

BRB No. 98-512

JOSE MALDONADO	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: _____
	)	
v.	)	
	)	
TRANSCONTINENTAL TERMINALS, INCORPORATED	)	
	)	
and	)	
	)	
HOUSTON GENERAL INSURANCE COMPANY	)	
	)	
Employer/Carrier- Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Decision on Claimant's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Harry C. Arthur, Houston, Texas, for claimant.

John R. Walker (Brown, Sims, Wise & White, P.C.), Houston, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order and Decision on Claimant's Motion for Reconsideration (95-LHC-1025) of Administrative Law Judge C. Richard Avery 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 laborer, slipped and fell on March 9, 1993, after two and one-half days on the job, while moving 100 pound sacks of flour from pallets onto a conveyor belt which led to a ship. He injured his lower back, stomach, and knee in the fall. The administrative law judge found that claimant was a borrowed employee of Transcontinental Terminals and therefore that Transcontinental Terminals is responsible for the workers’ compensation benefits and medical benefits due claimant. The administrative law judge found that claimant’s injuries are work-related, that claimant reached maximum medical improvement by January 23, 1994, that employer established suitable alternate employment as of October 1, 1994, and that claimant’s post-injury wage-earning capacity is \$6.50 per hour based on claimant’s earnings in the suitable alternate employment. Purportedly using Section 10(b), 33 U.S.C. §910(b), the administrative law judge calculated claimant’s average weekly wage as \$177.19 based on the 1992 earnings of Eugenio Cavazos, a similarly situated employee. Consequently, the administrative law judge awarded claimant temporary total disability benefits from March 9, 1993, through January 27, 1994, and permanent total disability benefits from January 28, 1994, through October 1, 1994, based on an average weekly wage of \$177.19. The administrative law judge also awarded medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, and interest. The administrative law judge denied claimant’s motion that he reconsider the average weekly wage determination.

On appeal, claimant challenges the administrative law judge’s calculation of his average weekly wage. Employer responds in support of the administrative law judge’s calculation, but asserts that the administrative law judge should have applied Section 10(c), 33 U.S.C. §910(c), instead of Section 10(b), and alleges that Mr. Cavazos is not an employee similarly situated to claimant.

Claimant contends that the administrative law judge erred in calculating his average weekly wage based on the 1992 W-2 Forms of a similarly situated employee, Mr. Cavazos, as this period did not include the entire 52-week period prior to claimant’s injury on March 9, 1993. Claimant’s average weekly wage is determined at the time of injury by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. §910. See 33 U.S.C. §910(a)-(c). Section 10(a), which is inapplicable here, applies when claimant has worked in the same or comparable employment for substantially the whole of the year immediately preceding the injury and provides a specific formula for calculating annual earnings. Where claimant’s employment is regular and continuous, but he has not been employed in that

employment for substantially the whole of the year, the wages of similarly situated employees who have worked substantially the whole of the year may be used to calculate average weekly wage pursuant to Section 10(b). Section 10(c) provides a general method for determining annual earning capacity where Section 10(a) or (b) cannot fairly or reasonably be applied to calculate claimant's average weekly wage at the time of injury. *Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1991).

In determining claimant's average weekly wage in the instant case, the administrative law judge purported to apply Section 10(b) based on Mr. Cavazos' 1992 earnings after finding that Mr. Cavazos was a similarly situated employee and that his wage records are a sufficient substitute for what claimant would have earned had he worked the entire year. Decision and Order at 27-28 The administrative law judge relied on Mr. Cavazos' s 1992 W-2 records which indicated that he earned \$9,213.63 in the 1992 calendar year, divided by 52 weeks. The administrative law judge thus found that claimant had an average weekly wage of \$177.19 based on Mr. Cavazos' s 1992 earnings.

Initially, we affirm the administrative law judge's finding that Mr. Cavazos is an employee similarly situated to claimant. See 33 U.S.C. §910(b), (c). Based on Mr. Cavazos' testimony that his work was similar to that of claimant's work in that like claimant he lifted sacks onto and off of pallets at employer's warehouse, and Mr. Cobb's testimony that the employees were all part of a labor pool, the administrative law judge rationally found that Mr. Cavazos is a similarly situated employee. Decision and Order at 12, 27-28; Cl. Ex. 19 at 12; Cl. Ex. 21 at 10-11; Emp. Ex. 9 at 12. The administrative law judge rationally rejected employer's argument that Mr. Cavazos is not a similarly situated employee based on differences in the two employees' work history, stevedoring experience, and residency status as employer did not evaluate, classify and hire its employees based on experience and skill but rather treated its employees as part of a pool of labor. See generally *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); Decision and Order at 27-28; Emp. Br. at 9-11.

Moreover, we affirm the administrative law judge's calculation of claimant's average weekly wage, although we do so under Section 10(c), instead of Section 10(b), since the administrative law judge's calculation does not actually apply to Section 10(b) as he simply divided Mr. Cavazos's earnings by 52.<sup>1</sup> The

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<sup>1</sup>Section 10(b) requires that the administrative law judge determine claimant's average weekly wage under a specific method of calculation, which is to divide the actual earnings of the appropriate employee for the year preceding the injury by the

administrative law judge acted within his discretion in calculating claimant's average weekly wage based on the earnings of the similarly situated employee in the prior calendar year, 1992, based on the federal tax information of record.<sup>2</sup> See *Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987); Decision and Order at 28; Cl. Exs. 18, 21 at 10. Under Section 10(c), the administrative law judge is not required to employ a specific method of calculation and has broad discretion in calculating claimant's average weekly wage based on a variety of factors, including the earnings of co-workers. See 33 U.S.C. §910(c); *Gatlin*, 936 F.2d at 819, 25 BRBS at 26 (CRT); *Harrison*, 21 BRBS at 339. In denying claimant's motion for reconsideration, in which claimant alleged the administrative law judge should have calculated his average weekly wage with reference to Mr. Cavazos' earnings in the 52 weeks immediately prior to claimant's injury,<sup>3</sup> the administrative law judge agreed with employer's contention that even the \$177.19 figure he utilized exceeds claimant's prior earning history.<sup>4</sup> See Decision on Claimant's Motion for Reconsideration at 1. This factor is relevant to a calculation under Section 10(c),

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actual number of days he worked during that period. This average daily rate is then multiplied by 260 for a five-day employee, or by 300 for a six-day employee, and the product is divided by 52. See *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978); see also *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158, 160 n. 3 (1986). In the instant case, the administrative law judge merely divided Mr. Cavazos' 1992 earnings by 52. Moreover, there is no evidence of the number of days Mr. Cavazos worked in the 1992 calendar year. Thus, Section 10(b) is inapplicable, and Section 10(c) must be used to calculate claimant's average weekly wage. See *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981).

<sup>2</sup>Contrary to claimant's contention, the administrative law judge was not required to use the earnings of Mr. Cavazos in the 52 weeks immediately preceding claimant's injury, as Section 10(b) merely refers to the wages earned in the "immediately preceding year," and Section 10(c) seeks earnings which reasonably represent annual earning capacity. 33 U.S.C. §910(b), (c). It thus was within the administrative law judge's discretion to use the wages Mr. Cavazos earned in the immediately preceding calendar year to calculate claimant's average weekly wage.

<sup>3</sup>This calculation results in an average weekly wage of \$307.45.

<sup>4</sup>Previously, claimant was a migrant farm worker. Using claimant's prior earning history, claimant's average weekly wage for 1992 (the previous year's earnings) is approximately \$79, for 1990 (the year in which he earned the most from 1990-1992) is approximately \$124, and from 1990-1992 is approximately \$67. See Emp. Ex. 2; Emp. Br. at 9.

*see generally Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated in part on other grounds*, 462 U.S. 1101 (1983); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985), and thus the administrative law judge was not required to accept claimant's calculation of his average weekly wage based on Mr. Cavazos' earnings from March 9, 1992 to March 9, 1993. We therefore affirm the administrative law judge's calculation of claimant's average weekly wage in the amount of \$177.19 as it is rational and supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order and Decision on Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge