BRB No. 96-1503

EMMANUEL GREEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREAT LAKES DREDGE & DOCK COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Jefferson R., Tillery (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (94-LHC-2176) of Administrative Law Judge Quentin P. McColgin 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 if they 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).

On June 22, 1993, claimant slipped and fell during the course of his employment for employer as a cement mason foreman. Claimant's hands were subsequently placed in soft casts and he was kept off work for two weeks. Employer voluntarily claimant paid two weeks of temporary total disability compensation, 33 U.S.C. §908(b), based on an average weekly wage of $521.52. In his Decision and Order, the administrative law judge found that claimant was entitled to compensation for two weeks of temporary total disability which employer voluntarily paid and for an eleven percent permanent partial disability of the left

index finger, 33 U.S.C. §908(b), (c)(7). Pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), the administrative law judge found claimant's average weekly wage to be $744.32. On appeal, employer challenges the administrative law judge's average weekly wage determination. Claimant has not responded to employer's appeal.

Employer challenges the administrative law judge's calculation of claimant's average weekly wage at the time of his injury, contending that the administrative law judge should have calculated claimant's average weekly wage under Section 10(a) of the Act rather than Section 10(c) of the Act. 33 U.S.C. §910(a), (c). We disagree. Section 10(a) is to be applied when an employee has worked substantially the whole of the year immediately preceding his injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. 33 U.S.C. §910(a); *see Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). This average daily wage is then multiplied by 260 if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all 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.[1] *See Newby v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). The Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Richardson,* 14 BRBS at 855.

In the instant case, the administrative law judge determined that Section 10(a) was inapplicable since claimant's payroll records while working for another employer prior to July 31, 1992, had not been provided by that employer and, thus, he could not determine the amount of claimant's earnings between June 23, 1992 and July 31, 1992; in rendering this finding, the administrative law judge specifically found employer's proffered formula, which utilized claimant's 1992 Wage and Tax Statement, to be insufficiently reliable to quantify claimant's earnings with the prior employer during the relevant period of time. The administrative law judge thus declined to use Section 10(a) and, rather, calculated claimant's average weekly wage pursuant to Section 10(c). Our review of the record reveals that claimant's payroll records fail to apportion the number of hours worked by claimant during a pay period to specific days; moreover, as set forth by the administrative law judge, claimant's actual earnings between June 23, 1992 and July 31, 1992, cannot be determined by the evidence of record. We thus hold that the administrative law judge rationally determined that Section 10(a) could not be applied to the instant case, and that

[1]In the instant case, no party contends that Section 10(b) is applicable.

claimant's average weekly wage should be calculated pursuant to Section 10(c). Accordingly, as the administrative law judge's calculation of claimant's average weekly wage under Section 10(c) is unchallenged, it is affirmed.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge