BRB No. 99-0610

LAWRENCE M. SHORT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Permanent Partial Disability and Denying Section 8(f) Relief and Decision and Order Denying Employer's Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Laura Stomski (Henry L. Solano, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

Claimant appeals the Decision and Order on Remand Granting Permanent Partial Disability and Denying Section 8(f) Relief and Decision and Order Denying Employer's Motion for Reconsideration (94-LHC-1816; 95-LHC-2657) of Administrative Law Judge Richard K. Malamphy 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a welder, sustained a work-related injury to his right index finger on September 1, 1985, and a work-related injury to his back on October 11, 1985. The parties stipulated before the district director as to claimant's entitlement to benefits for the finger injury. With regard to the claim for the back injury, employer paid various periods of temporary total and partial disability benefits, and provided claimant a job within his restrictions at its facility. Employer discharged claimant effective June 15, 1988, for violating a company rule which prohibits stealing company property. Specifically, claimant was discharged for cashing a duplicate workers' compensation check for his finger injury.

In his initial decision, the administrative law judge found employer's discharge of claimant did not violate Section 49 of the Act, 33 U.S.C. §948a. In addition, he determined that claimant is not entitled to any benefits after his discharge because employer provided claimant with a suitable job at his full pre-injury wage. Claimant appealed, challenging the administrative law judge's finding under Section 49 of the Act, and denial of continuing partial disability benefits after his discharge. In its decision, the Board affirmed the administrative law judge's finding that employer's discharge did not violate Section 49, vacated his finding that claimant is not entitled to any disability benefits after his discharge, and remanded the case for consideration of all evidence relevant to claimant's post-injury wage-earning capacity. *Short v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 97-1510 (July 27, 1998)(unpub.).

On remand, the administrative law judge found claimant entitled to temporary and permanent partial disability benefits based on a loss of overtime, and denied employer's request for Section 8(f) relief, 33 U.S.C. §908(f), as employer did not establish the that claimant had a pre-existing permanent partial disability. Employer's motion for reconsideration was denied.

On appeal, employer challenges the administrative law judge's award of benefits and denial of Section 8(f) relief. Claimant responds, urging affirmance of

the award of benefits. Additionally, the Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

Employer argues that administrative law judge erred in finding claimant entitled to partial disability benefits as he failed to establish that overtime was available to comparable workers between the time of his discharge on July 18, 1988, and the hearing, or that claimant's inability to work any alleged overtime is due to his work-related injury. Employer further argues that pursuant to *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993), claimant's termination for misconduct in the instant case precludes his entitlement to temporary total or partial disability benefits.

Sections 8(c)(21) and (e) of the Act, 33 U.S.C. §908(c)(21), (e), provide for an award for partial disability benefits based on two-thirds of the difference between claimant's pre-injury average weekly wage and post-injury wage-earning capacity. 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 fact that claimant received actual post-injury wages equal to his pre-injury earnings does not mandate a conclusion that he has no loss in wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP,* 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991); *Mangaliman v. Lockheed Shipbuilding Co.,* 30 BRBS 39 (1996). Actual earnings in a suitable job lost by claimant for reasons related to his misconduct, like any other suitable job claimant holds post-injury, should be considered by the administrative law judge in determining claimant's post-injury wage-earning capacity. *Mangaliman,* 30 BRBS at 42. Moreover, when overtime hours are a regular and normal part of claimant's employment, they should be considered in determining claimant's average weekly wage as well as his loss of wage-earning capacity. *See Peele v. Newport News Dry Dock & Shipbuilding Co.*, 20 BRBS 113 (1987). In determining whether claimant is entitled to partial disability compensation based on a loss of overtime, the focus should be on claimant's loss of overtime because of his injury. *See Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989); *Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987).

In *Sears*, the Board affirmed the administrative law judge's finding that claimant failed to establish a loss in overtime pay based on evidence submitted by employer which showed that no overtime was available in claimant's pre-injury job and that claimant worked decreasing amounts of overtime before her injury. *Sears*, 19 BRBS at 235. In *Brown*, the Board held that the administrative law judge erred in requiring claimant to prove that overtime was available in her pre-injury welding job after her injury, when in fact, the focus should be on claimant's loss of previously available overtime because of her injury. *Brown*,

23 BRBS at 110. The Board distinguished *Sears* on the basis that employer in *Brown*, presented no evidence that overtime was unavailable in claimant's old job after her injury and the evidence of record showed that claimant worked increasing amounts of overtime prior to her injury. *Id.*

In the instant case, claimant, like his counterparts in *Sears* and *Brown*, was assigned, post-injury, to employer's MRA shop to perform light-duty work. The administrative law judge found that employer, as in the *Brown* case, did not produce any evidence to show that no overtime was available in claimant's pre-injury job or that claimant worked decreasing amounts of overtime before his injury.[1] *Brown*, 23 BRBS at 110; Order on Recon. at 2. Rather, employer focused on the fact that claimant did not produce evidence regarding overtime available after his discharge.[2] Contrary to employer's contention, however, the proper inquiry is whether claimant established a loss of wage-earning capacity prior to his discharge.

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[1]In fact, the payroll memo history indicates that claimant worked more overtime hours in 1985, *i.e.*, the year of his injury, than in 1983 and 1984 combined. *See* n. 3 *infra*.

[2]Employer also asserted that claimant's assignment to the MRA shop was only temporary, and that he was still under the supervision of Mr. Miller, who testified that he had post-injury work outside the MRA shop within claimant's restrictions which claimant could have performed during that time, and in which claimant presumably could have earned overtime. While Mr. Miller did state that such post-injury work was available, he also stated that he did not give claimant any of this light duty work post-injury, since claimant was working, when not out on total disability, exclusively in the MRA shop during his entire post-injury employment with employer. If this light-duty work was not made available to claimant, it cannot serve as evidence that claimant's overtime opportunities did not decrease due to his injury.

The payroll memo history shows that claimant earned overtime in the years preceding his injury and that subsequent to his injury he did not.[3] CX 5. In addition, the record establishes that claimant was earning the same hourly rate both pre-injury and post-injury, CX 4, and that employer paid claimant temporary partial disability benefits due to his work-related back injury between mid-October 1985 and mid-July 1988. EX 1. The administrative law judge therefore rationally determined that the stipulated average weekly wage at the time of claimant's injury reflected claimant's earnings from overtime, and thus, that the difference between his post-injury wage-earning capacity and pre-injury average weekly wage is due to the unavailability of overtime hours as a result of claimant's transfer, post-injury, to the MRA shop. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Brown*, 23 BRBS at 110. We therefore affirm his finding that claimant is entitled to continuing permanent partial disability benefits at a compensation rate of $38.57 based on a post-injury loss of overtime hours as it is rational and supported by substantial evidence.

Moreover, employer's contention that claimant's discharge for misconduct precludes his entitlement to continuing partial disability benefits is without merit. In *Brooks*, 2 F.3d at 64, 27 BRBS at 100 (CRT), the Fourth Circuit affirmed the Board's holding that the claimant was not entitled to total disability benefits following a discharge, as his inability to perform the post-injury job at employer's facility was due to his own misfeasance, and thus, not due to the disability resulting from the work-related incident. This holding is based on the principle that employer does not bear the renewed burden of demonstrating suitable alternate employment where claimant loses a suitable job due to his own misconduct. *See also Walker v. Sun Shipbuilding & Dry Dock Co.,* 19 BRBS 171 (1986). It does not, however, hold that partial disability which preceded the discharge and reflects an ongoing loss of wage-earning capacity in the alternate employment terminates; such partial disability does not result from the discharge but from claimant's work-related injury. In the instant case, claimant's loss of wage-earning capacity was not due to his termination, but instead occurred prior to his termination as a result of his inability to return to his pre-

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[3]This memo shows as follows:

1983	120 overtime hours
1984	56 overtime hours
1985	216 overtime hours
1986-1988	no overtime hours

CX 5.

injury welding position which offered overtime on a regular basis. Thus, claimant's existing loss of wage-earning capacity in the suitable job he performed continues notwithstanding the discharge, *see Mangaliman,* 30 BRBS at 42*; Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10, 17 (1980), unless employer can establish, via modification proceedings, that claimant has a higher wage-earning capacity. *See* 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 S.Ct. 121, 31 BRBS 54 (CRT) (1997); *Metropolitan Stevedore Co. v. Rambo [Rambo I],* 515 U.S. 291, 30 BRBS 1 (CRT)(1995); *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996). Accordingly, employer's contentions are rejected and the administrative law judge's award of permanent partial disability benefits is affirmed.

Employer next argues that the administrative law judge erred in failing to find that claimant's chronic back pain and/or right index finger injury do not constitute pre-existing permanent disabilities for purposes of Section 8(f) relief. Employer first asserts it satisfied the "cautious employer" test and thus, established the pre-existing permanent partial disability element for Section 8(f) relief based on the fact that claimant, with a history of back pain, was hired to perform heavy manual labor. Employer maintains that this evidence, in conjunction with Dr. Hall's opinion that "even an insignificant back injury could have an effect on an employer's desire to either hire or retain an individual with prior back problems," satisfies its burden under Section 8(f). Employer also argues that claimant's right finger injury, to which Dr. Knauft assigned a 5 percent permanent partial disability rating and for which claimant received compensation, similarly satisfies its burden to establish a pre-existing permanent partial disability under Section 8(f) of the Act.

To avail itself of Section 8(f) relief where an employee suffers from a permanent partial disability, an employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to the employer prior to the work-related injury; and 3) that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT) (4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87 (CRT)(1995). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id*.

An employer may satisfy the pre-existing permanent partial disability requirement by demonstrating that, prior to the most recent injury,

> the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability.

C & P Telephone Co. v. Director, OWCP, 564 F.2d 503, 513, 6 BRBS 399, 412 (D.C. Cir. 1977); *see also Morehead Marine Services, Inc. v. Washnock,* 135 F.3d 366, 32 BRBS 8 (CRT)(6th Cir. 1998); *Director, OWCP v. General Dynamics Corp.,* 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991). In this case, employer sought to do so based on evidence of prior back pain and an injury to claimant's right index finger.

In his decision, the administrative law judge considered but rejected the relevant opinions of Drs. Hall and Reid as contrary to the other evidence of record.[4] Specifically, the administrative law judge concluded that in the absence of any complaints of back pain between mid-July 1985 and the work-related back injury in October 1985, and as claimant returned to full duty without any restrictions in July 1985, the injury in June 1985 did not result in any permanent impairment. Thus, contrary to employer's contention, the administrative law judge rationally found that claimant's prior back injury and pain did not result in a "serious lasting physical condition,"and thus, is insufficient to establish a pre-existing permanent partial disability. *C & P Telephone Co.*, 564 F.2d at 513, 6 BRBS at 412; *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

Similarly, the administrative law judge considered and rejected employer's contention that claimant's right index finger injury, in which a piece of metal became lodged in that digit, is a pre-existing permanent partial disability since there was no evidence that the finger injury was disabling prior to the October 11, 1985, back injury. In particular, the administrative law judge found that there are no shipyard clinical records on file that refer to such an injury, and that claimant's treating

[4]Dr. Hall opined that claimant's "chronic" problem with his back in June and July 1985, is indicative of a permanent and serious defect, while Dr. Reid stated that the June 12, 1985, abrasion and contusion on claimant's back resulted in a 6 percent permanent impairment. EX 22, 24.

physician, Dr. Knauft, indicated that the condition was asymptomatic until late 1986.[5] The administrative law judge therefore rationally concluded that this impairment cannot be considered a pre-existing permanent partial disability for purposes of Section 8(f) relief.

The mere fact that claimant sustained prior injuries is insufficient to establish the existence of a serious lasting physical impairment. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991); *Director, OWCP v. Belcher Erectors, Inc.*, 770 F.2d 1220, 17 BRBS 146 (CRT) (D.C. Cir. 1985); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Thus, as the administrative law judge's findings are rational and supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant did not suffer from a pre-existing permanent partial disability due to either his prior back injury, *see Legrow*, 935 F.2d at 430, 24 BRBS at 202 (CRT); *Belcher Erectors*, 770 F.2d at 1222, 17 BRBS at 149 (CRT); *Campbell Industries*, 678 F.2d at 840, 14 BRBS at 977, or the injury to his right index finger. The administrative law judge's denial of Section 8(f) relief is therefore affirmed. *See Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

[5]There is no evidence of disability until 1987, when Dr. Knauft removed the metal from claimant's right index finger and assigned a permanent impairment rating for which claimant ultimately received compensation.

Accordingly, the administrative law judge's Decision and Order on Remand Granting Permanent Partial Disability and Denying Section 8(f) Relief, and Decision and Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge