BRB Nos. 91-0420
and 93-2341

RODOLFO REYNOSO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONTINENTAL MARITIME OF SAN FRANCISCO	)	DATE ISSUED:
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY c/o MHG ADJUSTING COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order of Alfred Lindeman and the Decision and Order Granting Modification of Benefits of Paul A. Mapes, Administrative Law Judges, United States Department of Labor.

Brian O. Leary (Jewel & Leary), San Francisco, California, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (90-LHC-938) of Administrative Law Judge Alfred Lindeman and the Decision and Order Granting Modification of Benefits (93-LHC-477) of Administrative Law Judge Paul A. Mapes 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 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).

On December 29, 1986, claimant injured his lower back in the course of his employment as a shipyard laborer with employer. Employer initially voluntarily paid claimant temporary total disability compensation at the rate of $300 per week but later reduced its payments to $207.72 per week. At the hearing before the administrative law judge, the parties stipulated that claimant was entitled to continuing temporary total disability compensation commencing February 1, 1987 but the issue of the applicable average weekly wage and claimant's entitlement to reimbursement for self-procured medical care he obtained in Mexico remained in dispute.

In a Decision and Order dated October 29, 1990, Administrative Law Judge Alfred Lindeman found that employer was not liable for reimbursement of the disputed medical costs. 33 U.S.C. §907(d); 20 C.F.R. §§702.406, 702.413. The administrative law judge further determined that claimant's average weekly wage at the time of injury was $384.61, calculated pursuant to 33 U.S.C. §910(c), based upon the average of claimant's actual earnings for calendar years 1985 and 1986. Claimant appealed the administrative law judge's average weekly wage determination to the Board. BRB No. 91-420.

While claimant's appeal was pending before the Board, employer sought to modify Administrative Law Judge Lindeman's disability award from one for temporary total disability compensation to one for permanent partial disability compensation. In a Decision and Order issued on July 20, 1993, Administrative Law Judge Paul A. Mapes granted modification. The administrative law judge found that claimant reached maximum medical improvement on October 21, 1991. He also found that although claimant was unable to resume his former employment as a laborer, employer had met its burden of establishing suitable alternate employment available to claimant as a cashier at a self-service gas station or parking lot, which paid an average of $4.26 per hour at the time of injury. The administrative law judge further found that claimant was capable of working an 8-hour day as a cashier and that his residual wage-earning capacity was therefore $170.40 per week. Accordingly, he awarded claimant permanent partial disability compensation pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), as of the date of his decision, based on the difference between his average weekly wage of $384.61 and his residual earning capacity of $170.40 per week.

Claimant appeals this decision, challenging the determination of his wage-earning capacity based on a 40-hour work week. BRB No. 93-2341. This appeal has been consolidated with claimant's earlier appeal of his average weekly wage. Employer responds to both appeals, urging affirmance.

I. AVERAGE WEEKLY WAGE- BRB No. 91-420

Claimant initially argues that because he was hired on October 13, 1986, and injured on December 29, 1986, and thus did not work a full year for employer, the administrative law judge should have calculated his average weekly wage pursuant to Section 10(b), 33 U.S.C. §910(b), based on the 1986 earnings of claimant's coworker, Paulo Gutierrez. Section 10, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by

52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an 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 annual wages where an injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to Section 10(c), 33 U.S.C. §910(c), however, if subsections (a) or (b) cannot be reasonably and fairly applied. In the present case, because the evidence of record clearly establishes that claimant's work since 1979 in the ship repair industry was intermittent and discontinuous, we affirm the administrative law judge use of Section 10(c) to calculate claimant's average weekly wage. *See Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980); *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996).

Alternatively, claimant contends the administrative law judge misapplied the provisions of Section 10(c). Claimant asserts that the $384.61 average weekly wage computed by the administrative law judge fails to accurately reflect his annual earning capacity at the time of injury as is required by Section 10(c). Claimant maintains that because his 1986 earnings of $14,758.56 were unusually low due to lack of work in the 52-week period prior to injury, the administrative law judge should have discounted them in their entirety and instead calculated his average weekly wage as $509, based upon the average of his 1985 earnings of $25,240.74, and the $26,771 in 1986 earnings of his coworker, Paulo Gutierrez, an employee of the same class who worked for the same employer, doing the same work under the same union contract at the same wage rate. In the alternative, claimant maintains that pursuant to Section 10(c), his average weekly wage should have been calculated as $524.89 or $552.57, based upon the average of claimant's 1985 earnings, Mr. Gutierrez's 1986 earnings, and either the 1987 earnings of Mr. Gutierrez or Ramon Buenrostro, another similarly situated coworker.

The administrative law judge is afforded considerable discretion in arriving at a fair and reasonable approximation of claimant's annual earning capacity at the time of injury pursuant to Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979). After review of the administrative law judge's decision in light of the evidence of record, we affirm his average weekly wage determination. In determining claimant's average weekly wage, the administrative law judge rationally declined to employ the 1986 or 1987 earnings of claimant's coworkers Gutierrez or Buenrostro because he found that claimant failed to establish that their work histories and lifestyles were sufficiently similar to that of claimant; he noted for example that claimant typically spent approximately one month per year in Mexico whereas the record did not reflect that claimant's coworkers were likewise unavailable for work. Nevertheless, the administrative law judge found that the fact that Mr. Gutierrez and Mr. Buenrostro had earnings in excess of $25,000 in 1986 and 1987 did corroborate that claimant's 1985 earnings of $25,240.70 were not an aberration. Moreover, the administrative law judge also rationally found that no evidence had been submitted which indicated that claimant's actual earnings of $14,758.56 in the 52-week period prior to injury did not accurately reflect "both the vagaries of the work in the industry and claimant's work availability that year." Decision and Order at 3.

In light of these facts, the administrative law judge concluded that the average of claimant's actual earnings in the years 1985 and 1986 most fairly represented his annual earning capacity at the

time of injury and that claimant's average weekly wage was $384.61 pursuant to Section 10(c). Inasmuch as the administrative law judge provided valid reasons for declining to calculate claimant's earning capacity at the time of injury in the manner urged by claimant, and his determination of claimant's average weekly wage is reasonable, supported by substantial evidence, and is consistent with the goal of arriving at a figure which reasonably represents claimant's annual earning capacity at the time of injury, we affirm his average weekly wage calculation. *See generally Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985).

II. WAGE-EARNING CAPACITY- BRB No. 93-2341

With regard to the award of permanent partial disability on modification, claimant contends that in determining that his post-injury wage-earning capacity was $170.40 per week, the administrative law judge erred in crediting the opinion of Dr. Hanbery, who saw claimant on only one occasion and stated that claimant may be able to work an 8-hour day, rather than the contrary opinion of claimant's treating physician, Dr. Zwerin, who found that claimant could work at most 3 to 4 hours per day.

After review of the administrative law judge's Decision and Order on modification in light of the record evidence and claimant's arguments, we affirm the administrative law judge's finding that claimant had a post-injury wage-earning capacity of $170 per week based on his ability to work 8 hours a day because it is rational, supported by substantial evidence, and in accordance with applicable law. *O'Keeffe*, 380 U.S. at 359. Inasmuch as it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including physicians, and to draw his own inferences from the evidence, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and claimant has failed to identify any reversible error made by the administrative law judge, his findings regarding claimant's post-injury wage-earning capacity are affirmed. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

Accordingly, the Decision and Order Awarding Benefits of Administrative Law Judge Lindeman and the Decision and Order Granting Modification of Benefits of Administrative Law Judge Mapes are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge