BRB Nos. 10-0172
and 10-0172A

AGUILLARD SANCHEZ	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
HARBOR CONSTRUCTION COMPANY, INCORPORATED	)	DATE ISSUED: 07/28/2010
	)	
and	)	
	)	
THE GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

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

Isaac H. Soileau, Jr. (Couture & Soileau 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:

Claimant appeals and employer cross-appeals the Decision and Order on 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'Keeffe v.*

Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965). This is the second time this case has come before the Board.

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), 33 U.S.C. §910(c), and remanded the case for further consideration. *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. Both parties appeal this decision, contending that the administrative law judge used an erroneous number of available work hours in the multiplier. Employer also contends that the administrative law judge erred in finding that claimant's employment would have lasted more than the three to six months anticipated for this specific job.

In his initial decision, the administrative law judge used claimant's hourly rate at the time of injury, $16, multiplied by an 84-hour week to calculate an average weekly wage of $1,344. The Board stated that substantial evidence supported the finding that claimant's hourly rate was $16. The Board stated, however, that the administrative law judge had not discussed evidence that claimant could not expect to work 84 hours each week. Specifically, the Board noted that the record contained the wage reports of six other welders for the week of claimant's injury, August 5-11, 2002. The Board stated that these records establish that the other welders averaged 49.67 hours for that week. *Id.*, slip op. at 6. The Board also stated that substantial evidence did not support the finding that claimant could expect to work twelve-hour days, 365 days per year, as claimant's position with employer was to last no more than six months. On remand, the Board stated that the administrative law judge was to make a specific finding regarding the number of hours claimant realistically could have expected to work and the reasonable length of his employment to arrive at a figure that reasonably represented claimant's annual earning capacity at the time of injury. This figure was to be divided by 52, pursuant to Section 10(d), 33 U.S.C. §910(d). *Id.*

On remand, the administrative law judge stated he was adopting the average weekly hours, 49.67, "determined by the Board." Decision and Order on Remand at 2. He multiplied the first 40 hours by $16 per hour for a base salary of $640 and the remaining 9.67 hours by time and a half ($24) for overtime of $232.08. The administrative law judge credited claimant's testimony that when he was hired, Global, the lending employer, told him that it had other work lined up when the job with employer ended. Ms. Hebert, the owner of Global, testified on deposition that Global provided workers to employer throughout 2002 and 2003. Thus, the administrative law judge inferred that had claimant not been injured he would have had work available to him on one project or another for more than 52 weeks. The administrative law judge multiplied the weekly wage of $872.08 by 52 weeks for average annual earnings of $45,348.16. He divided that figure by 52 weeks pursuant to Section 10(d)(1), 33 U.S.C. §910(d)(1), to find that $872.08 reasonably represents claimant's average weekly wage at the time of his injury.

Claimant contends that the administrative law judge erred in basing his average weekly wage on 49.67 hours per week, as the Board erred in arriving at this figure. Employer avers that if the hours of only fitter/welders are used, a lower weekly figure results.

We need not address the parties' specific contentions because we must remand the case for the administrative law judge to make independent findings of fact in the first instance. *See Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995). The Board did not make a "finding" that 49.67 hours per week was to be used to calculate claimant's average weekly wage. Rather, the figure, derived from the wage records of other employees, *see* CX 15, was illustrative of the point that the administrative law judge did not discuss evidence contradicting Ms. Hebert's testimony that claimant could expect to be paid for 84 hours of work each week. After the case was remanded, the administrative law judge asked the parties for additional briefs on the issue of the calculation of claimant's average weekly wage pursuant to Section 10(c). The parties provided these briefs, yet the administrative law judge did not address their contentions in his decision on remand.[1] Therefore, we

[1] The parties agreed that it was appropriate to use Section 10(c) to calculate claimant's average weekly wage, as claimant was injured on his first day on the job and had not worked for two years prior to this employment. The goal of a Section 10(c) calculation is to arrive at a sum that reasonably represents claimant's annual earning capacity at the time of the injury. *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). Claimant alternatively argued for application of Section 10(b) if additional evidence could be provided concerning the wages of other workers.

vacate the finding that claimant's average weekly wage should be based on 49.67 hours of work per week, and we remand the case to the administrative law judge to address the parties' contentions and to make independent findings of fact "regarding the number of hours claimant realistically could have expected to work."[2] *Sanchez*, slip op. at 6. Claimant's average weekly wage must be based on a time variable representing work actually available to claimant. *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283 (1981).

Employer also appeals the administrative law judge's determination that claimant could have worked at least an entire year for employer if not for his injury. Employer contends that the administrative law judge did not follow the Board's instruction to address evidence that claimant's current job would have been limited to three to six months.

We reject this contention of error. On remand, the administrative law judge credited claimant's testimony that, although the specific job was to last for no more than six months, Global told him when he was hired that it would have work for him when the job with employer ended. Tr. at 54-56. The administrative law judge's credibility determination is affirmed as it is rational. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge also rationally credited Ms. Hebert's deposition testimony that workers in fact were provided to this employer throughout 2002, GX 7 at 46, and that work opportunities were available at least until the "end of 2003, beginning of 2004." GX 9 at 7. The administrative law judge's conclusion that claimant would have remained employed throughout the year, therefore, is reasonable and supported by substantial evidence. *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Jackson v. Potomac Temporaries Inc.*, 12 BRBS 410, 413 (1980). Thus, on remand, the administrative law judge may base his average weekly wage calculation on the finding that claimant could have earned wages in 52 weeks if not for his injury.

[2] The administrative law judge also should state the basis for his finding that hours over 40 would be paid at time and a half. Employer correctly notes that the administrative law judge did not cite any evidence in the record as support for this finding.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded for further consideration in accordance with this decision.

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