BRB No. 00-870

ROBERT JARRELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVENS SHIPPING AND TERMINAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
ARM INSURANCE SERVICES	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits in Part and the Decision and Order Denying Reconsideration and Remanding Petition for Modification of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

L. Jack Gibney, Jacksonville, Florida, for claimant.

Mary Nelson Morgan and Scott Stephen Gallagher (Cole, Stone, Stoudemire, Morgan & Dore, P.A.), Jacksonville, Florida, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits in Part and the Decision and Order Denying Reconsideration and Remanding Petition for Modification (1998-LHC-2821) of Administrative Law Judge Pamela Lakes Wood 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 was injured while driving a hustler for employer in April 1997. The crane, attempting to load the container from the hustler onto the ship, inadvertently lifted the chassis and the hustler cab with the container. When the truck was approximately fifteen feet in the air, the chassis and cab fell to the ground, injuring claimant's back and fracturing a rib. Emp. Exs. 1-3; Tr. at 48-49, 52-54. Dr. Kilgore, claimant's neurologist, determined that claimant's condition reached maximum medical improvement on May 7, 1998, leaving a residual permanent impairment of seven percent. Employer paid temporary total disability benefits from April 19, 1997, through July 10, 1998. Jt. Ex. 1; Tr. at 7. Other than four hours of driving work in May 1998, claimant has not worked since his injury. Tr. at 45-46. Claimant filed a claim for permanent total disability benefits.

The administrative law judge found that claimant's disability changed from total to partial as of May 28, 1998, when Mr. Albert, employer's vocational expert, identified suitable alternate employment for claimant. Decision and Order at 11. Initially, the administrative law judge found that claimant is unable to return to his usual work as a hustler driver, as that job involves repetitive bending and stooping as well as constant jolting to claimant's back due to the lack of shock absorbers. *Id.* at 11-12. The administrative law judge then credited Mr. Albert's opinion and labor market survey and found that employer established the availability of suitable alternate employment on the waterfront. The positions identified included auto driver, van driver, and flagman, and the wages ranged from $21.25 to $25 per hour.[1] Despite the complicated seniority system established for waterfront work, the administrative law judge believed claimant had sufficient seniority to obtain and perform longshore work within his restrictions on a full-time basis. Further, the administrative law judge found that claimant undermined his own position by failing to seek work. Based on the labor market survey, the administrative law judge concluded that claimant has a residual wage-earning capacity of $21.25 per hour. Accordingly, she awarded permanent partial disability benefits from May 28, 1998, and continuing. *Id.* at 13-14. Employer filed a motion for reconsideration, and claimant filed a response, which the administrative law judge interpreted as a cross-motion for reconsideration, and a motion for modification. She denied both requests for reconsideration, and she referred the motion for modification to the district director's office for appropriate processing.[2]

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[1]Mr. Albert also identified non-longshore work which he felt was suitable and available to claimant with wages ranging from $5.50 to $12 per hour. Emp. Ex. 6. However, given the higher hourly wages of waterfront work, the administrative law judge gave the longshore positions primary consideration. Decision and Order at 13.

[2]By Order dated November 22, 2000, with the agreement of both parties, Administrative Law Judge Richard K. Malamphy cancelled the hearing and remanded the

Employer appeals the administrative law judge's award of benefits, arguing that claimant is able to return to his usual work and has not suffered a loss of wage-earning capacity. Alternatively, employer argues that the administrative law judge erred in calculating claimant's residual wage-earning capacity. Claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in determining that claimant cannot return to his usual work as a hustler driver. Employer argues that the administrative law judge failed to consider the pertinent evidence of the changes which have been made to that position which would enable claimant to perform the required duties. Employer's risk manager, Mr. Demas, testified that, since claimant's injury in 1997, the hustler cabs have been redesigned with ergonomic modifications to make the cab roomier and more "user-friendly." Such modifications included installation of air-cushioned seats to make the ride more comfortable for the driver. Tr. at 96-97. Additionally, operations changed from using "rolling containers" to using "stacking containers" which means the containers do not have wheels, and instead of being hooked by hoses to the cab and chassis, they are set upon flatbeds already attached to the cabs. Tr. at 97-98. For the driver, this means he does not have to continuously hook or unhook air hoses; rather, he is able to remain in the truck. *Id.*

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request for modification to the district director to be held in abeyance until the Board decides this appeal.

In determining that claimant cannot return to his usual job of hustler driver, the administrative law judge relied on claimant's work restrictions which limited lifting, bending and squatting, as well as the job description of hustler driver which stated that occasional stooping and crouching and frequent twisting is required. Decision and Order at 11; Emp. Exs. 6 at 23, 8A. Moreover, she relied on Dr. Knibbs' disapproval of the suitability of the hustler job, on claimant's testimony that, because of his back pain, the lack of shock absorbers and the frequent bending and stooping would prevent him from being able to perform work as a hustler driver, and on the fact that neither Mr. Albert nor the other doctors of record expressed the opinion that claimant can return to his usual work.[3] Decision and Order at 11-12. Employer argues that the opinions against claimant returning to his usual work are based on out-dated information. Specifically, claimant has not worked as a hustler driver since early 1997, and the job description on which Dr. Knibbs' disapproval is based was created in June 1995. Emp. Ex. 6 at 23-25; Tr. at 46. Mr. Demas testified that the modifications to the hustler position have taken place since 1997. Tr. at 96.

In order to establish a *prima facie* case of total disability, a claimant must demonstrate an inability to return to his usual work. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). "Usual" work has been defined as a claimant's regular duties at the time of his injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). In order to determine whether a claimant can return to his usual work, the administrative law judge must compare the claimant's medical restrictions with the physical requirements of the usual employment. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). While it is apparent the administrative law judge in this case compared claimant's physical restrictions with the requirements of the hustler position as that position existed prior to claimant's injury, it is equally apparent that she did not acknowledge the testimony regarding the modifications to the job or address claimant's ability to perform the hustler driver job with the modernized equipment and amended procedures described by Mr. Demas. Consequently, we must vacate the administrative law judge's determination that claimant cannot return to his usual work and remand the case for further consideration of the evidence relevant to this issue. *See generally Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1989).

On remand, the administrative law judge must compare claimant's medical restrictions

[3]According to the record, Dr. Kilgore does not evaluate the ability of his patients to perform specific post-injury jobs. Consequently, Mr. Albert consulted with an independent physician. Emp. Exs. 6, 9. The administrative law judge acknowledged Dr. Kilgore's permission for claimant to return to work within certain restrictions but noted he did not express an opinion as to whether claimant could return to his usual work notwithstanding those restrictions. Decision and Order at 11.

with the current physical requirements of the hustler job. If the administrative law judge determines that claimant can perform such work, then she must determine whether claimant's wages as a hustler driver reasonably represent his wage-earning capacity or whether claimant is entitled to disability benefits. *See Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995); *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). If the administrative law judge concludes that claimant cannot perform the duties of the modified hustler driver position, then employer's alternate argument involving the proper method of computing claimant's wage-earning capacity becomes relevant. Therefore, in the interest of judicial efficiency, we shall address that issue.

Employer contends the administrative law judge erred in concluding that claimant's residual wage-earning capacity should be based on the lowest of the hourly rates established for the suitable longshore work. Rather, employer contends the appropriate method of determining claimant's wage-earning capacity would be to average the rates, resulting in a residual capacity of $23.52 per hour. In support of its assertion, employer cites *Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998), and *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998).

Section 8(h) of the Act, 33 U.S.C. §908(h), defines "wage-earning capacity" as an employee's actual earnings. If the employee has no actual earnings or those earnings do not reasonably represent his wage-earning capacity, then the fact-finder may:

> fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. §908(h). When given a range of potential post-injury jobs, it is reasonable for an administrative law judge to use the average wage in determining a claimant's post-injury wage-earning capacity, as such method takes into account the uncertainties which come with the job search and the economy. *Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT); *Abbott v. Louisiana Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd* 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). However, if circumstances warrant otherwise, and rationale is provided, it may be appropriate to utilize another reasonable method. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). Therefore, Section 8(h) does not mandate a specific method of calculation and, contrary to employer's assertion, *Pulliam* and *Shell Offshore* do not require use of the average wage of suitable post-injury jobs in determining a claimant's wage-earning capacity.

In this case, the administrative law judge found that claimant's residual wage-earning capacity was $21.25 per hour. She based this decision on her inference as to the availability of the longshore jobs in light of claimant's seniority in the union and, thus, his chances for securing certain positions.[4] Due to the number of workers ahead of claimant in the seniority list and the undisputed testimony that those workers generally select the easier jobs, despite employer's assurance it would hire claimant, the administrative law judge determined that employer cannot show that the jobs identified as suitable are equally available to claimant. Within the confines of the established union practice, the administrative law judge's use in this case of the lowest wage, as representative of claimant's residual wage-earning capacity, is rational. *See generally Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). Consequently, we reject employer's contention that claimant's wage-earning capacity must be determined by the average wage of the range of jobs identified, and affirm the administrative law judge's calculation of claimant's post-injury wage-earning capacity. *See Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990).

We also reject employer's assertions that the administrative law judge should have included overtime and "special payments" in the calculation of claimant's wage-earning capacity. The administrative law judge found that inclusion of overtime, based on the record before her, would be speculative. Decision and Order at 14. Because claimant has not secured a job, he has no "actual wages" on which to base a computation of overtime pay. Moreover, the testimony of record establishes that claimant's opportunities for overtime work would be contingent upon his ability to secure particular longshore work at each day's call-up. As the administrative law judge stated, based on this evidence, it would be speculative to estimate how much overtime claimant could earn. Therefore, we affirm her decision to exclude overtime from the calculation of claimant's wage-earning capacity. *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6 (1984). We decline to address the argument with regard to the "special payments," *i.e.*, vacation, holiday and container royalty payments, because this issue was not raised before or addressed by the administrative law judge, and there is no evidence of record pertaining to this issue. *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000); *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997). Therefore, we affirm as reasonable the administrative law judge's decision to calculate claimant's post-injury wage-earning capacity based on an hourly rate of $21.25.

[4]Claimant is a "K" cardholder in the union. Mr. Demas estimated there were approximately 100 union members holding cards "A" through "K" seeking work each day. Tr. at 47, 90-92.

Accordingly, the administrative law judge's Decision and Order is vacated in part, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge