

BRB No. 92-2323

MONROE JOHNSON, Jr.)
)
 Claimant-Petitioner)
)
 v.)
)
 INGALLS SHIPBUILDING,)
 INCORPORATED) DATE ISSUED:
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Jennings, Administrative Law Judge,
United States Department of Labor.

John L. Hunter (Cumbest, Cumbest, Hunter, & McCormick), Pascagoula, Mississippi, for
claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured
employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY,
Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-3155) of Administrative Law Judge
Kenneth A. Jennings awarding benefits 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, who worked as a carpenter for employer on three occasions for a total of
approximately fourteen years, filed a claim for occupational noise-induced hearing loss benefits on
April 12, 1989. In his Decision and Order, the administrative law judge awarded claimant
compensation for a 2.5 percent binaural hearing impairment pursuant to Section 8(c)(13)(B) of the
Act, 33 U.S.C. §908(c)(13)(B), based upon an average weekly wage of \$262.35, which he stated
was based upon claimant's actual earnings in the 52-week period preceding September 16, 1988, the
stipulated date of claimant's injury. Decision and Order at 4. Claimant appeals the administrative

law judge's calculation of his average weekly wage, and employer responds, urging affirmance.

On appeal, claimant contends that the administrative law judge erred in computing his average weekly wage pursuant to Section 10(a) of the Act based strictly upon income reported on his 1987 and 1988 tax returns. Claimant asserts that inasmuch as he was unable to work most of the year in 1987 because he had undergone surgery for a knee injury, the administrative law judge's consideration of his 1987 income was not equitable.¹ Claimant asserts that in such cases, Section 10(b) specifically provides for the determination on the applicable average weekly wage based upon evidence of a substitute employee's wages rather than on the basis of claimant's tax returns. In the alternative, claimant argues that the administrative law judge should have calculated his average weekly wage under Section 10(c) and that where, as here, claimant has been prevented from working on a full-time basis for reasons outside of his control, Section 10(c) requires the fact-finder to apply a more equitable method to determine claimant's average weekly in order to fairly and adequately compensate him for his loss. Finally, claimant avers that because he has been employed as a transient construction worker and the nature of his employment was intermittent and seasonal, Section 10(a) cannot fairly and reasonably be applied.

Initially, we note that, contrary to claimant's assertions, the administrative law judge did not calculate his average weekly wage under Section 10(a) but rather properly utilized Section 10(c). Although the administrative law judge did not identify the subsection he employed in making his average weekly wage determination, it is apparent that he utilized Section 10(c) as the record contains no evidence from which claimant's average daily wage can be calculated. Inasmuch as such evidence is a pre-requisite to application of both subsections (a) and (b), we affirm the administrative law judge's use of Section 10(c).² See *Browder v. Dillingham Ship Repair* 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489, 494-5 (1981).

Claimant's assertion that the administrative law judge erred in including any 1987 wages in the average weekly wage calculation is rejected. Claimant correctly asserts that subsection (c), unlike subsections (a) and (b), contains no requirement that claimant's actual wages in the 52-week period prior to the injury be employed to determine his average weekly wage. Nonetheless, the administrative law judge's use of claimant's actual earnings in the 52-week period before claimant's injury, which included his 3.5 months of 1987 earnings, was clearly within his discretion. See *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137, 139 (1991).

We agree, however, with claimant's assertion that the administrative law judge's method of calculating his annual earning capacity under Section 10(c) cannot be affirmed. Initially, it is

¹Claimant avers that given the nearly \$10,000 discrepancy in his income between the two years, he was prejudiced by the administrative law judge's use of Section 10(a), 33 U.S.C. §910(a).

²Additionally, Section 10(b) would be inapplicable in the instant case as neither party has introduced evidence concerning the wages of other workers in the same or similar employment situation which would enable the administrative law judge to make an average weekly wage determination. *McKee v. D. E. Foster Co.*, 14 BRBS 513, 516 (1981); *Holmes v. Tampa Ship Repair and Dry Dock Co.*, 8 BRBS 455, 461-2 (1978).

unclear how the administrative law judge arrived at his average weekly wage figure, as he provided no explanation. It appears that he divided claimant's actual earnings for 1987 and 1988 by 12, and then multiplied the resultant figures for each year by the number of months claimant worked in the year prior to injury. Thereafter, it appears that he added the two figures together to obtain annual earnings and then divided by 52 weeks.³

The administrative law judge's failure to adequately detail his average weekly wage findings consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A),⁴ requires that we remand this case for specific findings. *See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 382-3 (1990). In so doing, we note that earnings in the period from September 16, 1987, to December 31, 1987 are properly included in the 52-week period prior to claimant's injury which the administrative law judge stated he was using. Dividing the \$6,920 claimant actually earned in 1987 by 12 months, however, does not accomplish this result, as claimant testified he did not work for 8 months of that year due to a knee injury. Extrapolating 4 months of earnings over a 12-month period distorts the determination of claimant's annual earning capacity in the year prior to his injury. *See Brown v. General Dynamics Corp.*, 7 BRBS 561 (1978). Moreover, pro-rating claimant's 4 months of 1987 earnings over that entire year does not account for the fact that claimant was temporarily totally disabled by a prior knee injury for 8 months in that year. *See Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 183, 185-6 (1984). If the administrative law judge is using actual earnings from September 1987 to September 1988, he must rationally determine the actual earnings for the months claimant worked.⁵ Accordingly, we vacate the administrative law judge's average weekly wage calculation and remand for him to reconsider the question of claimant's annual earning capacity under Section 10(c) and to explain his findings consistent with the requirements of the Administrative Procedure Act.

Accordingly, the administrative law judge's average weekly wage finding is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

³ Actual Earnings 1987: \$6,920/12 mos= \$576.66 x 3.5 mos =	\$2018.33
Actual 1988 earnings: \$16,410/12 mos= \$1367.50 x 8.5 mos =	\$11,623.75
(\$2018.33 (1987) + \$11,623.75 (1988)) = \$13,642.08/52 =	\$262.35

⁴Under this provision, decisions rendered under the Act must include a statement of "findings and conclusions and the reason or basis therefor, on all material issues of fact, law, or discretion presented in the record." *See Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985).

⁵Since claimant worked the entire year in 1988, dividing those earnings by 12 and multiplying by 8.5 as the administrative law judge appears to have done is reasonable.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge