BRB No. 04-0191

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| DARIN C. SCHNEIDER | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| TRITON MARINE CONSTRUCTION | ) | DATE ISSUED:Oct. 15, 2004 |
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| and | ) | |
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| FRANK GATES ACCLAIM | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Anne Beytin Torrington, Administrative Law Judge, United States Department of Labor.

Jay Lawrence Friedheim, Honolulu, Hawaii, for claimant.

Wesley M. Fujimoto and Bryan P. Andaya (Imanaka Kudo & Fujimoto), Honolulu, Hawaii, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2003-LHC-0224) of Administrative Law Judge Anne Beytin Torkington 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 sustained a back injury while working for employer on November 20, 2001. Claimant attempted to return to his usual work for employer, but severe back pain prevented any continued employment and subsequently prompted claimant to undergo a

microdiskectomy in May 2002. At the time of the hearing, claimant remained out of work due to his back injury and was participating in a vocational rehabilitation program.

The administrative law judge, after rejecting employer's assertion for application of Section 10(a), 33 U.S.C. §910(a), calculated claimant's average annual earning capacity pursuant to Section 10(c), 33 U.S.C. §910(c). Applying Section 10(c), the administrative law judge found that the wages claimant earned in his fifteen weeks with employer prior to his work injury accurately reflected his earning capacity, and thus concluded, based on those earnings, that claimant had a pre-injury average weekly wage of $1,319.92, with a corresponding compensation rate of $879.95.

On appeal, employer challenges the administrative law judge's findings regarding claimant's average weekly wage. Claimant responds and urges affirmance of the administrative law judge's Decision and Order.

Employer initially asserts that the administrative law judge should have determined claimant's average weekly wage under Section 10(a).[1] Employer argues that as claimant worked substantially the whole of the one-year period prior to his November 20, 2001, injury for All Pool and employer, and as those positions are, contrary to the administrative law judge's determination, comparable, Section 10(a) can be reasonably and fairly applied to calculate claimant's pre-injury average weekly wage in this case. In this regard, employer asserts that claimant's pre-injury employment with All Pool and employer involved the same skills, knowledge and experience, and that claimant's hiring with employer was, in fact, based on skills utilized in his previous employment. As such, employer contends that the administrative law judge erred in concluding that claimant's employment with employer was "far more demanding" than his position with All Pool. Decision and Order at 5.

Section 10(a) applies if the injured employee worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. 33 U.S.C. §910(a); *see generally Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *see also Stevedoring Services of America v. Price*, 366 F.3d 1045, 38 BRBS 25(CRT) (9th Cir. 2004); *Castro v. General Constr. Co.*, 37 BRBS 65 (2003). The Board has stated that the "substantially the whole of the year" requirement is related to the nature of claimant's employment, *i.e.*, whether it is intermittent or permanent.

[1] It is undisputed that Section 10(b) does not apply to this case, as the requisite information for a determination pursuant to that provision, *i.e.*, records of employees similarly situated to claimant, is, as the administrative law judge found, absent from the record. 33 U.S.C. §910(b); Decision and Order at 6.

*Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987). This requirement may be met where claimant held regular jobs with different employers during the year, so long as the skills, knowledge and experience used in the jobs are highly comparable. *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1986); *Hole v. Miami Shipyards*, 12 BRBS 38 (1980), *rev'd on other grounds*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *see also Waters v. Farmers Export Co.*, 14 BRBS 102 (1981), *aff'd per curiam*, 710 F.2d 836 (5th Cir. 1983) (table).

The administrative law judge found that claimant had reached a wage of $15 per hour after four years with his previous employer, All Pool, and that he earned $32.49 per hour with employer. The administrative law judge found that this pay disparity reflected a difference in the skill levels and responsibility required by the two positions.[2] Decision and Order at 5. In addition, the administrative law judge found that claimant's position with employer was "far more demanding," and required "several types of certification and special training." Decision and Order at 5. In particular, the administrative law judge surmised that repairing a dry dock requires different skills than does plumbing a pool. Moreover, the administrative law judge found that the difference in the size of the two operations, All Pool being a small operation, while claimant's job with employer was a part of a large government project, could well have an effect on the level of skill required by the operation. Thus, the administrative law judge determined that as the two positions did not require the same skills, knowledge and experience, they were not the "same or substantially the same" employment, and that therefore Section 10(a) is inapplicable to determining claimant's pre-injury average weekly wage. Decision and Order at 6. As the administrative law judge's findings regarding the nature of the two jobs are supported by substantial evidence, they are affirmed.[3] *Mulcare*, 18 BRBS 158. As claimant thus did not work in any job substantially the whole of the year, we affirm the administrative law judge's determination that Section 10(a) cannot be applied.

[2] The administrative law judge found that while employed at All Pool, claimant repaired pools, and that in his subsequent work for employer, claimant worked on a dry dock, saw cutting and injecting epoxy. Decision and Order at 5. Thus, while both jobs involved work as a laborer, the administrative law judge determined that claimant's work with employer required far more skill.

[3] In *Mulcare*, 18 BRBS 158, the administrative law judge applied Section 10(a) to calculate the claimant's average weekly wage based on both his six-month earnings for employer as well as his pre-employer wages as a journeyman electrician, since claimant specifically testified that the two positions involved the same type of work. Based on this factual distinction, we reject employer's assertion that application of Section 10(a) is mandated here.

Employer contends, alternatively, that the administrative law judge erred in his analysis of the average weekly wage issue under Section 10(c). Employer avers that claimant's actual earnings during the twelve-month period prior to claimant's injury constitute a fair and reasonable estimate of his annual wage-earning capacity at the time of his injury. Employer argues that the administrative law judge erred in finding that Section 10(c) focuses on future earning capacity in that such a finding is contrary to the plain language of the provision which specifically states that the average weekly wage must be calculated in a manner "having regard to the previous earnings of the injured employee." 33 U.S.C. §910(c). Employer further argues that the holding of the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, requires wages earned in previous employment be considered in determining an average weekly wage under Section 10(c). Employer notes that claimant worked for 20 years in the pool and spa construction industry, that he was earning $15 per hour at his previous position with All Pool, and that it was only during his four months of employment with employer, prior to his injury, that claimant was paid the $32.29 per hour relied upon by the administrative law judge in determining claimant's average weekly wage. Employer thus asserts that basing a calculation of claimant's average weekly wage on anything other than his actual earnings during the prior one-year period would be unduly harsh to employer and be contrary to the intent of Section 10(c).

Section 10(c) provides a general method for determining annual earning capacity where Section 10(a) or (b) cannot fairly or reasonably be applied to calculate claimant's average weekly wage at the time of his injury. *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). 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 Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). The administrative law judge has broad discretion in determining a claimant's annual earning capacity under Section 10(c), and the Board will affirm an administrative law judge's determination of claimant's average weekly wage if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Story v. Navy Exch. Serv Ctr.*, 33 BRBS 111 (1999); *Fox v. West State Inc.*, 31 BRBS 118 (1997).

In the instant case, the administrative law judge found that claimant's actual earnings over the entire year prior to his injury did not accurately represent his wage-earning capacity as he left a lower-paying position with All Pool for a higher-paying one with employer during that time. Decision and Order at 7. The administrative law judge found, based on claimant's testimony as to his intent to remain with employer indefinitely, Hearing Transcript at 61, that the earnings that he was receiving on his job with employer at the time of injury provided the most accurate representation of claimant's future earning capacity. Decision and Order at 7.

Section 10(c) is the proper provision for calculating a claimant's average weekly wage when claimant received an increase in salary shortly before his injury. *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986); *Miranda v. Excavation Constr.*, 13 BRBS 882 (1981). In this case, the administrative law judge rationally determined that claimant left a lower-paid position as a plumber with a pool company for the much higher-paid position with employer in which he was injured. Based on this increase in claimant's wages in his new job, which the administrative law judge found would have continued indefinitely, the administrative law judge properly used Section 10(c) to calculate claimant's average weekly wage. Contrary to employer's assertion, an administrative law judge is not required to consider wages received in earlier employment in calculating a claimant's average weekly wage if, as the administrative law judge here found, such wages do not accurately reflect claimant's wage-earning capacity at the time of his injury.[4] *See Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980); *Bonner*, 600 F.2d 1288; *Hilyer v. Morrison-Knudsen Constr. Co.*, 6

[4] Contrary to employer's argument, the decision of the United States Court of Appeals for the Ninth Circuit in *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979), is directly on point and supports the administrative law judge's decision here. In *Bonner*, the court affirmed the administrative law judge's calculation based on her earnings of $189 per week during her 13 weeks of employment with National Steel. The court specifically did not rely on claimant's prior lower earnings in other pre-injury jobs, stating

> The employer is wrong if it asserts that the administrative law judge automatically had to base the compensation award upon the minimum wages the employee had earned in her earlier employment. The earlier wages could be considered for what they were worth, but they are not binding upon the administrative law judge. . . . The trier can reasonably draw an inference that but for the injury, the worker would have continued to earn the new, higher wages. It would make no sense to hold as a matter of law that, because this pipefitter was hurt shortly after she started her new job, the employer is entitled to base her disability compensation on her old babysitting wages.

600 F.2d at 1293. In *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), the court remanded for consideration of Section 10(b), but held that if Section 10(c) were used, then the administrative law judge's calculation had to be reconsidered. The administrative law judge's computation included claimant's earnings as a painter when injured, as well as prior earnings as an upholsterer. Citing *Bonner*, the court held that if Section 10(c) were applied on remand, the administrative law judge had to consider claimant's potential to continue working as a painter at the higher wage and calculate his average weekly wage accordingly.

BRBS 754 (1977). Moreover, again in contrast to employer's assertion, a definition of "earning capacity" for purposes of Section 10(c) encompasses the "ability, willingness, and opportunity to work," or "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980); *see also Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74 (9th Cir. 1932). Thus, in this case, the administrative law judge did not err in considering claimant's potential to continue to earn the higher wage he was paid at the time of injury. *Bonner*, 600 F.2d at 1293. As her finding that but for his injury, claimant could have continued to earn the higher wage of $32.49 per hour is supported by substantial evidence, the administrative law judge properly relied upon it. *Id.*

The administrative law judge's findings under Section 10(c) are reasonable, supported by substantial evidence in the record, and consistent with applicable law. Therefore, her average weekly wage determination is affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is 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