

BRB No. 92-0309

KENNETH OLSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JONES WASHINGTON STEVEDORING	)	DATE ISSUED:
COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of James J. Butler, Administrative Law Judge, United States Department of Labor.

William D. Hochberg (Levinson, Friedman, Vhugen, Duggan & Bland), Seattle, Washington, for claimant.

Robert L. Brousseau (Brousseau, Jankovich & Ormiston), Seattle, Washington, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-183) 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 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).

On June 27, 1990, claimant, employed as a casual longshoreman, sustained an injury to his left ankle when he slipped between two logs while loading a ship.<sup>1</sup> He was diagnosed as having

<sup>1</sup>In the Port of Tacoma, where claimant's injury occurred, a casual longshoreman did not have union status and filled the remaining available jobs only after the union members selected their employment. Tr. at 22.

suffered a left medial ankle contusion with a sprain, and was temporarily totally disabled until July 23, 1990. Although claimant was employed as a truck driver for 17 years, earning \$46,800.43 in the year prior to his injury, he left this position due to a strike in May 1990. From May 25, 1990 to June 27, 1990, the date of his injury, claimant was employed as a casual longshoreman earning an average of \$157.98 per week. The corresponding average weekly wage for similarly situated casual longshoremen was \$161.71 or approximately \$8,408 per year. In his Decision and Order, the administrative law judge concluded that the average weekly wage at the time of the injury which fairly and reasonably approximated claimant's wage-earning capacity pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), was \$157.98. This calculation was based on claimant's earnings in the employment in which he was working at the time of the injury and of other employees of the same or similar class of employment.<sup>2</sup> On appeal, claimant challenges the administrative law judge's determination of his average weekly wage. Employer responds in support of the administrative law judge's finding.

Claimant challenges the administrative law judge's conclusion that the average weekly wage of \$157.98 fairly and reasonably approximated his wage-earning capacity at the time of the injury. Claimant contends that his annual earning capacity under Section 10(c) is best represented by including his actual wages as a truck driver in the year prior to the injury as well as his earnings as a casual longshoreman. Claimant reasons that his wages as a truck driver in the year prior to the injury should be included as he had not only the potential and opportunity to return to work as a truck driver but also the willingness to work as one, citing *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978).

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, and (2) the previous earnings of similar employees, or (3) other employment of claimant. 33 U.S.C. §910(c); *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980). In determining claimant's average weekly wage, the administrative law judge relied on claimant's earnings in the job in which he was injured as well as the previous earnings of similar casual longshoremen. He did not rely on claimant's other employment as a truck driver in the year prior to the injury, as he found that claimant earned a salary in that position that was five times greater than his longshore earnings. The administrative law judge also did not consider claimant's other employment as a truck driver in the year prior to the injury because he found that the wages claimant could have earned from two truck driver opportunities lost because of the work injury were speculative. Decision and Order at 6. The administrative law judge concluded that he could not consider these two theoretical job opportunities in light of claimant's testimony that he did not investigate them prior to the time he was released to work. Decision and Order at 6; Tr. at 15-17. Additionally, Mr. Averill, employer's claims adjuster, testified that he told claimant that he would consider an adjustment in claimant's average weekly wage if claimant verified available trucking jobs but that claimant never called back to verify this information. Decision and Order at 6; Tr. at 27, 30.

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<sup>2</sup>The rate of \$157.98 per week is the rate employer used for calculating voluntary payments. Therefore, the administrative law judge denied claimant further benefits.

Contrary to the administrative law judge's finding, claimant is not seeking use of these theoretical earnings from the two lost job opportunities but of his actual earnings as a truck driver in the year prior to the injury.<sup>3</sup> Moreover, in finding claimant's actual wages in the entire year preceding the injury to be an inflated measure of claimant's earning capacity at the time of the injury, the administrative law judge relied on cases approving the use of actual earnings under Section 10(c) to avoid the use of inflated theoretical earnings under Section 10(a). *See* Decision and Order at 5-6. These cases thus do not support the administrative law judge's decision to disregard the majority of claimant's actual earnings. In contrast to Section 10(a), moreover, Section 10(c) specifically provides for the consideration of other employment of the claimant in the year preceding the injury in addition to the wages earned in the employment in which he was injured. Although the administrative law judge correctly notes that under Section 10(c), claimant's actual wages in the year prior to the injury are not necessarily controlling, *see National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979), in such cases the administrative law judge must have a rational basis for finding these earnings do not represent claimant's annual earning capacity. In this case, since claimant worked as a truck driver before and after his injury, these earnings cannot be summarily discounted. While the United States Court of Appeals for the Ninth Circuit, wherein appellate jurisdiction of this claim lies, and the Board have affirmed the administrative law judge's findings of an average weekly wage based on a claimant's earnings in the employment at the time of the injury rather than his earnings in other employment in the year prior to the injury, in these cases earnings included were those of claimant's primary employment and the salary was lower in the other position. *Bonner*, 600 F.2d at 1288 (lower paying employment included work as a babysitter); *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989)(lower paying employment was as a maid); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988)(administrative law judge reasonably relied upon an average annual earnings figure which was higher than that which was previously enjoyed by claimant). In this case, by eliminating the majority of claimant's earnings, the administrative law judge unreasonably deflated his annual earning capacity.

As the plain language of Section 10(c) provides for the inclusion of earnings in "other employment," and the administrative law judge's basis for not including the wages claimant earned in "other employment" as a truck driver in the year prior to the injury cannot stand, we vacate the determination that claimant's average weekly wage is \$157.98 and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must consider claimant's other employment as a truck driver in the year prior to the injury as well as the earnings of claimant in the job in which he was injured in determining claimant's average weekly wage.

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<sup>3</sup>Claimant properly distinguishes this case from *Orkney*, 8 BRBS at 543. In *Orkney*, the Board affirmed the administrative law judge's use of claimant's union contract hourly wage at the time of the injury, which was lower paying than claimant's previous employment, to determine average weekly wage as it reasonably represented claimant's earning capacity at that time and as there was no evidence of higher wage-earnings opportunities lost because of claimant's disability. Here, there is evidence of higher wage-earnings opportunities lost because of claimant's disability since claimant's former employer's strike was settled before he was medically released to return to work and claimant promptly returned to work for his former employer when he was medically released.

Accordingly, the administrative law judge's Decision and Order is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge