

ROBERT L. BROWN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONTAINER STEVEDORING)	DATE ISSUED:
COMPANY)	
)	
and)	
)	
RISK MANAGEMENT SERVICES)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Robert J. Brissenden and Order Denying Reconsideration of Edward C. Burch, Administrative Law Judges, United States Department of Labor.

Ronald R. Ward (Levinson, Friedman, Vhugen, Duggan, Bland & Horowitz), Seattle, Washington, for claimant.

Russell A. Metz (Metz & Frol), Seattle, Washington, for employer/carrier.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Reconsideration (89-LHC-237) of Administrative Law Judges Robert J. Brissenden and Edward C. Burch denying benefits 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965);

33 U.S.C. §921(b)(3).

On February 17, 1986, claimant sustained an injury to his back in the course of his employment as a crane operator. This injury necessitated surgery on October 6, 1986. Employer voluntarily paid claimant temporary total disability benefits from February 19, 1986 to March 23, 1986, and from August 6, 1986 to January 11, 1987, and temporary partial disability from January 12, 1987 to May 21, 1988. Cl. Ex. 1. The administrative law judge found that claimant reached maximum medical improvement on January 11, 1987, the date claimant returned to work as a longshoreman. The administrative law judge found further that claimant presented sufficient evidence to establish that he could not perform his usual work due to his residual impairment. The administrative law judge determined, however, that employer met its burden of showing suitable alternate employment inasmuch as claimant had worked a combination of appropriate post-injury longshore jobs with employer and relief positions with his union. The administrative law judge also found that although claimant worked fewer hours post-injury than he had pre-injury, his actual earnings beginning in 1988 are higher. In the absence of credible evidence showing that claimant's actual wages do not reasonably represent his post-injury wage-earning capacity, the administrative law judge concluded that claimant failed to present sufficient evidence to accurately calculate his alleged loss of wage-earning capacity, and he denied permanent partial disability benefits. The administrative law judge awarded claimant medical benefits, and because claimant was not awarded permanent disability benefits, he did not address employer's claim for Section 8(f) relief, 33 U.S.C. §908(f). Claimant's motion for reconsideration was summarily denied.

On appeal, claimant contends that the administrative law judge erred in finding that he does not have a loss of wage-earning capacity, as he has demonstrated that he works fewer hours because of his injury. Claimant also contends that the administrative law judge erred in rejecting as proof of a loss in wage-earning capacity Exhibit 11 entitled "LWEC Worksheet" because the form was prepared by claimant's counsel. Employer responds that the decision is supported by substantial evidence, is in accordance with law and should be affirmed.

Under Section 8(c)(21) of the Act, an award for permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21). The wage-earning capacity of an injured employee is determined by his actual post-injury earnings if such earnings fairly and reasonably represent his wage-earning capacity. *See* 33 U.S.C. §908(h). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has stated that higher post-injury earnings do not preclude compensation if claimant has, nevertheless, suffered a loss of wage-earning capacity. *See Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). The party contending that actual earnings are not truly representative of post-injury wage-earning capacity has the burden of establishing a different wage-earning capacity. *See Misho v. Dillingham Marine & Manufacturing Co.*, 17 BRBS 188 (1985).

In the instant case, claimant argues that his computations indicate that he has a lost earning capacity of \$450 per week. The administrative law judge found, however, that the combination of jobs that claimant worked post-injury were appropriate given his condition and that although

claimant worked fewer hours post-injury, his actual post-injury earnings are higher.¹ The administrative law judge thus concluded that claimant's receipt of higher wages for fewer hours of work indicates that inflationary factors have not diminished claimant's wage-earning capacity, and that claimant failed to establish a loss in wage-earning capacity. The administrative law judge refused to credit as evidence of diminished wage-earning capacity Claimant's Exhibit 11, which is a worksheet prepared by claimant's counsel allegedly establishing a loss in wage-earning capacity. The administrative law judge found that the calculations were unsubstantiated in the record in that they take into account only hours worked, and not wages actually earned.²

We reject claimant's contention that the administrative law judge erred in finding that claimant failed to demonstrate a loss in wage-earning capacity. The administrative law judge, within his discretion, refused to credit the worksheet prepared by claimant's attorney as he rationally found it lacked a proper evidentiary foundation and omitted relevant information. *See generally Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT)(9th Cir. 1988). Moreover, the administrative law judge could rely on claimant's higher post-injury wages to conclude that claimant's actual wages represent his wage-earning capacity and that he has not demonstrated a loss in wage-earning capacity despite the lesser number of hours worked than before his injury. *See Darcell v. FMC Corp., Marine & Rail Equip. Div.*, 14 BRBS 294 (1981). The administrative law judge's findings are rational and supported by the record, and we therefore affirm his denial of permanent partial disability benefits.

¹Based on claimant's average weekly wage of \$1,156.94, claimant earned approximately \$60,000 in the year preceding the injury on February 17, 1986. The administrative law judge found that claimant earned \$65,427.66 in 1988.

²The administrative law judge also stated that the worksheet was prepared by claimant's counsel and therefore does not represent an independent assessment of claimant's post-injury wage-earning capacity.

Accordingly, the Decision and Order and Order Denying Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge