

JOSEPH PETITT)
)
 Claimant-Petitioner)
)
 v.)
)
 SAUSE BROTHERS) DATE ISSUED: 01/19/2012
)
 and)
)
 SEABRIGHT INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard M. Clark,
Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, LLP), Portland, Oregon, for
employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2008-LHC-00942)
of Administrative Law Judge Richard M. Clark 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 sustained a lower back injury while working as a welder for employer on
September 24, 2003. The parties agreed that claimant reached maximum medical
improvement on September 19, 2005, and that employer paid all temporary total and

permanent total disability benefits up until December 19, 2007, when claimant found alternative employment as an assembler with K & K Sound Systems (K & K). Employer thereafter paid claimant permanent partial disability benefits based on his wage-earning capacity with K & K. Employer adjusted claimant's permanent partial disability benefits to reflect his receipt of a special merit raise of \$0.55 per hour as of January 20, 2008, as well as his receipt of quarterly raises of \$0.25 per hour, which commenced in June 2008. Claimant disputed employer's inclusion of the quarterly pay raises he received from K & K in calculating his post-injury wage-earning capacity and corresponding permanent partial disability compensation rate.

In his decision, the administrative law judge found, based on the parties' stipulations, that claimant is entitled to an award of permanent total disability benefits from September 17, 2007, through December 18, 2007, and a continuing award of permanent partial disability benefits thereafter. With regard to that latter award, the administrative law judge found that claimant's merit pay increase and the regular quarterly pay raises with K & K are reflective of his post-injury wage-earning capacity and, thus, should be used to calculate his permanent partial disability award.¹ The administrative law judge thus periodically adjusted claimant's compensation rate downward to reflect his increasing wage-earning capacity.

On appeal, claimant argues that the \$0.25 quarterly raises he received with K & K reflect increases in the general wage level and not an increase in his wage-earning capacity. Thus, claimant contends these raises should not be included in the calculation of his partial disability benefits. Employer responds, urging affirmance.

After consideration of the administrative law judge's decision, the arguments raised on appeal, and the evidence of record, we affirm the administrative law judge's Decision and Order Awarding Benefits as it is supported by substantial evidence and contains no reversible error. An award for partial disability for a back injury is based on two-thirds of the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h). 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. *Id.* In making this determination, relevant considerations include the employee's physical condition, age, education, industrial history, claimant's earning power on the open market, and any other reasonable variable that could form a factual basis for the decision. *See Container Stevedoring Co. v. Director, OWCP [Gross]*, 935

¹The administrative law judge did not include cost-of-living increases claimant received. This finding is not contested.

F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *De villier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The objective of the inquiry under Section 8(h) is to determine claimant's wage-earning capacity in his injured state. *Long*, 767 F.2d 1578, 17 BRBS 149(CRT); *see also Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001). The party that contends that claimant's actual wages are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66 (1988), *aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990).

The administrative law judge found that the parties stipulated that claimant's wage-earning capacity upon his return to work at K & K on December 19, 2007, where he was initially paid the Oregon minimum wage in effect at that time, \$7.80, should be reduced to the Oregon minimum wage in effect at the time of the September 24, 2003, accident, *i.e.*, \$6.90 per hour.² The administrative law judge then found that claimant's current hourly wage at his alternative work with K & K, as modified by the quarterly raises claimant received starting in June 2008, fairly and reasonably reflect claimant's earning capacity. Decision and Order at 8. In reaching this conclusion, the administrative law judge relied on the deposition testimony of Karla Kaudel, the Chief Executive Officer of K & K, that all new employees at K & K receive the minimum wage and, that with adequate performance, they additionally receive automatic quarterly raises of \$0.25 cents per hour up to the maximum wage of \$13.50 per hour. EX 27, Dep. at 6; *see also* Decision and Order at 5. She stated that these raises represent the agreement that an employee will earn a certain wage in a certain time frame. EX 27, Dep. at 6. This testimony supports the administrative law judge's finding that the raises should be included, as they represent the capacity to earn of a worker with certain seniority. *See generally Deweert*, 272 F.3d 1241, 36 BRBS 1(CRT).

Moreover, by claimant's own admission, K & K paid the quarterly raises in order to retain employees and to keep wages competitive with what employees might be able to earn elsewhere. *See* Cl. Brief at 5-6. Thus, these raises reflect a wage that claimant might be able to earn on the open market in his injured capacity. *See Long*, 767 F.2d

²In this case, the administrative law judge relied on employer's approach for adjusting claimant's post-injury earnings back to the time of his injury in order to account for inflation. Claimant has conceded that these adjustments are appropriate and thus, does not challenge this aspect of the administrative law judge's finding. *See generally Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

1578, 17 BRBS 149(CRT). As the administrative law judge applied the correct legal standard, and as his finding that claimant's actual earnings, except for a cost-of-living raise, following an adjustment to reflect a rate in effect at the time of injury, are representative of his post-injury wage-earning capacity is supported by substantial evidence, rational, and in accordance with law, it is affirmed. 33 U.S.C. §908(h); *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *see also Long*, 767 F.2d 1578, 17 BRBS 149(CRT); *Devillier*, 10 BRBS 649. Consequently, the administrative law judge's calculation of claimant's post-injury wage-earning capacity at various rates based on his actual earnings with K & K, and corresponding awards of permanent partial disability based on these rates, are affirmed. *Id.*

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge