

WILLIAM EHRLICH)	
)	
Claimant-Respondent)	
)	
v.)	
)	
MARATHON OIL COMPANY)	DATE ISSUED:
)	
and)	
)	
HARTFORD FIRE INSURANCE COMPANY)	
)	
Employer/Carrier- Petitioners)	DECISION and ORDER

Appeal of the Order Granting in Part Claimant’s Motion for Reconsideration and Order Denying Employer’s Motion for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Yancy White (White, Huseman & Pletcher), Corpus Christi, Texas, for claimant.

Marilyn T. Hebinck (Royston, Rayzor, Vickery & Williams, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Order Granting in Part Claimant’s Motion for Reconsideration and Order Denying Employer’s Motion for Reconsideration (92-LHC-1646) of Administrative Law Judge Richard D. Mills 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 administrative law judge’s findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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, an instrument repairman, was injured on November 30, 1984, when the

personnel basket in which he was being transferred hit the side of a boat and dropped approximately ten feet onto the boat's deck, causing trauma to claimant's back. In his Decision and Order Awarding Benefits, the administrative law judge found claimant entitled, *inter alia*, to temporary total disability compensation from December 2, 1984, to July 6, 1988, permanent total disability compensation from July 7, 1988 to May 31, 1990, and permanent partial disability compensation thereafter based on an average weekly wage of \$720.90. Decision and Order at 17. On reconsideration, the administrative law judge found that claimant's compensation should be based on an average weekly wage of \$781.10.

Employer now appeals, arguing that the administrative law judge should have found that claimant's average weekly wage for compensation purposes was \$716.43. Alternatively, employer contends that the Board should reinstate the administrative law judge's original determination of \$720.90 as claimant's applicable average weekly wage. Claimant responds, urging affirmance of the administrative law judge's Order on Reconsideration.

Employer challenges the administrative law judge's calculation of claimant's average weekly wage at the time of his injury. Specifically, while acknowledging that the administrative law judge properly utilized Section 10(c) of the Act, 33 U.S.C. §910(c), to calculate claimant's average weekly wage at the time of his injury, employer contends that the administrative law judge erred in using 26, rather than 24, pay periods in calculating claimant's average weekly wage. Employer contends that, as a result, the average weekly wage arrived at by the administrative law judge is inflated because it includes two additional pay periods from the year preceding claimant's injury. We disagree.

In the instant case, the administrative law judge initially determined that Section 10(c) of the Act was to be used in calculating claimant's average weekly wage because claimant was neither a traditional five nor six day per week worker. Decision and Order at 15. Next, the administrative law judge divided the total amount of wages which claimant received in 1984, \$37,486.81, by 52, in arriving at an average weekly wage for compensation purposes of \$720.90. On reconsideration, the administrative law judge added to the total wages paid claimant in 1984, \$37,486.81, for his eleven months of work through November 30, 1984, the amounts paid to claimant in December 1983, \$3,130.39; this sum, \$40,617.20, reflected the amount of wages claimant earned between December 1, 1983, and November 30, 1984.¹ See Order on Reconsideration at 1. He then divided this amount by 52 to arrive at an average weekly wage of \$781.10. Employer contends that, as claimant received 24 pay checks per year, the administrative law judge should have used the last two pay periods of 1983 plus the first 22 pay periods of 1984, the sum of which, \$37,253.97, would then be divided by 52 to obtain an average weekly wage of \$716.43.

¹The administrative law judge used employer's pay records to determine the wages paid to claimant. See DXS 12, 15.

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 *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). It is well-established that the administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). See *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in part*, 600 F.2d 1288 (9th Cir. 1979). We 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 *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981). In the instant case, the administrative law judge calculated claimant's average weekly wage by dividing claimant's total earnings from December 1, 1983, through November 30, 1984, by 52. See 33 U.S.C. §910(d). We hold that the result reached by the administrative law judge is reasonable and is supported by substantial evidence as it takes into account the wages claimant earned in the 12 months preceding his injury.² See *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). We, therefore, affirm the administrative law judge's determination of claimant's average weekly wage.

²We note that the evidence relied upon by employer in contending that the administrative law judge should have used only 24 pay periods in calculating claimant's average weekly wage is not clearly supportive of that position; specifically, employer's pay records indicate that claimant received 24 payments of wages in 1983, a year in which he worked 12 months, and that he also received 24 payments of wages in 1984, a year in which he worked 11 months. See DXS 12, 15. Moreover, the testimony of Mr. Paul Parker, employer's human resource representative, which employer now concedes is "contradictory" and "confusing," see Employer's brief at 9, indicated claimant was paid bi-weekly. See Tr. at 254-256.

Accordingly, the administrative law judge's Order Granting in Part Claimant's Motion for Reconsideration and Order Denying Employer's Motion for Reconsideration is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge