

BRB No. 99-0494

DONNA ELIASON)
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 Claimant-Respondent)
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 v.)
)
 NICHOLS BROTHER BOAT BUILDERS) DATE ISSUED:
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 and)
)
 INDUSTRIAL INDEMNITY COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Samuel J. Smith,
Administrative Law Judge, United States Department of Labor.

David B. Condon (Welch & Condon), Tacoma, Washington, for claimant.

Robert J. Burkner, Jr. (Metz & Associate, P.S.), Seattle, Washington, for
employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (98-LHC-523) of
Administrative Law Judge Samuel J. Smith 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359
(1965); 33 U.S.C. §921(b)(3).

Claimant was injured on May 16, 1996, when she was twisting to weld an angle iron from the vertical to the overhead. She felt pain in her neck, all the way down to her shoulder and arm. She was seen immediately at the emergency room by Dr. Martin, who diagnosed acute cervical strain with radiculopathy. Claimant did not return to her former employment, and she sought benefits under the Act.

The administrative law judge found that claimant is entitled to permanent partial disability benefits. In addition, the administrative law judge found that pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), claimant had an average weekly wage of \$421.73. The administrative law judge rejected employer's contention that claimant's average weekly wage should be \$81.10, which is derived by dividing the amount claimant earned from employer in the year preceding her injury, \$4,217.27, by fifty-two weeks. He concluded that while claimant only worked for employer for a short period of time prior to her accident, that average weekly wage would not adequately compensate claimant for her wage-earning capacity at that time.

On appeal, employer contends that the administrative law judge erred in his determination of claimant's average weekly wage. Claimant responds, urging affirmance of the administrative law judge's decision.

Specifically, on appeal employer contends that the administrative law judge based his determination of claimant's average weekly wage on the erroneous assumption that claimant would have had the opportunity to work an entire year, which is contrary to the evidence. The Act provides three methods of computing claimant's average weekly wage. 33 U.S.C. §910(a), (b), (c). Employer does not contest the administrative law judge's application of Section 10(c) to determine claimant's average annual earnings in the instant case. Under Section 10(c), the administrative law judge must determine the sum that reasonably represents claimant's annual earning capacity, and it is well-established that an administrative law judge has broad discretion in doing so. *See, e.g., Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in part, part, 600 F.2d 1288* (9th Cir. 1979). Accordingly, the Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable determination of claimant's earning capacity at the time of the injury. *See Fox v. West State Inc.*, 31 BRBS 118 (1997).

Employer contends that claimant's work history does not support a finding that she would have been able to work an entire year, and therefore her actual wages should have been divided by fifty-two weeks, rather than by the ten weeks she actually worked for employer prior to her injury. The administrative law judge acknowledged claimant's prior history of intermittent employment with employer from 1990 to 1996, but noted that claimant had held other positions with other employers during this period of time. *See Decision and*

Order at 5, 35. He concluded that while claimant had only worked for employer for a short period of time prior to her accident, an average weekly wage based only on her earnings for 10 weeks spread over an entire year would not adequately compensate claimant for her wage-earning capacity at the time of injury.¹ We reject employer's contentions. The administrative law judge's calculation of claimant's average weekly earnings by dividing her total earnings with employer by the ten weeks she worked is reasonable, supported by substantial evidence, and consistent with the goal of arriving at a sum which reasonably represents claimant's earning capacity at the time of injury.² We therefore affirm his determination that claimant's average weekly wage is \$421.73.³ See Fox, 31 BRBS at 125.

¹Claimant notes that the fact she was not laid off by employer until January 1997 indicates that she would have had the opportunity to work for most of the year had she not been injured.

²We reject employer's contention that this case is governed by the holding in *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997). The United States Court of Appeals for the Fifth Circuit held in that case that if the administrative law judge looks beyond the one year immediately preceding the injury, he must take into account the earnings of all the years within the period. However, the court did not mandate that the administrative law judge consider any year other than the year immediately preceding the injury.

³The goal of Section 10(c) is to determine claimant's annual earning capacity, which is then divided by 52 weeks under Section 10(d)(1). Where an administrative

law judge uses a limited number of weeks, he may extrapolate a weekly figure based on actual earnings and days worked over an entire year by multiplying by 52. The resulting annual figure is divided by 52. In the present case, these additional steps would result in the same average weekly wage figure.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge