BRB Nos. 02-0616
and 02-0616A

DAVID J. GUTHRIE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: May 20 2003
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, and Order Granting in Part and Denying in Part Claimant's Petition for Attorney's Fees and Costs of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for employer/ carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits, and claimant appeals the Order Granting in Part and Denying in

Part Claimant's Petition for Attorney's Fees and Costs (2001-LHC-2452) 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 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 amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, while working a "rail job" for employer on July 21, 1997, sustained an injury to his lower back. As a result, claimant underwent a second operation on his lower back, *i.e.*, decompressive lumbar surgery, on September 26, 1997,

[1] from which, he states, he continues to suffer from persistent pain and back spasms.

[2] Claimant was released to return to work on June 21, 1999, with a 50 pound lifting restriction, and has since worked as regularly as he can, picking and choosing his jobs through the union's hiring hall. Employer voluntarily paid temporary total disability benefits from July 21, 1997, until June 20, 1999, based on the statutory maximum rate of $801.06. 33 U.S.C. §§906(b)(1), 908(b). Claimant thereafter filed a claim seeking permanent partial disability benefits from June 20, 1999, based on an average weekly wage of $1,463.42. Employer controverted the claim, arguing that claimant's average weekly wage is $1,193.42.

In her decision, the administrative law judge determined, pursuant to Section 10(a), 33 U.S.C. §910(a), that claimant's pre-injury average weekly wage was $1,335.05, and that his post-injury wage-earning capacity, pursuant to Section 8(h), 33 U.S.C. §908(h), is $635.82. Accordingly, she awarded temporary total disability benefits for the period from July 21, 1997, until June 20, 1999, at the maximum rate of $801.06 per week, 33 U.S.C. §906(b)(1), and permanent partial disability benefits to commence thereafter at a rate of $466.18 per week. 33 U.S.C. §908(c)(21).

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[1] Claimant previously had back surgery in 1989, following an industrial accident while working at a feed mill. Claimant stated that his recovery from this surgery "went really well." Hearing Transcript (HT) at 48.

[2] Claimant is currently taking both Baclofen, for his spasms, and Ultram, for the continued back pain.

Claimant's counsel subsequently filed an attorney's fee petition seeking a total fee of $16,447.09, representing 71 hours of attorney time at an hourly rate of $225, 3.75 hours of legal assistant time at an hourly rate of $85, plus $153.34 in costs.

[3] Employer filed objections to the fee petition. In a supplemental order, the administrative law judge reduced the attorney time requested by 1.25, but then added .75 hours of that reduction back into the time requested for work by the legal assistant. In all other aspects, the attorney's fee petition was granted in its entirety. She thus awarded an attorney's fee of $16,229.59.

On appeal,

[3] The administrative law judge, in this case, considered an amended fee petition for an attorney's fee submitted by claimant's counsel. The record indicates that claimant's counsel altered his original fee petition following consultations with employer's attorney.

[4] employer challenges the administrative law judge's calculation of claimant's average weekly wage under Section 10(a). Claimant responds, urging affirmance of that finding. In his cross-appeal, claimant challenges the administrative law judge's determination regarding claimant's post-injury wage-earning capacity. Employer responds, urging affirmance of that finding. Claimant also challenges the administrative law judge's decision, in her supplemental award of an attorney's fee, to adjust the hours claimed by .75.

Average Weekly Wage

Employer initially challenges the validity of the decision of the United States Court of Appeals for the Ninth Circuit in *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), asserting that there is no support in the statute for the court's holding that a claimant who works 75 percent of the available days has worked "substantially the whole of the year" and that Section 10(a) is thus applicable. Employer acknowledges that the Board, like the administrative law judge, is bound by *Matulic* in this case, as it arises within the jurisdiction of the Ninth Circuit. Thus, we will not address employer's specific reasons for asserting that *Matulic* is wrongly decided. In *Castro v. General Construction Co.*, BRBS , BRB No. 02-0783 (May 13, 2003), the Board recognized that *Matulic* was controlling precedent and affirmed the administrative law judge's calculation of claimant's average weekly wage under Section 10(a), since, as the administrative law judge observed, *Matulic* set the threshold for application of Section 10(a) at 75 percent, and Castro met that level.[5] *Castro*, slip op. at 17; *see also Price v. Stevedoring Services of America,* 36 BRBS 56 (2002), *appeal pending,* No. 02-71207 (9th Cir.). We thus reject employer's contention that *Matulic* is invalid. *Castro*, slip op. at 14-17.

Employer next asserts that claimant's employment, particularly since he receives jobs out of a union hiring hall, is by its very nature intermittent and casual. Thus, it argues that the administrative law judge's finding to the contrary and his application of Section 10(a) to calculate claimant's average weekly wage are erroneous. Employer also avers that the administrative law judge erroneously determined that claimant was a five-day-per-week worker, since she did not discuss the fact that the collective bargaining agreement allows for 359 to 360 potential workdays and that use of those figures brings claimant's work well below the 75 percent rule of *Matulic,* thereby requiring calculation of claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c), as opposed to Section

[4] By Order dated March 19, 2003, the Board dismissed the parties' appeals and remanded the case to the district director for reconstruction of the record. On April 30, 2003, the Board received the original case record. Accordingly, we reinstate the parties' appeals on the Board's docket.

[5] In *Castro*, the administrative law judge found that claimant earned, in the 52 weeks prior to his work injury, a total of $40,466 by working 1,611 hours or 201.35 days, which amounts to 77.4 percent of the 260-day standard work year for a five-day per week worker.

10(a).

Section 10(a) of the Act, 33 U.S.C. §910(a) (emphasis added), states:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during *substantially the whole of the year* immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

In the instant case, the administrative law judge initially found, in contrast to employer's contention, that claimant's employment was not "intermittent and casual." Specifically, the administrative law judge determined, based on the hearing testimony, that claimant, like other longshoreman, regularly worked from job to job out of a hiring hall, on a rotational basis. The administrative law judge then found that there is no question that claimant worked substantially the entire year prior to July 21, 1997, as employer admitted that claimant worked 228 days during that one-year period. She further found, based on the testimony provided by claimant and his wife, as supported by the PMA records, that claimant was, for purposes of calculating his average annual wage under Section 10(a), a five-day-per-week worker.[6] In particular, the administrative law judge relied on claimant's testimony that he worked more than a standard five-day work week on several occasions, and his wife's statements that claimant sometimes worked weekends, and sometimes worked a three or four day week but that "it all balanced out, for the most part to be, you know, like a normal job," HT at 33-34, *i.e.*, a five-day work week. The administrative law judge also relied on the PMA records, which indicated that for the one-year period between July 21, 1996, and July 21, 1997, claimant worked 12 six-day work weeks, 16 five-day work weeks and 13 four-day work weeks. The administrative law judge observed, that "averaged out, it would appear that the majority of claimant's work in 1996-1997 was of the five-day-per-week variety." Decision and Order at 17. Based on these findings, the administrative law judge calculated claimant's average weekly wage, pursuant to Section 10(a), at $1,335.05.[7] As employer suggests, this results in average annual earnings of

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[6] Section 10(a) explicitly sets the formula for calculating a claimant's average annual earnings, and in turn for calculating the percentage of days worked, depending upon whether claimant is a five-day a week (260) or six-day a week (300) worker. 33 U.S.C. §910(a). As such, employer's suggested use of 359 or 360 as the figure of possible workdays based on the collective bargaining agreement is rejected. Using Section 10(a), and based on the fact that claimant actually worked 228 days in the year preceding his injury, the percentage of days worked falls well beyond the threshold cited by the Ninth Circuit in *Matulic, i.e.,* 228 days divided by the requisite 260 days for a five-day a week worker yields a percentage of 87.7, far above the 75 percent figure set in *Matulic,* 154 F.3d at 1058, 32 BRBS at 151(CRT).

[7] Specifically, she divided claimant's earnings in the 52 weeks preceding his

$69,422.60, which exceeds claimant's actual earnings of $60,879.41, by $8,543.19. Nevertheless, as the Ninth Circuit stated in *Matulic* that overcompensation alone is insufficient reason to rebut the use of Section 10(a), and as employer's remaining contentions, notably that claimant was an intermittent and casual worker and that the collective bargaining agreement should be used in calculating the percentage of days worked under the *Matulic* formula, are without merit, we affirm the administrative law judge's use of Section 10(a) in this case as the resulting average weekly wage "falls well within the realm of theoretical or actual 'overcompensation' that Congress contemplated." *Matulic*, 154 F.3d at 1058, 32 BRBS at 152(CRT); *see also Price*, 36 BRBS at 62; *Castro*, slip op. at 17.

Wage-Earning Capacity

Claimant's sole contention, via cross-appeal, is that the administrative law judge erred by calculating claimant's post-injury wage-earning capacity without regard to the fact that he was able to work as much as he did only because of the daily dosages of prescription medication he took to control his back pain and back spasms. Claimant maintains that when a worker requires prescription medication to keep working, his actual earnings should not be representative of his wage-earning capacity. Claimant asserts that while the use of medication is not a factor specifically enumerated in the Board's decision in Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649 (1979), such a consideration is necessary in order to arrive at an accurate figure as to what an injured worker would actually receive on the open market.

An award for partial disability 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(c)(21), (h). Section 8(h) of the Act, 33 U.S.C. §908(h), 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. Id. In making this determination, relevant considerations include the employee's physical condition, age, education, industrial history, claimant's earning power on the open market, and any other reasonable variable that could form a factual basis for the decision. See Container Stevedoring Co. v. Director, OWCP [Gross], 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); Long v. Director, OWCP, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649 (1979). The objective of the inquiry under Section 8(h) is to determine claimant's wage-earning capacity in his injured state. Long, 767 F.2d 1578, 17 BRBS 149(CRT); see also Sestich v. Long Beach Container Terminal, 289 F.3d 1157, 36

July 21, 1997, injury, $60,879.41 by the actual number of days worked, 228, and then multiplied that figure, $267.01 by 260 to arrive at average annual earnings of $69,422.60, which divided by 52 results in an average weekly wage of $1,335.05. Decision and Order at 18.

BRBS 15(CRT) (9th Cir. 2002); Deweert v. Stevedoring Services of America, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001). The party that contends that claimant's actual wages are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. Grage v. J.M. Martinac Shipbuilding, 21 BRBS 66 (1988), aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990). In her decision, the administrative law judge considered the relevant evidence pursuant to the appropriate standard and determined that claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity. Specifically, the administrative law judge credited the testimony presented by both claimant and his wife to find that claimant is unable to work on a daily basis, and that he works as many days as he is capable of working per week. In so finding, the administrative law judge rejected employer's contention that claimant's post-injury wage-earning capacity is greater than his actual earnings, and claimant's contention that his post-injury wage-earning capacity is less than his actual earnings. With regard to claimant's specific contention, as reiterated in his appeal, the administrative law judge declined to reduce claimant's post-injury wage-earning capacity by 15 percent due to claimant's required use of medication to work, since "there is no legal precedent for such an adjustment." Decision and Order at 22 n. 27. The administrative law judge observed that the hearing loss and sight loss cases cited by claimant, wherein the claimants needed hearing aids or corrective lenses to continue to work, "differ greatly from one in which a worker requires pain medication." Id. The administrative law judge added "if this were the case, every claimant who took medication for pain would qualify for a reduction in his wage-earning capacity." Id. In any event, the impact of claimant's use of medication on his ability to work is already factored into his post-injury wage-earning capacity for, as the administrative law judge concluded, he works fewer days because of his work-related back injury. Claimant's contention therefore lacks merit.

Inasmuch as the administrative law judge applied the appropriate standard for determining claimant's post-injury wage-earning capacity, and as her factual findings are rational, supported by substantial evidence and are in accordance with law, they are affirmed. 33 U.S.C. §908(h); *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Calbeck v.*

[8] Moreover, as the administrative law judge determined that claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity, claimant bore the burden of establishing an alternative reasonable wage-earning capacity due to his use of prescription medication. *Grage*, 21 BRBS 66. As employer suggests, claimant produced no evidence of any kind that either Ultram or Baclofen further impaired his ability to work post-injury as a longshoreman. Decision and Order at 19.

Strachan Shipping Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see also Gross*, 935 F.2d 1544, 24 BRBS 213 (CRT); *Long*, 767 F.2d 1578, 17 BRBS 149(CRT); *Devillier*, 10 BRBS 649 (1979). Consequently, the administrative law judge's calculation of claimant's post-injury wage-earning capacity at $635.82, and resulting award of benefits, are affirmed. *Id.*

Attorney's Fee

Claimant argues that the administrative law judge erred in calculating the attorney's fee award, as she should not have deducted .75 hours of attorney time on August 9, 2002, because the attorney was only claiming .50 hours on that date. Claimant therefore argues that the administrative law judge should have revised the request for an attorney's fee by transference of .50 hours, as opposed to .75 hours, from attorney work to paralegal work thereby resulting in an actual attorney's fee award of $16,264.75, instead of the $16,229.59 ordered by the administrative law judge. Claimant also requests that if he is successful in the prosecution of his cross-appeal, the Board should vacate the attorney's fee award and remand the case to the administrative law judge for reconsideration of the amount of the fee in light of claimant's additional success in the pursuit of his case. Employer responds that the administrative law judge's award of an attorney's fee should be affirmed.

We agree with claimant that the administrative law judge erred in finding .75 hours of services performed on August 9, 2002, compensable at the paralegal hourly rate. Claimant correctly contends that he billed only .5 hours on that date. Therefore, the administrative law judge's attorney's fee award is modified to award counsel a fee for 70 hours of attorney services and 4.25 hours of paralegal services, at the rates awarded by the administrative law judge. As claimant's cross-appeal was unsuccessful, we need not remand this case for the administrative law judge to reconsider the amount of the fee awarded.

[9] In response, employer also argues that claimant's counsel's position in appealing this fee award does not raise a substantial question of law or fact as the amount in error is trivial, involving only an alleged error of $35.16. Employer thus maintains that this issue is not appropriate for review before the Board. We reject this contention for the reasons stated in *Potomac Iron Works v. Love,* 673 F.2d 537, 14 BRBS 777 (D.C. Cir. 1982).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed. The administrative law judge's fee award is modified as stated herein, and is otherwise affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge