BRB No. 00-1056

DENA E. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CISCO CORPORATION	)	DATE ISSUED: July 16, 2001
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE CORPORATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Dena E. Smith, Live Oak, Florida, *pro se.*

John C. Taylor, Jr., and Lana G. Eicher (Taylor, Day & Currie), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (1996-LHC-1918) of Administrative Law Judge Mollie W. Neal 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a welder, was injured on June 6, 1990, in a work-related accident, when she slipped and fell on grease. In her decision, the administrative law judge awarded claimant temporary total disability benefits from June 7, 1990 through July 8, 1993, and continuing permanent total disability benefits commencing July 9, 1993, based on an average weekly wage of $746.80. The

administrative law judge calculated claimant's average weekly wage by dividing her earnings in the year prior to her injury, $18,670, by 25, as she earned this sum in 25 weeks of work.

On appeal, employer contends the administrative law judge erred in calculating claimant's average weekly wage. Specifically, employer contends that the administrative law judge erred in dividing claimant's earnings by 25 weeks instead of by 52 weeks; employer avers that $18,670 represents claimant's annual earning capacity and therefore that this sum should be divided by 52 weeks. Claimant, who is not represented by counsel, has not responded to this appeal.

Section 10 of the Act, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a),(b), are the statutory provisions relevant to a determination of an employee's average weekly wage where the injured employee's work is regular and continuous, and she is a five or six day per week worker. The computation of average annual earnings must be made pursuant to Section 10(c) if subsection (a) or (b) cannot be reasonably and fairly applied. 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 her injury. *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

In the instant case, it is uncontested that the administrative law judge's use of Section 10(c) to calculate claimant's average weekly wage is appropriate, as claimant's work in the year prior to her injury was intermittent and irregular. Rather, employer contends that the administrative law judge law judge erred in determining that claimant's average weekly wage should be based upon a divisor of 25, the number of weeks claimant actually worked pre-injury, instead of 52. Employer contends that claimant voluntarily limited herself to intermittent "shut-down" work, and that claimant's actual earnings for 25 weeks of work represent her annual earning capacity at the time of injury.

In the instant case, the administrative law judge recognized at the outset that the question of whether claimant's actual earnings should be divided by 52 or 25 weeks turns on whether she voluntarily limited herself to "shut down" jobs that do not provide steady and consistent employment. Decision and Order at 18. The judge found that the "shut-down" work claimant preferred resulted in intermittent employment. *Id.* at 19. However, the administrative law judge did not answer the question as to whether this intermittent employment was the result of the type of work available to her or of her own self-limitation. As employer suggests on appeal, claimant is free to limit her work to suit her lifestyle, but employer is not required to compensate her as if she were a full-time worker if indeed she voluntarily limited her employment. *See Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987). The Board has held that if a claimant voluntarily curtails her earnings, her actual earnings should be used to calculate average weekly wage under Section 10(c), rather than the theoretical earnings claimant could have earned. *See Conatser v. Pittsburgh Testing*

Laboratory, 9 BRBS 541 (1978). The administrative law judge's calculation of average weekly wage, although based on claimant's actual earnings, assumes that claimant was willing to work and could have earned $746.80 in every week of the year preceding her injury, and this assumption is not supported by substantial evidence. Thus, we must vacate the administrative law judge's average weekly wage calculation and remand this case for further consideration.

On remand, there is evidence of record to be addressed which the administrative law judge did not previously discuss at length or to which she did not assign weight. In addition to claimant's testimony, her brother testified that claimant was an excellent welder who, in the year prior to her injury, was capable of performing any job she wanted to do. Tr. at 39, 41. He stated that he knew of no reason why claimant did not work full-time, other than that one might want to take two months off. *Id.* at 42. The evidence concerning claimant's ability to work the entire year before the injury also is relevant to the inquiry concerning claimant's annual earning capacity. Claimant was in an automobile accident in November 1988, and was unable to work for a while. Claimant testified both that she was available to work in the entire one-year period prior to her June 1990 injuries, *id.* at 62, and that she did not return to work until August 1989 following her accident. *Id.* at 60. The administrative law judge stated that while the exact date was not forthcoming, there was testimony that in recent years prior to claimant's injury she had worked full-time as a welder suggesting that claimant would engage in full-time employment, if available. Decision and Order at 19, *citing* Tr. at 57-62. On remand, the administrative law judge should reconsider the evidence bearing on claimant's work history and job availability, and calculate an average weekly wage under Section 10(c) that approximates claimant's *annual* earning capacity.[1] *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

[1]We note that Section 10(d)(1) of the Act states that, "The average weekly wages of an employee shall be one fifty-second part of his average annual earnings." 33 U.S.C. §910(d). In *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000), the Fifth Circuit affirmed an average weekly wage calculation under Section 10(c) arrived at by using claimant's actual wages divided by 48 weeks, as claimant was off for four weeks because of an unrelated in jury. The court noted that this divisor is in technical violation of Section 10(d), but stated that the same result obtains as if the administrative law judge had added four weeks' salary to the wages earned and divided by 52. Thus, under Section 10(c) claimant's actual earnings can be divided by 25 if the resulting weekly amount, when extrapolated over a full year, results in a fair representation of claimant's annual earning capacity.

Accordingly, the administrative law judge's average weekly wage calculation is vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order-Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge