BRB No. 99-0534

ANTHONY CHIARULLI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRANS OCEAN MARITIME SERVICES	)	DATE ISSUED:
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits and Decision and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

John K. McDonald (Cozen and O'Connor), Philadelphia, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits and Decision and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration (97-LHC-01671) of Administrative Law Judge Ainsworth H. Brown 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 casual slingman, was injured at work on October 25, 1995. Employer voluntarily paid claimant temporary total disability benefits from October 26, 1995, to February 7, 1997, based upon an average weekly wage of $278.36. Initially, the administrative law judge awarded claimant temporary total disability from October 25, 1995, until September 6, 1996, and permanent total disability from September 7, 1996, until January 29, 1997, based on an average weekly wage of $191.49 calculated pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c). The administrative law judge found that claimant's disability became partial as of January 29, 1997, but that claimant is not entitled to permanent partial disability benefits as his post-injury wage-earning capacity exceeds his pre-injury average weekly wage. Consequently, the administrative law judge denied benefits. On reconsideration, the administrative law judge found that claimant was permanently totally disabled until July 1, 1997, instead of January 29, 1997. The administrative law judge declined to readdress his average weekly wage determination or to entertain claimant's request for a nominal award and ongoing medical benefits.

On appeal, claimant challenges the administrative law judge's calculation of his average weekly wage as $191.49 under Section 10(c). Employer responds in support of the administrative law judge's calculation of claimant's average weekly wage.

Claimant argues that the administrative law judge erred in calculating his average weekly wage under Section 10(c) by taking into account only claimant's longshore earnings in the 36 weeks preceding his injury, rather than his earnings in the 52 weeks prior to injury. Claimant also argues that the administrative law judge erred by not taking into account his earnings in other employment at a lumber company in 1991 and as a cement mason in 1995. In determining average annual earnings under Section 10(c), regard must be given to (1) the previous earnings of claimant in the job at which he was injured, (2) the previous earnings of similar employees, or (3) other employment of claimant. 33 U.S.C. §910(c);[1] *Palacios v. Campbell Industries*, 633 F.3d 840, 12 BRBS 806 (9th Cir. 1980). The objective of Section 10(c) is to reach a fair and reasonable approximation of claimant's earning capacity at the time of injury. *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 276, 32 BRBS 91 (CRT)(5th Cir. 1998); *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51 (CRT)(5th Cir. 1997); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991).

[1]The administrative law judge found it appropriate to use Section 10(c) to calculate claimant's average weekly wage as his work with employer was seasonal and as he performed non-longshoring work as well. This finding is not challenged on appeal. *See generally Mattera v. M/V Antoinette, Pacific King, Inc.,* 20 BRBS 43 (1987).

With regard to claimant's earnings in his usual employment as a casual longshoreman, the administrative law judge calculated claimant's average weekly wage by dividing claimant's net pay of $9,957.70 by 52 weeks even though the earnings encompassed only a 36-week period from January 1, 1995, to October 29, 1995, because, as he stated, these earnings when divided by 36 ($276.60) indicated claimant's "average paycheck, when he received one, and not his average weekly wage, ..." Decision and Order at 19; Emp. Ex. 11. As claimant correctly contends, however, the administrative law judge erred in calculating his average weekly wage by dividing his earnings during the first 36 weeks of 1995 by 52 because this determination accounted only for claimant's earnings during the 36 weeks preceding his injury. Under Section 10(c), the administrative law judge should determine claimant's average annual earnings by arriving at a figure approximating an entire year of work and then dividing this figure by 52. *See Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990); 33 U.S.C. §910(d). In this regard, the administrative law judge did not determine whether a full year's work was available to claimant such that claimant's actual average weekly salary could be extrapolated over a 52-week period. He also did not consider other evidence of record regarding claimant's wages with employer in the 52 weeks preceding the injury.[2] *See* Emp. Ex. 11. Consequently, we vacate the administrative law judge's calculation of claimant's average weekly wage, and remand this case for reconsideration of claimant's average weekly wage, taking into account claimant's earnings in the 52 weeks prior to injury, or an approximation thereof.

[2]In making its voluntary payments, employer calculated claimant's average weekly wage by taking the gross pay claimant earned for 36 weeks in 1995 ($11,798.50) and adding the amount claimant earned for employer in 1994 ($449.50) and dividing this sum by 44 weeks. *See* Emp. Ex. 11.

We reject claimant's remaining contentions. The administrative law judge rationally found that claimant's wages in 1991 for a lumber company were of limited probative value as they preceded the work injury by four years. *See generally Hall*, 139 F.3d at 276, 32 BRBS at 91 (CRT); *Chilton*, 118 F.3d at 1028, 31 BRBS at 51 (CRT); *Gatlin*, 936 F.2d at 819, 25 BRBS at 26 (CRT); Decision and Order at 18; Emp. Ex. 12. Moreover, the administrative law judge acted within his discretion in excluding the wages claimant earned as a concrete mason, as he found claimant's testimony lacked specificity and was inconsistent and as the testimony of Mr. Mohn, claimant's vocational expert, was general as to the annual earnings of a cement mason and not specific as to the actual earnings that claimant earned in this position.[3] *See generally Fox v. West State, Inc.*, 31 BRBS 118 (1997); *Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987); Decision and Order at 18-19; Emp. Ex. 40 at 23-24, 64-76, 92, 97-99; Tr. at 51, 89. Lastly, the administrative law judge was not required to find that claimant's average weekly wage is $600 because claimant was paid that amount for an unrelated 1991 work injury or because claimant's child support order entered post-injury allegedly is based on those earnings, as the administrative law judge stated the child support order was not admitted into the record. *See generally Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989); Decision and Order at 18; Emp. Ex. 12; Tr. at 53.

Accordingly, the administrative law judge's calculation of claimant's average weekly wage is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[3]Claimant testified that he earned from $400-$1000 per week and $500-$1000 per week as a cement mason. Tr. at 51, 89. Claimant could not present records of his earnings in the year prior to injury from his concrete work as he stated he was paid in cash and all work was done "under the table." Tr. at 87-88, 91. Furthermore, the administrative law judge accorded little weight to Mr. Mohn's testimony that claimant earned in the range of $30,000-$40,000 per year and $1,000 per week as a cement mason since Mr. Mohn stated that his opinion pertained to earnings of cement masons generally rather than to claimant specifically. Decision and Order at 19; Emp. Ex. 40 at 23-24, 64-76, 92, 97-99.

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge