U.S. Department of Labor

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

BRB No. 14-0307

CROSBY FORBES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORFOLK SOUTHERN RAILWAY COMPANY c/o NORFOLK SOUTHERN CORPORATION	)	DATE ISSUED: Apr. 16, 2015
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein Camden LLP), Norfolk, Virginia, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order (2013-LHC-01008) of Administrative Law Judge Kenneth A. Krantz 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, who has been employed as a longshoreman for 18 years,[1] injured his right shoulder and arm in the course of his employment with employer on September 13, 2011. Employer voluntarily paid claimant temporary total disability benefits from

[1] Claimant is also referred to as a shortshoreman and a freight handler.

September 22, 2011 to February 7, 2013, and permanent partial disability benefits for a period of 34.32 weeks. 33 U.S.C. §908(b), (c). Claimant returned to his usual work as a longshoreman on February 8, 2013. The sole issue in dispute is the calculation of claimant's average weekly wage. In his Decision and Order, the administrative law judge utilized Section 10(c) of the Act, 33 U.S.C. §910(c), to determine that claimant's average weekly wage at the time of his injury was $706.47.

On appeal, claimant challenges the administrative law judge's average weekly wage determination under Section 10(c) of the Act, 33 U.S.C. §910(c). Employer has not responded to claimant's appeal.

The parties in this case stipulated that claimant's gross wages, not including unemployment benefits, in the 52-week period preceding claimant's September 13, 2011 work injury were $36,736.67. *See* Decision and Order at 2, 7; JX 1; Brief in Support of Claimant's Petition for Review at 2-3, 7-8. It is uncontested that, as an E-card holder[2] with his local union, claimant's seniority was relatively low and that jobs were assigned on the basis of seniority and qualifications to do a particular job. *See* Decision and Order at 3; Tr. at 18, 30-31, 35. Claimant testified that, although he reported to the union hall each morning, frequently there was no work available to him because of his low seniority. *See* Decision and Order at 3; Tr. at 18-19, 22-23, 27, 32, 34-35; *see also* EX 7. Claimant further testified that he has been unable to obtain regular work during the entire 18-year period that he has been a longshoreman, that he obtains work as frequently as the other E-card holders in his local union, and that he and the other longshoremen in his local union, who primarily handle break bulk cargo, do not work as frequently as the longshoremen in other locals who handle containerized cargo. *See* Tr. at 23-25, 27-28, 31-35. Claimant also testified that the amount of work available to him depended on the time of year and that the work typically started to slow down in October. *See* Tr. at 28; s*ee also* EX 7. Claimant testified that if he was unable to obtain work for five consecutive days, he was eligible to receive unemployment benefits from the Railroad Retirement Board, and that he received $5,610 in unemployment benefits in 2011. *See* Decision and Order at 3-5; Tr. at 19-22, 28-29, 36; CX 6; EX 3 at 11-12.

In determining claimant's average weekly wage pursuant to Section 10(c), the administrative law judge divided claimant's actual earnings from the year immediately preceding claimant's September 13, 2011 injury, $36,736.67, by 52 weeks, to arrive at an

[2] Employees in claimant's union were given designations (e.g., A-card, B-card, C-card, and so on) that enabled them to secure employment based on their seniority. A-card holders, for example, had the highest seniority and were given priority for job openings on a given day. Tr. at 17-18, 30. E-card holders, like claimant, were fifth in line for seniority. *Id*.

average weekly wage of $706.47.[3] *See* Decision and Order at 7. In challenging the administrative law judge's average weekly wage calculation, claimant first avers that the administrative law judge should have utilized Section 10(a) of the Act, 33 U.S.C. §910(a), rather than Section 10(c), to calculate his average weekly wage. We reject this contention. As correctly found by the administrative law judge, Section 10(a) cannot be utilized in this case as claimant's work schedule was variable depending on the availability of work and, thus, claimant was neither a five- nor a six-day worker, as required for application of Section 10(a). *See* Decision and Order at 6; EX 7; Tr. at 18-19, 22-28, 35-36; *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987). Consequently, the administrative law judge properly determined that Section 10(c)[4] is the appropriate provision for calculating average weekly wage where, as here, the nature of claimant's

[3] Claimant concedes that the administrative law judge properly determined that the unemployment benefits claimant received from the Railroad Retirement Board during the 52 weeks preceding his work injury are not considered wages within the meaning of the Act and, thus, are not earnings that can be included in the calculation of claimant's average weekly wage. *See* Brief in Support of Claimant's Petition for Review at 2, 6, 8; Decision and Order at 5; 33 U.S.C. §902(13); *Strand v. Hansen Seaway Service, Ltd.*, 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980); *Blakney v. Delaware Operating Co.*, 25 BRBS 273 (1992).

[4] Section 10(c) provides:

> If either of the foregoing methods [subsections (a) and (b)] 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 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). Claimant does not contend that Section 10(b) applies in this case. Thus, our analysis is limited to the applicability of Sections 10(a) and (c).

employment is inherently discontinuous or intermittent.[5] *See Hall v. Consolidated Employment Systems*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997); *Strand v. Hansen Seaway Service, Ltd.*, 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980); *Gilliam*, 21 BRBS 91; *see also O'Hearne v. Maryland Casualty Co.*, 177 F.2d 979 (4th Cir. 1949).

Claimant next assigns error to the administrative law judge's method of calculating claimant's average weekly wage under Section 10(c). The object of Section 10(c) is to arrive at a 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); *Story v. Navy Exch. Serv. Center*, 33 BRBS 111 (1999). 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 pert. part*, 600 F.2d 1288 (9th Cir. 1979). A determination of annual earning capacity under Section 10(c) entails consideration of the employee's "ability, willingness and opportunity to work." *Palacios v. Campbell Industries*, 633 F.2d 840, 843, 12 BRBS 806, 808 (9th Cir. 1980) (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); *New Thoughts Finishing Co.*, 118 F.3d 1028, 31 BRBS 51(CRT).

The administrative law judge divided by 52 claimant's stipulated earnings of $36,736.67 in the year preceding his injury to arrive at an average weekly wage of $706.47. *See* Decision and Order at 6-7. Claimant contends that the administrative law judge erred in using 52 weeks as a divisor, and instead should have subtracted from the 52-week period the 85 days for which claimant received unemployment benefits. We disagree. As correctly found by the administrative law judge, the cases cited by claimant do not support his position in this regard. *See* Decision and Order at 6-7. The decisions in *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), and *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000), stand for the proposition that, when calculating annual earnings, an administrative law judge may properly account for time lost due to an unrelated injury, a strike, or other non-

[5] Claimant's uncontroverted hearing testimony reflects that the availability of work was the same for all members of his local union with his level of seniority and, thus, establishes the intermittent and discontinuous nature of the employment and the industry itself, not merely claimant's individual work history. *See* Tr. at 28, 30-31, 33, 35; *Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005); *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980); *O'Hearne v. Maryland Casualty Co.*, 177 F.2d 979 (4th Cir. 1949).

recurring events, where subtracting the period of lost work facilitates "the goal of making a fair and accurate assessment of the amount that [claimant] would have the potential and opportunity of earning absent the injury." *Gallagher*, 219 F.3d at 434, 34 BRBS at 40(CRT) (internal quotations and citation omitted). The administrative law judge noted that, in *Gallagher*, the claimant's lost time due to an unrelated injury was an anomaly in his work history that distorted the claimant's annual income for the year and, thus, his earnings during that year did not reasonably represent his earning capacity at the time of injury. *See* Decision and Order at 6. The administrative law judge distinguished *Gallagher* from the present case, as claimant did not establish that the number of days for which he received unemployment compensation in the year preceding his injury was not representative of the intermittent nature of his 18-year work history. *See id*. To the contrary, the record in this case is devoid of any evidence that, at the time of his injury, claimant would have had the opportunity for continuous employment. *Id*.; *see New Thoughts Finishing Co.*, 118 F.3d at 1031, 31 BRBS at 53(CRT). Under these circumstances, the administrative law judge rationally determined that to subtract the days for which claimant received unemployment benefits would result in an inaccurate assessment of claimant's true earning capacity at the time of his injury. *See* Decision and Order at 6-7. The administrative law judge's calculation of claimant's average weekly wage under Section 10(c) accounts for the intermittent nature of claimant's employment and 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 Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *Gilliam*, 21 BRBS 91.

Accordingly, the administrative law judge's Decision and Order is 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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GREG J. BUZZARD
Administrative Appeals Judge