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BRB No. 06-0193

EDWARD M. BOGDEN	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 11/09/2006
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order, the Order Partially Granting Employer's Application for Modification of Award, and the Order Denying Employer's Motion for Reconsideration of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Jean E. Novak (Strassburger McKenna Gutnick & Potter), Pittsburgh, Pennsylvania, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order, the Order Partially Granting Employer's Application for Modification of Award, and the Order Denying Employer's Motion for Reconsideration (2004-LHC-1786) of Administrative Law Judge Thomas M. Burke 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).

Claimant sustained a work-related back injury on February 24, 2002. He continued

working for employer until May 8, 2002, and has not returned to any employment since that date. Employer voluntarily paid claimant temporary total disability benefits from May 2002 through November 2003, as well as medical benefits. 33 U.S.C. §§908(b), 907; *see* EX 15. In his Decision and Order issued August 23, 2005, the administrative law judge found that claimant established a *prima facie* case of total disability, employer established the availability of suitable alternate employment, and claimant did not establish that he diligently sought employment post-injury. Pursuant to these findings, the administrative law judge awarded claimant permanent total disability compensation from May 9, 2002, to October 27, 2004, at a weekly rate of $1,011.67, and permanent partial disability thereafter at weekly rate of $894.96. 33 U.S.C. §908(a), (c)(21). In an Order Partially Granting Employer's Application for Modification of Award, the administrative law judge amended his prior decision to reflect claimant's entitlement to permanent total disability benefits at a rate of $966.08 per week from May 9, 2002, to September 30, 2002, $996.54 per week from October 1, 2002, to September 30, 2003, and $1,011.67 per week commencing October 1, 2003. The administrative law judge further clarified his award of benefits to claimant in an Order issued October 12, 2005, wherein the administrative law judge stated that, as claimant did not reach maximum medical improvement until March 9, 2003, claimant's weekly benefits during the period May 9, 2002, to March 9, 2003, were for temporary total disability, that the increases in claimant's weekly compensation rates prior to October 1, 2003, were due solely to the maximum compensation provision contained in Section 6(b)(1) of the Act, and that Section 10(f) of the Act, which provides for annual adjustments to the amount of permanent total disability benefits due claimant, would thereafter apply to those benefits beginning on October 1, 2003.

On appeal, employer contends that the administrative law judge erred in determining the amount of weekly benefits to be awarded to claimant during his periods of disability. Claimant has not filed a response brief.

Employer initially contends that the administrative law judge erred in determining the amount of benefits to which claimant is entitled to prior to October 1, 2003. For the reasons that follow, we modify the administrative law judge's decision on this issue.

The parties stipulated that claimant had an average weekly wage of $1,517.50, at the time of his February 24, 2002, work injury. Based on this figure, the administrative law judge commenced claimant's temporary total disability benefits on May 9, 2002, at the rate of $966.08 per week, which is the maximum rate allowable at that time pursuant to Section 6(b)(1), 33 U.S.C. §906(b)(1). The administrative law judge adjusted claimant's weekly benefits to $996.54, as of October 1, 2002, stating that this increase in claimant's weekly benefits for his temporary total disability was solely attributable to the new maximum compensation rate which took effect on that date.[1] October 12, 2005 Order at 2. As

[1] Thus, contrary to employer's position on appeal, the administrative law judge's

claimant reached maximum medical improvement on March 19, 2003, the administrative law judge awarded claimant permanent total disability benefits as of this date at the October 2002 maximum rate, and subject thereafter to adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), commencing October 1, 2003.

Pursuant to Sections 8(a) and (b) of the Act, compensation for permanent and temporary total disability is paid at the rate of two-thirds of the claimant's average weekly wage. 33 U.S.C. §908(a), (b). The award, however, is subject to the maximum rate allowable under the Act. 33 U.S.C. §906. In this regard, Section 6 provides, in pertinent part, that:

> (b)(1) Compensation for disability or death (other than compensation for death required by this Act to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).
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> (b)(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage of the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending September 30 of the next year….
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> (c) Determinations under subsection (b)(3) with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

33 U.S.C. §906(b)(1), (2), (c). In interpreting Section 6, the Board has held that only claimants receiving permanent total disability or death benefits receive the new maximum rate in effect each October. *See Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990). The Board held that those receiving compensation for temporary total disability are considered to have been "newly awarded compensation" when benefits commence, generally at the time of injury, and receive benefits at the maximum rate in effect at that time. *Id.* at 31-32. Benefits for temporary total disability compensation thereafter remain at this rate because, on a subsequent October 1, the claimant is no longer "newly awarded" benefits and is not receiving benefits for permanent total disability or death.

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increase in the weekly benefits to be paid claimant was not premised upon the provisions of Section 10(f) of the Act, 33 U.S.C. §910(f).

Thus, a claimant who is temporarily totally disabled is not entitled to the new maximum rate. *Id*. at 32; *see also Reposky v. Int'l Trans. Serv.,* BRBS , BRB Nos. 06-0148/A (Oct. 19, 2006).

In *Reposky*, the Board also addressed the factual situation presented here, where claimant's temporary total disability changed to permanent total disability during the fiscal year. The Board concluded that while the date of maximum medical improvement changes the nature of the claimant's disability, a claimant who was continuously receiving benefits was not "newly awarded" compensation at that time. The Board held that the statutory maximum rate in effect during the fiscal year that claimant reached maximum medical improvement therefore does not apply to increase claimant's compensation rate for permanent total disability. Such a claimant receives the same rate until the following October 1, and at that time receives the applicable adjustment to the maximum rate. *Reposky*, slip op. at 21-22.

As claimant herein is not entitled to the new statutory maximum rate in effect each fiscal year during his period of temporary total disability or on the date of maximum medical improvement, we modify the administrative law judge's decision to reflect claimant's entitlement to weekly total disability benefits from October 1, 2002, to September 30, 2003, at the rate of $966.08, the maximum weekly rate in effect at the time his disability commenced. As claimant was receiving permanent total disability benefits on October 1, 2003, he is entitled to the higher maximum rate in effect as of that date. As the new maximum rate exceeds his compensation rate under Section 8(a), the administrative law judge's determination that claimant is entitled to compensation at the rate of $1,011.67 commencing October 1, 2003, with yearly adjustments under Section 10(f), is affirmed. *See Marko v. Morris Boney Co.*, 23 BRBS 353 (1990).

Employer also contends that the administrative law judge's calculation of claimant's post-injury wage-earning capacity cannot be affirmed. Specifically, employer asserts that the administrative law judge provided no explanation as to the mathematical calculation used to arrive at claimant's post-injury wage-earning capacity, and the case must be remanded for reconsideration of this issue. We disagree. An award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity.[2] 33 U.S.C. §908(c)(21); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). Section 8(h) of the Act provides that claimant's earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT)

[2] In this case, no party challenges the administrative law judge's finding that claimant is incapable of resuming his usual employment duties with employer, and that employer established the availability of suitable alternate employment as of October 27, 2004. Those findings are therefore affirmed.

(5th Cir. 1992). If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h); *see Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988); *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage 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). The United States Court of Appeals for the Fifth Circuit has held that an average of the range of salaries identified as suitable alternate employment is a reasonable method for determining a claimant's post-injury wage-earning capacity since a fact-finder has no way of determining which job, of the ones proven available, the employee will obtain; thus, the court stated, averaging ensures that the post-injury wage-earning capacity reflects each job that is available. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998).

In the instant case, claimant has not returned to work and he has no actual, post-injury earnings. However, the administrative law judge credited the labor market survey prepared by employer's expert to find that multiple sedentary and light-duty employment opportunities existed for claimant in the relevant labor market area as of October 27, 2004. Specifically, the administrative law judge found that employer had identified nine sedentary jobs averaging $190.42 per week in wages, and ten light-duty jobs averaging $161.25 per week in wages. Decision and Order at 17. Based upon these findings, the administrative law judge determined that the average of the wages paid by these identified and suitable sedentary and light-duty positions, $175.06, represented claimant's wage-earning capacity as of October 27, 2004, and he consequently utilized that figure in awarding claimant permanent partial disability compensation. *Id.*

We affirm this finding. The result reached by the administrative law judge represents the mean average of the weekly salaries paid by the nine sedentary and ten light-duty employment opportunities determined by the administrative law judge to be suitable and available for claimant. *See* Emp. Ex. 7. The administrative law judge's decision to average the wages of the credited positions identified in employer's labor market survey is rational and in accordance with law. *See Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT). Thus, we affirm the administrative law judge's calculation of claimant's post-injury loss of wage-earning capacity subsequent to October 27, 2004, and his consequent award of ongoing permanent partial disability benefits to claimant at a weekly rate of $894.96, as of that date.

Accordingly, the administrative law judge's Decision and Order, Order Partially Granting Employer's Application for Modification of Award, and Order Denying

Employer's Motion for Reconsideration are modified to award claimant compensation for total disability from October 1, 2002, to September 30, 2003, at a rate of $966.08 per week. In all other respects, the administrative law judge's Decision and Order, Order Partially Granting Employer's Application for Modification of Award, and Order Denying Employer's Motion for Reconsideration are 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