BRB No. 06-0778

RAMIRO C. CARDENAS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
M&M PROJECT STAFFING	)	DATE ISSUED: 05/31/2007
	)	
and	)	
	)	
GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER
	)	

Appeal of the Decision and Order and Order on Motion for Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Quentin D. Price (Barton, Price, McElroy & Townsend), Orange, Texas, for claimant.

Michael D. Murphy (Hays, McConn, Rice & Pickering), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Order on Motion for Reconsideration (2005-LHC-1502) 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 findings of fact and conclusions of law of the administrative law judge 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).

Claimant, a welder, injured his back on April 7, 2004; he returned to work until he was laid off on June 17, 2004. The parties agreed that claimant cannot return to his usual job and that because surgery is anticipated he has not yet reached maximum medical improvement. In his Decision and Order, the administrative law judge found that claimant was temporarily totally disabled from June 17, 2004, until August 24, 2004, temporarily partially disabled from August 25, 2004, until April 25, 2005, and temporarily totally disabled thereafter. He awarded compensation based upon an average weekly wage of $1,038.70.

Both parties sought reconsideration. Claimant argued that the administrative law judge erred in not finding him partially disabled from the date of his return to work, April 8, 2004, until he was laid off June 17, 2004, based on his lost wages during this period. Employer argued that the administrative law judge erred in his method of computing claimant's average weekly wage. In his Order on Motion for Reconsideration, the administrative law judge found no error in his interpretation of Section 10(c), 33 U.S.C. §910(c). However, he granted claimant's motion for reconsideration and amended his Decision and Order to reflect claimant's entitlement to temporary partial disability benefits for the period of April 8 to June 16, 2004.

Employer appeals, contending that the administrative law judge erred in computing claimant's average weekly wage. Claimant responds, urging affirmance.

The only issue on appeal is the administrative law judge's calculation of claimant's average weekly wage. A claimant's average weekly wage at the time of injury is determined by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. §910(a)-(c). Section 10(a), 33 U.S.C. §910(a), applies when claimant worked in the same or comparable employment for substantially the whole of the year immediately preceding the injury and provides a specific formula for calculating annual earnings. Where claimant's employment is regular and continuous but he has not been employed in that employment for substantially the whole of the year, Section 10(b), 33 U.S.C. §910(b), may be applied based on the wages of comparable employees.[1] Section 10(c) provides a general method for determining annual earning capacity where neither Section 10(a) nor (b) can fairly or reasonably be applied to calculate claimant's average weekly wage at the time of the injury. The objective of Section 10(c) is to arrive at a figure which is a

[1] No party argues that Section 10(b) is applicable in this case. Moreover, there is no specific evidence establishing whether claimant was either a five or six day per week worker in the 33 weeks preceding his injury which is necessary for the application of Section 10(a) and (b). *See generally Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000).

reasonable representation of the claimant's annual earning capacity at the time of injury. *See Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

The administrative law judge utilized Section 10(c), dividing claimant's wages for the 33 weeks he worked for employer, $34,276.98,[2] by 33, the number of weeks he worked prior to the injury, for an average weekly wage of $1,038.70. Employer contends that the administrative law judge should have divided claimant's wages by 52, to arrive at an average weekly wage of $659.17, pursuant to Section 10(d).

We reject employer's contention of error. Although Section 10(d) states that "the average weekly wages of an employee shall be one-fifty second part of his average annual earnings," 33 U.S.C. §910(d), the administrative law judge's use of a lesser divisor is not necessarily inappropriate. The definition of "earning capacity" for the purposes of Section 10(c) is the "amount of earnings the claimant would have the potential and opportunity to earn absent injury." *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980). The administrative law judge may account for periods of non-work by dividing a claimant's average annual earnings by a figure less than 52. *See, e.g., James J. Flanagan Stevedores v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984); *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981). In *Gallagher*, the Fifth Circuit affirmed the use of a 48-week divisor for wages earned in 48 weeks, noting that extrapolation of the claimant's earnings over a whole year and dividing by 52 would yield the same average weekly wage. *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT); *see also Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *mod. on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000).

In this case, the administrative law judge found that in the weeks claimant did not work, he was capable of working but was unable to find employment. Order on Recon. at 4. The administrative law judge concluded, however, that the Section 10(c) inquiry concerns claimant's annual earning *capacity* and should reflect what claimant could have made had work been available all year. *Empire United Stevedores*, 936 F.3d 819, 25 BRBS 26(CRT). The administrative law judge is afforded considerable discretion in determining claimant's average annual earning capacity pursuant to Section 10(c). *See, e.g., Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). Thus, the administrative law judge did not err in dividing claimant's wages by 33

[2] In arriving at this figure the administrative law judge added claimant's wages, $27,856.48, and his per diem earnings, $6,420.50, minus the $300 he spent on work supplies. Decision and Order at 46. No party contests this figure.

weeks, as he stated, alternatively, that he would have extrapolated the 33 weeks' earnings over a 52 week period and divided by 52. As the administrative law judge's computation rationally assesses claimant's annual earning capacity, is based on substantial evidence of record, and is in accordance with law, we affirm the administrative law judge's finding that claimant's average weekly wage is $1,038.70. *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT).

Accordingly, the administrative law judge's Decision and Order and Order on Motion for Reconsideration are affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge