

DAVID L. STRICKLAND)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NORTH AMERICAN SHIPBUILDING)	DATE ISSUED:
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
COMPANY)	
)	
and)	
)	
FIDELITY & CASUALTY COMPANY)	
OF NEW YORK)	
)	
Employer/Carriers-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order- Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Lawrence D. Ward, Jr., Houma, Louisiana, for claimant.

Jerald L. Album (Abbot, Simses, Album, Knister & Baynham), New Orleans, Louisiana, for employer and Signal Mutual Indemnity Company.

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for Fidelity & Casualty Company of New York.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Awarding Benefits (94-LHC-2609) of Administrative Law Judge James W. Kerr, Jr., 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 injured his back on March 15, 1991, in a work-related accident when he picked up a steel plate weighing approximately 100 pounds. He continued to work at his job and to suffer from increasing back pain until May 1992 when he stopped working on advice of his physician. Claimant sought benefits under the Act.

The administrative law judge found that claimant is entitled to temporary total disability benefits from May 5, 1992 until December 1, 1992, the date he reached maximum medical improvement; permanent total disability benefits from December 2, 1992 until September 22, 1994, the date suitable alternate employment was established; permanent partial disability compensation with a \$6.00 per hour residual wage-earning capacity from September 23, 1994 and continuing; and medical benefits from March 10, 1992 and continuing. 33 U.S.C. §§907, 908(a), (b), (c)(21), (h). The administrative law judge based claimant's benefits on an average weekly wage of \$572.69 pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a).

On appeal, claimant contends that the administrative law judge erred in his calculation of the applicable average weekly wage. Employer and its carriers respond, urging affirmance of the administrative law judge's decision.

Section 10(a) applies where the claimant worked substantially the whole of the year preceding the injury and looks to the actual wages of the injured worker as the monetary base for a determination of the amount of compensation. To calculate average weekly wage under this section, claimant's actual earnings for the 52 weeks prior to the injury are divided by the number of days he actually worked during that period, to determine an average daily wage. *See generally Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986). The average daily wage is then multiplied by 300 for a six-day per week worker and the quotient is divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to determine average weekly wage.

In the present case, the administrative law judge noted that claimant had earned \$33,912.40 in the 56 weeks preceding the injury representing 2733.5 hours of work.¹ The administrative law judge divided these hours by 8 to yield 341.69 working days. Then he divided claimant's actual earnings of \$33,912.40 by 341.69 to yield an average daily wage of \$99.25. As the administrative law judge found that claimant was a six-day per week worker, the average daily wage of \$99.25 was multiplied by 300, which results in average annual earnings of \$29,774.71. When divided by 52 as required by Section 10(d), the administrative law judge concluded that claimant had a pre-injury average weekly wage of \$572.59.

On appeal, claimant contends that Section 10(a) cannot properly be used in this case as there is no evidence of the actual number of days claimant worked during the 56 week period. We agree. The payroll records indicate only the number of hours claimant worked each week, and claimant testified that he worked anywhere from 45 to 90 hours a week, Tr. at 27, and that after his injury in

¹The prior 56 week total was used rather than the prior 52 week total to account for four weeks claimant had missed work due to a work-related injury in August 1991. *See generally Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984).

August 1991, he was working 12 hours a day, Tr. at 57. Therefore, as the administrative law judge's finding that claimant worked 8 hours a day is not supported by substantial evidence, and there is no other evidence of the number of days claimant worked during the 56 weeks preceding his injury, we hold that there is insufficient evidence from which claimant's average daily wage can be determined under Section 10(a). We thus vacate the administrative law judge's application of Section 10(a) in determining claimant's average weekly wage.

Section 10(c), 33 U.S.C. §910(c), is applicable to cases where the methods at subsections (a) and (b) cannot fairly or realistically be applied, or where there is insufficient evidence in the record to make a determination of average daily wage under either subsections (a) or (b).² *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). As we have held that there is insufficient evidence in the record to determine claimant's average daily wage under Section 10(a), we remand the case to the administrative law judge for consideration of claimant's average weekly wage pursuant to Section 10(c) of the Act. 33 U.S.C. §910(c), (d)(1).

Accordingly, the Decision and Order of the administrative law judge awarding benefits based an average weekly wage of \$572.59 is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. The administrative law judge's decision is affirmed in all other respects.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

²No party contends that Section 10(b), 33 U.S.C. §910(b), is applicable to this case.