BRB No. 11-0725

TROY A. HINES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEWARD SHIP'S DRYDOCK, INCORPORATED	)	DATE ISSUED: 05/22/2012
	)	
and	)	
	)	
CHARTIS INSURANCE	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Claimant's and Respondent's Motions for Reconsideration of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, L.L.P.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Order Denying Claimant's and Respondent's Motions for Reconsideration (2009-LHC-1735) of Administrative Law Judge Jennifer Gee 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 began working for employer in Alaska as a welder and pipefitter in January 2008. Prior to his injury on April 26, 2008, claimant requested an eight-week leave of absence beginning the last week of May 2008 so he could obtain his captain's license to allow him to start a charter fishing business.[1] On April 26, 2008, claimant injured his back and neck at work. He finished his work that day, had the weekend off, and, on Monday, reported he was unwell to his supervisor, and was taken to the hospital. Using conservative pain relief methods, claimant returned to work and continued until May 21, 2008, when he could no longer tolerate the pain. Decision and Order at 5-6. Due to his back pain, claimant did not attend the eight-week class, and he did not return to work for employer because he did not have a doctor's release.

The administrative law judge found that claimant's April 2008 thoracic and cervical injury caused his pre-existing degenerative disc disease to become symptomatic and that claimant cannot return to his usual work. Decision and Order at 21, 23. Because claimant was able to find some post-injury jobs, albeit of brief duration, the administrative law judge found that claimant is not totally disabled; however, she found that claimant's condition had not reached maximum medical improvement. *Id.* at 27-29. The administrative law judge also found, and the parties agreed, that claimant's average weekly wage must be calculated under Section 10(c) of the Act, as he did not work substantially the whole of the year in the same or similar employment, and the record lacks evidence of the wages of similarly-situated employees. Decision and Order at 29-30; *see* 33 U.S.C. §910(a)-(c).[2] The administrative law judge found that claimant's average weekly wage should be calculated as of May 21, 2008, when claimant stopped working as a result of his injury, and she determined that the best method of calculating claimant's average weekly wage would be to use claimant's actual earnings for employer as well as a projection of what he could have made had he continued to work for employer. Decision and Order at 31-34. The administrative law judge divided claimant's gross earnings of $17,828.13 by his 18.29 weeks of work, resulting in an average wage of $974.75 per week.[3] She multiplied that number by 39 weeks, having

[1]Claimant was hoping this would supplement his income during slow periods at employer's facility. Tr. at 59-62.

[2]Section 10(c) applies if either Section 10(a) or Section 10(b), 33 U.S.C. §910(a), (b), "cannot reasonably and fairly be applied." 33 U.S.C. §910(c).

[3]Claimant was hired to work for employer in November 2007 and was asked to delay his start date until January 15, 2008. The administrative law judge computed claimant's wages beginning in January 2008 and specifically did not subtract time when employer's facility may have been closed at Christmas 2009 based on the closure at Christmas in 2008. The administrative law judge found that claimant worked 684.25 hours of straight time and 223 hours of overtime between January 15 and May 21, 2008,

determined that claimant would not have worked a full 52 weeks, to get $38,015.25, and she divided that number by 52 to reach an average weekly wage of $731.06. Decision and Order at 35. The administrative law judge awarded claimant temporary total disability benefits beginning May 22, 2008, except she awarded temporary partial disability benefits for those periods after that date when claimant found work.[4] The administrative law judge subsequently denied both claimant's and employer's motions for reconsideration.[5] Claimant appeals the administrative law judge's average weekly wage finding, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in concluding that, even if he had not been injured, he would not have worked, and would have had no income, for 13 weeks during the summer of 2008, thereby decreasing his average weekly wage. Claimant argues that, at most, the record supports an eight-week exclusion, and he argues that he would have found alternate work during any period of layoff or slow down, as summer is Alaska's tourist season. We reject claimant's contentions of error as the administrative law judge's average weekly wage calculation is rational and supported by substantial evidence.

Under Section 10(c), the administrative law judge has broad discretion to arrive at a fair approximation of a claimant's annual earning capacity at the time of his injury. *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991); *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410 (1980) (average weekly wage represents amount of potential to earn absent injury). While post-injury events, such as decreased work opportunities or wages, generally are not relevant, *see, e.g., Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094

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which is 18.29 weeks. This results in gross earnings of $17,828.13. Decision and Order at 34. Claimant does not dispute these findings.

