BRB No. 01-163

PAUL CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROY ANDERSON CORPORATION	)	DATE ISSUED: 10/19/01
	)	
Employer-Respondent	)	
	)	
R A BUILDING CORPORATION	)	
	)	
and	)	
	)	
EMPLOYER'S INSURANCE OF WAUSAU	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Woodrow W. Pringle, III, Gulfport, Mississippi, for claimant.

Ronald T. Russell and Margaret Murdock (Bryant, Clark, Dukes, Blakeslee, Ramsay & Hammond, P.L.L.C.), Gulfport, Mississippi, for employer Roy Anderson Corporation.

Joseph B. Guilbeau (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metarie, Louisiana, for employer R A Building Corporation and carrier.

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

PER CURIAM:

R A Building Corporation (R A Building) and its carrier, Employer's Insurance of Wausau (Wausau), appeal the Decision and Order-Awarding Benefits (99-LHC-1350) of Administrative Law Judge David W. Di Nardi 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 which 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 worked as a rigger aboard a barge located on the navigable waters of Back Bay in Biloxi, Mississippi. Claimant has had right leg problems since birth due to a congenital birth defect. As a youth, he underwent numerous surgical procedures on that foot, including a partial amputation. Claimant was injured at work on May 2, 1994, when he slipped on an oil slick and his right foot lodged in a load of rods, twisting his right foot around. He had to have his work boot cut off so that his right leg could be extricated. Claimant was off from work for two days, resting, but attempted to work on the third day. However, he was sent home two days later and was told he was laid off when he picked up his check on May 10, 1994. Claimant sought treatment for his foot and back pain, and has not returned to work. He sought total disability benefits under the Act.

At the time of injury, Roy Anderson Corporation had two divisions, R A Building, which performed construction work over navigable waters, and Roy Anderson Corporation (RAC) which performed land-based construction work. Frank Jenkins was the site superintendent for the land-based projects and Jerry Rimes was the project superintendent for the maritime projects. Claimant was hired by Jerry Rimes to work as a rigger on the crane barge, and a representative of RAC testified that claimant should have been assigned to the payroll of R A Building but, due to a clerical error, he was assigned to that of RAC. R A Building had an insurance policy with Wausau to provide coverage under the Longshore Act.[1]

[1]Claimant also filed suit under the Jones Act against RAC and R A Building. Defendants' motion for summary judgment was granted by the district court on December 11, 1996, on the ground that the crane barge on which claimant was injured was not a vessel. Cl. Exs. 18. The United States Court of Appeals for the Fifth Circuit affirmed the grant of

In his Decision and Order, the administrative law judge found that claimant has not reached maximum medical improvement, as he needs continued medical treatment, and that his condition has prohibited any type of employment. Thus, he awarded claimant temporary total disability benefits based on an average weekly wage of $528.43, and future medical benefits. In considering the responsible employer issue, the administrative law judge found that R A Building is the responsible employer, and therefore that Wausau is the responsible carrier; alternatively, he stated that even if claimant was found to be an employee of RAC, then R A Building would be the borrowing employer and Wausau would remain liable for benefits.

On appeal, R A Building and Wausau (petitioners) contend that the administrative law judge erred in finding that claimant is entitled to ongoing temporary total disability benefits. Alternatively, petitioners contend that the administrative law judge erred in his determination of claimant's average weekly wage and in finding that R A Building could be a borrowing employer as it is only a paper entity. RAC responds, also contending that the administrative law judge erred in finding that claimant is entitled to ongoing benefits and that the administrative law judge erred in his determination of claimant's average weekly wage. However, RAC urges affirmance of the administrative law judge's finding that R A Building is the responsible employer. Claimant also responds, urging affirmance of the administrative law judge's decision.

Initially, petitioners contend that the administrative law judge erred in finding that claimant suffers from a continuing work-related disability. Specifically, petitioners contend that the evidence establishes that claimant's temporary aggravation resolved by November 6, 1995, the date claimant was released to work with the same restrictions he had before the injury. Claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1980).

---

summary judgment, and the Supreme Court denied *certiorari.* Cl. Exs. 19, 20.

Dr. Knight opined that claimant is disabled from returning to work as a rigger due to complications from his work-related injury. Cl. Ex. 2 at 33. Although he admitted that the symptoms claimant exhibited in 1996 were similar to those claimant exhibited prior to the work injury, Dr. Knight noted claimant's inability to work with the present symptoms, whereas claimant previously was able to work. Thus, he attributed claimant's ongoing disability to the work injury. The record also contains the opinion of Dr. Johnson, who, after an examination in November 1994, recommended that claimant have a bone spur removed from the right heel. He stated this condition may have been aggravated by the work accident. The bone spur was surgically removed on January 30, 1995. Subsequently, Dr. Johnson discharged claimant to his regular work and opined that he reached maximum medical improvement on November 6, 1995. Emp. Ex. 9 at 10-13. Dr. Johnson opined that claimant had suffered a temporary aggravation of a pre-existing condition which lasted from the time of the accident to November 6, 1995, and that there was no increase in the amount of claimant's pre-existing impairment as a result of the work injury. Emp. Ex. 9 at 14. Claimant subsequently was examined by Dr. Knight at the request of Mr. Fentress, a vocational consultant. Dr. Knight recommended an alteration to the present prosthetic device used by claimant and perhaps another revision to his stump.[2] Cl. Ex. 2. Dr. Knight testified on deposition that claimant could not return to his usual work as a rigger due to work-related complications with his foot. Cl. Ex. 2 at 19, 22. In addition to Dr. Knight, the administrative law judge also discussed the 1999 report of Mr. Fentress, who opined that claimant is probably totally vocationally disabled from re-entering the work force and from maintaining any type of significant gainful employment. Cl. Ex. 8. Claimant testified that he has noted a significant difference in his foot since the accident, with increased pain, swelling, drainage and bleeding. Tr. at 48-50. He further stated he is unable to perform the work he did prior to the injury. *Id.* at 55.

[2]Although he stated the record closed on June 22, 2000, the administrative law judge nonetheless admitted into evidence a letter from claimant's counsel to the administrative law judge dated August 16, 2000, advising that claimant recently had surgery and requesting that he be allowed to submit additional medical evidence upon receipt of reports. Decision and Order at 4. The administrative law judge did not act on this motion. Additional evidence can be submitted by way of a motion for modification pursuant to Section 22 if claimant seeks to demonstrate a change in condition or mistake in fact.

After reviewing the evidence, the administrative law judge found that claimant has been temporarily totally disabled from the date of the accident and continuing, based on the opinions of Dr. Knight and Mr. Fentress and the continued symptoms reported by claimant.[3] He rejected Dr. Johnson's opinion that claimant had reached maximum medical improvement in 1995. Decision and Order 27. The administrative law judge further noted that Dr. Johnson prematurely released claimant to work given claimant's obvious pain. Decision and Order 33. As the administrative law judge acted within his discretion in crediting the opinions of Dr. Knight and Mr. Fentress over the contrary opinion of Dr. Johnson, we affirm the administrative law judge's finding that claimant suffers from continuing work-related total disability, as it is supported by substantial evidence.[4] *See generally Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *see also Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

Petitioners also contends that the administrative law judge's determination of claimant's average weekly wage is flawed and leads to a result which is harsh and incongruous. Under Section 10, 33 U.S.C. §910, computation of average annual earnings must be made pursuant to subsection (c) if subsection (a) or (b) cannot be reasonably and fairly applied. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). The administrative law judge is accorded broad discretion in determining claimant's annual earning capacity under Section 10(c). *See, e.g., Bonner v.*

---

[3]We note that claimant testified to his continuing problems and the administrative law judge implicitly credited his testimony in finding claimant in need of continued treatment, Decision and Order at 27, and by stating that claimant continued to be in obvious pain and could not perform the physically demanding work of a rigger. Decision and Order at 33. *See generally Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

[4]Moreover, as we affirm the administrative law judge's finding that Dr. Knight's opinion is entitled to determinative weight, we reject petitioners' contention that the administrative law judge erred in finding that claimant's disability is work-related. The administrative law judge credited Dr. Knight's opinion that claimant's current problems with his distal stump are related to the work-related injury on May 2, 1994. The administrative law judge's rejection of Dr. Johnson's opinion regarding claimant's ability to work necessarily requires the rejection of his opinion that whatever continuing problems claimant has are the same problems claimant had prior to the work injury. In addition, petitioners' contention that the administrative law judge erred in awarding claimant permanent total disability is without merit as claimant was awarded ongoing temporary total disability benefits.

National Steel & Shipbuilding Co., 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979); *Fox v. West State Inc.*, 31 BRBS 118 (1997).

In the present case, claimant worked for employer for five weeks preceding the injury, earning a total of $3,368.75. The parties do not dispute that the administrative law judge properly applied Section 10(c) to determine claimant's average weekly wage. However, the parties each urged a different method of calculation. Before the administrative law judge, employer argued that claimant's average weekly wage should be $237.56 based on the average annual earnings of $12,353.18, an average of claimant's annual earnings for the years 1993 and 1994. The administrative law judge found that this was unreasonable because it resulted in earnings less than claimant's actual earnings at the time of injury. Claimant argued that his average weekly wage should be $673.75, which represents $3,368.75 divided by five weeks. The administrative law judge found that this method of calculation yielded an average annual wage of $35,035, which was too high in light of the fact that claimant's previous earnings in the same industry were between $18,000 and $20,000 annually.

Thus, the administrative law judge devised an alternative method of calculation based on claimant's average hourly rate. He found that claimant was earning an average of $13.21 per hour (his hourly rate ranged from $12.50 to $18.75 depending on the actual type of work he was doing) and worked at least 40 hours per week prior to the injury. Therefore, he concluded that claimant had an average weekly wage of $528.43 ($13.21 x 40). Petitioners contend that this amount is unreasonable, as claimant had not earned that much in the three years prior to the injury. The Board has held that an administrative law judge may reasonably rely upon an amount representing claimant's annual earning capacity which is higher than the amounts previously earned by claimant. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Moreover, contrary to petitioners' contention, the administrative law judge did not "invent" an average weekly wage, but calculated it based on claimant's average hourly wage times a 40 hour week. Although the administrative law judge did not calculate this figure out to determine the average annual earnings and then divide the sum by 52, the result would be the same if he had. *See James J. Flanagan Stevedores Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT)(5th Cir. 2000); 33 U.S.C. §910(d). In addition, the administrative law judge compared the average annual earnings under the alternate proposed schemes before he rejected them as unreasonable. As the administrative law judge's calculation of claimant's average weekly wage based on his actual average hourly rate is rational, we affirm the administrative law judge's finding that claimant's average weekly wage is $528.43, as it is supported by the evidence. *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986).

Petitioners lastly contend that the administrative law judge erred in finding that RA Building is the responsible employer. The evidence establishes that when claimant was hired, his paperwork indicated his status as an employee of RAC, rather than RA Building. Cl. Ex. 9. However, RAC's representative, David White, testified that this was a clerical

error, since all like employees were employed by R A Building, in order to insure them under the Longshore Act as a group. Tr. at 104, 113. The administrative law judge credited Mr. White's testimony, noting it held up under intense cross-examination in a post-hearing deposition. Decision and Order at 35. Moreover, the administrative law judge noted that claimant was hired by Jerry Rimes, the project superintendent for employer's work on maritime projects. Tr. at 103. As it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant worked for R A Building.[5]

We also reject petitioners' contention that R A Building is not an "employer" as the term is used under the Act, because it was merely a paper entity. For example, petitioners allege that R A Building did not own anything, entered into no contracts, and had no management structure. Petitioners contend that since R A Building was created solely to serve the interests of RAC, RAC is properly designated the responsible employer. This contention is ludicrous. It is clear that employees were hired R A Building, or transferred to R A Building from RAC, to work on the maritime side of the construction operation, and that insurance was procured from Wausau for these employees on behalf of R A Building. Emp. Ex. 15. Section 2(4) of the Act, 33 U.S.C. §902(4), defines the term "employer" as "an employer any of whose employees are employed in maritime employment...." As it is clear that R A Building engaged employees in maritime employment and obtained insurance to cover such workers under the Act, *see* 33 U.S.C. §932, it would be inconsistent with the purposes of the Act to permit Wausau to avoid coverage by asserting R A Building did not "really" exist. Under petitioners' theory, none of the employees insured by Wausau would be covered, although Wausau had an insurance by contract to specifically cover these employees. We reject this contention as it would absolve carrier of liability which it contracted to accept. Emp. Ex. 15. As we affirm the administrative law judge's finding that claimant was erroneously listed as an employee of RAC, and was actually an employee of R A Building in furtherance of its maritime projects, we hold that the administrative law judge properly held R A Building and it carrier, Wausau, liable for claimant's benefits.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

---

[5]As we affirm the administrative law judge's initial finding that R A Building was claimant's actual employer, we need not address the administrative law judge's alternative finding that R A Building was claimant's borrowing employer.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge