

BRB No. 99-0404

HOWARD ESQUIVEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FAIRWAY TERMINALS	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL, LIMITED	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

John D. McElroy and Ed W. Barton (Law Office of Ed W. Barton), Orange, Texas, for claimant.

Michael D. Murphy (Eastham, Watson, Dale & Forney, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-1406, 97-LHC-1407) of Administrative Law Judge Lee J. Romero, 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 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 was injured on July 19, 1993, when he was struck in the chest by a

spreader bar while he was loading sacks of flour onto a ship for employer.<sup>1</sup> Employer voluntarily paid claimant temporary total disability benefits from July 19, 1993, through June 19, 1996, and permanent partial disability benefits from June 20, 1996, through July 20, 1997, based on an average weekly wage of \$512.67. The administrative law judge awarded claimant temporary total disability benefits from July 21, 1993, to June 20, 1996, and permanent total disability benefits from June 21, 1996, to the present and continuing based on the average weekly wage of \$423.41, calculated pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c).

On appeal, claimant challenges the administrative law judge's calculation of his average weekly wage. Employer responds in support of the administrative law judge's calculation of claimant's average weekly wage to which claimant has replied.

Claimant argues that the administrative law judge, by using his average earnings and hours worked in 1988, 1991 and 1992, did not take into account his 1993 promotion to gang foreman which resulted in increased pay and more hours. Claimant asserts that the administrative law judge should have found that his average weekly wage is \$764.77 based on his earnings in the 52-week period prior to his 1993 injury.<sup>2</sup>

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<sup>1</sup>Claimant suffered two work injuries for two different employers - one in 1989 while working for Ryan Walsh, Incorporated, and one in 1993 while working for Fairway. After recovery from his 1989 injury, claimant returned to work. Claimant's appeal of the administrative law judge's decision involves only the average weekly wage determination with regard to the 1993 injury at Fairway.

<sup>2</sup>During that time, claimant worked a total of 22.7142 weeks from July 24, 1992, to July 19, 1993, and earned \$17,371.15 including vacation and container royalty pay. By dividing \$17,371.15 by 22.7142, claimant asserts that his average weekly wage is \$764.77.

Under Section 10(c), the administrative law judge determined that claimant's average weekly wage is \$423.41 by multiplying claimant's average hourly wage for the years 1988, 1991 and 1992 by the average hours worked in those years, and dividing that number (\$22,017.44) by 52.<sup>3</sup> Decision and Order at 49-52. The administrative law judge did not include claimant's earnings in the years 1987, 1989, and 1990 because he found these years unrepresentative of claimant's earnings as those earnings were artificially low due to the injury with Ryan Walsh. Decision and Order at 51 n. 11. The administrative law judge also did not include claimant's earnings in the 22.7142 weeks he worked prior to his 1993 injury because he found that it artificially enhanced claimant's earnings, nor his promotion to gang foreman prior to his 1993 injury, which resulted in increased pay and more hours. Decision and Order at 51-52 n. 13.

We hold that the administrative law judge erred in not considering claimant's promotion to gang foreman prior to his 1993 injury. 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). A calculation under Section 10(c) should reflect pay raises claimant receives shortly before his injury. See *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986); *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462 (1981). In this way, the amount claimant had the potential to earn if not for his injury is properly accounted for. See *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT)(D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1986). Thus, we vacate the administrative law judge's calculation of claimant's average weekly wage, and remand this case to the administrative law judge for reconsideration of claimant's average weekly wage, taking into account the increased pay and hours claimant worked as a result of his 1993 promotion to gang foreman.<sup>4</sup> See *Mijangos*, 19 BRBS at 15; *Le*, 18 BRBS at 175; Cl. Exs. 4, 24;

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<sup>3</sup>The administrative law judge correctly determined that there was insufficient evidence in the record to determine claimant's average daily wage under Section 10(a) or (b), 33 U.S.C. §910(a), (b).

<sup>4</sup>Prior to his 1993 injury, claimant testified that he was promoted to gang foreman, and as a result, earned a dollar more per hour than he previously received, and worked more hours when other gang foremen did not show up for work. Tr. at 74-76. Claimant's wage records and Social Security earnings support his

Emp. Ex. 12; Tr. at 74-76.

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testimony. Cl. Exs. 4, 24; Emp. Ex. 12.

Accordingly, the administrative law judge's calculation of claimant's 1993 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 is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge