BRB No. 96-1056

PHILLIP MANN, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Stephanie Burks Paine (Mason & Mason, P.C.), Newport News, Virginia, for the self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-1737) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 mobile equipment operator, sustained a work-related injury on July 29, 1994, when he slipped while getting out of a forklift. He went to the company clinic, where Dr. Reid imposed restrictions but indicated that claimant could operate a forklift. Claimant returned to work in the south yard within these restrictions from July 29, 1994, until August 29, 1994. At that time, claimant consulted Dr. White, an orthopedic surgeon, who diagnosed a horizontal cleavage tear of the posterior horn of the right medial meniscus and imposed additional restrictions of no squatting, no kneeling, no climbing vertical ladders,

limited lifting to 20 pounds and walking and standing limited to 4 hours per day. Emp. Ex. 8a-b. Claimant was assigned to perform cleaning work and work in the toolroom, tasks which he had not performed prior to his injury, although he also continued to operate a forklift. Dr. White performed surgery on claimant's knee on September 23, 1994, and claimant returned to work on February 8, 1995. Dr. White imposed restrictions of no squatting, kneeling, climbing vertical ladders, walking more than 200 yards, standing more than two hours per day, or lifting more than ten pounds, as well as limited use of foot controls and limited climbing of a few steps. These restrictions remained in effect until June 17, 1995.

After his return to work in February, claimant, who had been on loan to the south yard to assist with commercial ship repair for one to two years prior to his injury, was reassigned to work in the north yard under the supervision of Kay Weisskopf, because the volume of ship repair work in the south yard had allegedly declined. Tr. at 34-35. After performing light-duty work for one to two weeks, claimant was assigned to operate a pay loader, which he had operated before his injury. He alleged that he had problems operating this machinery because pressing its pedals caused his leg to swell and he had to climb a vertical ladder entering and exiting the machine, but he took breaks. He also operated a forklift, which he stated caused him similar problems. Tr. at 37. He testified that his supervisor advised him to use discretion in operating the equipment, and only to perform work within his restrictions. Claimant further indicated that if his 1995 restrictions had been followed strictly, he would not have been able to operate a JLG, forklift, or pay loader, as he had done prior to his injury, but he made adjustments and was able to perform work involving this machinery.

One or two months after returning to work, claimant began training to operate a transporter. The transporter has only two steps, making it easier to board, and the foot controls, which are operated by air, require less pressure. While qualification to operate some pieces of equipment requires only completion of a course, qualification to operate the transporter involves on-the-job training with certification being granted at the discretion of the supervisor. Tr. at 45. As of the time of the hearing, claimant had not been formally certified to operate the transporter.

Alleging that from the time he returned to work following his surgery until June 17, 1995, the only overtime work he performed was on two Saturdays in April, claimant filed a claim for temporary partial disability benefits under the Act based on a loss of overtime earnings from July 29, 1994, to September 22, 1994, and from February 9, 1995 to June 16, 1995. The administrative law judge denied the claim, finding that claimant failed to establish a loss of overtime earnings based on either a comparison with his own pre-injury earnings or the post-injury earnings of comparable employees for the period of July 29, 1994 to September 22, 1994. With regard to the period of February 9, 1995 to June 16, 1995, the administrative law judge found that while overtime was available, claimant was precluded from performing certain overtime work because of his work-injury and was not entitled to the claimed compensation because he failed to introduce evidence sufficient to allow the administrative law judge to calculate the amount of his lost overtime wages.

On appeal, claimant argues that the administrative law judge's determination that he is not entitled to temporary partial disability due to loss of overtime after the injury is not supported by substantial evidence and is based on application of an incorrect legal standard. Employer responds, urging affirmance.

An award for temporary 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(e). 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. *Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990). 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. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 n.3 (1987). Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's post-injury wage-earning capacity. *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). The administrative law judge must consider all relevant factors and evidence in making findings regarding claimant's wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). Loss of overtime earnings may provide a basis for determining that a claimant has demonstrated a loss in wage-earning capacity, where, as here, overtime was a normal and regular part of claimant's pre-injury employment and accordingly was included in determining claimant's average weekly wage. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1990); *Butler v. Washington Metropolitan Area Transit Authority*, 14 BRBS 321 (1981).

Claimant initially challenges the denial of compensation for the period from July 29, 1994, to September 22, 1994. The administrative law judge first considered the period between August 29, 1994 and September 22, 1994[1] and determined that during this 3 4/7 week period claimant worked 27.7 hours of overtime, for an average of 7.5 hours per week. However, as claimant did not work for ten consecutive days, including two weekends, and claimant's supervisor, Ms. Weisskopf, testified that overtime was offered on Fridays, Tr. at 74, the administrative law judge inferred that if claimant had not been on vacation, he

[1]Initially, in his answers to interrogatories claimant did not allege loss of overtime for the period of July 29,1994 to August 29, 1994. At the hearing, employer objected to the administrative law judge's consideration of claimant's entitlement to compensation during this period, arguing that it relied on claimant's answer and had it been informed otherwise, it would have planned its trial strategy differently. Although the administrative law judge rejected employer's argument in this regard, he nonetheless purported to separately discuss two time periods: from August 29, 1994 until September 22, 1994, and from July 29, 1994 until August 28, 1994.

would have been offered overtime, and accordingly imputed eight hours of overtime to claimant for each of those two weekends. Accordingly, the administrative law judge determined that as claimant could have worked a total of 43.7 hours, for a weekly average of 12.4 hours of overtime during this period, and this exceeded the 8.66 hours of overtime claimant had averaged during the seven months preceding his injury, claimant failed to establish a loss of overtime earnings for the period from August 27, 1994 until September 22, 1994.

For the period between July 29, 1994, and August 28, 1994,[2] the administrative law judge found that claimant worked a total of 58.7 hours of overtime. After determining that claimant's vacation prevented him from being offered overtime on 3 out of the 8 weekends in question, the administrative law judge again imputed eight hours of overtime work for the three weekends while claimant was on vacation. He accordingly found that as claimant could have worked 82.7 hours of overtime during the relevant post-injury period, or an average of 10.33 hours of overtime per week, and this amount exceeded the 8.66 average hours of overtime claimant worked in the seven months preceding his injury, claimant also failed to establish any loss of overtime earnings during this period. The administrative law judge also summarily stated that there was no data demonstrating loss of overtime compared with comparable employees.

[2]The administrative law judge is mistaken in referring to the period between July 29, 1994 and August 28, 1994, as eight weeks, and as claimant alleges, is apparently referring to the whole period between July 29, 1994 and September 22, 1994.

We agree with claimant that the administrative law judge's determination that he failed to establish a loss of overtime earnings during the period from July 29, 1994, until September 22, 1994 cannot be affirmed. As claimant avers, in making this determination the administrative law judge acted arbitrarily in imputing overtime hours for those weekends when claimant was on vacation post-injury, while not doing the same during the weekends when claimant was on vacation prior to his injury.[3] The relevant inquiry where claimant is seeking to establish a loss of wage-earning capacity based on loss of overtime earnings is whether claimant is unable to perform available overtime because of his injury. The same method used to determine the amount of overtime available and worked must be used for both the pre-injury and post-injury periods; thus, the administrative law judge erred here in imputing overtime hours to claimant for post-injury days when he was on vacation without a similar inclusion for the pre-injury period. *See Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110, 113 (1989). Due to this discrepancy, the case must be remanded for reconsideration.

We also agree with claimant that the administrative law judge acted arbitrarily in comparing claimant's post-injury overtime earnings with his overtime earnings in the seven month period, rather than the 52 week period, prior to his injury, without providing any explanation as to his reasons for choosing that particular period.[4] Moreover, although the administrative law judge determined that claimant had not introduced any figures to demonstrate a loss of overtime earnings as shown by comparison to comparable employees, he did not explain the basis for this determination. Finally, claimant correctly alleges that while the administrative law judge purported to compare claimant's actual average pre-injury overtime earnings in the seven month period prior to his injury of 8.66 hours per week with his overtime earnings for the period from August 29, 1994, to September 22, 1994, the figures he employed in making the latter calculation actually correspond to claimant's earnings during the period from July 29, 1994, to September 22, 1994. In light of the aforementioned problems inherent in the administrative law judge's finding that claimant failed to establish a loss of overtime earnings from July 29, 1994, until

[3]We note that this involved at least two occasions. *See* Emp. Ex. 4(f).

[4]Claimant contends that had the administrative law judge calculated his pre-injury overtime hours on a 52-week period, which corresponds to the period on which the average weekly wage was based, his pre-injury average of 12.8 overtime hours per week exceeds the 10.33 average post-injury overtime figure found by the administrative law judge.

September 22, 1994, we vacate this determination. On remand, after imputing additional overtime hours in the pre-injury period for the weekends when claimant was on vacation, the administrative law judge should reconsider claimant's entitlement to temporary partial disability compensation during this period in accordance with applicable law and explain the basis for any factual findings he makes consistent with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). *Cotton v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 380 (1990).

Claimant also contends that the administrative law judge erred in determining that he is not entitled to temporary partial disability benefits for loss of overtime earnings from February 9, 1995 to June 16, 1995. Based on Ms. Weisskopf's testimony, the administrative law judge found that it was more probable than not that claimant was denied some overtime during the period in question because of his restrictions, or at least because of management's perception that he was drawing workers' compensation because of those restrictions. The administrative law judge further determined, however, that claimant nonetheless was not entitled to the claimed temporary partial disability compensation because the only evidence he introduced to quantify the degree of his loss of overtime earnings was the wage records of his co-workers, Shook, Callis, and Landis. As these employees were better qualified than claimant to work on the transporter, where most of the overtime work was available, he determined that they were not comparable employees for purposes of a loss of overtime calculation. In addition, the administrative law judge noted that the record contained no breakdown of anyone's overtime hours *vis-a-vis* the particular type of machinery on which the work was performed so as to allow him to calculate claimant's loss of overtime on equipment for which he was qualified.

Claimant argues on appeal that inasmuch as the administrative law judge found that overtime was available and that claimant did not work available overtime because of his work-related injury, he erred in denying the 1995 claim for temporary partial disability by focusing solely on the fact that claimant's co-workers were not comparable employees. Claimant avers that evidence of comparable employees is not mandatory to establish a loss of overtime earnings, and as he proffered a loss of wage-earning capacity calculation based on a strict comparison between his pre-injury average weekly wage including overtime and his average weekly earnings during the pertinent post-injury period including overtime, the administrative law judge abdicated his responsibility to fully inquire into all issues before him and violated the requirements of the APA by failing to consider the reasonableness of his calculation.

The administrative law judge acted within his discretionary authority in finding that the amount of overtime worked by claimant's co-workers Shook, Callis and Landis was not probative of the amount of claimant's lost overtime because they possessed better formal qualifications and significant experience with working on the transporter which claimant lacked. Tr. at 67, 72, 75-77. *See Butler,* 14 BRBS at 321. We agree with claimant, however, that this fact is not dispositive, since there is other evidence in the record, most notably, claimant's wage-records, Emp. Ex. 4, which the administrative law judge neglected to consider in determining that claimant failed to adequately quantify his loss of overtime

earnings in 1995.[5] Inasmuch as claimant's wage records, if credited, can establish a loss in overtime wages based on a comparison of actual pre- and post-injury earnings,[6] *see Brown*, 23 BRBS at 113, we vacate the administrative law judge's denial of temporary partial disability for the period claimed in 1995. On remand, the administrative law judge should reconsider claimant's entitlement to the claimed compensation in light of this evidence.

Accordingly, the administrative law judge's denial of claimant's claim for temporary partial disability is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER

[5]In his post-hearing brief, claimant lays out the basis of his calculations. At the time of his injury, claimant was earning $13.48 per hour, with a corresponding overtime rate of $20.22 per hour. The stipulated average weekly wage was $793.84. From the date of injury, July 28, 1994, to June 16, 1995, claimant worked 973 regular hours and 74.7 overtime hours, earning gross wages of $14, 626.47. Dividing this figure by the 24.33 weeks claimant actually worked during this period yields a post-injury average weekly wage of $601.17; thus subtracting this figure from claimant's pre injury average weekly wage of $793.84 yields a wage-earning capacity loss of $192.67, which corresponds to a temporary partial disability rate of $128.45 per week. Emp. Exs. 4(b)-4(l). In 1993 claimant worked 2649.7 regular hours and 608.6 overtime hours. Emp. Ex. 4a.

[6]We note that the administrative law judge utilized this evidence in considering whether claimant's overtime hours decreased during the period for which temporary partial disability was claimed in 1994. *See* Decision and Order at 13.

Administrative Appeals Judge