

BRB No. 97-0872

JAMES L. BURTON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
STEVEDORING SERVICES)	
OF AMERICA)	DATE ISSUED:
)	
and)	
)	
EAGLE PACIFIC INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Henry B. Lasky,
Administrative Law Judge, United States Department of Labor.

Robert K. Udziela (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland,
Oregon, for claimant.

Dennis R. VavRosky (VavRosky, MacColl, Olson, O'Herty & Miller, P.C.),
Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (92-LHC-2050) of
Administrative Law Judge Henry B. Lasky 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). This is the second time this case is before the Board.

Claimant, a utility/dock man, sustained an injury to his lower back on November 14,

1989. Claimant returned to work on March 12, 1990, and thereafter sought permanent partial disability compensation under the Act. In his first Decision and Order, the administrative law judge found that claimant sustained a 33 1/3 percent loss of wage-earning capacity and awarded claimant permanent partial disability compensation at the rate of \$257.27 per week. 33 U.S.C. §908(c)(21), (h). Employer appealed to the Board, contending that the administrative law judge's decision failed to comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c), and that his decision was not supported by substantial evidence. The Board agreed with employer's contentions, vacated the administrative law judge's findings relevant to the issue of claimant's post-injury wage-earning capacity, and remanded the case for the administrative law judge to impartially evaluate the evidence, make findings of fact and conclusion of law based on his independent review of the record, and to provide a reasoned analysis in compliance with the APA. *Burton v. Stevedoring Services of America*, BRB No. 93-2396 (Sep. 12, 1996)(unpublished).

In his Decision and Order on Remand, the administrative law judge concluded that claimant failed to establish that he suffered a present post-injury loss in wage-earning capacity. As the record supported a determination that there is a significant probability that he will, at some future time, suffer economic harm as a result of his work-related injury, the administrative law judge found claimant to be entitled to a nominal award reflecting that claimant has suffered a one percent loss of wage-earning capacity.

Claimant now appeals, contending that the administrative law judge erred in his conclusion that claimant suffers no current loss in wage-earning capacity and asserting that the administrative law judge's prior decision and award should be reinstated.¹ Employer

¹Claimant also alleges judicial bias arising out of claimant's failure to comply with the administrative law judge's request that both parties submit a recommended decision on remand; in response to the administrative law judge's request, claimant replied that the only action necessary on remand was for the administrative law judge to reissue his original decision, adding that all evidence was fully considered in conformance with the APA. Claimant's allegation that the administrative law judge's subsequent decision is a retaliatory action in response to claimant's response to his order, Brief at 2, however, is neither substantiated by the record nor fully briefed and will, therefore, not be further addressed.

responds, urging affirmance.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. See *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985). Thus, claimant bears the burden of proof in establishing any loss of wage-earning capacity due to his November 14, 1989, work accident. See *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985); *West v. Port of Portland*, 21 BRBS 87 (1988), *modifying on recon.* 20 BRBS 162 (1988). Under Section 8(c)(21), 33 U.S.C. §908(c)(21), 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), 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual earnings if these earnings fairly and reasonably represent his wage-earning capacity. If such earnings do not represent claimant's wage-earning capacity the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. See *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). A claimant's pain and limitations are relevant factors in determining his post-injury wage-earning capacity and may support an award of permanent partial disability under Section 8(c)(21), (h), based on reduced earning capacity despite the fact that claimant's actual earnings may have increased. See, e.g., *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).²

In addressing the issue of claimant's post-injury wage-earning capacity, the administrative law judge on remand relied upon the records of the Pacific Maritime Association (PMA), which reflect that claimant continues to work in jobs which he claims he no longer can or does perform;³ specifically, the administrative law judge found that these records contradicted claimant's testimony that he is precluded from taking approximately 33 1/3 percent of the offered waterfront jobs because of his physical restrictions.⁴

²Claimant's allegations that the administrative law judge's decision does not comport with the requirements of the APA are without merit. Despite the administrative law judge's use of statistical data and factual statements contained in employer's recommended decision, he discusses and analyzes this data and arrives at a conclusion that claimant did sustain a loss in wage-earning capacity, contrary to the ultimate result sought by employer, although not at the 33 1/3 percent level sought by claimant. As he renders an independent analysis and conclusion, his decision meets the requirements of the APA.

³It is uncontroverted that claimant's post-injury hours worked and wages earned are greater than those worked and earned pre-injury.

⁴The administrative law judge specifically found that the PMA records indicate that claimant post-injury performed 55 of the 63 occupational codes which he performed pre-injury and that, moreover, claimant performed 25 new jobs post-injury.

Moreover, the administrative law judge found that the testimony of Mr. Ross, claimant's vocational consultant, that claimant may have suffered either a fifty percent loss in wage-earning capacity because approximately fifty percent of the jobs in the national economy which claimant could have performed pre-injury are no longer available to him, HT at 109-110, or an actual loss of earnings of 15 percent, HT at 94, or a 33 1/3 percent loss in wage-earning capacity, HT at 109-110, was contradictory, inconclusive and unsubstantiated by supporting data. The administrative law judge thus concluded that claimant did not meet his burden of proving that he has sustained a 33 1/3 percent loss of wage-earning capacity.

It is well-established that all adjudicative and fact finding functions reside in the administrative law judge. See *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). In arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. See *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the case at bar, the administrative law judge rationally relied upon the PMA records in determining the extent of claimant's loss in wage-earning capacity. Because the administrative law judge's finding that claimant did not prove a present loss in wage-earning capacity as a result of his November 14, 1989, work accident is supported by substantial evidence, it is affirmed. See *Portland Stevedoring Co. v. Johnson*, 442 F.2d 411, 412 (9th Cir. 1971)(*per curiam*); *Sears v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). As no party challenges the administrative law judge's finding that claimant is entitled to a nominal award, that finding is also affirmed. *Metropolitan Stevedore Co. v. Rambo*, 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge