

RONALD ARCENEUX)	
)	
Claimant-Respondent)	
)	
v.)	
)	
LOMBAS CONTRACTORS,)	DATE ISSUED:
INCORPORATED)	
)	
and)	
)	
LOUISIANA WORKERS')	
COMPENSATION CORPORATION)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Second Decision and Order on Remand of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Ford T. Hardy, Jr., New Orleans, Louisiana, for claimant.

David K. Johnson, Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Second Decision and Order on Remand (96-LHC-2581) of Administrative Law Judge James W. Kerr, Jr., 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 if they 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).

This case is before the Board for the second time. To briefly recapitulate, on March

12, 1994, claimant injured his back and neck in an explosion during his first day of employment with employer as a pipefitter. Prior to the injury, claimant was unable to work during all of 1993 and until March 9, 1994, due to malignant hypertension and congestive heart failure. On March 9, 1994, he returned to the workforce with another employer, J. R. Merit, where he was paid for 36 hours of work during the course of three days of employment.

In his initial Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on April 25, 1996, that claimant was totally disabled, and that \$450 represented claimant's average weekly wage at the time of his injury. Claimant thus was awarded temporary total disability compensation, 33 U.S.C. §908(b), from March 12, 1994, until April 25, 1996, and permanent total disability compensation, 33 U.S.C. §908(a), thereafter.

Employer appealed the award of benefits. The Board affirmed the administrative law judge's finding that claimant is totally disabled due to his work injuries. The Board vacated the administrative law judge's date of maximum medical improvement and average weekly wage findings. The Board instructed the administrative law judge on remand to make a specific determination, based upon the medical evidence of record, regarding the date claimant's condition became permanent. Moreover, the Board held there was no evidence of record that \$450 represents a reasonable estimate of claimant's wage-earning capacity at the time of injury. *Arceneaux v. Lombas Contractors, Inc.*, BRB No. 97-1731 (Sept. 3, 1998) (unpublished), *recon. denied*, March 25, 1999 (Order).

The administrative law judge issued his initial Decision and Order on Remand based on the existing evidence of record. The administrative law judge credited the medical report of claimant's treating physician and found that claimant's condition reached maximum medical improvement on April 7, 1997. The administrative law next recalculated claimant's average weekly wage as \$27.29, based on the record evidence of claimant's annual earnings for 1990 and 1992 divided by 104. EX 4. Claimant appealed the administrative law judge's average weekly wage determination to the Board. BRB No. 99-1035. Before the Board issued a decision on claimant's appeal, claimant requested modification of the administrative law judge's decision on remand pursuant to Section 22 of the Act, 33 U.S.C. §922. By Order issued August 19, 1999, the Board dismissed claimant's appeal, and remanded the case to the administrative law judge.

On modification, the administrative law judge admitted into the record additional evidence submitted by claimant, including claimant's social security earnings record, the Dictionary of Occupational Titles (D.O.T.) profile for pipefitters in the 1998-1999 Occupational Outlook Handbook issued by the Bureau of Labor Statistics, United States Department of Labor (DOL), CBX 2, and the DOL's 1996 and 1997 occupational wage

estimates for the New Orleans metropolitan area.¹ CBX 6, 7. In his Second Decision and Order on Remand, the administrative law judge determined that claimant had an average weekly wage of \$450 at the date of injury. The administrative law judge found that claimant's employment as a pipefitter at the time of injury would have been regular and continuous based on the newly submitted evidence of record, and he credited the parties' stipulation that claimant's hourly wage at the date of injury was \$11.25. The administrative law judge multiplied claimant's hourly wage of \$11.25 times 40 hours to derive an average weekly wage of \$450.

On appeal, employer challenges the administrative law judge's average weekly wage determination. Claimant responds, urging affirmance.

Employer contends that the administrative law judge's average weekly wage determination is not supported by substantial evidence or in accordance with law given: (1) the absence of any evidence showing a change of claimant's personal circumstances at the date of injury; (2) the absence of evidence specific to claimant's wage-earning capacity at the date of injury; (3) claimant's inability to work during the 14 months prior to the date of injury; (4) claimant's testimony that his work as a pipefitter in 1992 was intermittent; and (5) claimant's earnings history during the five years preceding the date of injury. We reject employer's contentions and affirm the administrative law judge's average weekly wage calculation.

The object of Section 10(c) of the Act, 33 U.S.C. §910(c), is to arrive at a sum that reasonably represents claimant's annual earning capacity at the time of his injury.² *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Fox v. West State Inc.*, 31 BRBS 118 (1997). It is well-established that the administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c); the Board will affirm an administrative law judge's determination of claimant's average

¹Specifically, claimant submitted into evidence the COMP2000 Pilot Survey, New Orleans, Louisiana, Metropolitan Statistical Area, August-September 1996, and the 1997 Metropolitan Area Occupational Employment and Wage Estimates, New Orleans, Louisiana.

²The administrative law judge's use of Section 10(c) as the applicable subsection for calculating claimant's average weekly wage is not challenged on appeal.

weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999); *Fox*, 31 BRBS at 124.

The administrative law judge initially found that claimant's employment as a pipefitter at the date of injury was regular and continuous. In this regard, the administrative law judge credited the statement in the 1998 D.O.T. profile that pipefitters generally work a standard 40 hour week. CBX 2 at 2. In the absence of evidence to the contrary, the administrative law judge found that this statement applied to conditions of employment in 1994. The administrative law judge next credited the hourly wage for pipefitters and welders in the New Orleans area in 1996 and their average annual wages and corresponding average weekly wage in 1997. *See* CBX 6 at 8; CBX 7 at 22, 26. The administrative law judge found that, based on the 1997 data reduced by a cost-of-living adjustment factor, the average weekly wage for pipefitters in 1994 was \$508.10 and for welders was \$498.81. The administrative law judge also found that it is undisputed that claimant was employed by employer full-time at the time of the injury. Accordingly, based on his findings that claimant's employment as a pipefitter was regular and continuous, that the average weekly wage for pipefitters in 1994 was \$508.10, and the parties' stipulation prior to the initial hearing that \$11.25 represented claimant's hourly wage at the date of injury, the administrative law judge concluded that \$450 represents a fair and reasonable average weekly wage for claimant at the date of injury.

We affirm this determination as it is rational and supported by substantial evidence. Employer does not challenge the administrative law judge's finding that pipefitters in the New Orleans area have been regularly and continuously employed since March 1994. Moreover, we reject employer's contention that the administrative law judge erred by crediting wage and hour data specific to claimant's occupation and geographic area. The administrative law judge acted within his discretion in inferring from this data, together with the evidence that employer hired claimant on a full-time basis, that claimant's employment at the date of injury was regular and continuous. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 741 (5th Cir. 1962). Employer submitted no contrary evidence pertinent to claimant's working conditions at the time of injury. Furthermore, the instant case is distinguishable from *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997), in that this case contains evidence on which the administrative law judge could rationally rely in calculating claimant's average weekly wage using his actual wage rate for employer. In *New Thoughts*, the court held that the administrative law judge erred in using 1988 wage information to calculate the claimant's average weekly wage in 1992, given that the claimant had significantly lower earnings in 1989, 1990, and 1991. The court held there was no evidence of record that the claimant would have the opportunity to be employed for a full year at the time of his 1992 injury given his earnings history, and that the administrative law judge erred in not including in the average weekly wage calculation all years between

1988 and 1992 as required by the court's decision in *Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT), when wages other than those at the time of injury are utilized.

The facts, in the instant case, that claimant's pre-injury earnings history was spotty, that his employment as a pipefitter in 1992 was intermittent, and that he was unable to work for approximately 14 months prior to the date of injury due to his health does not establish error in the administrative law judge's average weekly wage determination or require him to use claimant's prior earnings. It is well-established that the administrative law judge's findings between reasonable factual inferences are entitled to deference. *Hall v. Consolidated Equipment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998). In *Hall*, the United States Court of Appeals for the Fifth Circuit, in which the instant case arises, stated that it will be an "exceedingly rare case" where the claimant's actual earnings at the date of injury are wholly disregarded and that, "typically," a claimant's wages at the date of injury will best reflect his earning capacity. *Hall*, 139 F.3d at 1031, 32 BRBS at 96(CRT). At the date of injury on March 14, 1994, claimant had recently returned to full-time employment after a health-related absence of approximately 14 months. In the three days prior to his injury, claimant earned \$469.80 from J. R. Merit for 36 hours of work.³ The administrative law judge credited evidence as to the wages full-time pipefitters would have earned in the relevant geographic area. Based on this evidence of record, we hold that the administrative law judge acted with his discretion in calculating claimant's average weekly wage based on his actual hourly rate times a 40 hour week, instead of the evidence concerning claimant's wages from 1989 to 1992. *See id.*; *see also Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). Therefore, we affirm the administrative law judge's average weekly wage determination.

Accordingly, the administrative law judge's Second Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

³Employer does not assert that claimant stopped working for this employer due to his physical condition.

J. DAVITT McATEER
Administrative Appeals Judge