[4]In the spring of 2009, claimant worked for 12 hours one day as a welder/crane operator on a fishing tender. In September 2009, he worked as a bulldozer operator for two or three days for a logging company, and in early 2010, he worked for one week as a security guard at a scrap company. At the time of the hearing, February 17, 2010, claimant was attending classes to earn an Associate of the Arts degree. Decision and Order at 6-7.

[5]Claimant moved for reconsideration of the average weekly wage finding, and employer sought reconsideration of the award of temporary total disability benefits.

(1987); *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006), consideration of circumstances existing after the date of injury may be appropriate where previous earnings do not realistically reflect wage-earning potential. *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980). In computing a claimant's average weekly wage, the Board has stated that the administrative law judge may account for time lost from work and that a claimant's earnings need not be reduced due to time missed for non-recurring involuntary events. *See, e.g., Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978) (layoff); *see also Staftex Staffing v. Director, OWCP [Loredo]*, 237 F.3d 404, 34 BRBS 44(CRT), *modified in part on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000) (work-related knee injury); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000) (injury).

Contrary to claimant's contention, the record supports the administrative law judge's finding that claimant did not present sufficient evidence that, had he not been injured, he could have obtained alternate work in the summer of 2008 during any layoff or slow down at employer's facility and that the wages from that alternate work should be added to the average weekly wage calculation. The record contains evidence of two brief post-injury jobs claimant obtained in 2009 despite his injury. There is no evidence of their availability in 2008. Additionally, the suggestion that claimant could have secured some sort of employment merely because summer is tourist season in Alaska is speculative as to both the job and its wages. Therefore, we reject claimant's assertion that the administrative law judge should have included wages from potential jobs that, had he not been injured, he could have performed during the summer of 2008, thereby increasing the amount of wages he lost due to the work injury. *See Palacios*, 633 F.2d 840, 12 BRBS 806 (administrative law judge may, not must, consider earning capacity after date of injury); *Proffitt*, 40 BRBS 41 (post-injury events generally not considered). It was reasonable for the administrative law judge to rely only on claimant's projected wages for employer in calculating average weekly wage.

We also reject claimant's argument that the record does not support the administrative law judge's finding that claimant would not have worked for employer for 13 weeks of the year. The administrative law judge relied on testimony from Ms. Swartz, employer's bookkeeper, and from claimant. Decision and Order at 32. Ms. Swartz testified that employer generally has a slow business period during the summer when annual maintenance and equipment recertification takes place and that business in the second half of 2008 was slower than in the first half. Emp. Ex. 55 at 12-13, 29-30. Claimant testified that when he asked permission to take a leave of absence, prior to his injury, he was told that the leave would be at a good time because there was probably going to be a layoff and he would not miss much work. Emp. Ex. 54 at 49; Tr. at 60; *see* Decision and Order at 32. Moreover, although the administrative law judge stated that she did not include claimant's eight-week leave of absence in her average weekly wage

calculations, she did note that it would have coincided with employer's usual summer slow work period. Order on Recon. at 2. While an administrative law judge may account for time lost from work and need not reduce a claimant's earnings due to time missed for non-recurring involuntary events, taking a leave of absence to take classes is not an *involuntary* act and cannot be treated the same as time lost due to a strike or illness. *See Conatser v. Pittsburgh Testing Laboratory*, 9 BRBS 541 (1978) (unwillingness to travel is voluntary); *compare with Hawthorne v. Director, OWCP*, 844 F.2d 318, 21 BRBS 22(CRT) (6th Cir. 1988) (strike); *Browder*, 24 BRBS 216 (funeral). Therefore, in light of the summer slowdown and the leave of absence, it was reasonable for the administrative law judge to find that claimant would not have worked for employer for 13 weeks during the summer of 2008. As the administrative law judge arrived at a reasonable approximation of claimant's annual wage-earning capacity pursuant to Section 10(c) of the Act, we affirm the administrative law judge's finding that claimant's average weekly wage is $731.06. *See generally Rhine*, 596 F.3d 1161, 44 BRBS 9(CRT).

Accordingly, the administrative law judge's Decision and Order and Order Denying Claimant's and Respondent's Motions for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge