BRB Nos. 98-1501
and 98-1501A

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| SJONNIE PREECE | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| CONTINENTAL STEVEDORING COMPANY | ) | DATE ISSUED: July 28, 1999 |
| | ) | |
| and | ) | |
| | ) | |
| SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| Cross-Respondents | ) | DECISION and ORDER |

Appeals of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Howard L. Silverstein (Silverstein & Silverstein), Miami, Florida, for claimant.

Laurence F. Valle and Frank J. Sioli (Valle & Craig, P.A.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order (98-LHC-00037) of Administrative Law Judge Ralph A. Romano 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 suffered a work-related injury on September 15, 1996, when a basket of luggage slipped off a forklift blade and struck claimant's right knee. Employer has voluntarily paid claimant temporary total disability compensation since that date at an average weekly wage of $195.61. The parties stipulated that claimant's earnings in the year preceding his injury were $6,900. It is also undisputed that claimant missed nearly seven months of work from February to September 1996 in order to help rebuild his mother's house in St. Martin which had been destroyed in a hurricane in September 1995. Claimant remained in St. Martin until the house was completely reconstructed, and returned to work on September 14, 1996.

The only issues before the administrative law judge were claimant's average weekly wage and employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f). In his Decision and Order, the administrative law judge found that employer's voluntary payments had undercompensated claimant because the average weekly wage upon which the payments were made did not include the wages claimant would have earned during the nearly seven months of the year preceding his injury but for his return to St. Martin. After including the wages claimant would have earned during this period of time, the administrative law judge determined that claimant's average weekly wage at the time of his injury, as calculated under Section 10(c) of the Act, 33 U.S.C. §910(c), was $345. Finding that maximum medical improvement has not been reached, the administrative law judge denied employer's request for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's average weekly wage determination. Specifically, employer contends that the administrative law judge erred in including in claimant's average weekly wage calculation the wages he would have earned during the seven months he was absent from work. Claimant responds, urging affirmance of the administrative law judge's decision in this regard. In his cross-appeal, claimant contends that the administrative law judge erred in calculating his average weekly wage either by not taking into account claimant's annual earnings during several preceding years, or by not multiplying claimant's various hourly wages by his normal number of hours, which would have included the busy season and increased pay for holidays and weekends. Taking these factors into account, claimant contends that his average weekly wage should

be $680. Employer responds to claimant's cross-appeal, urging rejection of claimant's method of calculating 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(a), (b), can be reasonably and fairly applied.[1] *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 his 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). It is well-established that pursuant to Section 10(c), the administrative law judge may consider the wages claimant would have earned in the year preceding the injury but for personal illness, auto accident or union strike. *See, e.g., Hawthorne v. Director, OWCP*, 844 F.2d 318, 21 BRBS 22 (CRT)(6th Cir. 1988); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984). The Board will affirm an administrative law judge's determination of 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.

In calculating claimant's average weekly wage, the administrative law judge credited claimant's testimony that had he not traveled to St. Martin he would have earned the same income he had previously been earning with employer. The administrative law judge then concluded that the amount claimant would have earned had he worked those seven months should be included in claimant's average weekly wage because the time spent away from work was due to a non-recurring, exceptional event. Pursuant to Section 10(c) of the Act, the administrative law judge divided claimant's gross income in the year preceding his injury, $6,900, by the 20 weeks he actually worked during this period to derive an average weekly wage of $345. He then multiplied this figure by the 32 weeks he would have worked had he not traveled to St. Martin to derive a gross income in the year preceding his injury of $17,940, which he then divided by 52 weeks to again conclude that claimant's average weekly wage at the time of his injury was $345. 33 U.S.C. §910(d)(1).

[1]Neither employer nor claimant argues that Section 10(a) or (b) is applicable.

Employer contends that the administrative law judge erred in his average weekly wage calculation by including the wages claimant would have earned during the nearly seven months he was absent from work, arguing that claimant voluntarily chose to take time off from work.[2] We disagree that the administrative law judge erred. In rendering his decision, the administrative law judge relied on *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). In that case, the Board affirmed the administrative law judge's decision to include in his average weekly wage determination the seven weeks the claimant would have worked for the employer had she not attended her mother's funeral and attended to the estate. The Board rejected employer's contention that the claimant voluntarily chose to miss work, holding that the administrative law judge rationally concluded that the death of the claimant's mother was a non-recurring event similar to a personal illness or a strike, for which a claimant is to be given credit for wages that would have been earned. *See Hawthorne*, 844 F.2d at 318, 21 BRBS at 22 (CRT); *Klubnikin*, 16 BRBS at 182.

In the instant case, the administrative law judge credited claimant's testimony that he would have continued to work for employer at the same pay as prior to leaving for St. Martin, if not for his mother's home being destroyed. Tr. at 21-22. He also credited claimant's testimony that his mother's house had never before been destroyed by a hurricane, and that although other family members assisted the rebuilding effort, he was the only member of his family who could take the necessary amount of time off from work without losing his job. Tr. at 40-41. In support of its argument that claimant voluntarily chose to take time off from work, employer points out that claimant's mother's home was destroyed five months before he went to rebuild it. Claimant, however, testified that non-residents were not permitted to travel to St. Martin until the latter part of 1995, and that he had to wait until enough money was raised to purchase the material to rebuild the house. Tr. at 21, 41-42.

[2]The administrative law judge's calculation results in the same figure as if he had divided claimant's actual earnings in the year preceding his injury, $6,900, by the actual number of weeks worked, 20. Employer essentially seeks to divide claimant's total earnings by 52.

On the basis of the record before us, the administrative law judge's decision to credit claimant's testimony that he was the only family member capable of taking the necessary time off in order to rebuild his mother's house is rational, *see Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963), and his finding that the destruction of claimant's mother's house by a hurricane was a non-recurring event similar to a personal illness or a strike is in accordance with law.[3] *See, e.g., Browder*, 24 BRBS at 219. Accordingly, we hold that it was within the administrative law judge's broad discretion under Section 10(c) to include in claimant's average weekly wage the 32 weeks claimant would have worked but for his mother's house being destroyed.

We now address the issues raised by claimant in his cross-appeal. Claimant asserts that the administrative law judge, in determining claimant's average weekly wage pursuant to Section 10(c), should have considered claimant's earnings over the four years prior to his injury, which averaged $35,389 per year, and then divided this number by 52. Claimant further argues that the administrative law judge's determination does not account for increased wages earned for weekend and holiday work. Thus, as an alternative, claimant contends that the administrative law judge should have calculated his average weekly wage by multiplying claimant's average number of hours per week, 34, by his average hourly wage, $20. According to claimant, either method would result in an average weekly wage of $680.

We affirm the administrative law judge's method of calculation in determining claimant's average weekly wage. An administrative law judge must determine the average weekly wage at the time of the injury. *See New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51 (CRT)(5th Cir. 1997). Typically, a claimant's wages at the time of injury will best reflect the claimant's earning capacity at that time. *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 276, 32 BRBS 91 (CRT)(5th Cir. 1998). Accordingly, it was within the administrative law judge's

[3]Employer's reliance on *Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987), and *Conatser v. Pittsburgh Testing Laboratory*, 9 BRBS 541 (1978), is misplaced. In *Geisler*, the Board held that the administrative law judge rationally refused to consider in his average weekly wage calculation 30 hours per week which claimant worked without pay as a trainee-cook. In *Conatser*, the Board held that it was error for the administrative law judge to base the claimant's average weekly wage on a yearly amount which included pay the claimant could have earned had he not chosen to turn down assignments requiring travel. These cases are inapposite, however, as they each concern a course of voluntary behavior, not acts due to non-recurring events.

broad discretion under Section 10(c) to not look beyond the one year immediately preceding the injury in making his average weekly wage calculation.

Moreover, by basing his average weekly wage calculation on claimant's average wage over the 20 weeks he actually worked in the year preceding his injury, the administrative law judge did not abuse his discretion. At the hearing, claimant testified that he would average 32 to 36 hours per week, that he would usually work three to four days per week, Friday through Monday, and that he received $17 per hour on weekdays and $25 per hour on weekends. *See* Tr. at 17-18; Claimant's Dep. at 14-16. Nevertheless, the period claimant actually worked during the year preceding his injury, from September 1995 to February 1996, represents an extended period of time which included weekends and numerous holidays. We therefore cannot say that it was unreasonable for the administrative law judge to base his average weekly wage calculation on the amount claimant earned during this 20-week period. *See, e.g., Fox v. West State, Inc.*, 31 BRBS 118 (1997). Inasmuch as the administrative law judge's formula for calculating claimant's average weekly wage, based on the amount claimant earned in the 20 weeks he actually worked during the year preceding his injury, is reasonable, supported by substantial evidence, and consistent with the goal of arriving at a sum which reasonably represents claimant's annual earnings at the time of injury, we affirm his determination that claimant's average weekly wage is $345.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge