BRB No. 02-0767

RICHARD C. BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LONG BEACH CONTAINER TERMINAL	)	DATE ISSUED: 07/11/2003
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

James M. McAdams (Pierry, Moorhead, McAdams & Shenoi, LLP), Wilmington, California, for claimant.

Lisa M. Connor (Aleccia & Connor), Long Beach, California, for employer/ carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (01-LHC-2106) of Administrative Law Judge Anne Beytin Torkington 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 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).

Claimant, a UTR/top handler operator, suffered an injury to his back during the course of his employment on June 19, 1995, and returned to his usual job duties on September 30, 1995. Subsequently, claimant underwent lumbar surgery on July 31, 1996, and returned to work as an UTR operator on February 23, 1997. Employer voluntarily paid temporary total disability compensation for the period between June 30 to September 29, 1995, and from July 31, 1996, through February 4, 1997. Claimant sought additional compensation based on an alleged loss in his wage-earning capacity of at least $300 per week subsequent to his reaching maximum medical improvement on April 22, 1997.

In her decision, the administrative law judge found that claimant does not have a current loss in wage-earning capacity; however, she further found that there was a significant likelihood that claimant=s injury would deteriorate, resulting in a loss in wage-earning capacity in the future. Accordingly, the administrative law judge awarded claimant a *de minimis* award of $1 per week.

Claimant appeals, contending that the administrative law judge erred in finding that he does not have a loss in wage-earning capacity as a result of his work injury. Employer responds, urging affirmance.

An award for permanent partial disability under Section 8(c)(21) of the Act, 33 U.S.C. '908(c)(21), is based on the difference between claimant=s pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. '908(h). Wage-earning capacity is determined under Section 8(h), 33 U.S.C. '908(h), which provides that claimant=s wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). The party contending that the employee=s actual earnings are not representative of his wage-earning capacity bears the burden of establishing an alternative reasonable wage-earning capacity. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). The objective of the inquiry concerning claimant=s wage-earning capacity is to determine the post-injury wages to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *see generally Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

In the instant case, the administrative law judge took the total amount claimant has earned since his full return to work, $339,186.46, and divided that by the total days worked, 1,127, to determine claimant=s average daily wage, $300.96, which she multiplied by six days to determine that claimant=s post-injury weekly wage is $1,805.76. Adjusted for inflation,

this figure equals a weekly wage of $1,513.03,[1] which is higher than claimant=s stipulated pre-injury average weekly wage of $1,411.55. No party contends that the total amount earned, the number of days worked or the method of the inflationary adjustment, *per se*, are in error. Claimant alleges only that the divisor, *i.e.*, the number of days, should be enhanced to reflect those extended periods when claimant=s work injury allegedly prevented him from working, thereby yielding a loss in wage-earning capacity.

The administrative law judge found that claimant=s work injury was not the cause of his absences from work during the periods in question. After claimant=s work injury reached maximum medical improvement in April 1997, claimant was unable to work from April 2 to May 31, 1998, from December 21, 1998, to January 31, 1999, and from May 14 to June 7, 2000, following surgeries unrelated to his work injury.[2] Claimant also was absent from work from May 1 to May 22, 1999, from August 29 to October 17, 1999, and from February 14 to April 10, 2001. Claimant contends that the absences during these latter three periods were the result of his work-related back condition Aflaring up,@ and that, therefore, these 18 weeks should be accounted for in determining claimant=s post-injury wage-earning capacity.

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[1]To adjust for inflation, the administrative law judge used the National Average Weekly Wage (NAWW) in 1995, $391.22, which she multiplied by claimant=s present weekly wage, $1,805.76, as determined by the records of the Pacific Maritime Association from April 22, 1997, through 2001, CX 2, which she then divided by the NAWW in 2001, $466.91, to equal an adjusted weekly wage of $1,513.03. Decision and Order at 15 n.21. No party contests the administrative law judge=s method of calculation.

[2] Claimant underwent surgery for the removal of his gall bladder on April 2, 1998, for the repair of a hiatal hernia on December 21, 1998, and for the repair of a ventral hernia on May 14, 2000.

Drs. London and Nabavi released claimant to return to work on February 23, 1997. CX 35; EX 9. Dr. London stated that claimant may miss work due to flare-ups of his pain; however, Dr. London did not take claimant off work at any time following February 1997. CX 53. Moreover, claimant did not seek medical treatment during the period from May 1 to May 22, 1999, or from August 29 to October 17, 1999. During his absence from work from February 14 through April 10, 2001, claimant did seek treatment on March 11, 2001, but Dr. London, while supplying palliative treatment, did not remove claimant from work. CX 35. Upon claimant=s return to Dr. London six weeks later on April 9, 2001, Dr. London noted claimant=s increased complaints of pain but claimant returned to work two days later. CXS 36, 53

The administrative law judge concluded that claimant=s failure to seek medical assistance during two of these extended periods was inconsistent with his testimony that these absences were due to flare-ups in his back condition. The administrative law judge further found claimant=s allegations that he did not seek medical help because Dr. London=s staff prevented him from seeing the doctor belied by the pattern of treatment by Dr. London both before and after the relevant periods of time. Decision and Order at 13. Indeed, claimant further admitted that he did not seek any medical intervention for extended periods of time and that no physician had taken him off work due to his back condition. HT at 65-67. Moreover, Dr. London, while noting in retrospect that it was reasonable for claimant to miss work for a few days, did not comment on claimant=s extended absences. CX 53. The administrative law judge thus found it unreasonable for claimant to decide independently to remain off work for extended periods of time without obtaining medical assistance and/or clearance from his physician to do so. The administrative law judge also noted that claimant offered no explanation for his three week absence from work in May 1999. HT at 60-61. The administrative law judge, therefore, found claimant=s mere contention that these absences were due to his work injury insufficient to carry his burden of establishing that his actual wages did not represent his wage-earning capacity.[3]

Further, the administrative law judge found that while claimant has worked fewer hours since his return to work, this fact is not the result of claimant=s work injury. Claimant, having received his Class A longshoreman rating, was able to consistently work the third shift which resulted in his working fewer hours for the same pay, *i.e.*, the third shift required five hours work for eight hours of pay. HT at 42. Claimant testified that not only did he receive the same pay for fewer hours but also that he preferred working that shift because there are fewer supervisors around and he is a night person. HT at 37-41. Moreover, claimant testified that he has no trouble performing most of his job duties, especially with the UTR or top handler positions, HT at 46-47, positions which his A class rating allow him to

[3]The administrative law judge found that it is likely that claimant=s back pain caused some of the absence from February 14 through April 10, 2001, and that, in light of Dr. London=s opinion, it is reasonable to ascribe one week of the absence to claimant=s back pain. She accounted for this fact in calculating claimant=s wage-earning capacity. *See* Decision and Order at 13-14; n. 1, *supra.*

select. HT at 31. Thus, the administrative law judge determined that claimant=s fewer hours worked after his injury were due to his working on the third shift and not the result of his work injury.

In adjudicating a claim, it is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). In the instant case, we hold that the administrative law judge=s decision to reject the unsupported testimony of claimant that his absences were due to his work injury is rational. *See Price v. Stevedoring Services of America*, 36 BRBS 56 (2002). Moreover, her finding that claimant currently suffers no loss in wage-earning capacity is supported by substantial evidence of record and is therefore affirmed. *See DeWeert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002). As no party contests the administrative law judge=s *de minimis* award, it also is affirmed. *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT).

Accordingly, the administrative law judge=s Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge