BRB No. 04-0881

WILLIE L. MATTHEWS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 08/22/2005
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Rutter Mills, L.L.P.), Norfolk, Virginia, for claimant.

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

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

DOLDER, Administrative Appeals Judge:

Claimant appeals the Decision and Order (2003-LHC-02591) of Administrative Law Judge Richard E. Huddleston 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a rigger for employer beginning in 1980. On November 1990, he was removing metal scraps from some staging equipment under an elevator when he injured his back. Claimant sought treatment with Dr. Hardy, who performed surgery in 1990 and in 1991. Claimant returned to work with restrictions that precluded his performing his former duties as a rigger. Claimant's first assignment involved "staging equipment," and he also worked as a toolkeeper, tracking the tools and

issuing them to the riggers for their use. Claimant later was assigned to the hose shop where he fixed air lines and air hoses. Subsequently, claimant attended "forklift school" and, after receiving his certification, began working as a forklift operator. Employer paid temporary total disability benefits prior to claimant's return to work and temporary partial disability benefits thereafter.[1] In 1999, employer voluntarily converted claimant's payments to permanent partial disability benefits. Employer filed a motion for modification on June 17, 2003, contending that claimant no longer has a loss in wage-earning capacity due to an inability to work overtime. 33 U.S.C. §922.

In his decision, the administrative law judge considered the claim for continuing permanent partial disability benefits based on a loss in overtime.[2] He found that claimant submitted the hours of overtime worked by three employees with the same qualifications as claimant, but found that these documents reveal a wide disparity in the amount of overtime worked. He thus found that they cannot be used to calculate claimant's loss in overtime. In addition, the administrative law judge found that claimant is working virtually the same amount of overtime post-injury as he did pre-injury. Therefore, the administrative law judge concluded that claimant has no current loss in wage-earning capacity and denied benefits. The administrative law judge also found that any future loss in wage-earning capacity is too speculative, and he thus denied claimant a *de minimis* benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he does not have a loss in wage-earning capacity due to a loss in overtime.

[1] The parties agreed to an order issued by the district director on October 31, 1994, which provided an award of temporary total disability benefits for the periods of November 21, 1990 to March 17, 1991, July 15, 1991 to October 6, 1991, and October 12, 1991 to June 20, 1993, inclusive. The order also provided for "compromised" temporary total disability for various periods of time from June 21, 1993 to August 13, 1993, inclusive. Cl. Ex. 3. As claimant was able to return to modified duty, the parties agreed to another order for temporary partial disability benefits, which was issued by the district director on September 29, 1997. This order provided for an additional period of temporary total disability benefits from November 1, 1995 to April 28, 1996, and for temporary partial disability benefits from August 14, 1993 to October 31, 1995, May 17, 1996 to July 15, 1996, and July 21, 1996 to January 12, 1997. Additionally, the order directed employer to continue paying temporary partial disability benefits at a rate of $21.06 per week from January 13, 1996.

[2] The parties stipulated that claimant is entitled to permanent partial disability benefits of $21.06 per week for the period between August 14, 1998, and December 31, 2001, based on a loss of overtime.

Alternatively, claimant contends that the administrative law judge erred in failing to order a *de minimis* award. Employer responds, urging affirmance of the administrative law judge's decision.

Partial disability compensation for unscheduled injuries is awarded based upon the wage-earning capacity lost as a result of the injury. 33 U.S.C. §908(c)(21), (e), (h). Loss of overtime earnings may provide a basis for determining that a claimant has demonstrated a loss in wage-earning capacity. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). Claimant may establish a loss in overtime by demonstrating that overtime opportunities exist in his pre-injury job which are not available to him post-injury. *See Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989); *Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987).

In the present case, claimant submitted the work records of several co-employees, three of whom the administrative law judge found had similar qualifications and experience to that of claimant. The administrative law judge rationally credited only the records of these employees as they are non-nuclear riggers, which was claimant's pre-injury job. Decision and Order at 21; *see generally Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988). The administrative law judge found that Charles Overton worked 501.6 hours of overtime in 2002, 533.1 hours in 2003, and had worked 93.8 hours of overtime by March 3, 2004. CX 8 at 1. James Elam worked 378.3 hours of overtime in 2002, 180.5 hours in 2003, and had worked 18.5 hours of overtime by March 3, 2004. CX 8 at 3. Mack Lassiter worked 378.5 hours of overtime in 2002, 514.1 hours in 2003, and 185.5 hours of overtime as of June 22, 2004.[3] CX 8 at 5.

Claimant testified that, prior to his injury, he worked overtime when it was made available to him. Tr. at 18. The record indicates that claimant worked 96 hours of overtime prior to his injury in 1990. In addition, claimant worked 109.4 hours of overtime in 1989, and 124.2 hours of overtime in 1988. CX 1. Employer's representative, Mr. Spicer, testified that the foremen attempt to assign overtime evenly among the workers. Tr. at 44, 50-51, 54. After his injury, claimant was assigned to the tool room, where he worked some overtime in 2002 to 2003. While claimant worked in the hose shop, overtime was not available. After claimant began driving a forklift, he worked overtime when it was available, and he had worked approximately 23 hours of overtime in 2004 at the time of the March 24, 2004, hearing. Tr. at 18-19, 29-35.

[3] The administrative law judge extrapolated from the overtime worked through part of the year to find that in 2004, Mr. Overton would work 541.84 hours of overtime, Mr. Elam would work 106.6 overtime hours, and Mr. Lassiter would work 385.84 overtime hours. Decision and Order at 21.

The administrative law judge found that the number of hours overtime worked by claimant's co-workers varied significantly and that no explanation was given for the variances. The administrative law judge therefore concluded that while the three co-workers clearly worked more overtime than claimant did, the data provided do not allow him to calculate the exact amount of overtime claimant lost due to his injury. Moreover, the administrative law judge found that because claimant worked "virtually the same" amount of overtime before and after his injury, claimant's own wages do not provide a basis for an award based on a loss of overtime. Decision and Order at 21-22.

In this case, claimant submitted detailed records of similar employees with the same qualifications and experience as he possesses. In addition, claimant submitted records concerning the amount of overtime he worked pre-injury and post-injury. The administrative law judge found that claimant credibly testified concerning his overtime work. Decision and Order at 19. The administrative law judge did not discredit any of the evidence put forth by claimant with regard to the three comparable employees or to his own wages, but found that he could not calculate the exact amount of overtime lost due to the variances in the co-workers' hours.

We agree with claimant that the evidence he submitted contains sufficient evidence from which the administrative law judge could rationally determine a figure that represents claimant's loss in overtime hours. *See* Cl. Exs. 1, 8, 9; Emp. Ex. 6. Although the amount of overtime worked by the three co-workers varied, the administrative law judge noted that these workers "clearly worked more overtime during that time period [than claimant]." Decision and Order at 21. While the administrative law judge must calculate a dollar amount representing claimant's lost earning capacity, *see, e.g., Jennings v. Sea-Land Serv., Inc.,* 23 BRBS 312 (1990), the evidence of record need not point to only one conclusion. Rather, the administrative law judge is charged with making findings, conclusions, and inferences based on the evidence of record. *See generally Doss v. Director, OWCP,* 53 F.3d 654 (4th Cir. 1995); *Presley v. Tinsley Maintenance Service*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976). Section 8(h) of the Act does not provide a set formula for calculating loss in wage-earning capacity, but provides that the administrative law judge should "fix such wage-earning capacity as shall be reasonable, having due regard to the nature of the injury, the degree of physical impairment, his usual employment, and any other factors . . . which may affect [claimant's] capacity to earn wages in his disabled condition. . . ." 33 U.S.C. §908(h); *see Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). We hold that the administrative law judge had adequate, credible evidence from which he could make a finding regarding the overtime claimant lost as a result of his injury.

In addition, the administrative law judge erroneously rejected claimant's alternate contention that a comparison between his pre-injury overtime hours and his post-injury overtime hours provides a basis for an award based on a loss of wage-earning capacity.

The administrative law judge found that a comparison of claimant's pre-injury overtime hours and his post-injury overtime hours reveals "very little if any difference," and that the two amounts are "virtually the same." Decision and Order at 21. Although the difference between claimant's actual pre-injury overtime hours and his post-injury overtime hours may be small, we hold that this is an invalid basis to find that claimant had no loss in wage-earning capacity because the inquiry is whether claimant sustained any loss in wage-earning capacity due to lost overtime, not whether there is more than a minimal difference between his pre-injury earnings and his post-injury wage-earning capacity. *See Stallings v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 193 (1999), *aff'd in pert. part*, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001). In *Stallings*, the Fourth Circuit, within whose jurisdiction this case arises, affirmed an award of $3.78 per week representing claimant's lost overtime due to his inability due to his injury to work inside when it rained. In this case, claimant submitted evidence which the administrative law judge found credible, and which can support various methods to determine a loss in wage-earning capacity due to a reduction in overtime hours. Therefore, we vacate the administrative law judge's finding that claimant failed to establish a post-injury loss in wage-earning capacity, and we thus vacate the denial of permanent partial disability benefits. 33 U.S.C. §908(c)(21), (h). The case is remanded to the administrative law judge to determine a dollar figure that represents claimant's loss in overtime due to his work-related injury.[4] *See Everett*, 23 BRBS 316; *Jennings*, 23 BRBS 312; *Frye*, 21 BRBS 194; *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

[4] As we hold that there is sufficient evidence in the record from which the administrative law judge may calculate claimant's loss in wage-earning capacity, we decline to address claimant's alternative contention that the administrative law judge erred in not entering a *de minimis* award. *See generally Stallings v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 193 (1999), *aff'd in pert. part*, 250 F.3d 868, 35 BRBS 41(CRT) (4th Cir. 2001).

Accordingly, the Decision and Order of the administrative law judge denying benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge concurring:

I agree with my colleagues that the administrative law judge's decision should be vacated. I believe the administrative law judge did not fully discuss and analyze all of the evidence. In my view, it has yet to be determined whether the evidence establishes a loss in wage-earning capacity or whether it provides a reasonable basis to calculate a loss. However, I agree with my colleagues that if a loss can be calculated claimant is entitled to be compensated for the loss, regardless of its size.

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REGINA C. McGRANERY
Administrative Appeals Judge