BRB No. 11-0487

RICHARD SHIRROD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PACIFIC RIM ENVIRONMENTAL RESOURCES, LLC	)	DATE ISSUED: 02/14/2012
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Reconsideration of Decision and Order of Steven B. Berlin, Administrative Law Judge, Untied States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Order Denying Reconsideration of Decision and Order (2008-LHC-1585) of Administrative Law Judge Steven B. Berlin 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 began working for employer as a structural steel worker in August 2005 on a barge-refitting project. On November 1, 2005, he suffered a work-related injury to his left knee and right ankle and ceased work. Claimant filed a claim for benefits. While the case was before the administrative law judge, the parties agreed that claimant is entitled to compensation and medical benefits. However, they disputed, *inter alia*, claimant's average weekly wage. The administrative law judge calculated claimant's

average weekly wage to be $569.23; he awarded claimant temporary total disability benefits from November 1, 2005, through January 21, 2007, and permanent total disability from January 22, 2007, onward. 33 U.S.C. §908(a), (b). Claimant filed a motion for reconsideration which the administrative law judge denied. On appeal, claimant argues that the administrative law judge erred in determining his average weekly wage. Claimant contends his average weekly wage should be based solely on his wage rate during his employment by employer. Employer responds, urging affirmance on the administrative law judge's decisions. Claimant filed a reply brief.

Section 10 of the Act, 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. The parties agree that the computation of average weekly wage in this case cannot be made pursuant to Section 10(a) or (b), [1] and that Section 10(c), 33 U.S.C. §910(c) applies.[2] The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *See Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980). It is well established that an administrative law judge has broad discretion in determining an employee's average weekly wage under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977),

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[1] Section 10(a) does not apply because claimant did not work substantially the whole of the year prior to his injury, and Section 10(b) does not apply because the record does not contain evidence of the wages of an employee of the same class who worked substantially the whole year in the same or similar employment. 33 U.S.C. §910(a), (b).

[2] Section 10(c) provides:

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c).

aff'd in pert. part, 600 F.2d 1288 (9th Cir. 1979). Pursuant to Section 10(c), the administrative law judge may account for a claimant's intermittent work history, a raise in pay he received prior to the injury, and, if appropriate, circumstances existing after the date of injury. *See Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *Healy Tibbitts Builders, Inc.*, 444 F.3d 1095, 40 BRBS 13(CRT); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Palacios*, 633 F.2d 840, 12 BRBS 806.

In this case, the administrative law judge found that, prior to working for employer, claimant had worked seasonally as a fish counter for various employers and collected unemployment in the off season. As a fish counter for IAP World Services from March 7 through July 29, 2005, he had been paid $13.40 per hour and earned $16,684 in the 24 weeks he worked for IAP. Beginning in August 2005, employer paid claimant $800 per week, and claimant earned $10,197.34 in just over 12 weeks of work for employer. After claimant's work injury forced him to cease work, employer hired Lars Jensen to replace him. Mr. Jensen worked for employer until November 25, 2006, when he was let go for non-work-related reasons. Employer did not replace Mr. Jensen. Employer asserted there was no promise of continuous employment after the barge project ended; however, it acknowledged its practice to recall former employees when there was work for them.

Because claimant had worked seasonally counting fish from 2002 to 2005 prior to working for employer, and because claimant's work with employer was limited to the term of the barge re-fitting project with no promise of continuing employment, the administrative law judge found that claimant's work with employer was "temporary and part of [c]laimant's long-standing pattern of intermittent employment." Decision and Order at 20. Nevertheless, the administrative law judge also found that claimant "would have continued to work [for employer] until Mr. Jensen was let go and not replaced, November 25, 2005 [sic]," and that claimant's annual earnings should be calculated by multiplying his weekly wage for employer $800, by the number of weeks claimant could have expected to work if he had not been injured.[3] *Id*. at 21. Finding that claimant could have expected to work 37 weeks because claimant was employed from March 7, 2005, and could have worked until "November 25, 2005," the administrative law judge determined that claimant's annual earnings would have been $29,600 ($800 x 37). *Id*. at

[3]The administrative law judge found that $800 per week represented claimant's "earning potential for intermittent employment." Decision and Order at 21. In so doing, the administrative law judge explained that claimant had the potential to obtain additional intermittent work paying $800 per week, given employer's general business practice of rehiring former employees, and employer's satisfaction with claimant's work performance. *Id*. at 20-21.

21. Dividing this number by 52 weeks, the administrative law judge found claimant's average weekly wage to be $569.23. *Id*.

We cannot affirm the administrative law judge's average weekly wage calculation. The administrative law judge divided claimant's 2005 wages by the sum of the number of weeks claimant worked before the injury and the number of weeks claimant would have worked had he not been injured, as evidenced by Mr. Jensen's employment. Contrary to the administrative law judge's finding, however, Mr. Jensen was let go by employer on November 25, 200*6*, not 2005. Tr. at 124-125, 143. Therefore, as claimant began working for employer on approximately August 8, 2005, and Mr. Jensen was terminated more than one year later, under the administrative law judge's rationale, claimant could have worked for employer for more than 52 weeks absent his injury. Thus, substantial evidence does not support the administrative law judge's finding that claimant could have expected to work for only 37 weeks. Moreover, claimant earned significantly less than $800 per week in his fish counting employment between March 7 and July 29, 2005. Thus, if the administrative law judge's intent was to determine claimant's annual earning capacity with respect to his more remunerative work for employer, it is unclear why he included the weeks claimant worked as a fish counter. However, if the administrative law judge's intent was to calculate claimant's annual earning capacity in the year preceding his injury based on claimant's history of intermittent employment, it is unclear why he used only the wage rate claimant earned for employer. *See Healy Tibbitts Builders*, 444 F.3d 1095, 40 BRBS 13(CRT); *Palacios*, 633 F.2d 840, 12 BRBS 806. Consequently, we vacate the administrative law judge's average weekly wage determination, and we remand the case for further consideration. On remand, the administrative law judge must clarify the basis for the average weekly wage calculation with reference to the evidence of record and applicable case precedent.

Accordingly, we vacate the administrative law judge's average weekly wage finding, and we remand the case for further consideration, consistent with this opinion. In all other respects, the administrative law judge's Decision and Order and the Order Denying Reconsideration of Decision and Order are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge