BRB No. 92-1146

JERRY P. MUNCEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PUSH FINANCIAL SERVICES	)	DATE ISSUED:_____)
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Denial of Reconsideration of E. Earl Thomas, Administrative Law Judge, United States Department of Labor.

Edward L. Young, Jr. (Barrs, Williamson, Stolberg and Townsend, P.A.), Tampa, Florida, for claimant.

Timothy D. Wolf (Fowler, White, Gillen, Boggs, Villareal and Banker, P.A.), Tampa, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Denial of Reconsideration (90-LHC-3262) of Administrative Law Judge E. Earl Thomas denying benefits 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 was employed by employer as a boilermaker at the time of his accident on July 26, 1986, in which he slipped and fell on oil, striking his right knee as he was climbing out of a steam drum.[1] This injury necessitated surgery on February 12, 1991. The administrative law judge

[1]Employer provided temporary employees to shipyards in the Jacksonville area.

awarded claimant temporary total disability benefits for the period between February 12 and 26, 1991, and found that claimant reached maximum medical improvement on May 2, 1991 based on Dr. Mayhew's opinion. He also awarded claimant permanent partial disability benefits for a 20 percent impairment to the leg pursuant to Section 8(c)(2),(19) of the Act, 33 U.S.C. §908(c)(2),(19), but he denied benefits for temporary partial disability for periods before and after the surgery. In awarding benefits, the administrative law judge applied Section 10(c) of the Act, 33 U.S.C. §910(c), to determine that claimant's average weekly wage was $76.06 based on an average of claimant's actual earnings as reflected in his income tax returns from 1986 through 1990. Because this wage is less than 50 percent of the national average weekly wage, claimant is entitled to benefits at his actual average weekly wage. *See* 33 U.S.C. §906(b)(2). Claimant's motion for reconsideration was denied summarily.

On appeal, claimant contends that the administrative law judge erred in denying benefits for temporary partial disability. Claimant also contests the calculation of his average weekly wage. Claimant maintains that in determining claimant's average weekly wage the administrative law judge was required by law to examine claimant's pre-injury earnings, not his post-injury earnings. Employer responds, urging affirmance.

Initially, claimant contends that the administrative law judge's decision denying claimant temporary partial disability benefits is irrational since the administrative law judge awarded claimant permanent partial disability benefits after surgery with the same restrictions as claimant had prior to surgery. In order to establish entitlement to temporary partial disability benefits, claimant must establish that he has a loss in wage-earning capacity. *See* 33 U.S.C.§908(e),(h). Thus, claimant must establish that the work injury prevents him from performing his usual work, and that his physical impairment has caused an economic disability. *See generally Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984).

We agree with claimant that the administrative law judge erred in finding that he was not prohibited from performing the boilermaker job and that claimant's post-injury job required claimant to perform the "prohibited" maneuvers. Contrary to the administrative law judge's finding that no doctor placed restrictions inconsistent with, or prohibited claimant from performing, the boilermaker job, all doctors placed restrictions on claimant. Claimant testified that following his injury he and three co-workers were laid off, and that he began his own lawn mower repair business in May 1989. Thus, when claimant began treating with Dr. Mayhew on June 22, 1987, claimant no longer performed his usual employment as a boilermaker. Dr. Mayhew stated in a report dated December 12, 1990, that claimant would not be able to return to shipyard work because it is too strenuous. Cl. Ex. 2 at 42-43. Throughout the course of treatment, Dr. Mayhew stated that claimant could work at his *current* job, but that he should avoid lifting over 40 pounds, and should avoid activities such as climbing, stooping, bending and squatting. *See, e.g., id.* at 41, 51, 55-56. Finally, Dr. Mayhew testified that claimant's restrictions were the same prior to the surgery as after the surgery. *Id.*, dep. at 8. In response to a post-surgery inquiry from employer as to whether claimant could perform the work of a boilermaker, Dr. Mayhew stated claimant could not perform the work.[2] Cl. Ex. 2 at 23.

[2]The job description of a boilermaker contains the following items relevant to claimant's restrictions: 30-40 pound lifting, with some up to 100 pounds; climbing gangways and ladders; stooping, bending, kneeling and crouching required when working in the steam slip. Cl. Ex. 2 at 21-

Similarly, Dr. Gustke, who treated claimant only before his surgery, stated claimant was able to squat or climb "very infrequently" Emp. Ex. 1 dep. at 15, and that he should avoid these activities on an indefinite basis. *Id*. at 16. Dr. Gustke stated that these restriction were in place both before and after the date he found claimant reached maximum medical improvement, April 16, 1990. *Id.* at 17. Claimant testified that he quit some of his post-injury jobs because they hurt his knee and were inconsistent with his restrictions. Tr. at 20-21.

Inasmuch as the administrative law judge mischaracterized the evidence regarding the restrictions placed on claimant and the requirements of the pre- and post-injury employment, we reverse his finding that claimant was not prohibited from performing his usual work. *See generally Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987). Since claimant was employed post-injury, he is entitled to temporary partial disability benefits if he establishes a loss in wage-earning capacity. We therefore vacate the denial of temporary partial disability benefits for the periods of June 3, 1987 to February 12, 1991, and February 27, 1991 to May 2, 1991. We remand the case for the administrative law judge to consider whether claimant established a loss of wage-earning capacity entitling him to temporary partial disability benefits for these periods. *See* 33 U.S.C §908(e).

Claimant additionally argues that the administrative law judge erred in his method of calculating his average weekly wage under Section 10(c) of the Act because he relied on post-injury earnings rather than pre-injury earnings. We agree. The administrative law judge has broad discretion under Section 10(c) in calculating claimant's average weekly wage, and actual earnings are not controlling. *See Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 106 (1989); *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979). Generally, average weekly wage is to be computed at the time of injury; post-injury events are not relevant to this inquiry. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992); *see also Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986). Use of claimant's post-injury earnings may penalize claimant if his earnings are lower because of the work injury.

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In the instant case, the administrative law judge's use of an average of claimant's actual post-injury earnings from 1986 through 1990 is inconsistent with law. *See generally Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Thompson*, 26 BRBS at 53. We therefore vacate the administrative law judge's average weekly wage finding, and remand the case for the administrative law judge to recalculate claimant's average weekly wage utilizing pre-injury earnings. We note that the record does not contain claimant's income tax records which are the subject of testimony, nor does it contain evidence of claimant's pre-injury earnings except for copies of his pay stubs for the three weeks prior to the accident.[3] Cl. Ex. 1. On remand, therefore, the administrative law judge may reopen the record for the submission of evidence concerning claimant's pre-injury average weekly wage. 20 C.F.R. §702.338.

Accordingly, the Decision and Order and Denial of Reconsideration are vacated with regard to the denial of temporary partial disability benefits and the calculation of claimant's average weekly wage. The case is remanded to the administrative law judge for further proceedings consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[3]Claimant argued in his Motion for Reconsideration that he was gainfully employed for more than a year at AS-COM, Inc., in 1985 when his earnings were $10,405.95 according to his 1985 income tax return.