BRB No. 97-1527

NATHANIEL BRUNSON	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
SOUTHERN CAROLINA STEVEDORING	)	
	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Nathaniel Brunson, Jacksonville, Florida, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (93-LHC-1557) of Administrative Law Judge Robert G. Mahony 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine 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); 20 C.F.R. §§802.211(e), 802.220.

Claimant suffered two injuries during the course of his covered employment. On March 10, 1981, claimant sustained a fractured foot while employed by Strachan Shipping (Strachan). Claimant remained off work until January 27, 1982, when he commenced working for employer; however, a few hours into his first shift with employer, claimant suffered an injury to his low back. Claimant has not returned to longshore employment since the date of his second injury. At the time of his March 1981 injury, claimant's average weekly wage was $519.36; there is no evidence in the record concerning the rate at which claimant was hired to perform his longshore job with employer. Following claimant's January 1982 injury, employer paid claimant temporary total disability compensation based upon his average weekly wage while working for Strachan; on July 7, 1987, based upon a labor market survey, employer determined that claimant had a residual wage earning capacity of $3.35 per hour, and began paying claimant permanent partial disability compensation at the weekly rate of $256.89.

In his Decision and Order, the administrative law judge found, *inter alia*, that employer erred in paying claimant compensation based upon his average weekly wage while working for Strachan, and that claimant's average weekly wage while working for employer, determined under Section 10(c), 33 U.S.C. §910(c), was $200. Accordingly, the administrative law judge awarded claimant temporary total disability compensation for the period of January 27, 1982, through July 7, 1987, and permanent partial disability thereafter, based on an average weekly wage of $200, and a post-injury wage-earning capacity of $109.88.

On appeal, claimant, representing himself, challenges the administrative law judge's decision to reduce his weekly compensation benefits. Employer has not responded to this appeal.

In his decision, the administrative law judge initially addressed the issue of claimant's applicable average weekly wage at the time of his injury while working for employer. For the reasons that follow, we affirm the administrative law judge's calculation. A claimant's average weekly wage for compensation purposes is to be calculated pursuant to Section 10 of the Act, 33 U.S.C. §910. Section 10(a) is to be applied when an employee has worked substantially the whole of the year immediately preceding his injury 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 Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). Section 10(b), 33 U.S.C. §910(b), is applicable to injured workers who have not been employed for substantially the whole year preceding the injury and utilizes the earnings of a comparable worker. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Section 10(c), 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor 10(b) can be reasonably and fairly applied. *See Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). 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 the injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). The Board will affirm an administrative law judge's determination of a claimant's average 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 Richardson*, 14 BRBS at 855; *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981).

In the instant case, the administrative law judge declined to utilize Section 10(a) as claimant had not worked during the ten months preceding his injury; additionally, as no evidence in the record related to Section 10(b), the administrative law judge declined to use that subsection.[1] We hold that the administrative law judge rationally determined that Sections 10(a) and 10(b) could not be applied to the instant case; accordingly, we affirm the administrative law judge's decision to use Section 10(c) to calculate claimant's average weekly wage.

In calculating claimant's average weekly wage as of January 1982 pursuant to Section 10(c), the administrative law judge initially found that claimant's physician had precluded his return to longshore employment. Given the state of the record, which contains no documentation regarding claimant's rate of pay in January 1982, the administrative law judge determined claimant's average weekly wage by relying upon the opinion of Mr. Albert, a vocational consultant, who opined that claimant was, at the time of his injury with employer, capable of earning between $186.27 and $200 per week.[2] Based upon this testimony, the administrative law judge concluded that claimant was capable of earning $200 per week at the time of his January 1982 injury. As there is no evidence as to claimant's hourly rate or earnings from employer, we must conclude the result reached by the administrative law judge is reasonable, as it is supported by the only relevant evidence of record. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905

[1]Moreover, the administrative law judge noted that, as Dr. Hardy had concluded that claimant could not work as a longshoreman after his first injury, it would not be proper to use the wages of a similar longshoreman.

[2]The lower end of this range utilizes the minimum hourly wage rate in effect at the time of claimant's injury.

(1980); *Gilliam*, 21 BRBS at 91. We therefore affirm the administrative law judge's determination of claimant's average weekly wage at the time of his injury with employer.

With regard to the extent of disability, in the instant case it is uncontroverted that claimant is unable to return to his usual employment duties. Thus, the burden shifted to employer to establish the existence of realistically available jobs within the geographc area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986). The administrative law judge credited the testimony of employer's vocational consultant, Mr. Albert, who, with the approval of Dr. Graham-Smith, located specific job opportunities within claimant's physical restrictions. *See* EX-14. As the administrative law judge's determination that employer established the availability of suitable alternate employment is rational, supported by substantial evidence, and in accordance with applicable law, we affirm his finding regarding this issue and his consequent award of permanent partial disability compensation to claimant. *See generally Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge