BRB No. 98-1564

RAMIRO LOREDO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STAFTEX STAFFING	)	
	)	DATE ISSUED: July 28, 1999
and	)	
	)	
HOUSTON GENERAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order, the Decision on Employer's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

John D. McElroy (Law Office of Ed W. Barton), Orange, Texas, for claimant.

Gus David Oppermann, V (Brown, Sims, Wise & White, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order, the Decision on Employer's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees (97-LHC-242) of Administrative Law Judge C. Richard Avery 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is

discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a back injury on October 11, 1990, during the course of his employment. Between 1992 and 1998 he underwent numerous operations, and his condition has not yet reached maximum medical improvement. Employer voluntarily paid medical benefits and temporary total disability benefits from October 16, 1990, and continuing, based on various average weekly wages. The sole issue before the administrative law judge concerned claimant's average weekly wage. Specifically, although the parties agreed to use Section 10(c), 33 U.S.C. §910(c), to calculate claimant's average weekly wage as of the time of his injury, they disagreed on the wage calculation. The administrative law judge found that claimant's average weekly wage is $504.32 and ordered employer to pay benefits based on this figure, allowing it a credit for compensation already paid. Decision and Order at 4. The administrative law judge then denied employer's motion for reconsideration.

Thereafter, claimant's counsel filed a petition for an attorney's fee for work performed before the administrative law judge. He sought a total of $21,257.24 plus expenses. Employer filed objections. The administrative law judge concluded that counsel is entitled to a fee under Section 28(b) of the Act, 33 U.S.C. §928(b). After considering the application and objections, he reduced the hourly rates from $225.54 and $181.94 to $150 and $125, respectively. He disapproved portions of some individual entries, and then he reduced the total fee by 50 percent in light of the amount of additional benefits claimant obtained ($487.62 per year). Consequently, he awarded counsel a fee of $7,239.38, plus expenses. Supp. Decision and Order.

Employer appeals all three decisions, arguing that the administrative law judge erred in calculating claimant's average weekly wage and in awarding an attorney's fee. Claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in calculating claimant's average weekly wage as of the time of his injury. Specifically, employer argues that the figure computed by the administrative law judge greatly inflates claimant's earnings to an amount higher than claimant had been earning during the previous five years of employment. It argues that the administrative law judge should have divided claimant's earnings by 52 rather than 27, and it argues that he erroneously ignored the evidence establishing that, at most, claimant earned $9,000 during any one of the preceding five years.

Claimant and employer agree that Section 10(c) should be used to calculate claimant's average weekly wage. An administrative law judge has considerable latitude in calculating a claimant's average weekly wage pursuant to Section 10(c). *Bonner v. National Steel &*

Shipbuilding Co., 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979). Provided they are a reasonable representation of the claimant's earning capacity, actual past wages may be used to make the computation, but the administrative law judge is not bound by the claimant's actual earnings. *Bonner*, 600 F.2d at 1292; *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Richardson v. Safeway Stores, Inc.* 14 BRBS 855 (1982). In this case, claimant stated, and employer has not disputed, that he made $13,616.53 during the year preceding his back injury in October 1990. Claimant also testified that he was out of work for 25 weeks between February and August 1990 due to a knee injury which he sustained while working for another employer. Thus, claimant testified that he worked 27 weeks of the year prior to his October 1990 injury.

Under Section 10(d) of the Act, 33 U.S.C. §910(d), it is proper to divide a claimant's annual earnings by 52. However, the Board has held that it is appropriate for an administrative law judge to account for time lost due to injury when calculating annual earnings. *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984). In this case, the administrative law judge accounted for claimant's lost time by dividing his earnings during the year preceding his injury by 27 instead of 52. Although the administrative law judge did not arrive at a figure representing claimant's annual earnings and divide it by 52, his calculation nonetheless results in the same average weekly wage, and any error is harmless.[1]

We also reject employer's assertion that the administrative law judge must take into account claimant's earnings during the preceding five years, noting that all were significantly lower than his earnings as calculated. The goal of Section 10(c) is to find a reasonable approximation of claimant's 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 immediately before the injury. *See Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986); *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981). In this case, the administrative law judge used claimant's earnings during the year immediately preceding the injury, and it was unnecessary for him to address any

[1]$13,616.53 divided by 27 = $504.32; $504.32 multiplied by 52 = $26,224.64; $26,224.64 divided by 52 = $504.32.

earnings prior thereto.[2] Although he noted that claimant's earnings were low during those

[2]The instant case is thus distinguishable from *Chilton*, as the administrative law judge did not randomly select earnings from one of the previous five years, but rather chose to use earnings from the year immediately preceding the injury to calculate average weekly wage. Therefore, we reject employer's assertion that *Chilton* is controlling.

years, he stated that during 1990 claimant worked 10 weeks prior to the back injury, with average weekly earnings of $646.[3] Therefore, it is not unreasonable for him to have determined that claimant's average weekly wage during the year preceding his October 1990 injury was $504.32. As the administrative law judge's calculation of average weekly wage under Section 10(c) of the Act is reasonable, we reject employer's assertions and affirm the administrative law judge's decision. *Brien*, 23 BRBS at 207; *Klubnikin*, 16 BRBS at 182.

Employer also challenges the administrative law judge's fee award. Initially, it argues that the fee is not sanctioned under Section 28(a) or (b), 33 U.S.C. §928(a), (b). We reject employer's theory. Clearly, Section 28(b) applies to this case, as a controversy over claimant's average weekly wage arose after employer voluntarily paid benefits. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT) (9th Cir. 1998); *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986). Further, we reject employer's remaining arguments regarding the hourly rates, the quarter-hour minimum billing method, and the time spent preparing the fee petition, as it has failed to demonstrate error on the part of the administrative law judge. *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998); *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). Consequently, we affirm the administrative law judge's fee award.[4]

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[3]We also note that claimant worked five weeks before his knee injury, and he averaged a weekly wage of $529.

[4]Employer requests a ruling on the earliest date for which it could be held liable for an attorney's fee for work before the administrative law judge, as it alleges it complied with the recommendations following the informal conferences and should not be held liable for any fee generated prior to the date it filed its brief before the Board, October 21, 1998. Employer's argument is meritless because, at some time between the date of the informal

conference in February 1996 and the date the case was referred to the Office of Administrative Law Judges, October 28, 1996, another dispute pertaining to average weekly wage arose between the parties. Thus, October 28, 1996, the date of referral, is the earliest date upon which employer could be held liable for an attorney's fee for services rendered before the administrative law judge. *See generally Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986). The first entry on the fee petition, however, was February 6, 1997.

Accordingly, the administrative law judge's decisions are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge