BRB No. 97-480

GARY ROSS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTERN TRANSPORTATION COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision and Order on Reconsideration of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

David A. Hytowitz (Pozzi Wilson Atchison, LLP), Portland, Oregon, for claimant.

Delbert J. Brenneman (Hoffman, Hart & Wagner), Portland, Oregon, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and Decision and Order on Reconsideration (95-LHC-1498) of Administrative Law Judge Thomas Schneider 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).

On April 22, 1991, claimant, a forklift driver and warehouseman for employer, sustained a work-related back injury. After providing conservative treatment, Dr. Rosenbaum, a neurosurgeon, released him for unrestricted work on May 26, 1992, and again on March 1, 1993.[1] Dr. Rosenbaum stated, however, that claimant should follow

[1]Dr. Rosenbaum diagnosed a bulging disc at L4/5 and L3/4 in 1992, *see* CX 45. In

“guidelines” or “restrictions,” limiting activities which jar the lumbar spine, repetitive lifting or twisting at the waist or forward flexion, and lifting more than 35 pounds. CX 59. Although claimant returned to work, he alleged he continued to experience problems with his back which intermittently would preclude him from working. Claimant sought permanent partial disability compensation under the Act, asserting that his actual post-injury earnings did not fairly and reasonably reflect his post-injury wage-earning capacity and that, in any event, he suffered a loss of wage-earning capacity based on a loss of overtime earnings.

In a Decision and Order Awarding Benefits, after initially determining that there is no distinction in this case between "guidelines" and "restrictions"[2] and that, to the extent Dr. Rosenbaum had released claimant for full duty work, he had done so to help claimant keep his job, the administrative law judge found that claimant’s work exceeded the restrictions imposed by Dr. Rosenbaum and that his capacity for earning wages in the open market had suffered as a result of the injury. He nonetheless found, however, that claimant’s actual post-injury earnings fairly and reasonably represented his post-injury wage earning capacity and awarded him permanent partial disability compensation under Section 8(c)(21), (h), 33 U.S.C. §908(c)(21), (h), based on the difference between his stipulated pre-injury average weekly wage of $560.55 and his actual average weekly earnings of $436.45 in the 78 weeks since he reached maximum medical improvement. The administrative law judge further found that claimant failed to establish a loss of wage-earning capacity due to a loss of overtime earnings. Finally, he awarded claimant’s counsel a fee of $12,289.63 plus costs of $2,735.30, having reduced claimant’s request for a $2,995.50 witness fee for the vocational testimony of Mr. Ross to $2,000. Employer moved for reconsideration.

January 1993, his diagnosis was recurrent lumbar strain. CX 53.

[2]In so concluding, the administrative law judge noted that Dr. Rosenbaum had used the terms interchangeably.

In his Decision and Order On Reconsideration, relevant to the current appeal,[3] the administrative law judge accepted employer's argument that he erred in calculating claimant's post-injury wage-earning capacity because he failed to consider the effect of a 14-week strike in 1994.[4] In so concluding, the administrative law judge noted employer's argument that if the strike were considered, claimant's actual average weekly earnings post-injury would be somewhat greater than his pre-injury average weekly wage. With regard to claimant's argument that the initial decision was correct because claimant was unable to find work during the strike due to his injury, the administrative law judge found that the evidence of record was insufficient to establish what claimant would have earned during this period. The administrative law judge thus concluded that upon reconsideration, a nominal award of benefits which was subject to modification when claimant's earnings get to be significantly lower than their current level would be appropriate. Claimant's motion for reconsideration of this decision was denied summarily.

On appeal, claimant requests that the Board reinstate the administrative law judge's initial award of permanent partial disability compensation, arguing that he erred in limiting claimant's compensation to a nominal award on reconsideration based solely on a comparison of claimant's pre- and post-injury wages. Claimant avers initially that he established a loss in wage-earning capacity because he is currently unable to work as much overtime as his co-workers. Moreover, claimant argues that because he needs help from his co-workers in performing his job duties, is medically restricted regarding what he can do on the job, is required to perform work which exceeds his restrictions and causes him to experience pain routinely, and experienced substantial difficulty in attempting to secure employment during the 1994 strike, his actual post-injury earnings are not representative of his post injury wage-earning capacity. In addition, claimant argues that there is substantial evidence in the record to establish a present loss in wage-earning capacity based on the effect of claimant's disability as it may naturally extend into the future.[5] Claimant also asserts that the administrative law judge erred in reducing Mr. Ross's

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[3] In his Decision and Order on Reconsideration, the administrative law judge also rejected employer's argument that it had not stipulated that if Dr. Rosenbaum's guidelines had been treated as restrictions, claimant would not have been hired. The administrative law judge found that even if there were no stipulation to that effect, the record reflects that if employer had known of the restrictions Dr. Rosenbaum imposed, it would not have hired claimant as a lift truck driver.

[4]Employer argued on reconsideration that instead of dividing the $34,043.35 claimant earned post-injury in 1.5 years by 78 (the number of weeks in that period), the administrative law judge should have subtracted from 78 the 14 weeks between September 3, 1994, and December 12, 1994, during which the employees were on strike. Claimant responded that the administrative law judge's initial calculation was correct because while his coworkers found other employment elsewhere during the strike, he was unable to do so because of his work-related injury.

[5]Claimant cites the following evidence In support of this contention: Dr.

witness fee. Employer responds, urging affirmance. Claimant replies, reiterating the arguments in his petition for review.

Under Section 8(c)(21) of the Act, an award for permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that the claimant's wage-earning capacity shall equal his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. If such earnings do not represent the claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents the claimant's wage-earning capacity. *See* 33 U.S.C. §908(h). The objective of the inquiry concerning the claimant's wage-earning capacity is to determine the post-injury wage that would be paid under normal employment conditions to the claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Factors to be considered in determining whether the claimant's post-injury earnings fairly and reasonably represent this post-injury wage-earning capacity include the claimant's physical condition, age, education, and industrial history, the beneficence of a sympathetic employer, the claimant's earning power on the open market, and any other reasonable variables that could form a factual basis for this determination. *See Darcell v. FMC Corp., Marine and Rail Equipment Division*, 14 BRBS 294 (1981); *Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979). If the administrative law judge finds that claimant's actual earnings do not equal his wage-earning capacity, the same factors are utilized in assessing the amount representative of claimant's wage-earning capacity. *See Randall v. Comfort Control, Inc.,* 725 F.2d 791, 16 BRBS 56 (CRT) (D.C. Cir. 1984).

If the claimant's post-injury work is found to be continuous and stable, the claimant's post-injury earnings are more likely to reasonably and fairly represent his wage-earning capacity. *See generally Wayland v. Moore Dry Dock*, 25 BRBS 53, 57 (1991). Relevant questions in this regard include whether the post-injury work is suitable, whether the claimant is physically capable of performing it, and whether claimant has the seniority to stay in the job. *See Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691 (1980). A nominal award may be appropriate where claimant has no present quantifiable loss in

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Rosenbaum's opinion that it appears unlikely that claimant will be able to continue performing this work indefinitely; Mr. Ross's vocational opinion that if this occurred, 75 percent of the jobs available on the open labor market would be unavailable to claimant, resulting in a 50 percent loss of his wage-earning capacity; and employer's concession that it would not have hired claimant if Dr. Rosenbaum's "guidelines" were viewed as restrictions.

wage-earning capacity but has demonstrated a significant possibility of future economic harm. *Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 117 S.Ct. 1953, 31 BRBS 54 (CRT) (1997). In this case, employer does not challenge claimant's entitlement to a nominal award; therefore, claimant is entitled to this amount at a minimum.

Initially, we reject claimant's argument that he is entitled to greater than a nominal award because he established a loss of wage-earning capacity based on loss of overtime wages.[6] Loss of overtime earnings may provide a basis for determining that a claimant has demonstrated a loss in wage-earning capacity, where 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). In the present case, however, the administrative law judge rationally found in his initial Decision that with the exception of claimant's testimony, which he chose not to credit, there was no record evidence that claimant worked available overtime prior to his injury. Decision and Order at 3. Moreover, although claimant's vocational expert, Richard Ross, opined that claimant lost 22 percent of his wage-earning capacity based on loss of overtime, the administrative law judge rationally characterized Mr. Ross's estimate as "mere speculation" in the absence of credible evidence that claimant performed available overtime work prior to his injury. Inasmuch as the administrative law judge's finding that claimant failed to establish that, absent his injury, he would have taken advantage of the opportunities available to work overtime is rational and supported by substantial evidence, and claimant has failed to establish that his credibility determinations are inherently incredible or patently unreasonable, we affirm his determination that claimant failed to establish a loss in wage-earning capacity based on a loss of overtime earnings. *See Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979).

We are unable, however to affirm the administrative law judge's finding on reconsideration that claimant has no present loss in his wage-earning capacity. As claimant argues on appeal, higher post-injury earnings do not preclude an award of compensation where claimant has actually sustained a loss in his wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991). In the present case, in his initial Decision and Order the administrative law judge concluded that claimant's post-injury work for employer exceeded his medical restrictions and resulted in a loss of wage-earning capacity on the open market. These findings are supported by substantial evidence. The administrative law judge credited Dr. Rosenbaum's opinion regarding claimant's physical capabilities and rationally found that Dr.

[6]We reject employer's contention that claimant could not raise the issue of loss of wage-earning capacity on grounds other than loss of overtime because claimant failed to raise this theory while the case was before the administrative law judge. While claimant's post-hearing brief focused on a loss of overtime theory, he also argued that he sustained a loss of wage-earning capacity because he was working at his former job despite medical restrictions and through extra effort and determination, and was dependent on fellow employees to help out. Moreover, at the hearing, claimant attempted to elicit testimony that other employees had to help him in his usual work. Tr. at 121, 123-124, 202-203.

Rosenbaum's "guidelines" were the same as physical restrictions. Employer points to no contrary medical opinion. In view of his finding initially and on reconsideration that claimant's ability to be hired as a driver would be limited by his physical restrictions, the administrative law judge also rationally found claimant's capacity to earn on the open market was adversely affected by his injury.

Having made these findings, the administrative law judge erred in summarily concluding that claimant's post-injury earnings represented his wage-earning capacity. Where claimant's post-injury work is not suitable given his physical restrictions, claimant has established a basis for a finding that his wage-earning capacity has been diminished. *See Container Stevedoring,* 935 F.2d at 1550, 24 BRBS at 220-221 (CRT). Having found, based on substantial evidence, that claimant's post-injury work was not suitable and his earning capacity on the open market was affected, the administrative law judge could not rationally conclude that his actual earnings represented his wage-earning capacity, without addressing other relevant factors.

In his initial calculation, however, although the administrative law judge relied on actual earnings, he found a loss in wage-earning capacity by dividing claimant's total actual earnings over the 78 weeks since maximum medical improvement by 78. On reconsideration, he vacated this calculation and accepted employer's assertion that he erred because he failed to account for a strike lasting 14 weeks in the last quarter of 1994. Once these weeks were excluded, claimant's actual earnings exceeded his earning capacity.[7] In excluding the strike time, the administrative law judge noted claimant's argument that he could have found another job if not injured, but rejected it as the record is devoid of evidence as to what claimant could have earned if not injured. Claimant, however, testified that while his co-workers found employment, he was unable to find work within his restrictions. This evidence, if credited, supports the conclusion that claimant's earning capacity was diminished during the period of the strike and thus that those weeks could properly be included in the divisor in calculating claimant's post-injury average weekly earnings. As the administrative law judge's calculation using claimant's actual earnings is not consistent with his findings that claimant's job exceeded his restrictions and that his injury impaired his ability to be hired and earn wages on the open market, and his decision does not address all the relevant factors, we vacate the administrative law judge's determination that claimant's actual earnings equal his wage-earning capacity and remand this case for reconsideration of claimant's wage-earning capacity.

On remand, the administrative law judge must consider all relevant evidence under the factors of Section 8(h). *See Randall,* 725 F.2d at 791, 16 BRBS at 56 (CRT); *Deviller,* 10 BRBS at 649. The administrative law judge should also consider claimant's argument that he performs his work with increased effort and requires the help of co-workers. This

[7]There is no indication in making these calculations that the administrative law judge adjusted claimant's post-injury earnings to the level paid at the time of injury to account for inflation. *See, e.g., Bethard v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 691 (1980).

argument was raised below but not addressed by the administrative law judge and, if the administrative law judge finds the facts alleged, it would support a present loss of wage-earning capacity. *See Container Stevedoring,* 935 F.2d at 1551, 24 BRBS at 221 (CRT). Moreover, as Section 8(h) allows the administrative law judge to consider the future effects of a disability, if claimant's future ability to compete on the open market is affected by his work injury, that factor may also demonstrate a present loss in his wage-earning capacity. *See Rambo*, 117 S.Ct. at 1953, 31 BRBS at 54 (CRT); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982). The administrative law judge should also address the vocational evidence offered by the parties. Any calculations should adjust post-injury earnings to the level at the time of injury to neutralize the effects of inflation. *See Richardson v. General Dynamics Corp.,* 19 BRBS 48 (1986).

Finally, claimant challenges the administrative law judge's reduction of the witness fee for Mr. Ross's vocational testimony from $2,995.50, to $2,000, arguing that it is unfair to assess against claimant the unawarded balance. Inasmuch, however, as the administrative law judge acted within his discretion in viewing the amount claimed as excessive considering the value of the evidence produced, and the amount he awarded is reasonable, his reduction of Mr. Ross's witness fee to $2,000 is affirmed. S*ee generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 102 (1997); *Morris v. California Stevedore and Ballast Co.*, 10 BRBS 375 (1979).

Accordingly, the administrative law judge's determination of claimant's wage-earning capacity is vacated, and the case is remanded for the administrative law judge to reconsider his findings regarding claimant's post-injury wage-earning capacity consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge