

ERNEST C. BRITT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	DATE ISSUED: _____
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits for Claimed Loss of Overtime of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein and Gregory E. Camden (Rutter & Montagna), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits for Claimed Loss of Overtime (94-LHC-2240, 94-LHC-2241) of Administrative Law Judge Richard K. Malamphy, 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 drill press operator for employer, suffered work-related back injuries on September 14, 1988, and June 2, 1989. He sought temporary partial disability benefits under the Act, alleging that he sustained a loss in his wage-earning capacity of \$19.87 per week based on a loss of overtime wages following his last surgery in 1992.<sup>1</sup> The administrative law judge determined

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<sup>1</sup>Employer paid temporary total disability benefits for various periods.

that claimant failed to establish the availability of post-injury overtime and denied the claim for temporary partial disability benefits. Claimant appeals, contending that the administrative law judge's finding that claimant failed to establish the availability of post-injury overtime is not supported by substantial evidence inasmuch as the record reflects that claimant has not been offered overtime since his last surgery in 1992, while two other drill press operators, Mr. Paler and Mr. Baines, have continued to perform overtime work. 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); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340, 344-345 (1992). 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 that contends that the employee's actual earnings are not representative of his wage-earning capacity, in this case claimant, 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). 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); *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110, 112 (1989); *Butler v. Washington Metropolitan Area Transit Authority*, 14 BRBS 321 (1981).

After review of the administrative law judge's Decision and Order in light of the evidence of record and claimant's arguments on appeal, we affirm his finding that claimant failed to establish a loss in his wage-earning capacity based on a loss of overtime wages because it is rational, supported by substantial evidence, and in accordance with law. See *O'Keeffe*, 380 U.S. at 359. In determining that claimant failed to establish a loss in his wage-earning capacity, the administrative law judge reasonably inferred from the overtime records of Mr. Baines and Mr. Paler that, while both men worked overtime during the period in question, the majority of their overtime earnings did not involve drill press operation, as their basic rate of overtime pay was considerably less than the overtime wages of a drill press operator. Moreover, Mr. Langston, claimant's former supervisor, and Mr. Rackley, the superintendent of machine shops, testified that the overtime work performed by Mr. Baines and Mr. Paler was primarily catering and that, while claimant's restrictions do not affect his ability to work overtime as a drill press operator, the overtime available in the machine shop has decreased significantly in the last 8 years such that almost none has been available recently. The administrative law judge rationally relied on this evidence and found that, although claimant is not working as much overtime as he once did, it is because overtime is not generally available to drill press operators rather than due to the effects of his work-related back injuries. See Decision and Order at 3. Inasmuch as the administrative law judge's finding that claimant failed to establish the availability of post-injury overtime in his usual work as a drill press operator is rational and supported by substantial evidence, and claimant has not established any reversible error made by the

administrative law judge in determining that claimant's inability to work overtime is not due to his work-related injuries, his denial of temporary partial disability benefits is affirmed. *Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987); *Brown*, 23 BRBS at 110.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge