U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 17-0069

QUINTIN J. COOLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COASTAL CARGO OF TEXAS, INCORPORATED	)	
	)	
	)	DATE ISSUED: Aug. 15, 2017
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Robert E. O'Dell, Vancleave, Mississippi, for claimant.

Alan G. Brackett, Patrick J. Babin and Caitlyn R. Byars (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration (2015-LHC-01214) 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 if they are rational, supported by substantial evidence, and 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 started working for employer in October 2011 as a foreman operator. On August 16, 2014, claimant was working in employer's Houston facilities. He was pulling pipe out of a cargo hold when the crane operator dropped the pipes and two pipes landed on claimant's right foot. Tr. at 19-20. Claimant was diagnosed with a crush injury of the right foot with fractures of the metatarsal bones.

Claimant testified his work for employer was not on a set schedule but that he worked when ships came into port; he did not have a guaranteed number of hours. Claimant stated that some weeks he worked twenty hours, while in others he worked eighty. Tr. at 29-30; *see* CX 6. Claimant confirmed that he did not work from November 12 to December 12, 2013 and from December 23, 2013 to January 10, 2014. Tr. at 37-38.

Brooke Newsome, the Human Resources Coordinator for employer, testified at the hearing, confirming claimant's daily wage records and that claimant was hired as a casual employee who was not guaranteed a set number of hours or days of work. Tr. at 48-49. She stated that claimant's work schedule depended on vessel flow, work flow at each location, and weather conditions. *Id.* at 53-54. She asserted that the gaps in claimant's employment history are not uncommon for casual employees. *Id.*

Erick Trotter, an operations manager at employer's New Orleans facility, also testified at the hearing. He testified that to the best of his knowledge, claimant was hired as a casual employee on an as-needed basis. Tr. at 61-62. Mr. Trotter confirmed that claimant did not know how many hours or days he would work in a given week. *Id.* at 64-67.

At the hearing, the parties stipulated that claimant has a three percent permanent disability to his right foot and that he reached maximum medical improvement on March 24, 2015. Decision and Order at 3. The parties also stipulated that employer paid claimant temporary total disability benefits from August 17 through November 14, 2014 and scheduled permanent partial disability benefits. *Id.* at 2. The issues remaining for decision included, inter alia, the calculation of claimant's average weekly wage.

The administrative law judge reviewed the evidence concerning claimant's work schedule and the number of days he worked. The administrative law judge found that calculating claimant's average weekly wage under Section 10(a), 33 U.S.C. §910(a), would distort claimant's average annual earning capacity, as the unpredictable nature of

claimant's work did not lend itself to concluding he was a five-day or six-day per week worker. Decision and Order at 12. The administrative law judge determined that Section 10(c), 33 U.S.C. §910(c), should be used to calculate claimant's average weekly wage due to his intermittent work schedule. *Id.* at 14. In calculating claimant's average weekly wage, the administrative law judge divided claimant's annual earnings of $27,902.56 in the 52-week period prior to his injury of August 16, 2014, by 52 weeks, for an average weekly wage of $536.59 and a weekly compensation rate of $357.73. *Id.* As employer had paid claimant all compensation due, the administrative law judge denied claimant's claim for additional compensation. *Id.* at 15.

Claimant filed a motion for reconsideration arguing, inter alia, that the use of Section 10(c) to calculate claimant's average weekly wage improperly focused on the nature of claimant's employment, rather than the nature of employer's enterprise. The administrative law judge found that claimant's motion raised essentially the same issues as he addressed in his initial decision and, accordingly, denied claimant's motion for reconsideration as far as the calculation of claimant's average weekly wage was concerned.[1]

On appeal, claimant challenges the administrative law judge's calculation of his average weekly wage. Employer filed a response brief, urging affirmance. Claimant filed a reply brief.

Claimant contends that the administrative law judge erred in failing to apply Section 10(a) to calculate his average weekly wage.[2] Claimant asserts that Section 10(a) is appropriate because he worked substantially the whole of the year prior to his injury. Claimant avers he worked in 48 of the 52 weeks before the injury and, on average, worked five days each week.

[1] The administrative law judge granted in part claimant's motion for reconsideration with respect to employer's liability for additional temporary total disability benefits through December 19, 2014. Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration at 5-6.

[2] Employer contends that claimant's appeal should be dismissed as claimant's petition for review was filed more than 30 days after the Board acknowledged the appeal. The regulation, 20 C.F.R. §802.211, states that a party should submit its petition for review "[w]ithin 30 days after the receipt of an acknowledgment of a notice of appeal." Claimant's counsel submitted his affidavit and an affidavit of his office manager stating that counsel's office received the Board's acknowledgment on December 5, 2016. Claimant's petition for review was mailed on January 3, 2017, and received by the Board on January 9, 2017. This document was timely, *see* 20 C.F.R. §802.221, and therefore, we deny employer's motion to dismiss.

Section 10(a) provides a specific formula for determining average annual wages based on the actual earnings of an injured worker where "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 preceding his injury." 33 U.S.C. §910(a). Application of Section 10(a) is premised on claimant's working substantially the whole of the year and being a five or six-day per week worker. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999) (affirming an administrative law judge's application of Section 10(c) where claimant could not establish that he was either a five-day or six-day per week worker). The administrative law judge reasoned that Section 10(a) cannot be reasonably applied in this case because claimant did not work substantially the whole of the year prior to his injury and was an intermittent employee, i.e., neither a five-day nor six-day per week worker.

The administrative law judge found that claimant worked 199 out of the 365 days before his injury, which amounts to less than 55 percent of the year and is not "substantially the whole of the year." This conclusion is based on an erroneous premise. The measure of whether a claimant worked substantially the whole of the year is not based on the total number of days in a calendar year but on the number of available days in a "work" year, i.e., 260 work days in a year for a five-day per week worker or 300 work days for a six-day per week worker. *See Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000) (noting that Section 10(a) aims at an approximation of what claimant would have earned had he worked every available work day in the year). Claimant, in working 199 days out of the theoretical 260 available work days, worked approximately 75 percent of the previous year for a five-day per week worker or approximately 66 percent of the 300 work days for a six-day per week worker. *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004) (work in 91 percent of available workdays is "substantially the whole of the year;" court does not adopt Ninth Circuit's presumption that Section 10(a) applies when the claimant works 75 percent or more of available work days).

We conclude, however, that the administrative law judge's error in this regard is harmless because the administrative law judge rationally concluded that the evidence does not support a finding that claimant was regularly either a five-day or six-day per week worker and that use of Section 10(a) would distort claimant's annual earning capacity. There is a presumption that Section 10(a) or 10(b) applies rather than 10(c) and only if these provisions "cannot reasonably and fairly be applied" is Section 10(c)

applicable.[3] *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). Section 10(a) cannot reasonably and fairly be applied when employment is seasonal, part-time, intermittent, or discontinuous. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

The administrative law judge determined that the record supports a finding that claimant's work schedule was irregular, discontinuous, and unpredictable. The administrative law judge emphasized that claimant testified he did not work a set schedule and that there were weeks when he had no work, which is supported by claimant's wage records showing gaps in claimant's employment, as well as the testimonies of Ms. Newsome and Mr. Trotter confirming the irregular nature of claimant's work. Indeed, claimant's own recitation of the number of days worked per week ranges from zero to seven.[4] CX 17. The administrative law judge also found that a calculation under Section 10(a) would result in an annual earning capacity higher than claimant could earn as a casual employee. The administrative law judge found that classifying claimant as a five-day worker under Section 10(a)'s formula would result in annual earnings of approximately $35,000, which is about 30 percent greater than claimant actually earned. Accordingly, he concluded that Section 10(c) was appropriate. *See generally Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *but see Gulf Best Electric*, 396 F.3d 601, 38 BRBS 99(CRT) (administrative law judge applied Section 10(c) because of a concern about possible "overcompensation;" the court affirmed the Board's decision to reverse and apply Section 10(a) because the claimant worked 91 percent of available workdays). Substantial evidence of record supports the administrative law judge's conclusion that Section 10(a) cannot be fairly or reasonably applied because claimant's employment was unpredictable and inconsistent in the sense that he was not regularly a five-day or six-day per week worker. Therefore, we affirm the administrative law judge's decision to apply Section 10(c) to calculate claimant's average weekly wage. *See Gilliam v. Addison Crane Company*, 21 BRBS 91 (1987).

[3] The administrative law judge stated the record contains no evidence of wage records for similar employees and therefore Section 10(b) cannot be applied. *See* Decision and Order at 13.

[4] We reject claimant's contention that the administrative law judge was required to find claimant was a five-day per week worker on the basis that he had 12 five-day work weeks. Cl. Brief at 8; CX 17. The wage records indicate there were 36 weeks in which claimant worked more or fewer than five days per week. *Id.*

Claimant next assigns error to the administrative law judge's method of calculating claimant's average weekly wage under Section 10(c). "[T]he prime objective of section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of the injury." *Empire United Stevedores*, 936 F.2d at 823, 25 BRBS at 29(CRT). It is well established that an administrative law judge has broad discretion in determining average annual earnings under Section 10(c). *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

The administrative law judge calculated claimant's average weekly wage by taking the "wages [c]laimant made in the 52-week period prior to his injury of August 16, 2014 . . . which amounts to $27,902.56, divided by 52 weeks, for an average weekly wage of $536.59 and a weekly compensation rate of $357.73." Decision and Order at 14. Claimant contends the administrative law judge erroneously divided his gross annual earnings by 52 as opposed to 48, the number of weeks in which claimant earned wages in the year prior to his injury. We disagree.

Section 10(d)(1), 33 U.S.C. §910(d)(1), states that an employee's average annual earnings should be divided by 52 to find his average weekly wage, which the administrative law judge did here. Because the aim of Section 10(c) is to arrive at an *annual* earning capacity, the administrative law judge's calculation is reasonable. *See Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified in part on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000). There is no evidence that the weeks in which claimant did not work were due to circumstances which reduced his ability to earn wages. *See Gallagher*, 219 F.3d at 426, 34 BRBS at 35(CRT) (affirming an administrative law judge's calculation of the claimant's average weekly wage by dividing the claimant's annual earnings by 48 to reflect four weeks of time lost due to a previous injury). The administrative law judge's calculation of claimant's average weekly wage reasonably approximates his annual earning capacity at the time of injury. As the calculation is rational, supported by substantial evidence, and in accordance with the law, it is affirmed. *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Gilliam*, 21 BRBS 91.

Accordingly, the administrative law judge's the Decision and Order and the Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge