

ROBERT SERAFIN	)	
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Claimant-Respondent	)	
	)	
v.	)	
	)	
MID MARINE BULKHEAD, INCORPORATED	)	DATE ISSUED: 05/13/2011
	)	
and	)	
	)	
STATE INSURANCE FUND OF NEW YORK	)	
	)	
Employer/Carrier- Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, P.C.), Hoboken, New Jersey, for claimant.

John E. Kawczynski (Field Womack & Kawczynski, L.L.C.), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2008-LHC-02082) of Administrative Law Judge Janice K. Bullard 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and 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 sustained a neck injury in the course of his work for employer as a dock builder on September 26, 2007, prompting his filing of a claim under the Act. The administrative law judge found that claimant sustained a work-related injury that rendered him incapable of returning to his usual work as a dock builder and that employer established the availability of suitable alternate employment as of February 24, 2009. She thus awarded claimant temporary total disability benefits from October 2, 2007, to February 23, 2009, and temporary partial disability benefits continuing thereafter based on an average weekly wage, as derived under 33 U.S.C. §910(c), of \$1,100, and a post-injury wage earning capacity of \$412.90. 33 U.S.C. §908(b), (e), (h).

On appeal, employer challenges the administrative law judge's calculation of claimant's average weekly wage. Claimant responds, urging affirmance.

Employer argues that the administrative law judge's calculation of claimant's average weekly wage without consideration of the alleged intermittent nature of claimant's dock building work produced an artificially high average weekly wage which is not in accordance with the purposes of Section 10(c) of the Act. Employer argues that the administrative law judge improperly rejected the testimony of its general manager, Thomas DeSousa, that dock building is seasonal in nature, dependent upon the amount of available work, and thus, that claimant was subject to a layoff from that work at any time, in favor of claimant's contrary testimony that he would have worked in this capacity without interruption absent the September 26, 2007, work injury. Employer adds that claimant's own work history, which establishes that he was unable to work at all in calendar year 2006 and for much of calendar year 2007, confirms Mr. DeSousa's testimony regarding the intermittent nature of claimant's job.

Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(a), (b), can be reasonably and fairly applied.<sup>1</sup> See *Hall v. Consolidated Employment Systems, Inc.*, 139

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<sup>1</sup>No party contends that Section 10(a) or Section 10(b) should be applied in the instant case. Section 10(c) states:

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 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.

F.3d 1025, 32 BRBS 91(CRT) (5<sup>th</sup> Cir. 1998); *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). 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 *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5<sup>th</sup> Cir. 1991); *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009); *Story v. Navy Exch. Serv. Center*, 33 BRBS 111 (1999); *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410 (1980) (average weekly wage represents amount of potential to earn absent injury). An administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). *Fox v. West State Inc.*, 31 BRBS 118 (1997).

According weight to Mr. DeSousa's testimony regarding claimant's weekly earnings with employer,<sup>2</sup> the administrative law judge found that claimant's average weekly wage was \$1,100. In reaching this conclusion, the administrative law judge rejected employer's suggestion that claimant's average weekly wage be calculated by dividing his 2007 earnings by 52 weeks because she found that the resulting figure would not fairly or reasonably represent claimant's earning capacity at the time of his injury. The administrative law judge acknowledged that while claimant was unemployed in 2006, his earnings of \$59,000 while working as a dock builder for fewer than 52 weeks in 2005 supports the finding that claimant's weekly wage at the time of his injury was \$1,100, because claimant's annual earnings would have been similar.<sup>3</sup> The administrative law judge also rejected employer's position that its business was too sporadic for claimant's actual wages to accurately represent his earning capacity at the time of his injury since employer did not produce any tangible evidence to support Mr. DeSousa's statements in this regard, *i.e.*, it put forth "no records establishing employer's business contracts for residential or other dock building."<sup>4</sup> Decision and Order at 23.

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33 U.S.C. §910(c).

<sup>2</sup>Mr. DeSousa testified that claimant earned \$1,100 per week. HT at 64.

<sup>3</sup>Based on weekly earnings of \$1,100, claimant's annual earning capacity for employer would have been \$57,200, if he were to have worked all 52 weeks.

<sup>4</sup>In response to the question regarding the availability of steady work, Mr. DeSousa stated that "it's all according to if we had the work and how he performed," that if employer did not have the work, claimant "couldn't stay on," and that employer controls the size of his labor force through layoffs. HT at 64. The record contains testimony provided by two individuals, Paul Campana and George Scott, who worked respectively for about ten and twenty-five years with employer. Neither testified to any

The administrative law judge thus concluded that claimant's weekly salary with employer of \$1,100 as of the date of his injury is a fair representation of what he might have continued to earn had his injury not occurred. As the administrative law judge's calculation of average weekly wage under Section 10(c) reasonably approximates claimant's annual earning capacity at the time of injury, we reject employer's assertions of error, and affirm the administrative law judge's finding that claimant's average weekly wage is \$1,100, as it is supported by substantial evidence. *See Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9<sup>th</sup> Cir. 2006); *Hall*, 139 F.3d 1025, 32 BRBS 91(CRT); *Story*, 33 BRBS 111.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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sporadic periods of non-work during their long tenures with employer. Moreover, there are no wage records of other employees in the record.