.

We first address claimant's challenge to the administrative law judge's average weekly wage determination. On remand, the administrative law judge reiterated the parties' agreement that claimant's average weekly wage must be calculated pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c).⁶ The object of Section 10(c) is to arrive at a

⁴ This finding is not challenged by claimant on appeal. *See* Cl. Reply to Emp. Resp. Brief at 2.

⁵ With respect to the attorney's fee issue, the Director simply notes that the administrative law judge acted within his discretion in declining to modify his November 1, 2011 fee award which is not yet final and enforceable. *See* Dir. Resp. Brief at 2 n.1, 6 n.4.

⁶ Section 10(c) provides:

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

sum that reasonably represents an employee's annual earning capacity at the time of his injury. See *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980). It is well established that an administrative law judge has broad discretion in determining an employee's average weekly wage under Section 10(c). See *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in part*, 600 F.2d 1288 (9th Cir. 1979). Pursuant to Section 10(c), the administrative law judge may account for a claimant's intermittent work history, a raise in pay he received prior to the injury, and, if appropriate, circumstances existing after the date of injury. See *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *Healy Tibbitts Builders, Inc.*, 444 F.3d 1095, 40 BRBS 13(CRT); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Palacios*, 633 F.2d 840, 12 BRBS 806. A determination of annual earning capacity under Section 10(c) entails consideration of the employee's "ability, willingness and opportunity to work." *Palacios*, 633 F.2d at 843, 12 BRBS at 808 (quoting *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 756, 10 BRBS 700, 706 (7th Cir. 1979)); see also *Healy Tibbitts Builders, Inc.*, 444 F.3d at 1102, 40 BRBS at 18(CRT).

In reconsidering the issue of claimant's average weekly wage on remand, the administrative law judge restated his previous finding that from 2002 until he began work for employer, claimant worked seasonally as a fish counter for various employers and collected unemployment benefits in the off season.⁷ Interim Decision and Order at 3, 9. The administrative law judge found that claimant was hired by employer on August 15,

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).

⁷ As a fish counter for IAP World Services from March 7 through July 29, 2005, claimant was paid \$13.40 per hour, and he earned \$16,684 in the 24 weeks he worked, for an approximate average of \$695 per week. See Interim Decision and Order at 3; CX 4; EXs 2, 4.

2005, and continued to work for employer until he was injured on November 1, 2005.⁸ *Id.* at 3; *see* EXs 27, 28. The administrative law judge determined that claimant's average weekly wage was appropriately based on the wage rate he earned for employer, which was higher than the wages he previously earned in fish counting work; the administrative law judge therefore did not include claimant's fish counting wage rate in his average weekly wage determination. Interim Decision and Order at 7, 9. In considering the evidence regarding claimant's earnings with employer, the administrative law judge found that claimant earned a total of \$10,197.34, a figure which includes a year-end bonus of \$357.34. *Id.*; *see* CX 3; EXs 3, 4, 28 at 87. The administrative law judge next calculated claimant's average weekly wage during his actual period of employment with employer from August 15 through November 1, 2005 to be \$903.56 (\$10,197.34 divided by 11 7/9 weeks). Interim Decision and Order at 3. The administrative law judge further found that had claimant not been injured, he would have continued to work for employer through March 24, 2006, when employer ceased operations and laid off its employees. *Id.* at 6, 8-9. The administrative law judge found, however, that claimant had no reasonable expectation for continuous, steady future employment; in this regard, the administrative law judge rejected claimant's contention that, following the cessation of employer's operations, employer's principal, Ty Ross, would have employed claimant in one of his other businesses.⁹ *Id.* at 7-9. Accordingly, having found that claimant could have expected to remain employed by employer from August 15, 2005 through March 24, 2006, a period of 31 5/7 weeks, the administrative law judge determined that claimant's expected annual earnings would have been \$28,655.76 (\$903.56 x 31 5/7 weeks). *Id.* at 9. Dividing this number by 52 weeks, the administrative law judge found claimant's average weekly wage to be \$551.07. *Id.*

On appeal, claimant contends that had he not been injured, he would have been hired to work in one of Mr. Ross's other companies after employer ceased operations on March 24, 2006, and that the projected wages from that alternate work should have been included in the administrative law judge's average weekly determination. We reject claimant's contention of error. The administrative law judge thoroughly considered the evidence relevant to this issue and rationally found that claimant's employment with employer was expressly temporary in that he was hired to work on a limited duration project to refit a barge. Interim Decision and Order at 3-5, 7-9. Specifically, the administrative law judge fully addressed the hearing testimony of claimant, Mr. Ross and

⁸ According to the administrative law judge's calculation, claimant worked 11 7/9 weeks from his date of hire through his last day of work for employer. *See* Interim Decision and Order at 3. The parties do not specifically challenge this calculation on appeal.

⁹ The administrative law judge found that claimant did not establish that he had the opportunity to work year-round, whether with a single employer or a combination of employers. Interim Decision and Order at 9 n.7.

Kevin Evans regarding claimant's prospects for continued employment with one of Mr. Ross's other companies, and he reasonably determined, based on this testimony, that claimant had no reasonable expectation of future employment with one of these companies. *Id.* at 4-6, 8-9; *see* Tr. at 70-71, 102-03, 120-23, 127, 136, 142-44. The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). The competing characterization of the hearing testimony and other record evidence set forth in claimant's Petition for Review and brief does not provide a basis for overturning the administrative law judge's credibility determinations and evaluations of the evidence which are rational and supported by the record. *See, e.g., Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT). We therefore reject claimant's contention that the administrative law judge erred in declining to base his average weekly wage determination in part on projected wages claimant might have earned working for one or more of Mr. Ross's other companies. *Cf. Healy Tibbitts Builders, Inc.*, 444 F.3d at 1103, 40 BRBS at 18-19(CRT); *see also New Thoughts Finishing Co. v. Chilton*, 118 F. 3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997).

We also reject claimant's alternative argument that the administrative law judge erred by not basing his average weekly wage determination on claimant's actual earnings during the 52-week period prior to his November 1, 2005 injury, a period which encompassed both claimant's earnings with employer and his fish counting earnings with IAP World Services. Claimant has shown no error in the administrative law judge's determination that claimant did not show that he could have worked year-round by combining seasonal work, such as fish counting, with other work, such as ship repair or laboring work. *See* Interim Decision and Order at 9 n.7. We note in this regard that in determining annual earning capacity under Section 10(c) the actual wages earned by claimant in the 52 weeks prior to his injury are not controlling. *Palacios*, 633 F.2d at 843, 12 BRBS at 808; *Bonner*, 600 F. 2d at 1292. In view of the intermittent nature of claimant's employment for a number of years prior to his work injury, the administrative law judge reasonably determined that claimant's combined earnings from his fish counting work and his employment with employer during the 52-week period prior to his injury do not realistically reflect his true earning capacity at the time of the injury. *See Palacios*, 633 F.2d at 843, 12 BRBS at 808; *see also Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT); *Tri-State Terminals, Inc.*, 596 F.2d 752, 10 BRBS 700. As the administrative law judge's average weekly wage determination accounts for claimant's work history of intermittent employment, it reasonably approximates his annual earning capacity at the time of injury, and is supported by substantial evidence of record, it is affirmed. *See Rhine*, 596 F. 3d 1161, 44 BRBS 9(CRT); *Healy Tibbitts*, 444 F.3d 1095, 40 BRBS 13(CRT).

We also reject claimant's contention that the administrative law judge erred in failing to rule on the issue of employer's principals' individual liability under Section 38(a) for the payment of the attorney's fees awarded by the administrative law judge in his November 1, 2011 fee award.¹⁰ As correctly stated by the administrative law judge, claimant's appeal of the Board's affirmance of the administrative law judge's November 1, 2011 fee award is pending before the United States Court of Appeals for the Ninth Circuit. *See* Order Denying Reconsideration on Attorney's Fees at 1-2. A fee award is not final and enforceable until all appeals in a case are exhausted. *Christensen v. Stevedoring Services of America*, 430 F.3d 1032, 39 BRBS 79(CRT) (9th Cir. 2005); *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999). Employer was ordered to pay this attorney's fee to claimant. Until such time as it is demonstrated that employer is unable to pay an enforceable fee award, it is premature to address whether employer's principals are to be held liable for the attorney's fee.¹¹ Thus, the administrative law judge did not err in declining to rule on the issue of whether there is any individual liability for the awarded attorney's fee on the part of employer's principals, pursuant to Section 38(a), and we affirm the administrative law judge's denial of claimant's motion for reconsideration on this issue.

¹⁰ The Special Fund did not agree to pay claimant's attorney's fees. *See* 33 U.S.C. §§918(b), 944. Claimant correctly asserts that the fee payable will not be less than \$33,581.17, as his appeal to the Ninth Circuit seeks to increase the hourly rate.

¹¹ Thus, we need not address employer's motion requesting that the Board take administrative notice of the fact that Pacific Rim Environmental Resources, LLC, remains an active limited liability company in the State of Washington for the purpose of paying the awarded attorney's fee.

Accordingly, the administrative law judge's Interim Decision and Order on Remand, Decision and Order on Remand, and Order Denying Reconsideration on Attorney's Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge