

BRB No. 97-1062

PATRICK J. MONGEON)
)
 Claimant-Petitioner) DATE ISSUED: _____
)
 v.)
)
 SERVICE EMPLOYERS)
 INTERNATIONAL, INCORPORATED)
)
 and)
)
 INSURANCE COMPANY OF THE)
 STATE OF PENNSYLVANIA)
 (AIU NORTH AMERICA))
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Herbert J. Arnold (Arnold, Bacot, Gay & Darby, P.A.), Baltimore, Maryland, for claimant.

Michael W. Prokopik (Semmes, Bowen & Semmes), Baltimore, Maryland, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2424) of Administrative Law Judge Robert G. Mahony 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On December 28, 1993, claimant entered into a contract to perform services as a bulldozer and heavy equipment operator for employer's operations in the country of Somalia. On February 4, 1994, he suffered an injury to his back, and shortly thereafter, he returned to the United States for medical treatment. Claimant sought benefits under the Act, and the only contested issue before the administrative law judge was the applicable average weekly wage.

Claimant had several other employers in the year prior to his injury. From the middle of January 1993 until late March or early April, he was employed as a carpenter for Six Flags Over Texas. He then worked as a bulldozer operator for Brown and Root, employer's parent company, from April 12, 1993, to June 5, 1993. He left this job to work as a heavy equipment operator with T. J. Lambert, a position he held (with the exception of a 3 to 4 week layoff) from June until December 1993. Employer voluntarily paid claimant temporary total disability compensation commencing February 4, 1994, based on an average weekly wage of \$750.85.

In the proceedings before the administrative law judge, claimant contended that the applicable average weekly wage should be \$1,491.99, representing the money rate at which he was being compensated under the contract of hire in force at the time of his injury in Somalia. In the alternative, claimant asserted that his average weekly wage should be \$1,633.50 calculated pursuant to Section 10(b), 33 U.S.C. §910(b), based on the average annual earnings of several of his co-workers who had departed for Somalia on the same date as he did and who worked for substantially a year or for their contract duration. Employer argued that claimant's average weekly wage should be calculated under Section 10(c), 33 U.S.C. §910(c), and asserted that because his statement of wages, see EX-10, reflected that he had earned only \$9,010.30 working for employer in the 12 month period prior to his injury claimant's average weekly wage was, at most, \$750.85.

The administrative law judge initially determined that inasmuch as the claimant's co-workers did not work for substantially the whole of the year immediately preceding the injury, their earnings could not properly serve as a basis for calculating claimant's average weekly wage under Section 10(b). He then determined that the preponderance of the evidence supported employer's contention that claimant's significantly increased earnings during his five weeks of employment with employer in Somalia should not serve as the basis for calculating his average weekly wage because it represented a transitory windfall which was not representative of his past or future earning capacity. The administrative law judge then determined that as claimant had worked for substantially the whole year prior to his injury as a heavy equipment operator, it was appropriate to calculate his average weekly

wage under Section 10(a), 33 U.S.C. §910(a) stating:

His earnings for 1993 were \$16,471 of which I estimate \$13,840 were for his approximately eight months of work as a heavy equipment operator. ($260 \text{ days} \times \frac{2}{3} = 173 \text{ days} \times \$80.00 = \$13,840$). His Somalia contract wage, plus bonus, was \$5,968 resulting in a wage of \$19,808 as a heavy equipment operator for the period April 1993 to date of injury, February 4, 1994.

I estimate he worked as a heavy equipment operator for an additional 23 days on his contract, or 198 days total. I find this to be substantially the whole year preceding his injury. Under Section 10(a) this results in a daily wage of \$500.20. ($\$19,808 \div 198 = \$100.00 \times 260 = \$26,010 \div 52 = \500.20).

Decision and Order at 3-4.

On appeal, claimant argues that the administrative law judge erred in calculating his average weekly wage pursuant to Section 10(a) because he did not perform the same type of employment he was performing at the time of the injury during substantially the whole of the year prior to his injury. In addition, claimant argues that the administrative law judge's calculation of his average weekly wage cannot be affirmed under Section 10(c) because he abused his discretion in determining that the increase in wages claimant was receiving pursuant to the Somalian contract represented a transitory windfall and his calculation accordingly does not reasonably reflect a reasonable estimation of his earning capacity at the time of his injury. Accordingly, claimant urges the Board to reverse the administrative law judge's calculation of his average weekly wage under Section 10(a), and either modify his Decision and Order to reflect his entitlement to compensation based on an average weekly wage calculated pursuant to Section 10(c) of \$1,491.99, his contractual rate of pay in Somalia, or alternatively, \$750.85, the amount employer originally calculated.¹ Employer responds, urging affirmance, contending that the administrative law judge acted within his discretion in determining claimant's average weekly wage under Section 10(a).

¹Although claimant asserts that in evaluating the record evidence, the administrative law judge erred in failing to resolve all factual doubt in his favor, the United States Supreme Court has held that the "true doubt rule" is invalid because it conflicts with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d). *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

Section 10(a) is to be applied when an employee has worked substantially the whole of the year immediately preceding his injury and requires that the administrative law judge determine the average daily wage claimant earned during the preceding twelve months. 33 U.S.C. §910(a); see also *Story v. Navy Exchange Service Center*, 30 BRBS 225 (1997); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). This average daily wage is then multiplied by 260 if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. 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(b), can be reasonably and fairly applied. See *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98 (1997); *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988).

We agree with claimant that the administrative law judge's use of Section 10(a) to calculate his average weekly wage was improper and accordingly cannot be affirmed. While claimant argues that the administrative's use of Section 10(a) was in error because he did not perform the same type of employment he was performing at the time of the injury during substantially the whole of the year prior to his injury, we disagree. Claimant's suggestion that the work he performed in Somalia differed from that he performed previously is simply not borne out by the record. Nonetheless, we conclude that the administrative law judge's use of Section 10(a) was improper on the facts presented as it is clear that his calculation does not follow the formula set out in that subsection. Section 10(a) cannot be applied when there is no information from which an average daily wage can be calculated. See *Lobus v. I.T.O. Corp. Of Baltimore, Inc.*, 24 BRBS 137 (1990). Specifically, claimant's earnings during the almost six month period he worked for T.J. Lambert were included in the wages used by the administrative law judge to calculate his average weekly wage, but there is no evidence of record from which claimant's average daily wage during this employment can be derived. See *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

Inasmuch as Section 10(a) cannot fairly be applied in this case, and the administrative law judge's finding that Section 10(b) cannot properly be applied is unchallenged on appeal,² his determination of claimant's average weekly can only be affirmed if his calculations reflect a reasonable estimation of claimant's annual earning capacity at the time of his injury as is required in determining the applicable average weekly wage under Section 10(c). See generally *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). It is well established that the administrative law judge is afforded broad discretion under Section 10(c), and the Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of his annual earning capacity at the time of the injury. See *Fox v. West State Inc.*, 31 BRBS 118, 123 (1997).

Claimant correctly argues on appeal that in determining annual earning capacity under Section 10(c), unlike Sections 10(a) and 10(b) of the Act, the administrative law judge is not limited to considering earnings in the year immediately preceding the injury. *New Thoughts Finishing Company v. Travelers Insurance Company*, 118 F.3d 1028, 31 BRBS 51 (CRT) (5th Cir. 1997). Moreover, he also correctly asserts that in determining annual earning capacity under Section 10(c), the amount of time that a claimant has held a job prior to his injury is not necessarily determinative, see, e.g., *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1989), and that computations under Section 10(c) generally should reflect a pay raise received shortly before the injury, see, e.g., *Le v. Sioux City and New Orleans Terminal Corp.*, 18 BRBS 175, 177 (1986). Nonetheless, in this case, as claimant's prior weekly earnings never approached the \$1,491.99 in salary and bonuses he received in Somalia, and the contract was to last no more than 12 months and was terminable at will, the administrative law judge acted within his discretionary authority in determining that claimant's significantly increased earnings during his employment in Somalia represented a transitory increase and

² Although claimant argued below that Section 10(b) should be applied in determining his average weekly wage, claimant concedes on appeal that Section 10(b) cannot be applied due to insufficient evidence. Pet. for Rev. at 6. Claimant argues, however, that if the contractual rate he was earning does not fairly and reasonable represent his earning potential at the time of injury a "Section 10(b) type" analysis, basing compensation on the wages of similar employees, is a more accurate reflection of claimant's earning capacity under Section 10(c) than the average weekly wage calculation made by the administrative law judge. We need not address this argument as it is not adequately briefed. See *Shoemaker v. Schiavone and Sons, Inc.*, 20 BRBS 214 (1988).

did not reflect his past or present annual earning capacity. Accordingly, claimant's argument that the administrative law judge erred in failing to determine that his average weekly wage calculated under Section 10(c) was \$1,491.99 pursuant to his Somalian contract is rejected..

While the administrative law judge could thus properly find that claimant's weekly earnings at the time of injury were not representative of his annual earning capacity, we are nonetheless unable to affirm his calculation of claimant's average weekly wage in light of the following errors. Initially, the administrative law judge underestimated claimant's earning capacity by reducing claimant's \$16,471 earnings in 1993 to \$13,840 in order to account solely for the time he worked as a heavy equipment operator. When calculating claimant's average weekly wage under Section 10(c), all sources of income must be included. See generally *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); see also *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822-823, 25 BRBS 26, 28-29 (CRT)(5th Cir. 1991). Secondly, the administrative law judge's conclusion that claimant's Somalian contract rate plus bonuses were \$5,968 and that this amount represents claimant's wages for his time in Somalia is not supported by the record; claimant introduced evidence below which established, as employer conceded in its brief before the administrative law judge, that claimant's 1994 earnings for his work in Somalia amounted to \$7,532. CX-2. ³ In light of the aforementioned, we vacate the administrative law judge's findings regarding claimant's average weekly wage and remand for him to reconsider claimant's average weekly wage under Section 10(c), utilizing a method which reasonably represents his annual earning capacity at the time of injury.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

³We note that based on the numbers utilized by the administrative law judge claimant actually worked 196 days in the year preceding his injury.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge