BRB No. 06-0726

JEROME DAVIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED/ AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: 05/21/2007
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order and the Supplement to Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Gregory S. Unger (Workers' Compensation, L.L.C.), Metairie, Louisiana, for claimant.

Richard S. Vale and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and the Supplement to Decision and Order (2005-LHC-01367) of Administrative Law Judge Patrick M. Rosenow 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 back on September 2, 2004, while working as a grinder for employer. Employer voluntarily paid claimant various periods of temporary total

disability benefits based on an average weekly wage of $616.40. CX 6. Claimant filed a claim alleging that employer under-calculated his average weekly wage and that he also was entitled to interest.

The administrative law judge applied Section 10(c) of the Act, 33 U.S.C. §910(c), finding that application of Section 10(a), 33 U.S.C. §910(a), unfairly fails to account for the entirety of claimant's pre-injury earnings, because it excludes claimant's earnings from his pre-injury part-time employment as a non-maritime trash hauler. The administrative law judge calculated claimant's average weekly wage as $629.28.[1] The administrative law judge ordered employer to pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. §1961 (1982).

Thereafter, claimant filed a motion seeking clarification regarding the interest employer owed him. Claimant averred that he had sought interest on employer's late payment of benefits in January 2005, as well as interest caused by employer's underpayment of his disability compensation. In his Supplement to Decision and Order, the administrative law judge awarded claimant the additional interest sought for the late payments due for the period of September 30, 2004 through January 10, 2005, as well as interest on the awarded interest.

On appeal, employer challenges the administrative law judge's application of Section 10(c) to calculate claimant's average weekly wage, as well as the award of interest. Claimant responds, seeking affirmance of the administrative law judge's decisions.

Employer contends that the administrative law judge erred in calculating claimant's average weekly wage under Section 10(c) and thereby including claimant's earnings as a trash hauler. Employer contends that, since claimant worked for employer for substantially the whole of the year prior to the injury and his work was regular, continuous, and full-time, claimant's average weekly wage must be calculated pursuant to Section 10(a) of the Act.

Section 10 of the Act, 33 U.S.C. §910, sets forth methods for determining claimant's average weekly wage. Section 10(a) applies when the employee worked for substantially the whole of the year prior to his injury in the employment in which he was injured, the employee was a five or six-day per week worker, and the administrative law

[1] The administrative law judge found that claimant earned $30,832.11 with employer and $1,890.60 for his part-time employment hauling trash for Bywater Building Service. The administrative law judge divided the sum of these earnings, $32,722.71, by 52 to arrive at an average weekly wage of $629.28. 33 U.S.C. §910(d).

judge can calculate an average daily wage from the evidence of record. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Proffit v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006). Section 10(c) is used to compute the claimant's average annual earnings if subsection (a) or (b) cannot be reasonably and fairly applied.[2] *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 that reasonably represents a claimant's annual earning capacity at the time of his injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

In this case, employer contends that the administrative law judge was required to use Section 10(a) to calculate claimant's average weekly wage because claimant was a permanent, full-time worker who worked 249 days for employer in the 52 weeks prior to his injury. Employer thus contends that Section 10(a) can be fairly applied and resort to Section 10(c) for the purpose of including claimant's part-time non-maritime wages is inappropriate.

We reject employer's contention of error. The administrative law judge properly found that inclusion of claimant's wages as a trash hauler could not be accomplished through the use of Section 10(a), as only the wages claimant earned "in the employment in which he was working at the time of injury, whether for the same or another employer" may be included in a Section 10(a) calculation. Section 10(a) thus requires all of claimant's jobs in the year prior to the injury to have been comparable to the job in which he was injured before the wages may be included in claimant's average weekly wage. *Proffit*, 40 BRBS at 43; *Hole v. Miami Shipyard Corp.*, 12 BRBS 38 (1980), *rev'd on other grounds*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). The administrative law judge found that claimant's trash hauling job was not comparable to his work for employer as a grinder.

Section 10(c) permits the administrative law judge to calculate average annual earning capacity with respect to claimant's employment at the time of injury, to the wages of similar employees, or to the "other employment of the employee." *Liberty Mutual Ins. Co. v. Britton*, 233 F.2d 699 (D.C. Cir. 1956). Because claimant's wages as a trash hauler could not be included in a Section 10(a) calculation, the administrative law judge found that Section 10(a) could not fairly and reasonably be applied. The administrative law judge noted that as claimant remained temporarily totally disabled, he is presumed to be unable to return to his part-time job and that the wages from that job should be included in his average weekly wage pursuant to Section 10(c). Decision and

[2] There is no contention that Section 10(b) of the Act, 33 U.S.C. §910(b), is applicable in this case.

Order at 5 n.18.[3] *See generally Harper v. Office Movers/E.I. Kane*, 19 BRBS 128 (1986). There is no basis in law for employer's contention that Section 10(a) must be applied to exclude claimant's wages from other, non-comparable employment, merely because the other factors for application of Section 10(a) are present. *See generally Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006). As the administrative law judge rationally found that claimant's trash-hauling wages should be included in his average weekly wage, and that Section 10(a) therefore could not reasonably be applied, we affirm his calculation of claimant's average annual earning capacity pursuant to Section 10(c). *See generally Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137 (1990).

With regard to the award of interest, employer contends on appeal that it has paid the awarded interest and that the issue is "moot." As employer has not raised any issue for the Board to address with regard to the administrative law judge's award of interest, the award is affirmed. *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997); *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971), *cert. denied*, 406 U.S. 958 (1972).

[3] Employer does not contest this finding.

Accordingly, we affirm the administrative law judge's Decision and Order and Supplement to Decision and Order.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge