BRB No. 97-990

DANIEL E. McDUFFIE	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:_____
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order -- Awarding Benefits of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-1135) of Administrative Law Judge C. Richard Avery 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).

The facts of this case are not in dispute. Claimant, who last worked at employer's facility on July 25, 1967, was exposed to noise during the course of his employment. Claimant underwent audiometric testing on August 13, 1994, and the results of the evaluation revealed a 13.5 percent binaural impairment. Cl. Ex. 4; Emp. Ex. 3; Jt. Stip. Although employer initially controverted the claim, in 1995 it accepted the claim and paid claimant benefits based on an average weekly wage of $95.66. Emp. Ex. 6. Prior to the formal hearing, the parties filed stipulations and a joint motion to waive the hearing; thus,

the administrative law judge decided the case on record evidence alone. At issue before the administrative law judge were only the issues of average weekly wage and claimant's entitlement to an attorney's fee. Using Section 10(c) of the Act, 33 U.S.C. §910(c), as the parties agreed, the administrative law judge found that claimant's average weekly wage at the time of the injury was $95.66. Decision and Order at 2-3. Claimant appeals the average weekly wage computation, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in using earnings from the first three quarters of 1967 and the last quarter of 1966 to determine his average weekly wage at the time of the injury on July 25, 1967. Specifically, he avers it would be more representative of his earnings at that time to utilize the wages received in the first two quarters of 1967 and the last two quarters of 1966, as he did not work for employer the majority of the third quarter in 1967. His method, he contends, would more accurately represent his earnings for the year preceding his injury. Employer argues that the administrative law judge properly calculated average weekly wage and that claimant's suggested computation would result in a violation of Section 6(b), 33 U.S.C. §906(b) (1970), which limited weekly compensation in 1967 to $70.00.

Claimant and employer agree that Section 10(c) should be used to calculate claimant's average weekly wage. An administrative law judge has considerable latitude in calculating a claimant's average weekly wage pursuant to Section 10(c). *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979). Provided they are a reasonable representation of the claimant's earning capacity, actual past wages may be used to make the computation, but the administrative law judge is not bound by the claimant's actual earnings. *Bonner*, 600 F.2d at 1292; *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Richardson v. Safeway Stores, Inc.* 14 BRBS 855 (1982).

In this case, a social security printout constitutes the sole evidence of record regarding claimant's earnings in 1966 and 1967.[1] Wages thereon are presented quarterly, and claimant worked in the third quarter of 1967. Cl. Ex. 4; Emp. Ex. 3. The administrative law judge, considering that the date of injury was in the third quarter of 1967 on July 25, included in his calculation wages from the first three quarters of 1967 and the last quarter of 1966. The administrative law judge specifically considered and rejected claimant's

[1]The report shows the following earnings:

	1st Qtr. Jan-Mar	2nd Qtr. Apr-June	3rd Qtr. July-Sept	4th Qtr. Oct-Dec	Total
1966	1,174.28	1,335.47	1,886.64	1,675.52	5,972.91
1967	1,499.45	461.49	71.50		2,032.44

Cl. Ex. 4; Emp. Ex. 3.

suggested methods for computing average weekly wage, and he determined it was most rational to include the quarter in which claimant's injury occurred. Decision and Order at 3. Claimant argues that the administrative law judge improperly diluted his average weekly wage by including two post-injury months, August and September 1967, wherein claimant did not work and had no earnings. While claimant is correct in demonstrating there are other methods for calculating his average weekly wage under Section 10(c), we cannot find fault with the administrative law judge's method. The administrative law judge has great discretion in calculating claimant's average weekly wage under Section 10(c), and he has acted within that authority by reaching a fair and reasonable approximation of claimant's wage-earning capacity at the time of the injury. *Bonner*, 600 F.2d at 1288; *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Richardson*, 14 BRBS at 855. As the record contains substantial evidence which supports the administrative law judge's determination, and as that determination is not unreasonable, we affirm his decision that claimant's average weekly wage is $95.66.[2] *See generally Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989).

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

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
JAMES F. BROWN
Administrative Appeals Judge

_____
NANCY S. DOLDER
Administrative Appeals Judge

[2]Contrary to employer's argument, claimant's compensation would not have been limited to $70 per week even had the administrative law judge opted to use claimant's method of computing average weekly wage. For cases pending after the 1972 Amendments, the $70 maximum compensation rate is no longer applicable; rather, compensation is limited by the maximum rate in effect at the time benefits are awarded. *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150 (CRT) (5th Cir. 1997); *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988); *Nooner v. Nat'l Steel & Shipbuilding Co.*, 19 BRBS 43 (1986).