BRB No. 07-0176

J.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BAY, LIMITED	)	DATE ISSUED: 10/24/2007
	)	
and	)	
	)	
ZURICH NORTH AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Michael D. Murphy (Hays, McConn, Rice & Pickering) Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2006-LHC-00369) of Administrative Law Judge Patrick M. Rosenow 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 was hired as a scaffolding supervisor and suffered a work-related injury on May 22, 2003, after working approximately two weeks for employer. During this time, claimant earned a total of $1,636, at an hourly wage rate of $18. CX 11 at 5. At the formal hearing, the sole issue before the administrative law judge was claimant's average

weekly wage. Claimant testified that during the years preceding his accident he had worked "on and off." Tr. at 15-16.[1] Therefore, claimant submitted the wages of co-workers, contending that his average weekly wage should be determined under Section 10(b) or Section 10(c), 33 U.S.C. §910(b),(c), with reference to these wages. CXs 12, 13, 14. Employer contended that claimant's average weekly wage should be based on his actual earnings in the five calendar years preceding the injury. The parties stipulated that claimant's co-workers worked in the "same or similar" employment as claimant. Decision and Order at 3, Stip. 10.

In his Decision and Order, the administrative law judge rejected claimant's argument that, because Mr. Thibodeaux and Mr. Valderrama are "similar" employees, he should average their salaries under Section 10(b) to determine claimant's average weekly wage. The administrative law judge declined to rely on Mr. Thibodeaux's wages, as he earned an hourly wage of $23, whereas Mr. Valderrama and claimant earned $18 per hour. Thus, the administrative law judge determined that he could rely only on Mr. Valderrama's wages. The administrative law judge found that Section 10(b) could not be used because the record did not permit the calculation of Mr. Valderrama's average daily wage. Therefore, the administrative law judge stated that Section 10(c) must be used; as Mr. Valderrama was working in a similar job at the same hourly wage, the administrative law judge found that his annual earnings for the year before claimant's accident are a fair estimate of what claimant could have reasonably been expected to earn. Decision and Order at 7-8. The administrative law judge divided Mr. Valderrama's annual earnings of $69,141 by 52, yielding an average weekly wage of $1,329.63. Thus, the administrative law judge awarded claimant continuing temporary total disability benefits from May 23, 2003, based on an average weekly wage of $1,329.63.

On appeal, employer concedes that the administrative law judge was correct in utilizing Section 10(c) to calculate claimant's average weekly wage. Employer contends, however, that the administrative law judge's calculation is erroneous because claimant did not establish that he would have worked the amount of overtime worked by Mr. Valderrama. Employer avers that claimant's average weekly wage should be based on claimant's average earnings in the five years prior to his injury, or alternatively, on his own actual earnings in the two weeks he worked for employer. Claimant has not responded to this appeal.

We reject employer's assertion that the administrative law judge erred in determining claimant's average weekly wage. The objective of Section 10(c) is to arrive at a figure which is a reasonable representation of the claimant's annual earning capacity

[1] Claimant earned $15,574 in 2003, $11,872 in 2002, $66,496 in 2001, $39,362 in 2000, $48,172 in 1999, and $47,993 in 1998. CX 1.

at the time of injury. *See Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26(CRT) (5th Cir. 1991). The definition of "earning capacity" for the purposes of Section 10(c) is 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). Section 10(c) specifically references the wages of employees similar to the claimant,[2] and thus, the administrative law judge is not bound to base an average weekly wage calculation on the claimant's actual past earnings. *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006). In this case, the administrative law judge rationally found that Mr. Valderrama's wages are a reasonable estimate of what claimant could have been expected to earn absent injury.[3] That other inferences also may have been reasonable does not dictate the conclusion that the administrative law judge's decision is erroneous. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *see also SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). As the administrative law judge's finding is rational and supported by substantial evidence, we affirm the finding that claimant's average weekly wage is $1,329.63. *See generally Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986); *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462 (1981).

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[2] 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 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).

[3] As the parties stipulated that claimant and Mr. Valderrama were engaged in similar employment, employer's argument that claimant did not prove a similar ability to work overtime is without merit.

Accordingly, the administrative law judge Decision and Order 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