

BRB No. 97-0863

DAVID O. LUCKETT)	
)	
Claimant-Petitioner)	DATE ISSUED:
)	
v.)	
)	
NORFOLK SHIPBUILDING AND DRYDOCK CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Temporary Partial Disability (Loss of Overtime) and Permanent Partial Disability of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert J. MacBeth, Jr. (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Kelly O. Stokes (Vandeventer, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for self-insured employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Temporary Partial Disability (Loss of Overtime) and Permanent Partial Disability (96-LHC-0099) 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, working as a machinist for employer, incurred back pain while descending a staircase carrying a valve weighing about sixty pounds. Claimant was ultimately referred to, and treated by, Dr. McAdam. In an effort to alleviate claimant's pain, Dr. McAdam performed a lumbar partial hemilaminectomy of the L4-5 left side on February 3, 1993. Despite this surgery, claimant reported that he continued to have intermittent back pain and constant pain in his left leg. Employer voluntarily paid benefits for periods of temporary

total and temporary partial disability. On November 9, 1995, claimant returned to work with restrictions imposed by Dr. McAdam, including a forty pound lifting limit and instructions that claimant could work a forty-hour week with moderate bending and lifting. Dr. McAdam also assigned claimant a ten percent permanent partial disability rating based upon the American Medical Association guidelines on February 28, 1995.

Claimant filed a claim seeking temporary partial disability benefits for lost overtime based on the difference between post-injury overtime hours worked by claimant compared with the average post-injury overtime hours worked by other employees within employer's machine department. Alternatively, claimant sought a scheduled award for permanent partial disability due to the impairment of his left leg.

In his Decision and Order, the administrative law judge determined that claimant failed to demonstrate that his diminished post-injury overtime resulted from his work-related injury and thus denied the claim for temporary partial disability benefits based on lost overtime pay. In addition, the administrative law judge found that claimant is not entitled to a scheduled award for his left leg condition, since the only physician to rate claimant's impairment, Dr. McAdam, did not provide any specific impairment rating for claimant's leg condition alone. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance.

Claimant initially contends that the administrative law judge erred in denying his claim for temporary partial disability benefits for lost overtime. Claimant specifically argues that once the administrative law judge determined that claimant's post-injury wages accurately reflected his post-injury wage-earning capacity, he was bound to apply Section 8(e) and thus award benefits corresponding to any loss by virtue of a pre-injury versus post-injury comparison of wages.

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 and Dry Dock Co.*, 23 BRBS 316 (1989). In determining whether a loss of overtime hours constitutes a loss in wage-earning capacity, the focus is whether claimant's loss of previously available overtime is due to the work-related injury. See *Brown v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 110 (1989).

In the instant case, the administrative law judge concluded that the decrease in claimant's post-injury overtime hours is not a result of claimant's physical limitations, but rather is a function of 1) claimant's skill level versus the skill level of other employees in employer's machine shop, and 2) the decrease in overtime sustained by all of employer's workers. In reaching this conclusion, the administrative law judge considered all of the relevant evidence of record, including, despite claimant's assertions to the contrary, the medical report of Dr. McAdam, which listed claimant's work restrictions as a result of his

injury.¹ Specifically, the administrative law judge relied on the credible testimony of claimant's supervisor, Mr. Tant,² that overtime is only assigned as is required based exclusively on skill and ability, Hearing Transcript (HT) at 57, that overtime is down overall throughout employer's facility, HT at 57-58, that whenever there was overtime available within claimant's skills it was offered to him, HT at 61, and that he would not have assigned claimant any more overtime even if he did not have any restrictions whatsoever.³ HT 61. In addition, Mr. Tant testified that claimant receives less overtime than his co-worker, Mr. Brown, because he is less skilled and cannot perform certain jobs that Mr. Brown can, regardless of claimant's injury. HT at 62-63. The administrative law judge further observed that pre-injury overtime records for 1990 indicate that claimant worked fewer overtime hours than the average employee in the machine shop, Employer's Exhibit D, and thus, determined that it is not surprising that claimant has worked fewer hours than the average machine department employer since the injury. The administrative law judge also noted claimant's testimony that he did not refuse any offered overtime. Thus, based principally upon Mr. Tant's testimony and employer's records of overtime worked, the administrative law judge determined that the fluctuations and decrease in claimant's overtime hours are the result of employer's lessened work-load and occurred facility-wide and are unrelated to

¹Contrary to claimant's assertion, Dr. McAdam's opinion that claimant "can work a forty hour work week," Employer's Exhibit E-5, does not equate to a limitation on the number of overtime hours which claimant should work.

²The record reflects that Mr. Tant is responsible for assigning overtime in the area in which claimant works. Hearing Transcript at 57.

³In this regard, the administrative law judge acknowledged that there is some overtime work which claimant could not do because of his injury, but found Mr. Tant's testimony regarding available overtime persuasive.

claimant's work-related injury.⁴

⁴The administrative law judge found, for instance, that the evidence establishes that claimant actually worked more overtime post-injury in 1995, 380.46 hours, than he had during 1990, when claimant worked a total of 310.82 hours of overtime. Employer's Exhibit D.

As the administrative law judge considered all of the relevant evidence of record, his decision comports with the requirements of the Administrative Procedure Act, contrary to claimant's contention. See 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), and 33 U.S.C. §919(d). Additionally, inasmuch as the administrative law judge's factual findings on this issue are rational and supported by substantial evidence, they are affirmed.⁵ Consequently, we affirm the administrative law judge's denial of claimant's claim for temporary partial disability benefits based on loss of overtime, as the decreased amount of post-injury overtime is not related to his work injury. See *Brown*, 23 BRBS at 110.

Claimant also argues that, contrary to the administrative law judge's determination, the medical opinion of Dr. McAdam, rating claimant's permanent partial impairment of the back and left leg at ten percent, clearly establishes a sufficient basis to award benefits under the schedule at 33 U.S.C. §908(c)(2). In the instant case, the administrative law judge denied claimant's alternative claim because the evidence of record did not provide him with a specific impairment/disability rating solely for claimant's leg condition upon which a scheduled award might be based.

As an initial matter, we note that the administrative law judge's analysis is incorrect on this issue. It is well established that the Section 8(c) schedule is not applicable where the actual situs of the injury is to a part of the body not specifically listed in the schedule, even if the injury results in disability to a part of the body which is listed. See *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985); *Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995); *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990). Nevertheless we hold that the administrative law judge has provided sufficient findings upon which to affirm his denial of a scheduled award of benefits as a matter of law. In the instant case, as the administrative law judge found, claimant initially injured only his back as a result of the work-related incident and subsequently developed the left leg pain. Decision and Order at 3, 7. Consequently, as the administrative law judge determined that the actual work-related injury in this case is to claimant's back, Decision and Order at 3,

⁵Claimant's contention that the administrative law judge should have awarded benefits pursuant to Section 8(e) simply on the basis of the difference between claimant's pre-injury average weekly wage and reduced post-injury wages is misplaced, as claimant has not established that his reduced wages result from his work-related injury. *Brown*, 23 BRBS at 110. Rather, as the administrative law judge found, the reduction in claimant's post-injury earnings is due to economic conditions unrelated to claimant's injury.

and thus, that claimant did not sustain a direct injury to his left leg as a result of the work accident, we affirm, as a matter of law, the administrative law judge's determination that claimant is not entitled to compensation for impairment to his left leg under the schedule based on the facts presented in this case. *Ward*, 31 BRBS at 65; *Andrews*, 23 BRBS at 169.

Accordingly, the administrative law judge's Decision and Order Denying Temporary Partial Disability (Loss of Overtime) and Permanent Partial Disability is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge