BRB No. 00-1032

JACK E. JONES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CARDINAL SERVICES, INCORPORATED	)	DATE ISSUED: July 9, 2001
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Marcus J. Poulliard (Seelig, Cossé, Frischhertz & Poulliard), New Orleans, Louisiana, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (96-LHC-1095) 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*., as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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 recapitulate, claimant

alleged he sustained a back injury and a resulting psychological disability on May 29, 1995, during the course of his employment on an offshore oil rig as a wireline operator. Claimant did not report the injury that day, and he accepted work for the following morning. On May 30, 1995, two co-workers met claimant near his home where he informed them that he was unable to work. Claimant reported the injury to employer later that day. Employer instructed claimant to see Dr. Serio for an examination and to go to a nearby facility for a drug test per employer's policy regarding work-related injuries. Instead, claimant received treatment and a drug test on May 31, 1995, at Southwest Mississippi Regional Medical Center in McComb, Mississippi. Claimant was terminated on the basis that he failed to complete an accident report and to submit for drug testing at the designated facility. Claimant filed a claim for medical benefits and compensation under the Act, which employer controverted.

In his Decision and Order, the administrative law judge initially rejected claimant's contention of retaliatory discharge under Section 49 of the Act, 33 U.S.C. §948a. The administrative law judge next found that, as a result of claimant's justifiable termination, claimant is not entitled to compensation under the Act pursuant to *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993), despite his inability to return to his usual work due to his injury. The administrative law judge further found that claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), that his back injury and resulting psychological disability are work-related, and that employer failed to rebut the presumption. The administrative law judge thus awarded claimant medical benefits for both of these conditions.

Claimant appealed the denial of disability compensation, contending that the administrative law judge erred by applying *Brooks* to the facts of this case. Employer cross-appealed, contending that the administrative law judge erred in finding that claimant presented sufficient evidence to invoke the Section 20(a) presumption linking his back condition to his employment. Moreover, employer argued that, in the event claimant is awarded compensation under the Act, his average weekly wage should be $592.44, pursuant to Section 10(c), 33 U.S.C. §910(c).

The Board reversed the administrative law judge's denial of compensation, holding *Brooks* inapplicable, as it holds that where claimant is successfully performing a light duty job in employer's facility which he loses due to his own misfeasance, employer does not bear the renewed burden of showing suitable alternate employment. In this case, claimant was not discharged from a light duty job he was successfully performing, but rather, pursuant to the administrative law

judge's finding, was medically unable to work. Claimant was thus entitled to compensation, pursuant to the administrative law judge's alternate findings, for temporary total disability, 33 U.S.C. §908(b), from May 29, 1995, on which date the administrative law judge found that claimant was totally disabled due to his work-related back injury and psychological disability. The Board rejected employer's contention that claimant was not entitled to invocation of the Section 20(a) presumption and the Board affirmed the administrative law judge's finding that claimant sustained a work-related back injury. Finally, the Board remanded for the administrative law judge to determine claimant's average weekly wage and corresponding compensation rate, 33 U.S.C. §910. *Jones v. Cardinal Services, Inc.*, BRB Nos. 98-0522/A (Sept. 28, 1999).

On remand, the administrative law judge found Sections 10(a) and 10(b) inapplicable for determining claimant's average weekly wage as the record lacks sufficient evidence from which he could calculate the average daily wage of claimant or of a similarly situated employee; therefore, the administrative law judge found that claimant's average weekly wage must be determined pursuant to Section 10(c). After discussing the relevant evidence of record, the administrative law judge found that claimant averaged $1,002.21 per week during the 25 weeks he worked for employer as a wireline operator prior to his injury. The administrative law judge found that claimant's weekly earnings with employer exceeded his weekly earnings over the previous four year period with another employer as a wireline operator. However, the administrative law judge determined that an average weekly wage based on claimant's increased earnings with the instant employer would best reflect claimant's wage-earning capacity at the date of injury. Accordingly, the administrative law judge concluded that claimant's average weekly wage at the date of injury is $1002.21.

On appeal, employer challenges the administrative law judge's finding that Section 10(a) is inapplicable to calculate claimant's average weekly wage, and the administrative law judge's failure to include claimant's annual earnings from 1991 to 1994 in determining claimant's average weekly wage under Section 10(c).[1]

[1]Employer states it is reiterating all arguments contained in its Petition for Review and brief filed in support of its prior appeal, BRB No. 98-0522A. The Board's disposition of the issues raised in employer's initial appeal constitutes the law of the case. *See generally Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000). We note that in its initial appeal, employer argued that claimant's average weekly wage could not be calculated pursuant to Section 10(a).

Claimant responds, urging affirmance.[2]

[2]By Order issued December 22, 2000, the Board granted employer's motion and dismissed its appeal of the administrative law judge's Supplemental Decision and Order-Awarding Attorney's Fees.

Claimant's average weekly wage is determined at the time of injury by utilizing one of three methods set forth in Section 10 of the Act. Section 10(a) is to be applied when an employee has worked substantially the whole of the year immediately preceding his injury, for this or another employer, and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. 33 U.S.C. §910(a); *see Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000)*, aff'g* 33 BRBS 88 (1999). This average daily wage is then multiplied by 260 if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's average weekly wage. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[3] *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

In the instant case, the administrative law judge declined to utilize Section 10(a) because he found that claimant did not work for employer for substantially all of the year prior to his injury and that the record is devoid of any evidence from which a daily wage could be computed. Specifically, the administrative law judge found that claimant worked 25 weeks for employer and that employer's payroll records do not reflect claimant's daily wages or the wages of a similarly situated employee. Decision and Order on Remand at 2-3. We affirm the administrative law judge's finding that Section 10(a) is inapplicable to determine claimant's average weekly wage. Employer's wage records of claimant's employment for 25 weeks from December 11, 1994, to May 28, 1995, CX 23, is not, in itself, sufficient evidence of claimant's employment as a wireline operator during substantially the whole of the year prior to his work injury on May 29, 1995. *See generally Bunol*, 211 F.2d 294, 34 BRBS 29(CRT); *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979). Moreover, although claimant worked in similar employment for another employer in 1994, claimant's 1994 income tax return, EX 10, is not sufficient evidence from which the administrative law judge could rationally derive claimant's average daily wage from May 30 1994, to December 10, 1994, as there is no evidence of claimant's precise earnings or the number of days he worked during this period. *See generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd,*

[3]In the instant case, no party contends that Section 10(b) is applicable.

169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Accordingly, the administrative law judge properly utilized Section 10(c) to calculate claimant's average weekly wage.

We also reject employer's assertion that the administrative law judge must take into account claimant's earnings as a wireline operator during the four years preceding his work injury. The goal of Section 10(c) is to calculate a reasonable approximation of claimant's annual wage-earning capacity at the time of the injury. *See generally New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997). In arriving at this approximation, it is proper for a Section 10(c) computation to reflect an increase in wages claimant received before the injury. *See Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986). In this case, the administrative law judge rationally used claimant's earnings during the 25 weeks he worked for employer immediately preceding the injury, and it was unnecessary for him to address any earnings prior thereto.[4] Although the administrative law judge noted that claimant's earnings as a wireline operator were lower from 1991 to 1994 than they were for employer, he stated that a calculation based on claimant's increased wages with employer would best reflect claimant's earning potential at the time of his injury. Decision and Order on Remand at 4. As the administrative law judge's calculation of average weekly wage under Section 10(c) of the Act reasonably approximates claimant's annual earning capacity at the time of injury, *see Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT), we reject employer's assertions of error, and we affirm the administrative law judge's decision, as it is supported by substantial evidence. *See generally James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Hall*

[4]The instant case is thus distinguishable from *Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT), as the administrative law judge did not randomly select earnings from one of the previous four years' employment, but rather utilized claimant's actual wages from the 25 weeks claimant worked for employer preceding the injury to calculate average weekly wage.

v. Consolidated Equipment Systems, Inc., 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998);[5] *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

[5]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).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge