BRB No. 12-0473

JOHN C. WATSON Claimant-Respondent v. SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Employer/Carrier-Petitioners	))))))))))))))))	DATE ISSUED: 05/28/2013 DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Jerry R. McKenney, Frank W. Gerold, and Karen Conticello (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2011-LDA-00586) of Administrative Law Judge Lee J. Romero, Jr., 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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 injured his right shoulder, lower back, and right leg on December 23, 2008, as a result of an accident that occurred in the course of his employment for employer in Iraq as a carpenter. Claimant was sent home to the United States for medical care and Dr. Drazner subsequently determined that claimant's work injuries reached maximum medical improvement on January 22, 2010, with permanent restrictions limiting pushing, pulling, and lifting. CX 1 at 59-60. Dr. Bauer, who examined claimant at employer's request on March 3, 2011, restricted claimant from overhead work and right arm lifting greater than 20 pounds. CX 1 at 72. Claimant sought compensation and medical benefits for his work injuries. Employer contended that claimant had no post-injury loss of wage-earning capacity and that his back condition is not related to the work accident.

The parties stipulated that from August 2007 until December 2008 claimant had an average weekly wage of $1,646.01. 33 U.S.C. §910. Post-injury, claimant worked as a car salesman from May 2010 until he resigned to start his own business, Texas Transports, in January 2011, which provides car deliveries from one automobile dealer to another. Claimant earned $10,862.58 in 2010 as a car salesman. He reported gross earnings from Texas Transports in 2011 of $94,403; however, after accounting for business expenses, claimant declared a net loss of $37,218 on his 2011 tax return.

In his decision, the administrative law judge found employer rebutted the Section 20(a) presumption, 33 U.S.C. §920(a), that claimant's back condition is related to the work injury, but that claimant established he has a work-related back injury based on the record as a whole. The administrative law judge accepted the parties' stipulation that claimant's work injuries reached maximum medical improvement on January 22, 2010, and he found claimant established that he is unable to return to his usual employment in Iraq. The administrative law judge found that claimant's gross earnings from Texas Transports do not establish his post-injury wage-earning capacity. He instead concluded that claimant's 2010 earnings as a car salesman establish a post-injury wage-earning capacity of $503.56 per week such that claimant has a loss in wage-earning capacity. In addition to medical benefits, the administrative law judge awarded claimant compensation for temporary total disability, 33 U.S.C. §908(a), from December 23, 2008 to January 21, 2010, permanent total disability, 33 U.S.C. §908(a), from January 22 to May 3, 2010, and permanent partial disability, 33 U.S.C. §908(c)(21), from May 3, 2010, based on a weekly loss of wage-earning capacity of $1,142.45.

On appeal, employer challenges the administrative law judge's findings that claimant current back complaints are related to the work injury and that claimant has a loss in his wage-earning capacity. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer contends that, based on the opinions of Drs. Drazner and Bauer, claimant's back complaints after January 2010 are related to pre-existing degenerative disc disease and/or morbid obesity and not to the work injury.[1] In his decision, the administrative law judge found that employer rebutted the Section 20(a) presumption based on the opinion of Dr. Bauer that claimant had pre-existing degenerative disc disease. Decision and Order at 22; *see* CX 1 at 72-74. The administrative law judge found that, while claimant had a pre-existing degenerative back condition, this condition was aggravated by the work accident, since claimant's back was asymptomatic prior to the accident. The administrative law judge found, in weighing the evidence as a whole, that Dr. Bauer's opinion is not credible since he had not treated claimant nor was he provided claimant's radiographic studies or diagnostic tests. Decision and Order at 23. The administrative law judge found that Dr. Drazner diagnosed a work-related lumbar strain and moderate subjective radiculopathy. *Id*. The administrative law judge found that, while Dr. Drazner opined in January 2010 that any lumbar complaints are no longer due to the work injury, he recognized that claimant had sustained a back injury. Therefore, the administrative law judge found that Dr. Drazner's opinion support claimant's assertion that he sustained a work-related back injury. *Id*. at 24.

The administrative law judge did not address employer's contention that claimant's work-related back injury had completely resolved by January 22, 2010.[2] Dr. Drazner's opinion that claimant's work-related back injury had resolved by January 22, 2010, CX 1 at 59; EX 11 at 7-8, is arguably sufficient to rebut the Section 20(a) presumption that claimant's back condition thereafter is due, at least in part, to the work injury. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). Accordingly, we vacate the administrative law judge's finding that claimant's back condition after January 22, 2010, is related to the work injury, and we remand the case for the administrative law judge to address whether employer presented substantial evidence rebutting the Section 20(a) presumption regarding claimant's current back condition; if so, the administrative law judge must address, based on the record evidence as a whole, whether claimant established that his back condition after January 22, 2010, is due, at least in part to the work injury. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *see generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS

[1]In its brief, employer concedes that claimant sustained a work-related lower back strain. Emp. Brief at 10.

[2]Employer clearly raised this issue in its post-hearing brief. Emp. Post-Hearing Brief at 2, 11-15.

65(CRT) (5th Cir. 1999). Employer is not liable for medical benefits if claimant's back condition is not related to the work injury.[3]

Employer next challenges the administrative law judge's finding that claimant has a post-injury wage-earning capacity of only $503.56 per week based on his 2010 wages. Employer argues that claimant's gross income in 2011 of $94,403 establishes his wage-earning capacity. Alternatively, employer contends that only direct business expenses may be used to reduce claimant's self-employment income in 2011.

In his decision, the administrative law judge found that claimant's income tax deduction for depreciation should not reduce his net income from Texas Transports since it has no real immediate effect on his business income. Decision and Order at 30; *see* EX 34 at 3. Claimant reported gross income tax deductions totaling $131,621, which resulted in a net loss of $37,218. EX 34 at 3. After subtracting the depreciation expense of $24,483, the administrative law judge found that claimant had a net business loss in 2011 of $12,735. Therefore, the administrative law judge concluded that claimant had no actual earnings in self-employment in 2011 and that claimant's post-injury wage-earning capacity as a car salesman in 2010 provides the basis for his ongoing post-injury wage-earning capacity. Decision and Order at 31.

Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). If they do not, or if claimant does not have any actual earnings, the administrative law judge must determine a dollar amount which reasonably represents his post-injury wage-earning capacity taking into consideration the factors enumerated in Section 8(h). *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990); *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Additionally, in calculating claimant's post-injury wage-earning capacity, the administrative law judge must adjust post-injury wage levels to the levels paid pre-injury in order to neutralize the effects of inflation.[4] *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). Under Section 8(c)(21) of the Act, claimant is compensated for the amount of wage-earning capacity lost as a result of the

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[3]We note that even if claimant's current back condition is not work-related, the administrative law judge found that claimant cannot return to his usual work because of his other work injuries. These findings are not appealed.

[4]The administrative law judge did not make this adjustment to claimant's 2010 wages.

injury based on two-thirds of the difference between claimant's average weekly wage at the time of the injury and his wage-earning capacity after the injury.

We affirm the administrative law judge's use of claimant's actual wages as a car salesman to determine his post-injury wage-earning capacity from May 2010 to January 2011, when claimant stopped working as a car salesman and founded Texas Transports. These actual wages reasonably represent claimant's post-injury wage-earning capacity during this period. *See generally Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT). However, we must vacate the administrative law judge's reliance on claimant's car salesman wages to determine his wage-earning capacity after January 2011 and remand for the administrative law judge to reconsider claimant's self-employment with Texas Transports as the basis for calculating his wage-earning capacity.

An employee's earnings from self-employment may establish his wage-earning capacity. *Sledge v. Sealand Terminal*, 16 BRBS 178, 181 (1984); *Mitchell v. Bath Iron Works Corp.*, 11 BRBS 770, 779 (1980). However, profit from ownership is not included in determining earning capacity. *Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989). Thus, an administrative law judge should determine whether income from self-employment is the result of an ownership interest or claimant's personal services; where a claimant's business income is the direct result of the claimant's "personal management or endeavor," or the claimant performs such extensive services for the business that the income represents salary rather than profits, the income should be considered in determining wage-earning capacity. *Id.* at 405-406; *see also McGee v. Estes Express Lines*, 480 S.E.2d 416 (N.C. Ct. App. 1997). Business income, however, may not always provide a reasonable basis for determining wage-earning capacity. In the context of calculating a claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), the Board reversed an administrative law judge's calculation based only on the claimant's gross earnings in self-employment, stating that a more rational calculation is based on the cost of hiring another person of equivalent skill and experience to perform the same work, i.e., the value of the work performed, less the aforementioned profits or goodwill. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862, 867 n.6 (1981), *rev'd,* 698 F.2d 743, 15 BRBS 94(CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34(CRT) (1984), *cert. denied*, 469 U.S. 818 (1984).[5] In *Roundtree*, the Board also stated that,

[5]In its decision in *Roundtree v. Newpark Shipbuilding & Repair, Inc.,* 13 BRBS 862 (1981), *rev'd,* 698 F.2d 743, 15 BRBS 94(CRT)(5th Cir. 1983),*panel decision rev'd en banc,* 723 F.2d 399, 16 BRBS 34(CRT) (5th Cir. 1984), *cert. denied,* 469 U.S. 818 (1984), the Board found that the administrative law judge properly analyzed the average weekly wage issue under Section 10(c), having reasonably determined that Section 10(a) and (b) could not fairly and reasonably be applied, but remanded the case for reconsideration under that section, discussing calculation of average weekly wage where

> there is no indication that the value of claimant's work equaled his wages less his income tax deductions. Income tax deductions are not necessarily indicative of actual business expenditures or the costs of doing business as an independent contractor. For example, in this case, claimant's deductions include such items as depreciation allowances for equipment which, in reality, did not decrease his actual income.

Roundtree, 13 BRBS at 869. The Board thus concluded that while a formula based upon gross earnings less income tax deductions may be easy to apply, there is no basis for assuming that the reasonable value of a claimant's services is equal to his net earnings. *Id.* Accordingly, in this case, we reject employer's contention that claimant's post-injury wage-earning capacity must be derived solely from claimant's reported gross income in 2011 of $94,403, as that figure does not necessarily fairly and reasonably represent his wage-earning capacity. *See generally Seidel*, 22 BRBS 403. However, we must vacate the administrative law judge's finding that claimant had no earnings from his self-employment due to his reliance only on claimant's tax return to conclude that claimant had a net loss, and therefore no wage-earning capacity.

The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). The administrative law judge could determine claimant's wage-earning capacity based on the cost of hiring another employee of similar skill and experience to perform the work claimant performed in order to quantify the monetary value of claimant's self-employment. *Roundtree*, 13 BRBS at 867 n.6. In *Mail Boxes, U.S.A. v. Industrial Commission of Arizona*, 888 P.2d 777 (Ariz. 1995), the Supreme Court of Arizona reviewed an intermediate court decision wherein a franchisee was determined to have an "actual average monthly wage" of $0 because he had no earned income in the year preceding the work injury. The franchisee sold his business approximately a year and half after purchasing the franchise because his work injuries would have required him to hire a store manager at $8.00 per hour. *Id* . at 778. The court concluded that the best measure of lost earning capacity of a sole proprietor is the market value of the services performed, which in that case was reflected by the $8.00 per hour salary for a replacement manager. *Id.* at 780-781.

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claimant is self-employed. The United States Court of Appeals for the Fifth Circuit reversed the Board's decision to apply Section 10(c), finding that Section 10(b) could be applied and that where it could be applied, its application was mandatory. The court did not address the Board's determination that claimant's gross earnings in self-employment cannot properly be used as a basis for calculating his average weekly wage under Section 10(c). Subsequently, the court, sitting *en banc,* overturned the panel decision on the ground that the appeal was not of a final order in view of the Board's remand of the case.

In this case, claimant testified that he has hired employees to perform some of the driving, but that he currently does all of the driving. Tr. at 43, 47. Claimant's income tax return lists $3,690 in labor costs. EX 34 at 3. Accordingly, the wages claimant paid employees for transporting cars could form a reasonable basis for determining claimant's post-injury wage-earning capacity. *Roundtree*, 13 BRBS at 867 n.6. In addition, the administrative law judge did not address whether claimant paid himself any salary from his business proceeds. *See* EX 34 at 28-31.

Moreover, the administrative law judge's use of claimant's gross earnings from self-employment less all of his income tax deductions except for depreciation does not reflect consideration of whether these deductions are indicative of actual business expenditures. *Roundtree*, 13 BRBS at 869. The administrative law judge accepted employer's contention that only those expenses which bear a direct relation to continuing business operations should reduce claimant's wage-earning capacity. *See* Decision and Order at 29-30 (citing *In re Thomas F. Jordan*, 47 E.C.A.B. 382, 386-387 (Feb. 15, 1996)). Nevertheless, he did not apply this analysis to any of the claimed tax deductions except for depreciation. In this case, the listed expenses on claimant's Schedule C for truck gas and oil ($27,632), dispatch services ($300), contract labor ($3,690), licenses ($643), and insurance ($10,126) may be such direct business expenses which can properly be deducted from claimant's gross self-employment income. EX 34 at 3-4. Other expenses, such as those for and meals and entertainment ($937) may not necessarily reduce claimant's wage-earning capacity; findings of fact are necessary to determine the effect of any particular expense on claimant's wage-earning capacity.

Therefore, on remand, the administrative law judge must make additional findings of fact regarding claimant's actual post-injury wage-earning capacity with Texas Transports by first determining claimant's actual earnings in view of the foregoing discussion. If the administrative law judge finds that claimant's actual earnings do not fairly and reasonably represent his wage-earning capacity in his injured condition, he may again consider utilizing claimant's 2010 car salesman wages, adjusted for inflation, pursuant to Section 8(h).

Accordingly, the administrative law judge's findings that claimant's back condition after January 22, 2010, is related to the work injury and that claimant's wage-earning capacity after January 2011 is $503.56 per week are vacated. The case is remanded for further consideration in accordance with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge