

JOSEPH D. RAFFAELE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
COLUMBIA GRAIN, INCORPORATED)	DATE ISSUED:
)	
and)	
)	
SAIF CORPORATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Donald R. Wilson (Pozzi, Wilson, Atchinson, O'Leary & Conboy), Portland, Oregon, for claimant.

Randolph B. Harris (SAIF Corporation), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (89-LHC-2461) of Administrative Law Judge Vivian Schreter-Murray 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, while working for employer as a longshoreman,¹ was injured on January 20, 1987,

¹At the time of his injury, claimant was a Class B longshoreman, a rating he held from the time he commenced this type of work in April 1980 until December 1988 when he became registered as a Class A longshoreman.

when he slipped and fell on his back and buttocks while discharging grain from a railroad hopper car. Claimant was subsequently treated by Dr. Wilson, who released claimant to return to work as of May 11, 1987. JX 22. Similarly, Dr. Smith, a neurological specialist, opined that claimant could return to full duty sometime in May 1987. JX 14. Claimant returned to work without restrictions on May 11, 1987, and has sustained no lost time as a result of his injury subsequent to that date.

In her Decision and Order, the administrative law judge implicitly found that claimant's post-injury earnings represented his wage-earning capacity and that claimant did not suffer a post-injury loss in wage-earning capacity after his return to work on May 11, 1987. In making this determination, the administrative law judge noted that claimant worked more hours following his injury than in the year preceding that injury, that claimant's post-injury employment is not sheltered, and that claimant's job is regular and continuous. Lastly, the administrative law judge concluded that a true comparison of claimant's post-injury wages with those wages earned by similar longshoremen could not be made since no pre-injury comparison was possible based upon the evidence of record.

On appeal, claimant contends that the administrative law judge erred in failing to find that he has a post-injury loss in wage earning capacity. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in determining that claimant's work injury did not decrease his wage-earning capacity. *See* 33 U.S.C. 908(c)(21), (h). Pursuant to Section 8(c)(21) of the Act, an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act 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. *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192 (1993); *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991)(Brown, J., dissenting on other grounds). If such earnings do not represent claimant's wage-earning capacity, the administrative law judge is authorized to calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variables that could form a factual basis for the decision. *Sproull*, 25 BRBS at 109; *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988); *Devilleir v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979). Should claimant's post-injury work be found to be continuous and stable, his post-injury earnings are more likely to reasonably and fairly represent his wage-earning capacity. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT)(9th Cir. 1985). Relevant questions include whether the work is suitable, claimant is physically capable of performing it, and claimant has the seniority to stay in the job. *See Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

In the instant case, in support of his assertion that he has sustained a loss in wage-earning

capacity, claimant testified that although many jobs are regularly available which he can perform without difficulty, he is unable to perform certain longshoring activities. *See* Tr. at 48-49. Claimant additionally relied upon the testimony of Mr. Healy, a longshoreman of the same class as claimant, in an attempt to establish that he earned less money post-injury than similarly classified longshoremen. Specifically, claimant testified that in 1986, the year prior to his injury, he worked 1,187.5 hours and earned \$27,865.10. In 1988, claimant asserted that he worked 1,712.5 hours and earned \$38,285.10, and in 1989, claimant worked 1,580.75 hours and earned \$38,360.88. *See* EXS 30, 31. In support of his assertion that he has sustained a loss in wage-earning capacity, claimant compared these earnings to those of Mr. Healy who, although failing to give the number of hours which he worked, testified that in 1988 he earned \$51,374.78, and in 1989 he earned \$57,549.00. *See* Tr. at 75-76.

In determining that claimant did not suffer a loss in wage-earning capacity, the administrative law judge considered many of the factors cited in *De villier*, *i.e.*, the lack of physical limitations placed on claimant post-injury, the number of hours worked by claimant post-injury, the non-sheltered nature of claimant's employment, and the stability of claimant's work. Specifically, the administrative law judge determined that claimant had returned to his position as a longshoreman with no restrictions imposed upon him, that claimant received no assistance from co-workers, that claimant's employment was not sheltered, and that claimant's work was regular, continuous, and not sporadic or seasonal. *See* Decision and Order at 8-9. The administrative law judge further found that claimant had not established a loss of hours post-injury, since the record indicates that claimant worked more hours following his injury than before it. *See* Ex.-30. In this regard, the administrative law judge concluded that no true comparison between claimant's post-injury earnings and the earnings of Mr. Healy was possible since no evidence was submitted into the record regarding a comparison between Mr. Healy's and claimant's pre-injury earnings; the administrative law judge noted that without such a baseline it was not possible to determine whether Mr. Healy regularly worked more hours than claimant.² *See* Decision

²The administrative law judge additionally determined that the wages earned by five allegedly non-disabled longshoremen submitted into evidence by claimant were not supportive of claimant's position since those wages, which ranged from \$45,000 to \$57,000, suggested that longshoremen may not work the maximum number of hours which they are capable of working. *See* Decision and Order at 7.

and Order at 6-7. We hold that the administrative law judge's determinations that claimant's post-injury earnings represent his wage-earning capacity and that claimant has not established a post-injury loss in wage-earning capacity are rational and are supported by substantial evidence; we therefore affirm the administrative law judge's finding that claimant has not established a post-injury loss in wage-earning capacity. *See Long*, 767 F.2d at 1578, 17 BRBS at 149 (CRT).

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge