BRB No. 97-0837

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| DARRELL L. JONES | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| CONSOLIDATED EMPLOYMENT SYSTEMS, INCORPORATED | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
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| EMPLOYERS INSURANCE OF WAUSAU | ) | |
| | ) | |
| Employer/Carrier-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits and Order Granting in Part and Denying in Part Employer's and Claimant's Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Frank A. Bruno, New Orleans, Louisiana, for claimant.

Joseph B. Guilbeau and Charles W. Farr (Juge, Napolitano, Leyva, Guilbeau & Ruli), Metarie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and Order Granting in Part and Denying in Part Employer's and Claimant's Motion for Reconsideration (96-LHC-2537) of Administrative Law Judge James W. Kerr, Jr., 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).

On May 6, 1991, while employed as a sandblaster/painter, claimant sustained

injuries to his shoulder, hip and back as a result of a work-related accident. Employer paid temporary total disability benefits from May 17, 1991, until July 12, 1993. Claimant thereafter sought additional benefits as a result of his injuries.

In his Decision and Order, the administrative law judge determined that claimant is entitled to temporary total disability benefits from May 7, 1991, until December 18, 1992, and permanent total disability benefits from December 19, 1992, until June 26, 1996, based upon an average weekly wage of $321.47. In addition, the administrative law judge found that employer must pay claimant all reasonable medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907. In a subsequent Order issued in response to motions for reconsideration filed by both parties, the administrative law judge recalculated claimant's average weekly wage reducing it from $321.47 to $129.82, and modified his award of total disability benefits to reflect this change. In addition, the administrative law judge modified the date of last payment for claimant's permanent total disability benefits from June 16, 1996, the date the administrative law judge determined that employer established suitable alternate employment, to February 29, 1996, the date that claimant actually began working in his post-injury job with no loss in wage-earning capacity. Accordingly, the administrative law judge concluded that pursuant to Section 6(b)(2), 33 U.S.C. §906(b)(2), claimant is entitled to temporary total disability benefits from May 7, 1991, until December 18, 1992, and permanent total disability benefits from December 19, 1992, to February 29, 1996, at the weekly rate of $129.82.[1]

On appeal, claimant challenges the administrative law judge's decision on reconsideration with reference only to the average weekly wage calculation. Employer responds, urging affirmance.

Claimant's sole contention on appeal is that the administrative law judge erred in reducing claimant's average weekly wage on reconsideration to $129.82, and requests that the Board reinstate the administrative law judge's original finding of $321.47 as a proper calculation of claimant's average weekly wage. Specifically, claimant objects to the administrative law judge's decision on reconsideration to divide claimant's earnings during the one year period prior to his injury, $6,750.84, by 52 to arrive at an average weekly wage of $129.82, since claimant believes that that figure does not accurately reflect his weekly wages at the time of his injury.

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[1]The administrative law judge determined that by operation of Section 6(b)(2), as claimant's average weekly wage is less than fifty percent of the national average weekly wage, he is entitled to receive his average weekly wages, $129.82, as compensation for total disability under the Act.

Section 10, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are the statutory provisions relevant to a determination of an employee's average annual earnings where an injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to Section 10(c), 33 U.S.C. §910(c), if subsections (a) or (b) cannot be reasonably and fairly applied. 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).

In his original decision, the administrative law judge, after noting that the calculation of claimant's average weekly wage should be made pursuant to Section 10(c), divided claimant's actual earnings in the year prior to his injury, $6,750.84, by the 102 days that he worked to arrive at an average daily wage and then multiplied that figure by the projected number of days that claimant might have been expected to work over the year, 252.57,[2] to arrive at an average annual wage of $16,716.27, which then was divided by 52 weeks to arrive at claimant's average weekly wage of $321.47.[3] Upon reconsideration, the administrative law judge determined, based upon the evidence of claimant's work history, that claimant worked sporadically for several years prior to his injury and thus, concluded

[2]The administrative law judge arrived at this number by first dividing the 102 days that claimant actually worked by the number of weeks during which this employment occurred, 21, to determine that claimant worked an average of 4.86 days per week for that period and then multiplied that figure by 52.

[3]Despite his method of calculation in his original decision, the administrative law judge determined that Section 10(a) was inapplicable because claimant's employment in the year immediately preceding the injury, a total of twenty-one weeks for three different employers, was not regular, continuous, or for substantially the whole of the year. Additionally, the administrative law judge correctly noted that there is no evidence in the record to require a Section 10(b) calculation.

that claimant is not entitled to have his average weekly wage calculated as though he would work the majority of the year. Accordingly, the administrative law judge modified his calculation of claimant's average weekly wage to reflect his sporadic employment history. Specifically, the administrative law judge determined that the actual wages earned in the year prior to his injury, $6,750.84, accurately reflects his pre-injury average annual income and therefore, divided that figure by 52 to arrive at an average weekly wage of $129.82.

The evidence of record supports the administrative law judge's finding that claimant has a sporadic work history. As the administrative law judge noted, claimant worked only 102 days in the year just prior to his injury. In addition, between 1988 and 1991, claimant worked intermittently with a number of employers, Employer's Exhibit (EX) 4; Claimant's Exhibit (CX) 8-11, 13, 14-16, and claimant's position at the time of his injury with employer was merely temporary in nature. EX 15. Moreover, claimant's Social Security earning records for the years prior to his injury similarly reflect a sporadic work history, as claimant earned $7,357.31 in 1988, $9,680.00 in 1989, and $8,717.64 in 1990. EX 4; CX 7.

The administrative law judge's determination of claimant's average weekly wage on reconsideration is therefore reasonable, supported by substantial evidence, and consistent with the goal of arriving at a sum which reasonably represents claimant's annual earning capacity at the time of his injury. *See New Thoughts Finishing Co. v. Chilton,* 118 F.3d 1028, 31 BRBS 51 (CRT)(5th Cir. 1997) (court notes record is devoid of evidence to support the finding that the claimant would have the opportunity for year-round employment, especially in view of his sporadic work history)*; Gatlin*, 936 F.2d at 819, 25 BRBS at 26 (CRT); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987). Consequently, the administrative law judge's modification of claimant's average weekly wage to reflect claimant's actual earnings in the year prior to the injury and his sporadic employment history is affirmed. *Id.*

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Granting in Part and Denying in Part Employer's and Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge