BRB No. 89-2688

JOSEPH E. HAWLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOCKHEED SHIPBUILDING COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Supplemental Decision and Order Upon Reconsideration of James J. Butler, Administrative Law Judge, United States Department of Labor.

Jay C. Kinney (Goodwin, Grutz & Scott), Seattle, Washington, for claimant.

Raymond H. Warns, Jr. (Witherspoon, Kelley, Davenport & Toole, P.S.), Seattle, Washington, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and Supplemental Decision and Order Upon Reconsideration (88-LHC-938 and 88-LHC-949) of Administrative Law Judge James J. Butler 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).

While working for employer as a shipwright, claimant injured his neck on December 1,

1983, and his head, neck, shoulder and arm on October 25, 1985. Claimant testified that he returned to work in September 1984 after the 1983 injury, worked until the October 1985 injury, and has not returned to work since that injury. Employer paid claimant compensation for temporary total disability from November 12, 1985 to October 26, 1987, and for temporary partial disability from October 27, 1987 to July 1, 1988, based on an average weekly wage of $561.19. 33 U.S.C. §908(b), (e). In his initial decision, the administrative law judge determined that claimant's average weekly wage is $668.26 for the October 1985 injury. Claimant was awarded temporary total disability benefits until July 28, 1988, and permanent partial disability benefits thereafter. 33 U.S.C. §908(b), (c)(21). Employer was awarded relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f).

Employer filed a motion for reconsideration, contending that claimant's average weekly wage is $561.19. In the Supplemental Decision and Order Upon Reconsideration, the administrative law judge agreed with employer and found that claimant's average weekly wage is $561.19. Claimant appeals, contending that the administrative law judge erroneously determined his average weekly wage. Claimant initially contended that his average weekly wage is $668.26, but in a reply brief contends it is $627.50. Employer responds, urging affirmance of the administrative law judge's finding.

In his initial decision, the administrative law judge applied Section 10(c), 33 U.S.C. §910(c), finding that he could not determine claimant's average daily wage under Section 10(a), 33 U.S.C. §910(a). The administrative law judge essentially calculated claimant's average weekly wage based on claimant's actual annual earnings in the year preceding the October 1985 injury. The administrative law judge found that claimant returned to work on October 19, 1984 after the September 1983 injury, and worked 64 days through the end of the 1984 calendar year. Relying on claimant's Social Security records, the administrative law judge found that claimant earned $9,530.47 in 1984 and $27,304.30 in 1985. The administrative law judge found that claimant's average daily wage in 1984 was $148.91 ($9,530.46/64). The administrative law judge erroneously assumed that claimant was injured on November 10, 1985, and deducted two weeks of earnings, $2,094.74 ($148.91 x 14), for the period from October 29, 1984 through November 10, 1984, from $9,530.47, to obtain $7,445, representing claimant's earnings from October through December 1984. The administrative law judge added $7,445 to $27,304.30, to obtain $34,750.03, representing claimant's annual earnings in the 52 weeks preceding the October 1985 injury. The administrative law judge then divided $34,750.03 by 52 to obtain claimant's average weekly wage of $668.26.

Employer subsequently filed a motion for reconsideration, contending, without providing any basis for its figures, that claimant's average weekly wage should be $561.19.[1] Employer noted that $561.19 yields an average annual wage of $29,181.89 which approximates the maximum annual earnings claimant earned in any calendar year, and yields an average hourly wage of $14.03 which exceeds claimant's alleged hourly salary with employer of $13.50. In the supplemental decision, the administrative law judge noted that in his original decision he had erroneously determined that the date of claimant's injury was November 11, 1985, and adopted employer's figures, stating that claimant's average weekly wage is $561.19, that the resulting average annual wage of $29,181.89 is more than claimant's annual salary in any calendar year preceding the October 1985 injury, and that the hourly wage of $14.03 exceeds claimant's hourly wage of $13.50 while working for employer.

On appeal, claimant contends that regardless of whether Section 10(a) or Section 10(c) applies, the administrative law judge should have calculated his average weekly wage based on his actual annual earnings in the 52 weeks preceding the October 1985 injury. In his reply brief, claimant contends his average weekly wage should be $627.50, obtained by dividing his total earnings in 1984 and 1985, $36,834.77 ($9,530.47 plus $27,304.30) by the alleged number of days claimant worked in 1984 and 1985, 293, to obtain an average daily wage of $125.71, which claimant then multiplied by 5.[2] Claimant notes that this average weekly wage results in an average hourly wage of $15.71 ($125.71/8). Claimant contends that the administrative law judge erred in determining that his hourly wage for employer was $13.50, as employer's Form LS-202 "First Report of Injury" indicates that his hourly rate increased from $13.75 in December 1983 to $15 by the time of the 1985 injury. *See* Emp. Exs. 1.10, 1.15. Claimant also contends that his annual earnings for the calendar years prior to October 1985 are irrelevant as he was unable to work a full calendar year since 1983 due to his work-related injuries, and his annual earnings should be what he would have earned absent the prior injuries. In its response brief, employer urges affirmance, and contends that claimant's hourly wage of $15 at the time of the October 1985 injury reflects that claimant was working as a supervisor, but employer contends claimant's supervisory work was sporadic.

[1]It appears that employer paid claimant benefits based on this figure for the 1983 injury. *See* Emp. Ex. 1.

[2]The number of days claimant alleges he worked, 293, is not substantiated in the record.

Section 10(a) applies when claimant has worked in the same employment for substantially the whole of the year immediately preceding the injury. To make a calculation under Section 10(a), it is necessary to know the wages claimant earned and the number of days claimant worked in the relevant time period.[3] *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53, 59 n.2 (1992); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). Section 10(b) also applies to permanent and continuous jobs, but applies where claimant has not been employed for substantially the whole of the year, and claimant submits evidence of the wages of similarly situated employees who have worked substantially the whole of the year. 33 U.S.C. §910(b).

Section 10(c) provides a general method for determining average weekly wage where Section 10(a) or (b) cannot fairly or reasonably be applied to derive claimant's annual earning capacity at the time of injury. *See Browder v. Dillingham Ship Repair*, 24 BRBS 216 (1991), *aff'd on recon.*, 25 BRBS 88 (1991). The administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *Browder*, 24 BRBS at 218; *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (5th Cir. 1979). Under Section 10(c), a recent pay increase in claimant's salary shortly before his injury should be taken into consideration. *Le v. Sioux City and New Orleans Terminal Corp.*, 18 BRBS 175, 177 (1986); *see also Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980).

We agree that the case must be remanded for reconsideration of the issue of average weekly wage. In this case, the administrative law judge erred in adopting the figures proposed by employer in its motion for reconsideration and in determining that claimant's average weekly wage is $591.16 without providing any explanation for his findings. Under the Administrative Procedure Act (APA), the administrative law judge's decision must include a statement of the "findings and conclusions, and the reason or basis therefor, on all material issues of fact, law, or discretion presented in the record." 5 U.S.C. §557(c)(3)(A); *see Cotton v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 380 (1990). Moreover, the administrative law judge did not address the evidence indicating that claimant's hourly wage had increased to $15 by the time of claimant's 1985 injury. *See generally*

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[3]If the claimant worked substantially the whole of the year preceding the injury, Section 10(a) provides that

> his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker....

33 U.S.C. §910(a). To calculate average weekly wage under this section, claimant's actual earnings for the 52 weeks prior to the injury are divided by the number of days he actually worked during the period to determine an average daily wage. This wage is then multiplied by either 300 or 260, as appropriate, and the quotient is divided by 52 to determine average weekly wage. *See Hardrick v. Campbell Industries, Inc.*, 12 BRBS 265 (1980).

Le, 18 BRBS at 177. We therefore vacate the administrative law judge's average weekly wage determination and remand the case for the administrative law judge to make appropriate findings in accordance with Section 10 and the APA.[4]

Accordingly, the Decision and Order Awarding Benefits and the Supplemental Decision and Order Upon Reconsideration are vacated with respect to the administrative law judge's findings regarding claimant's average weekly wage and the case is remanded for further consideration in a manner consistent with this opinion. In all other respects, they are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4]The administrative law judge should reconcile his finding that claimant returned to work in October 1984 with claimant's hearing testimony that he returned to work in September 1984 in order to properly account for claimant's 1984 earnings. Tr. at 26; Decision and Order at 6, 11.