BRB No. 13-0047

DWAYNE L. MOORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KNUTSON TOWBOAT COMPANY	)	DATE ISSUED: 09/27/2013
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
SAIF CORPORATION	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway LLP), Portland, Oregon, for employer and Liberty Northwest Insurance Corporation.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2009-LHC-00456, 2010-LHC-00597) 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by

substantial evidence, and 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 commenced employment with employer in 1972. In December 1995, while employer was insured by SAIF Corporation, claimant experienced low back pain while operating a LeTourneau. As a result of this incident, claimant was unable to perform his operator duties from January 3, 1996 through July 9, 1996. He returned to work and, subsequently, employer became insured by Liberty Northwest Insurance Corporation (Liberty). On January 6, 1998, he was involved in a vehicle accident while once again operating a LeTourneau. Claimant continued to work until February 9, 1998, on which date he sought medical treatment for severe back pain. Claimant returned to light-duty work for three days in May 1998, but was then released by employer. Claimant received some benefits under the Oregon workers' compensation law, but subsequently filed a claim under the Act.

In her Decision and Order, the administrative law judge found that claimant sustained a work-related injury to his low back in 1996, when employer was insured by SAIF, and that the work-related accident on January 6, 1998 exacerbated his back condition such that Liberty is the responsible carrier as of that date. The administrative law judge found that claimant's back condition reached maximum medical improvement on May 1, 2000, that claimant is unable to perform his usual employment duties as a LeTourneau operator due to his injury, and that employer did not establish the availability of suitable alternate employment. The administrative law judge calculated claimant's average weekly wage as $778.34 for his 1996 injury, and $749.64 for his 1998 injury, pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c). The administrative law judge awarded claimant temporary total disability benefits from January 3, 1996 through April 21, 1996, and temporary partial disability benefits from April 22, 1996 through July 9, 1996, payable by SAIF, and various periods of temporary total, temporary partial, permanent partial and permanent total disability benefits, commencing February 9, 1998, payable by Liberty. 33 U.S.C. §908(a), (b), (c)(21), (e). The administrative law judge also held employer liable for claimant's medical expenses. 33 U.S.C. §907.

On appeal, claimant challenges only the administrative law judge's calculation of his average weekly wage. Employer responds, urging affirmance. Claimant has filed a reply brief.

Claimant contends that, as he worked substantially all of the year preceding each of his work-related injuries, the administrative law judge erred in applying Section 10(c), 33 U.S.C. §910(c), rather than Section 10(a), 33 U.S.C. §910(a), to calculate his average weekly wage. Based upon the undisputed factual situation presented in this

case, we reject this argument and affirm the administrative law judge's average weekly wage calculation pursuant to Section 10(c).

Section 10 sets forth three alternative methods for determining claimant's average weekly wage. Section 10(a) of the Act, 33 U.S.C. §910(a), looks to the actual wages of the injured worker who is employed for substantially the whole of the year prior to the injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months.[1] 33 U.S.C. §910(a); *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). The Ninth Circuit has held that when a claimant works 75 percent of the available workdays of the measuring year Section 10(a) applies, if the necessary information to calculate an average daily wage is in the record. *Id.*, 154 F.3d at 1058, 32 BRBS at 151-152(CRT); *see also General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 12(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006). Section 10(c) of the Act, 33 U.S.C. §910(c), is a catchall provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[2] *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). The goal of Section 10(c) is to arrive at a sum which reflects the potential of claimant to earn absent injury. *See Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979).

In this case, claimant presented evidence documenting the wages he earned in the 12 months preceding his 1996 and 1998 injuries, as well as the number of hours he worked during those periods, but not the actual number of days he worked. *See* CXs 4 at

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[1]Section 10(a) of the Act, states:

> If the injured employee shall have worked in the employment in which he was working at the time of his injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a).

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

4 – 11; 48 at 118 – 126. Employer presented an affidavit from one of its payroll employees stating that payroll records older than seven years had been shredded by employer due to a shortage of storage space and that, as a result, its search for claimant's payroll records during the relevant periods had been unsuccessful. *See* CX 11. Based upon the state of the parties' evidence, claimant conceded before the administrative law judge that "it is not possible to calculate a precise average weekly wage under Section 10(a)" and that "it is also impossible to determine with any precision how many days [claimant] worked or was paid for working." Cl. Post-hearing Br. at 15 - 16.

The administrative law judge acknowledged the parties' agreement that claimant's complete wage records for the applicable periods are not available. *See* Decision and Order at 67. After addressing claimant's arguments and calculations at length, the administrative law judge found that, with the payroll records that are available, calculating the number of days claimant actually worked in the years preceding his work injuries is impossible, thus making it unfeasible to calculate claimant's average weekly wage under Section 10(a). *Id.* at 68. Consequently, since claimant could not establish that he was either a five- or six-day per week worker or the number of days he worked prior to each injury, the administrative law judge concluded that claimant's average weekly wage must be calculated pursuant to Section 10(c) of the Act. *Id.* at 68 – 72.

The parties agree that claimant's payroll records do not apportion the number of hours worked by claimant during a pay period to specific days. *See* CXs 4 at 4 – 11; 48 at 118 – 126. The administrative law judge's statement that from the data available "any approximation of how many days the Claimant worked is incredibly speculative," Decision and Order at 69 n.86, is supported by the record. Thus, contrary to claimant's contention on appeal, the Ninth Circuit's decision in *Matulic* does not require a calculation of claimant's average weekly wage pursuant to Section 10(a) notwithstanding claimant's working substantially the whole of the year prior to each injury. In *Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT), the Ninth Circuit specifically affirmed the use of Section 10(c) where payroll records failed to establish the number of days the claimant had worked, because such is "an essential element under the § 910(a) calculation." *See also Bath Iron Works Corp. v. Preston*, 380 F.3d 597 38 BRBS 60(CRT) (1st Cir. 2004); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). The administrative law judge therefore rationally determined that Section 10(a) cannot apply in this case, and that claimant's average weekly wage should be calculated pursuant to Section 10(c). *Id.*

Alternatively, claimant contends that employer's destruction of claimant's payroll records mandates that the case be remanded for the administrative law judge to credit claimant's testimony regarding the number of days per week that he worked in the years preceding his two injuries. Specifically, citing *Glover v. BIC Corp.*, 6 F.3d 1318 (9th Cir. 1993), claimant asserts that the administrative law judge has broad discretion to draw

adverse inferences against a party responsible for the destruction of evidence even if there is no bad faith in the party's action.

In this case, employer does not dispute the fact that, as part of its normal business practice regarding the retention of documents, it shredded its payroll records after seven years, and that a search by employer for claimant's payroll records during the relevant periods of time was unsuccessful.[3] *See* CX 11. In addressing claimant's argument that employer's actions mandate that all inferences should be made in claimant's favor, the administrative law judge found that employer acted neither inappropriately nor strategically when, as part of its document retention plan, it shredded records that were greater than seven years old.[4] *See* Decision and Order at 71. Specifically, the administrative law judge found that at the time employer took this action claimant's claim under the Oregon Act had been closed for several years, and that employer was thus understandably unaware that the records might be needed for litigation. Additionally, the administrative law judge found that employer did nothing to prevent claimant from filing his claim under the Longshore Act earlier than July 2008. Thus, the administrative law judge declined to draw an adverse inference against employer. *Id.* Claimant has not established an abuse of the administrative law judge's discretion in this regard, as she fully considered the issue. Thus, we affirm the administrative law judge's conclusion that employer's actions do not mandate that inferences regarding claimant's average weekly wage be drawn in claimant's favor. *See Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.*, 306 F.3d 806, 825 (9th Cir. 2002) (district court has the discretion to refuse the adverse inference requested). Therefore, as the administrative law judge properly found Section 10(a) inapplicable, and as claimant does not challenge the administrative law judge's actual calculation of his average weekly wage pursuant to Section 10(c), we affirm the administrative law judge's average weekly wage calculations. *Obadiaru*, 45 BRBS 17.

[3]Claimant, following his January 6, 1998, work injury, received benefits under the Oregon state workers' compensation statute; this state claim apparently was closed sometime in 1998. *See* EXs 110, 115, 117. Ten years later, in July 2008, claimant filed a claim under the Longshore Act for the back condition he alleged was causally related to the December 1995 and January 1998 work injuries. *See* CX 1.

[4]In his reply brief, claimant states that that employer acted "innocently" when it destroyed claimant's payroll records. Cl. Reply Br. at 3.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits 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