

BRB Nos 00-1144
and 00-1144A

WADE R. FISH)
)
Claimant-Petitioner)
Cross-Respondent)
)
v.) DATE ISSUED: Aug. 30, 2001
)
GUNDERSON MARINE,)
INCORPORATED)
)
and)
)
LIBERTY NORTHWEST INSURANCE)
COMPANY)
)
Employer/Carrier-)
Respondents)
Cross-Petitioners) DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, the Decision on Claimant's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, L.L.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits, the Decision on Claimant's Motion for Reconsideration and the Supplemental Decision and Order Awarding Attorney's Fees, and employer cross-appeals the Supplemental Decision and Order Awarding Attorney's Fees (99-LHC-2451) of Administrative Law Judge Alfred Lindeman 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 was working as a leadman for employer when he injured his lower back while handling a steel ladder on March 28, 1996. Claimant sought medical treatment for his low back injury from Dr. Heidsiek, who diagnosed an acute low back strain, and placed claimant on light duty with limited lifting. Claimant began treatment with Dr. Wagner who added restrictions requiring minimal stooping, twisting, bending, and no pushing, pulling, climbing or lifting over 20 pounds. Claimant was released for regular work after one month on light duty. He began to experience low back pain again and sought further treatment with Dr. Wagner on July 2, 1997. On July 18, 1997, Dr. Wagner prescribed painkillers and recommended that claimant take time off work. In October 1997, claimant began treatment with Dr. DiPaola who recommended that claimant be referred to a pain center for treatment. Dr. DiPaola revised claimant's work restrictions. Claimant changed physicians again and began treatment with Dr. Miller, who released claimant to light duty. Subsequently, Dr. Miller reconsidered his earlier decision to not perform back surgery, and claimant underwent a back operation on August 4, 1999. He was released for full duty work with no restrictions on September 22, 1999. In November 1999, claimant was promoted to foreman. Claimant sought permanent partial disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on January 4, 2000, and that claimant is entitled to temporary partial disability benefits for the periods he worked in a light-duty capacity, and from the date he returned to work on September 28, 1999 following his back surgery, to the date he reached maximum medical improvement on January 4, 2000. The administrative law judge did not adjust claimant's post-injury wage-earning capacity to account for the effects of inflation. The administrative law judge found that after claimant reached maximum medical improvement, his actual wages fairly and reasonably represent his post-injury wage-earning capacity. In addition, the administrative law judge found that claimant does not have a current loss in wage-earning capacity, but does have the "significant possibility" of a future loss, and thus awarded claimant a nominal award of \$1 per week to preserve claimant's ability to apply for Section 22, 33 U.S.C. §922, modification in the event of a change in condition.¹

¹On reconsideration, the administrative law judge adjusted the number of days he awarded temporary total disability and temporary partial disability benefits. In addition, the administrative law judge again rejected claimant's contention that his actual wages should be adjusted for inflation in the award of temporary partial disability benefits.

Subsequently, claimant's counsel filed an application for an attorney's fee of \$10,976.43, representing 53 hours of attorney services at the hourly rate of \$200, 3.5 hours of legal assistant time at the hourly rate of \$85 and costs of \$78.93. Given claimant's limited success in obtaining benefits, the administrative law judge awarded claimant an attorney's fee of \$8,000. In addition, the administrative law judge awarded the \$1,100 fee requested for the preparation of claimant's reply to employer's objections as he found the service was reasonable and necessary.

On appeal, claimant contends that the administrative law judge erred in refusing to adjust his actual post-injury wages for inflation in determining claimant's wage-earning capacity for purposes of temporary partial disability benefits. In addition, claimant contends that the administrative law judge erred in failing to award more than nominal benefits as he has a loss in overtime, and lost a merit wage increase because he was not eligible for the increase while on light duty. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant also appeals the attorney's fee award requesting that the fee award be vacated and remanded for further consideration if he is successful on appeal. On cross-appeal, employer contends that in considering the degree of claimant's success, the administrative law judge based the attorney's fee award on the erroneous comparison between employer's voluntary payments and its tender offer, instead of on the difference between employer's tender offer and the amount of benefits claimant obtained as a result of the administrative law judge's decision. In addition, employer contends that the administrative law judge erred in failing to reduce the amount awarded for time spent preparing claimant's reply to employer's objections by the same percentage as the original award was reduced because of limited success. Claimant responds, urging affirmance of the administrative law judge's fee award.

Initially, claimant contends that the administrative law judge erred in failing to factor out the cost-of-living raises claimant received since his injury when comparing his post-injury wages to his average weekly wage for purposes of temporary partial disability benefits. With regard to claimant's entitlement to temporary partial disability benefits, the administrative law judge found that the record is inadequate to determine claimant's exact post-injury earnings for the period claimant worked in a light duty position. He noted, however, that the parties sought only a determination on the legal issue of whether the cost-of-living increases paid by employer subsequent to claimant's injury should be factored out in calculating temporary partial disability benefits. The administrative law judge concluded that the increases should not be factored out because claimant did not provide any evidence that the wages he earned on light duty are not representative of his wage-earning capacity, claimant worked continuously in the same pay classification with the same job title during a

majority of the time periods at issue, and there is no evidence that claimant has been required to expend more time and effort to earn his post-injury wages. Decision and Order at 9. On reconsideration, the administrative law judge stated that the case law requiring inflation adjustments applies only to awards of permanent partial disability benefits, as it would be difficult to make such adjustments on awards of temporary partial disability as such are usually short in duration. Order on Recon. at 2.

The post-injury wage-earning capacity of a partially disabled employee for whom compensation is determined pursuant to Section 8(e), 33 U.S.C. §908(e), is equal to his actual earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). Thus, contrary to the administrative law judge's statement, the *extent* of the claimant's disability in a temporary partial case is determined in the same manner as it is in a permanent partial case; the nature of claimant's disability is immaterial to this inquiry.² See 33 U.S.C. §908(c)(21), (e), (h); *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). In determining wage-earning capacity based on post-injury wages, the administrative law judge must use the wage rates in effect for the post-injury job at the time of the injury in order to factor out the effects of inflation. This ensures that the claimant's post-injury wage-earning capacity is considered on an equal footing with his average weekly wage. See *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); see also *White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70(CRT) (1st Cir. 1987); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1986); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988).

²A temporary partial disability award, however, can run only for five years. 33 U.S.C. §908(e).

In this case, claimant was working in the same job classification, that of leadman, in his post-injury employment as he had been at the time of injury, until his promotion to foreman in November 1999. Thus, the wage rate of the post-injury leadman position adjusted to that paid time of injury would equal the wage rate claimant actually was earning at the time of injury, and the foreman position probably paid more at the time of injury than claimant earned as a leadman. Nonetheless, claimant could have a loss of wage-earning capacity if he worked fewer hours post-injury due to the residual effects of his injury. Therefore, as the administrative law judge erroneously concluded that he need not factor out the cost-of-living increases in determining claimant's post-injury wage-earning capacity for purposes of the temporary partial disability award, we must remand this case for the administrative law judge to make the necessary findings of fact regarding claimant's loss of wage-earning capacity, if any, prior to the time his condition reached maximum medical improvement.³ See generally *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998) (administrative law judge must specify amount of compensation due or provide a means for calculating the award without resort to extra-record facts).

Claimant next contends that the administrative law judge erred in finding that he did not have a loss in wage-earning capacity due to a loss of overtime after his return to full duties. Loss of overtime may support an award of partial disability benefits. See *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). Although the administrative law judge found, and claimant does not dispute, that claimant's overtime privileges had been recently taken away due to his behavior at a company function, for the period of time prior to this event, claimant's loss of overtime, if any, is relevant to the determination of his post-injury wage-earning capacity.

In the instant case, the administrative law judge found that claimant's testimony regarding the lack of overtime was "somewhat unclear and inconsistent." Decision and Order at 10. Specifically, the administrative law judge stated:

Claimant testified that the overtime which is available to a foreman (his current position) is the same amount as available for a leadman (the position he held at the time of the injury). TR 51, 62. Under further examination, however, he

³We note that the administrative law judge did not enter a specific award for temporary partial disability, stating only that claimant is entitled to an award for two-thirds of the difference between claimant's average weekly wage of \$896.13 and his actual post-injury wages. Decision and Order at 11. On remand, the administrative law judge must determine an actual dollar amount representing claimant's post-injury wage-earning capacity in order to comply with Section 8(e), (h).

stated that he would have worked more overtime, perhaps as many as six more hours per week, had he not been injured. TR 66-67.

Id. at n.8. This finding is not supported by the record as claimant testified that the same amount of overtime work was available, but that he was not capable of performing as much of the overtime work due to his injury. Claimant also testified that he turned down only two days of overtime because of his injury, Tr. at 65, and the administrative law judge considered this evidence in awarding claimant nominal benefits. As there is evidence of record that, prior to the disciplinary action, claimant was unable to work as many overtime hours due to his work-related injury, we vacate the administrative law judge's finding that claimant has not suffered a current loss in wage-earning capacity and we remand the case to the administrative law judge for further consideration of this issue. *See Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989).

Claimant also contends that the administrative law judge should consider that he was denied a merit promotion during the period he was on light duty. We disagree. Employer's representative testified that employees do not receive performance reviews while on light duty, and thus are not eligible for merit promotions. Tr. at 73-74. Although an administrative law judge may consider the fact that a claimant did not receive a promotion due to his injury in determining claimant's post-injury wage-earning capacity, *see Townsend v. Potomac Electric Power Co.* 13 BRBS 127 (1981), in the present case it is speculative for claimant to assert that he would have received the promotion had he not been injured as the promotions were merit-based. *See generally Johnson*, 25 BRBS 340.

Claimant also contends that the administrative law judge erred in failing to award more than nominal compensation, pursuant to the factors relevant to determining wage-earning capacity. 33 U.S.C. §908(h). Claimant contends that the administrative law judge incorrectly deferred a finding regarding the effect of claimant's future loss of wage-earning capacity by awarding a nominal award. Pursuant to Section 8(h), the administrative law judge must consider factors such as the employee's physical condition, age, education, industrial history, the availability of employment which he can do post-injury, the beneficence of a sympathetic employer, the employee's earning power on the open market, whether he must spend more time or use more effort or expertise to achieve pre-injury production, whether he can perform the physical work which he did pre-injury, and whether medical and other circumstances indicate a probable future wage loss due to the work-related injury. *See Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). If the claimant's injury presently causes him no loss of wage-earning capacity, but he establishes that there is a significant potential that the injury will cause a loss in wage-earning capacity in the future, a nominal award is appropriate. *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

In the instant case, the administrative law judge found that claimant has a significant possibility that his back injury will affect his physical ability to perform his job duties, but the administrative law judge did not find that this possibility was imminent enough to warrant finding a current loss in wage-earning capacity. Thus, he awarded a nominal amount based on the facts that claimant had reached maximum medical improvement only two months before the hearing, claimant has physical restrictions and must avoid over exerting himself at his job, he has taken vacation days because of back pain, and has limited education which would hinder his employability if he was unable to keep his current position. He found that claimant does not have a current loss as claimant has worked continuously in the same job title for a majority of the time periods at issue and he is not currently required to expend more time and effort to earn his post-injury wages. These findings are rational and supported by substantial evidence. Therefore, if, on remand, the administrative law judge finds that claimant failed to establish that he has a current loss in wage-earning capacity due to a loss in overtime, we affirm the administrative law judge's finding that a nominal award is appropriate in this case.

On cross-appeal, employer contends that the administrative law judge erred in awarding an attorney's fee based on the difference between the amount employer voluntarily paid, \$11,116.92, and the amount it tendered, \$7,944.85, and in finding that claimant thereby succeeded in obtaining an award of \$3,172.07, plus the nominal award. Rather, employer contends that the proper comparison is between the additional amount employer tendered before the hearing, \$7,944.85, and the amount claimant obtained as a result of the administrative law judge's decision, \$1,878.92, plus the ongoing nominal award. Employer thus contends that the \$8,000 fee is too high when considered in this light.

We agree with employer that the case must be remanded for the administrative law judge to reconsider the amount of the attorney's fee awarded. Section 28(b) of the Act states:

If the employer or carrier pays or tenders payment of compensation without an award . . . and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled . . . the employer or carrier . . . shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

33 U.S.C. §928(b). Claimant was successful in obtaining an ongoing nominal award, which, as the administrative law judge recognized, is a significant benefit in that it enables claimant to seek modification should his physical or economic condition deteriorate. *See generally E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993). Indeed, employer does not assert that it is not liable for any attorney's fee, but that the administrative law judge erred in determining the degree of claimant's success.

It does appear that the administrative law judge erroneously compared employer's voluntary payments to its additional tender offer, rather than comparing employer's additional tender offer to the success claimant obtained as a result of the proceedings before the administrative law judge. *See* Supp. Decision and Order at 2; Emp. Exs. 65, 66, 68, 69. Following the issuance of the administrative law judge's decision, an Office of Workers' Compensation Programs claims examiner calculated the amount due under the terms of the administrative law judge's decision as \$1,878.92, through July 24, 2000. Emp. Ex. 68. This amount is less than employer's pre-hearing tender offer of over \$7,900. Thus, we must vacate the administrative law judge's fee award, including that awarded for the reply to employer's objections, and remand the case for reconsideration of the amount of the attorney's fee award in light of claimant's success as measured by the difference between claimant's recovery, including the inchoate benefit provided by the ongoing nominal award, and employer's tender offer. Furthermore, as claimant asserts in his appeal, the administrative law judge may reconsider the amount of the fee awarded in light of any increased award as a result of the remand proceedings.⁴

⁵The administrative law judge properly recognized the principles applicable to an award of an attorney's fee where the claimant obtains limited success. Supp. Decision and Order at 2. Where claims involve a common core of facts, or are based on related legal

Accordingly, the administrative law judge's denial of an inflation adjustment on the temporary partial disability award, and the finding that claimant does not have a current loss in wage-earning capacity are vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and the Decision on Claimant's Motion for Reconsideration are affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is vacated, and the case is remanded for further consideration of the amount of claimant's attorney's fee.

SO ORDERED.

BETTY JEAN HALL, Chief

theories, the Supreme Court has held that the focus should be on the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award; the fee award thus should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436; *see also George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 992 (1988).

Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

NANCY S. DOLDER

Administrative Appeals Judge