BRB No. 12-0134

CHARLES PETERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROSS ISLAND SAND AND GRAVEL COMPANY	)	
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE CORPORATION	)	DATE ISSUED: 09/24/2012
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston, Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

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

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (2010-LHC-00409) of Administrative Law Judge Steven B. Berlin 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 worked for employer as a crane operator for many years, during the course of which he injured his left shoulder several times. Claimant testified that, after a 1987 injury, his left shoulder was extremely painful, and that, over time, it became more painful and work was more difficult. EX 100 at 195-200. In November 2005, claimant injured his right ankle and knee, but continued to work. On December 22, 2005, he reinjured his left shoulder while pulling a heavy chain. EX 79. Claimant was awarded scheduled permanent partial disability benefits for hearing loss and for his right ankle, and a nominal award of $1 per week for permanent partial disability for the December 22, 2005, left shoulder injury. Claimant continued to work, suffering pain. He underwent shoulder surgery on January 11, 2008, and was released to return to work in February 2008. EX 106, 108. Claimant terminated his employment on May 12, 2008, due to shoulder pain and knee strain.

When claimant became unable to work in May 2008, employer voluntarily increased the nominal award to compensate claimant for temporary total disability.[1] Because the increased award was not based on claimant's earnings in the fifty-two weeks prior to May 12, 2008, claimant filed a new claim for benefits, arguing he suffered a cumulative trauma injury caused by the work he had done since his 2005 injury. Initially, employer controverted that claim but later accepted it and has been paying compensation for the cumulative trauma based on the weekly wage claimant was earning prior to the December 22, 2005, left shoulder injury.[2] Tr. at 6-7. Employer contended before the administrative law judge that, although it stipulated that claimant's actual weekly wage in the fifty-two weeks prior to his last day of employment, on average, was $1,942.09,

[1]Employer based its compensation rate on an average weekly wage of $1,493.93, claimant's wages in the fifty-two weeks prior to his December 22, 2005, left shoulder injury. EX 131.

[2]The parties stipulated that claimant reached maximum medical improvement as of January 27, 2009, and has been permanently totally disabled since that date. Tr. at 6.

claimant's actual earnings exceeded his earning capacity and should not be used to calculate benefits. Employer additionally contended that claimant's average weekly wage should be calculated pursuant to Section 10(c), 33 U.S.C. §910(c), rather than Section 10(a), 33 U.S.C. §910(a), because the record does not establish how many days claimant worked in the year preceding the onset of his disability. The administrative law judge rejected employer's contention and found that "it is neither unfair nor unreasonable to base the calculation of average weekly wage on actual earnings." Decision and Order at 3, 7. As the parties stipulated that claimant's average weekly wage in the fifty-two weeks prior to May 12, 2008, was $1,942.09, the administrative law judge found claimant is entitled to compensation at the statutory maximum rate of $1,160.36. *Id*. at 6, 10. Accordingly, the administrative law judge awarded permanent total disability benefits based on this rate. 33 U.S.C. §§906, 908(a).

On appeal, employer contends the administrative law judge erred in applying Section 10(a) to calculate claimant's average weekly wage and in using the wages during the fifty-two weeks preceding May 2008 as those wages do not reasonably represent claimant's wage-earning capacity prior to the injury. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director) responds, contending the administrative law judge erred in relying on claimant's actual earnings in the fifty-two weeks prior to the date he ceased working for employer without first addressing whether claimant sustained a new injury on that date. Employer filed a reply brief.

The introduction to Section 10 of the Act provides: "Except as otherwise provided in this chapter, the average weekly wage of the injured employee at *the time of his injury* shall be taken as the basis upon which to compute compensation . . . ." 33 U.S.C. §910 (emphasis added). Thereafter, Section 10 sets forth three alternative 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.[3] Section 10(a) cannot be applied if the number of days a 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). The computation of average annual earnings also must be made pursuant to Section 10(c) if subsection (a) or (b) cannot be reasonably or fairly applied. *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 Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006).

[3]No party contends that Section 10(b) should be applied in this case.

In this case, the administrative law judge rejected employer's contention that claimant's average weekly wage could not be calculated under Section 10(a) because the record does not establish how many days claimant worked in the year preceding the date he became unable to work. Although the record does not establish how many days claimant worked in the year preceding the date he became unable to work, the administrative law judge found that employer waived this argument when it failed to raise it before or at trial. As employer specifically argued in its pre-hearing statement that Section 10(c) should be applied, the administrative law judge erred in finding that it waived the issue. However, this error is harmless because the parties stipulated to the actual average amount claimant earned each week during the year preceding his last day of work.[4] While employer is correct that its wage stipulation did not involve designating Section 10(a) as the appropriate method for calculating claimant's average weekly wage, the parties stipulated to a specific dollar figure and it matters not how that figure was calculated. *See generally Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Fox v. Melville Shoe Corp., Inc.*, 17 BRBS 71 (1985). Therefore, we reject employer's contention of error.

Employer also contends that claimant's actual weekly wages prior to the onset of disability do not represent his earning capacity because his work restrictions should have prevented him from performing the essential functions of the job. That is, despite working through his pain in a non-sheltered job for many years, employer asserts that claimant's actual earnings exceed what he could really have earned. The administrative law judge rejected this argument. He found that employer offered no support for it, and that "to argue that [claimant] was incapable of performing the very work that he was in fact performing month after month is ludicrous. Of course [c]laimant was capable of doing the work that in fact he did." Decision and Order at 7. "Thus, if a claimant's work

[4]We reject the Director's suggestion to remand the case to the administrative law judge to make a specific finding regarding the date of claimant's injury. Although employer initially controverted claimant's claim for cumulative trauma injury, "caused by the additional work that he had done since his 2005 injury," employer subsequently accepted this claim and paid compensation. Tr. at 6-7. Moreover, it agreed that the "time of injury" was equivalent to the date claimant last worked. Tr. at 7-8. As employer accepted the cumulative trauma injury claim and stipulated to an average weekly wage based on the understanding that the "time of injury" meant the time claimant had to stop working, any error the administrative law judge may have made in failing to explicitly make a finding on a new injury is harmless. *See Deweert v. Stevedoring Services of America*, 272 F.3d 1241, (9th Cir. 2001) (average weekly wage calculated at time of injury not time of disability unless disability truly latent); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990) (average weekly wage calculated at time of aggravating injury).

exceeded his pre-injury medical restrictions, it remains that he was still earning whatever the employer was paying him." *Id*. at 9.

In *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held that the statute makes clear that average weekly wages typically are to be discerned by looking at the claimant's, or similar employees' wages, for a period prior to the injury. Further, in *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), the D.C. Circuit held that a claimant's "salary for the period prior to the injury is the relevant figure, absent some extraordinary circumstance." *Walker*, 793 F.2d at 322, 18 BRBS at 104(CRT) (no cause for looking at factors other than claimant's actual wages prior to the injury because nothing exceptional about the nature of the job as a bus driver or the claimant's capacity to work).

Upon consideration of the administrative law judge's findings, the record as a whole, and the contentions raised on appeal, we find no error in the administrative law judge's decision. The parties stipulated to claimant's average weekly wage in the fifty-two weeks prior to his last day of employment/date of injury, and employer conceded that claimant performed the work he was paid to do and that the work was not sheltered employment. Despite any assertion that claimant may have been performing his job while in pain, he nonetheless continued to work and earn these wages. As claimant sustained a cumulative trauma injury which caused him to cease working on May 12, 2008, it was reasonable for the administrative law judge to find that claimant's actual earnings preceding this date fairly and reasonably represent his pre-injury earning capacity. *See Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT); *Walker*, 793 F.2d 319, 18 BRBS 100(CRT); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Fox*, 17 BRBS 71. As the administrative law judge's average weekly wage finding is rational, supported by substantial evidence, and in accordance with law, it is affirmed. We therefore affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge