

JOSE ZAPATA)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SOUTH BAY SANDBLASTING)	DATE ISSUED: <u>June 17, 2002</u>
AND TANK CLEANING)	
)	
and)	
)	
EAGLE PACIFIC INSURANCE)	
GROUP)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Determining Average Weekly Wage and Decision on Motions for Reconsideration of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Jason Zielinski and Maryann C. Shirvell (Laughlin, Falbo, Levy & Moresi), San Diego, California, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Determining Average Weekly Wage and Decisions on Motions for Reconsideration (2000-LHC-1566, 2000-LH-1567) of Administrative Law Judge Robert J. Lesnick 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).

Claimant injured his right knee on February 25, 1998 and July 8, 1998, while working for employer as a sandblaster. The parties stipulated that: claimant was temporarily totally disabled from September 4, 1998 to March 9, 1999; employer paid claimant temporary disability benefits from September 24, 1998, through April 14, 1999, based on an average weekly wage of \$600; claimant sustained a 10 percent permanent impairment to his lower right extremity; and claimant returned to work on March 9, 1999. The only issue presented for resolution at the hearing was the average weekly wage to be used in determining claimant's compensation rate.

The administrative law judge found that claimant's average weekly wage was \$429.25, calculated pursuant to Section 10(c), 33 U.S.C. §910(c), by dividing by 52, claimant's earnings of \$22,321.13 in the 52 weeks prior to his July 8, 1998, injury. *See* Decision and Order at 6; Decision on Motions for Reconsideration at 1-2. Consequently, the administrative law judge also found that employer is entitled to a credit for any overpayment of temporary total disability benefits against its liability for permanent partial disability benefits. On reconsideration, the administrative law judge denied claimant's motion which argued that claimant's earnings were better represented by a divisor of 36, the number of weeks claimant actually worked in the 52 weeks preceding his injury.

On appeal, claimant contends that the administrative law judge erred in calculating his average weekly wage. Claimant contends that the figure calculated by the administrative law judge does not represent his wage-earning capacity at the time of injury, as he earned higher wages with employer in the 29 weeks prior to his injury than he did in the year prior to injury, which included employment in a lower paying job. Claimant also states that his earnings over several years prior to his injury demonstrate a higher wage-earning capacity than that found by the administrative law judge. Employer responds, urging affirmance.

Section 10 of the Act, 33 U.S.C. §910, sets forth three methods for determining claimant's average weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are the statutory provisions relevant to a determination of an employee's average weekly wage where the injured employee's work is regular and continuous, and he is a five- or six-day per week worker. The computation of average annual earnings must be made pursuant to

Section 10(c) if subsection (a) or (b) cannot be reasonably and fairly applied.¹ See *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). The object of Section 10(c) is to arrive at a sum that reasonably represents a 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).

After consideration of claimant's contentions, we affirm the administrative law judge's average weekly wage calculation as it is supported by substantial evidence and claimant has not demonstrated reversible error in the administrative law judge's finding. The administrative law judge has broad discretion in determining claimant's average weekly wage under Section 10(c), see, e.g., *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982); *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981), and it was not irrational for the administrative law judge to utilize claimant's actual earnings in the year prior to injury as representative of claimant's annual wage-earning capacity. See *Stafftex Staffing v. Director, OWCP [Loredo]*, 237 F.3d 404, 34 BRBS 44(CRT), modified on other grounds on reh'g, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000). As the administrative law judge's calculation of claimant's average weekly wage under Section 10(c) is rational and supported by substantial evidence, it is affirmed. See generally *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), aff'g 31 BRBS 98 (1997); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

¹Claimant concedes the applicability of Section 10(c), noting the absence of evidence concerning the actual number of days claimant worked. See Cl. brief at 6, 9. Section 10(a) cannot be applied if the number of days claimant worked is not evident from the record. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), aff'g 31 BRBS 98 (1997). No party contended that Section 10(b) should be applied.

Accordingly, we affirm the administrative law judge's Decision and Order Determining Average Weekly Wage and Decision on Motions for Reconsideration.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge