BRB No. 06-0903

B.N.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAR-CON/THUNDER CRANE, INCORPORATED	)	DATE ISSUED: 08/17/2007
	)	
and	)	
	)	
ZURICH NORTH AMERICA INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Jere Jay Bice (Bice, Palermo & Veron, L.L.C.), Lake Charles, Louisiana, for employer/carrier.

Michael D. Murphy (Hays, McConn, Rice & Pickering), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order Denying Motion for Reconsideration (2005-LHC-2046) of Administrative Law Judge Lee J. Romero, 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 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. 33

U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was hired by employer as an offshore rigger for a crane operator. He testified he was scheduled to work for two weeks and then be off for two weeks. He was injured during the course of his employment on his second day of work on June 2, 2002.[1] Following the accident, employer paid medical benefits and temporary total disability benefits at the minimum compensation rate of $241.52 per week. Claimant sought additional benefits. The parties stipulated to all issues except for claimant's average weekly wage. The administrative law judge relied on the Board's decision in *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981), to find that the focus should be on claimant's potential earnings, not necessarily on his actual past earnings. The administrative law judge applied Section 10(c) of the Act, 33 U.S.C. §910(c), and calculated claimant's average weekly wage based on the wages he was paid by employer. The administrative law judge found that claimant's average weekly wage is $424.[2] He denied employer's motion for reconsideration, stating that his decision is supported by substantial evidence and that claimant's "meager past earnings" did not "accurately reflect his potential earning capacity" with employer. Order Denying Recon. at 2-3. Employer appeals the administrative law judge's award, and claimant responds, urging affirmance.

Employer contends the administrative law judge erred in using claimant's wages with employer to find that claimant's average weekly wage is $424, as claimant's earning history for the seven years prior to the work injury established that he worked only intermittently and earned no more than $3,300 in any one year. Jt. Ex. 1; Jt. Ex. 6 at 19, 21-22, 25, 28. We reject employer's assertion that the administrative law judge erred in determining claimant's average weekly wage.

Under Section 10(c), the administrative law judge has broad discretion to arrive at a fair approximation of a claimant's annual earning capacity at the time of his injury.[3]

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[1]The parties stipulated that claimant worked for two days and was paid $8 per hour for 12 hours each day for a total of $96.

[2]The administrative law judge calculated what claimant would have earned for one month of work ($8/hr. x 80 hrs = $640; plus $12/hr. x 88 hrs = $1,056; total monthly earnings = $1,696 / 4 wks = $424) to arrive at claimant's average weekly wage.

[3]It is undisputed that neither Section 10(a) nor 10(b), 33 U.S.C. §910(a), (b), applies to this case, as claimant did not work substantially the whole of the year prior to his injury, and the record contains no evidence of wages of similarly-situated employees.

Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). The claimant's actual past earnings need not control. *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006); *see also Staftex Staffing v. Director, OWCP [Loredo]*, 237 F.3d 404, 34 BRBS 44(CRT), *modified in part on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410 (1980) (amount of potential to earn absent injury). In this case, the administrative law judge found that claimant began a new, higher-paying job and was injured after two days of work. Based on the evidence before him, the administrative law judge rationally found the higher wages of that job representative of claimant's earning potential at the time of his work injury. Order Denying Recon. at 2. *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986); *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462 (1981). As the administrative law judge's finding is rational and supported by substantial evidence, we affirm the average weekly wage of $424.

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge