

BRB No. 11-0492

AGUILLARD SANCHEZ)
)
 Claimant-Respondent)
)
 v.)
)
 HARBOR CONSTRUCTION COMPANY,) DATE ISSUED: 02/23/2012
 INCORPORATED)
)
 and)
)
 THE GRAY INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order on Second Remand of C. Richard Avery,
Administrative Law Judge, United States Department of Labor.

Isaac H. Soileau, Jr. (Soileau & Associates, LLC), New Orleans, Louisiana,
for claimant.

Richard S. Vale and Pamela F. Noya (Blue Williams, L.L.P.), Metairie,
Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (2007-LHC-0596)
of Administrative Law Judge C. Richard Avery 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'Keefe v. Smith, Hinchman &
Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a pipefitter/welder, suffered injuries to his right elbow, lower back, neck and shoulder as a result of a work accident on August 9, 2002. Claimant has not worked since that time. In his initial Decision and Order, the administrative law judge found claimant entitled to compensation for temporary total disability based on an average weekly wage of \$1,344. Employer appealed to the Board, challenging the administrative law judge's findings regarding the responsible employer, the extent of claimant's disability, and the calculation of claimant's average weekly wage. Claimant's lending employer also appealed the average weekly wage finding. The Board affirmed the administrative law judge's findings that claimant is totally disabled and that employer, as claimant's borrowing employer, is liable for benefits, but vacated his calculation of claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), and remanded the case for further consideration. The Board held that the administrative law judge failed to consider relevant evidence regarding the number of hours claimant could have expected to work and the length of his employment.¹ *A.S. [Sanchez] v. Harbor Constr. Co., Inc.*, BRB Nos. 08-0397/A (Feb. 26, 2009) (unpub.).

On remand, the administrative law judge found that claimant's average weekly wage is \$872.08. In so finding, the administrative law judge adopted the average weekly hours, 49.67, "determined by the Board," and found that claimant would have been able to work for 52 weeks of the year absent his injury. Pursuant to claimant's appeal, the Board again vacated the administrative law judge's finding, holding that it did not make a finding but used that number to illustrate the point that the administrative law judge had not addressed evidence tending to undermine his finding that claimant could expect to work 84 hours per week. The Board remanded the case for the administrative law judge to make an independent finding of fact as to the number of hours claimant realistically could have expected to work in a week, considering all the relevant evidence.² *Sanchez v. Harbor Constr. Co., Inc.*, BRB Nos. 10-0172/A (July 28, 2010) (unpub.).

On second remand, the administrative law judge reconsidered the evidence and found that claimant's average weekly wage is \$1,293.92. Employer appeals this decision, contending the administrative law judge erred in relying on the August 15, 2002, invoice of hours worked for the week of August 5 through August 11, 2002, rather than the daily

¹The Board held that substantial evidence supported the administrative law judge's finding that claimant earned \$16 per hour for employer.

²The Board affirmed, as supported by substantial evidence, the administrative law judge's finding that claimant could have earned wages in 52 weeks if not for his injury. *Sanchez v. Harbor Constr. Co., Inc.*, BRB Nos. 10-0172/A, slip op. at 4 (July 28, 2010) (unpub.).

timesheets, to calculate claimant's average weekly wage. Claimant responds, urging affirmance. Employer filed a reply brief.

The object of Section 10(c) is to arrive at a figure that reasonably represents the claimant's annual earning capacity at the time of his injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). Under Section 10(c), the administrative law judge has broad discretion and may take into account a claimant's new, higher, wages. *Id.*; see *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1987). Nonetheless, the administrative law judge must make a fair and accurate assessment of the injured employee's earning capacity at the time of the injury. See, e.g., *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

In this case, the administrative law judge declined to rely on the daily timesheets from August 5 to August 11, 2002, finding that they appeared to be incomplete because the August 15, 2002, invoice showed that workers of claimant's classification, pipefitter/welder, worked more hours than the timesheets showed. Thus, the administrative law judge determined that the August 15, 2002, invoice was the best, most complete, evidence of record from which to calculate claimant's average weekly wage. The administrative law judge subtracted the number of hours claimant worked that week from the invoice total and found that the remaining pipefitters/welders worked an average of 45.5 regular hours and 23.68 overtime hours. Multiplying the average regular and overtime hours by \$16 and \$24, claimant's respective hourly rates, the administrative law judge determined that claimant could have expected to earn \$1,293.92 per week.

On appeal, employer asserts that the administrative law judge erred in relying on the August 15, 2002, invoice because the job number listed on the invoice differs from the job number on claimant's timesheet. Employer points out that the invoice bears job number "20014C+" and the daily timesheets contained in the record bear job number "20114C+;" thus, employer argues that it is unclear whether these documents reference the same job. Claimant notes that the daily timesheets and the August 15 invoice bear the same purchase order number, "16827." Contrary to employer's assertion, the administrative law judge could reasonably rely on the invoice as referencing the same job as the timesheets.³ Further, because the invoice showed that pipefitter/welders worked more hours than were accounted for by the timesheets, the administrative law judge

³Nothing in the record indicates that employer staffed multiple jobs in the same purchase order.

rationality inferred that some of the daily timesheets are missing and that the invoice better indicated the number of weekly work hours available to claimant. Decision and Order at 3. That the evidence is susceptible to more than one inference does not establish error in the administrative law judge's finding. *See Staftex Staffing*, 237 F.3d at 406, 34 BRBS 45(CRT); *see also Denton v. Northrop Corp.*, 21 BRBS 37 (1988) (administrative law judge may draw adverse inference). As employer raises no further challenges to the administrative law judge's average weekly wage finding and as the calculation is supported by substantial evidence of record, we affirm the finding that claimant's average weekly wage is \$1,293.92. *Staftex Staffing*, 237 F.3d at 406, 34 BRBS 45(CRT).

Accordingly, the administrative law judge's Decision and Order on Second Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge