BRB Nos. 01-0632
and 01-0632A

AREL PRICE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: April 30, 2002
	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order and Decision and Order On Reconsideration of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, L.L.C.), Portland, Oregon, for Stevedoring Services of America/Homeport Insurance Company.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for Stevedoring Services of America/Eagle Pacific Insurance Company.

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

PER CURIAM:

Stevedoring Services of America/Homeport Insurance Company (Homeport) appeals, and claimant cross-appeals, the Decision and Order and Decision and Order on Reconsideration (92-LHC-2469, 99-LHC-1653) of Chief Administrative Law Judge John M. Vittone rendered on claims 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).

This case involves issues stemming from injuries claimant sustained in 1991 and 1998 while employer was insured by two different carriers. In 1979, claimant fell off a ladder, had decompressive back surgery at L4-5, and was off work for

two years. Home port EX 14 at 88. Following this injury, claimant performed light duty work at Longview Port, Washington. Claimant filed a claim for the 1979 injury and received a permanent partial disability award based on a

loss of wage-earning capacity of $294.02 per week. *See Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996); Home port EX 53 at 304.

Claimant subsequently obtained his jobs through a union hiring hall off the

dock preference board which offered priority dispatch to employment in a limited category of jobs such as slingman and gang boss. The first back injury at issue here took place on October 2, 1991, while claimant was workin

g as a ship lasher. Tr. at 56. Dr. Berkeley, a neurosurgeon, performed decompressive surgery at L5-S1 on April 21, 1992. CX 9 at 114.

Claimant continued to experience symptoms related to this injury and Dr. Berkeley

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nsatio n from Octob er 3, 1991, to Nove mber 21, 1992, and all medica l benefit s for that injury. Dr. Berkel ey release d claima nt for work with restrict ions. CX 9 (Dr. Berkel ey Depo.) at 117-118. Claima nt testifie d that he tried to

get sling jobs and dock jobs after this injury, that he last worked for employer as a gang boss, and that the pain in his back gradually increased in 1996, to which he responded by increasing his level of medication. Tr. at

62-63, 71, 86.

Eventually, Dr. Berkeley recommended that claimant retire and claimant stopped working on July 2, 1998. EX 23 at 341.

In his decision, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920, presumption linking his degenerative back condition to his employment and that employer did not establish rebuttal of the Section 20(a) presumption. The administrative law judge found claimant entitled to temporary total disability benefits for the 1991 injury from October 3, 1991, until November 23, 1992, while Eagle Pacific was on the risk. The administrative law judge determined that Homeport is liable as the responsible carrier for the 1998 injury, finding that claimant sustained an aggravation of his injury in 1998 while Homeport was on the risk, and that claimant is entitled to permanent total disability benefits for that injury beginning on July 3, 1998, based on an average weekly wage of $1,156.15, calculated under Section 10(a), 33 U.S.C. §910(a). Finding that the permanent partial disability award for the 1979 injury remains payable, the administrative law judge awarded Homeport a credit for the amount by which the combined awards exceed the compensation allowable under Section 8(a), 33 U.S.C. §908(a), pursuant

to *Brady-Hamilton Stevedoring Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995).

On appeal, Homeport argues that the administrative law judge erred in finding that claimant's work while Homeport was on the risk aggravated his back condition and that therefore it is liable for total disability benefits as the responsible carrier, and that the administrative law judge erroneously determined claimant's average weekly wage for the 1998 injury under Section 10(a), rather than Section 10(c). Claimant cross-appeals, alleging that the administrative law judge erred in denying him a permanent partial disability award for his 1991 injury and challenging the average weekly wage determination for the 1991 injury. Claimant also contends that the administrative law judge improperly calculated claimant's average weekly wage for the 1998 injury, and that the judge erred in his finding regarding Homeport's entitlement to a credit if the combined awards for the 1979 and 1998 injuries exceed 66 2/3 percent of claimant's average weekly wage at the time of the 1998 injury. Eagle Pacific has filed response briefs to both appeals, urging affirmance of the administrative law judge's decision.

We first address claimant's contention that the administrative law judge erred in finding that he had no additional loss of wage-earning capacity after he returned to work following the 1992 surgeries. Claimant maintains that he could not perform catwalk jobs available on the dock preference board which he performed prior to his 1991 injury, and that as a result he missed 22 days of work per year between 1993 and July 2, 1998. Tr. at 64-66. Claimant alleges that the 22 days lost amount to 176 hours over 52 weeks, or 3.38 hours per week, which translates into $49.08 per week in compensation.

Under Section 8(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. 33 U.S.C. §908(c)(21), (h). The administrative law judge found that there was no documentary evidence to support claimant's allegation regarding this time loss, as claimant did not submit into evidence the time books he allegedly kept, and that claimant's testimony was confusing and contradictory. In his 1999 deposition claimant stated that he could not handle catwalk jobs but said he worked as much after the surgery as prior to it, and he did not allege a loss of wage-earning capacity following the 1991 injury prior to the hearing. Homeport EX 58 at 474; Cl. Sept.27, 1999 Depo. at 42. The administrative law judge also observed that claimant testified that jobs for longshoremen have increased, as there are fewer longshoremen and more work opportunities, and that the number of hours claimant worked in 1996 and 1997 were comparable to the number of hours he worked in 1990 (prior to the 1991 injury). Thus, the administrative law judge found that the evidence does not support a conclusion that claimant had a loss of wage-earning capacity as a result of refusing catwalk jobs.

We affirm the administrative law judge's denial of a permanent partial disability award following claimant's return to work in 1992. The burden is on claimant to show a loss of wage-earning capacity. Thus, claimant's argument that no party objected to his time books not being submitted into evidence or the administrative law judge's never asking for them is rejected. Moreover, it was within the administrative law judge's discretion to consider claimant's increased post-injury earnings resulting from increased work opportunities at the port. *See generally Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991), *aff'd in pert. part sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT)(9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *see also Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 35 BRBS 120(CRT) (9th Cir. 2001). The administrative law judge also acted within his discretion in rejecting claimant's testimony due to its contradictory nature. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant had no loss of wage-earning capacity as a result of the 1991 injury.[1] *See Price*, 31 BRBS 91.

[1]As we affirm the administrative law judge's finding that claimant is not entitled to a permanent partial disability award for the 1991 injury, we need not address claimant's contention that the finding by an administrative law judge in an earlier proceeding that his wage-earning capacity after the 1979 injury was $333.87, constitutes the law of the case with respect to a determination of his average weekly wage in this case for purposes of the 1991 injury.

Claimant next contends that the administrative law judge should, in the alternative, have awarded him at least a nominal award as of November 23, 1992. A claimant is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity, but there is a significant potential of future economic harm due to the injury. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). In his order on reconsideration, the administrative law judge denied a nominal award.[2] The administrative law judge found that claimant continued to work without any physical complaints or medical visits for a number of years while his earnings continued to increase. He thus concluded that the evidence did not support claimant's assertion of a significant possibility of future economic harm. This finding is supported by the record. Moreover, although claimant eventually became disabled in 1998, this claim was based on a new injury. Claimant sought a nominal award only after this disability occurred, at which point such an award could not serve the purpose noted in *Rambo* of holding open the Section 22, 33 U.S.C. §922, statute of limitations for the 1991 injury. *See id.* Therefore, the administrative law judge's denial of a nominal award is affirmed.

With regard to the 1998 injury, in its appeal, Homeport first argues that claimant's work as a gang boss while it was on the risk did not aggravate his back condition, as claimant did not establish that working conditions existed which aggravated his back condition. This issue is related to Homeport's contention that it is not the responsible carrier for claimant's permanent total disability, as that determination also involves whether an aggravation occurred. Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment

[2]In denying a nominal award, the administrative law judge first noted that claimant did not request such an award until after his decision was issued. Such an award, however, is encompassed within a claim for a greater partial disability award. *See Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *vacated and remanded on other grounds*, 521 U.S. 121 (1997).

conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition.[3] *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd,* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

The determination of the responsible carrier in the case of multiple traumatic injuries, turns on whether the claimant's condition is the result of the natural progression or the aggravation of a prior injury. If the claimant's disability resulted from the natural progression of the initial injury, then the carrier at the time of that injury is responsible for compensating the claimant for the entire disability. If there is a second injury which aggravated, accelerated or combined with the earlier injury, resulting in the claimant's disability, the carrier at the time of the second injury is liable for all medical expenses and compensation related thereto. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Buchanan v. Int'l Transp. Serv.*, 33 BRBS 32 (1999), *aff'd mem.*, No. 99-70631, 2001 WL 201498 (9th Cir. Feb. 26, 2001) (unpub.); *see also Delaware River Stevedores v. Director,* 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002). "The key under this formulation is determining which injury ultimately resulted in the claimant's disability." *Kelaita*, 799 F.2d at 1311. Each employer or carrier bears the burden of persuading the factfinder, by a preponderance of the evidence, that the claimant's disability is due to the injury with the other employer or carrier. *See Buchanan*, 33 BRBS at 35-36.

In finding that working conditions existed that could have aggravated claimant's back condition, the administrative law judge relied on Dr. Berkeley's opinion that claimant's back disability is attributable to an industrial injury. Decision and Order at 18. Homeport argues that the videotapes it submitted purporting to convey the work of a slingman do not support Dr. Berkeley's opinion that claimant's working conditions could have caused his degenerative back problems. Employer contends that the administrative law judge did not express an opinion about the videotapes, and that therefore his crediting of Dr. Berkeley's opinion over that of Dr. Vessely is not rational. The administrative law judge did refer to the

[3]Homeport argues that claimant has to show that his undeniably light work independently worsened his condition. Reply Memo at 11. Claimant, however, only has to show that his work could have aggravated his condition, at which point the burden shifts to employer to establish that it did not. *See Rajotte v. General Dynamics Corp.*, 18 BRBS 85, 86 (1986).

tapes several times in his summary of the evidence, Decision and Order at 5, 15, and thus did not neglect to consider them. With regard to his job duties, claimant testified that as a gang boss he routinely relieved slingmen for up to four hours per day and that the videotapes did not accurately convey all aspects of the tasks he had to perform. Tr. at 87, 203-204. Dr. Berkeley deposed that claimant described his duties to him, and that over the course of claimant's medical examinations he discussed the details of his work as slingman and gang boss. Dr. Berkeley also showed an awareness of claimant's job duties. CX 9 at 109-110, 140. Thus, as Dr. Berkeley's opinion and claimant's testimony regarding his job duties constitute substantial evidence to support the administrative law judge's finding that claimant's working conditions after 1992 could have aggravated his degenerative back condition, we hold that the administrative law judge properly invoked the Section 20(a) presumption based on evidence that claimant has a degenerative back condition and Dr. Berkeley's opinion that working conditions could have caused or aggravated this condition. Therefore, claimant established a *prima facie* case for invocation of the Section 20(a) presumption. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

Homeport next argues that even if claimant established his *prima facie* case, it has rebutted the presumption by virtue of Dr. Vessely's testimony that the kind of work claimant performed as a slingman and gang boss would not contribute to the degenerative process in claimant's back. Upon invocation of the presumption the burden shifts to employer to present substantial evidence that claimant's condition was not caused or aggravated by his employment. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See id; Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994). Where the aggravation of a condition is alleged, employer must establish that claimant's condition was not caused or aggravated by his employment in order to rebut the Section 20(a) presumption. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

The administrative law judge found that Homeport did not establish rebuttal of the Section 20(a) presumption. Dr. Vessely testified that the work of a slingman, as he understood it from watching two videotapes, EXs 60, 61, and reading a job analysis prepared by Mr. Weiford, a vocational counselor, EXs 44, 45, would not cause or "add" to degenerative changes in the lumbar spine. Tr. at 122, 123, 125. His opinion indicates that claimant's work did not aggravate his condition, and it is arguably sufficient to rebut the

Section 20(a) presumption. *See Duhagon,* 31 BRBS 98.

Any error in this regard is harmless, however, as, in discussing the issue of aggravation based on the record as a whole, the administrative law judge rejected employer's allegation that claimant's work could not aggravate or lead to the progression of a degenerative condition in the lumbar spine, stating, "Dr. Berkeley *credibly* stated that Claimant's back disability is wholly attributable to an industrial injury." Decision and Order at 19 (emphasis added). The administrative law judge credited Dr. Berkeley's opinion on the grounds that he was claimant's treating physician, and examined him on numerous occasions, as opposed to Dr. Vessely who examined claimant only once. The administrative law judge also found Dr. Berkeley's opinion to be well-reasoned.[4] Decision and Order at 23. The administrative law judge reasoned that when Dr. Berkeley released claimant in 1992, after performing surgery, claimant was essentially symptom-free until 1996, and had no debilitating symptoms from either his neck or low back injuries. CX 9 at 117-118. Dr. Berkeley reported that the daily subliminal trauma of claimant's work activities during the two to three years prior to July 1998 hastened the need for surgery and development of the degenerative condition. *Id.* at 132, 138-139, 141-142; Eagle Pacific EX 23 at 344. As the administrative law judge rationally credited Dr. Berkeley, substantial evidence supports his finding of a causal relationship between claimant's degenerative condition and his employment.

[4]For the reasons stated in *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195, 201 n.6 (2001), we reject the argument that the administrative law judge erred in citing *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999), in weighing the medical evidence, and in according Dr. Berkeley's opinion determinative weight on the basis that he is claimant's treating physician.

We therefore affirm the administrative law judge's finding that claimant sustained an aggravating injury in the years before July 1998. Accordingly, the conclusion that Homeport is the responsible carrier is also affirmed. We reject the contention that since, according to Dr. Berkeley, any activity would cause pressure on claimant's nerve, and therefore pain, claimant's current condition is the result of the natural progression of claimant's degenerative condition, rather than an aggravation of claimant's condition.[5] Dr. Berkeley's statement that claimant's condition would have progressed even in the absence of longshoring work is not inconsistent with his conclusion that claimant's work accelerated the deterioration of his condition.[6] The "aggravation rule" encompasses work events which accelerate the effects of a prior condition. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). In this case, the administrative law judge provided valid reasons for finding Dr. Berkeley's opinion persuasive on the issue of aggravation. As the opinion of Dr. Berkeley constitutes substantial evidence to support the administrative law judge's determination that Homeport is liable as the responsible carrier because it was on the risk in 1998 when claimant sustained the last aggravation of his condition, and Homeport has failed to establish error in the administrative law judge's weighing of the conflicting testimony, his determination that Homeport is liable as the responsible carrier is affirmed. *Foundation Constructors,* 950 F.2d 621, 25 BRBS 71 (CRT); *Kelaita*, 799 F.2d 1308; *Abbott v. Dillingham Marine & Manufacturing Co.,* 14 BRBS 453 (1981), *aff'd mem sub nom. Willamette Iron & Steel Co. v. Director, OWCP,* 698 F.2d 1235 (9th Cir. 1982).

Homeport next contends that although the administrative law judge's actual calculation of claimant's average weekly wage as $1,156.15, was correct, he erred in

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[5]Homeport asserts that the administrative law judge did not address an exhibit in which Dr. Berkeley stated that claimant became permanently totally disabled on July 3, 1998, and wrote that illness began, or the disabling injury occurred first in 1979, and then on October 2, 1991. Homeport EX 4 at 4. This is not inconsistent with Dr. Berkeley's opinion that claimant's post-1992 work hastened the need for surgery and hastened the deterioration of his degenerative back condition, as the last was a cumulative aggravation type injury.

[6]Dr. Berkeley used athletes as an example of the manner in which strenuous activity accelerates wear and tear on the body which would occur normally with aging. CX 9 at 138-139. Contrary to Homeport's argument, he did not equate claimant's job with the intensity of the athletic activities he cites.

determining it under Section 10(a), rather than Section 10(c), because claimant worked on a rotational basis out of a hiring hall and the employment in the port where claimant worked was intermittent. Claimant contends that the administrative law judge correctly utilized Section 10(a) to determine his average weekly wage, but appeals the calculation under that subsection.

Section 10(a), 33 U.S.C. §910(a), looks to the actual wages of the injured worker who is employed for substantially the whole year prior to the injury as the monetary base for the determination of the amount of compensation, and is premised on the injured employee's having worked substantially the entire year prior to the injury.[7] *Duncanson-Harrelson Co. v. Director, OWCP [Freer]*, 686 F.2d 1336 (9th Cir. 1982), *vacated and remanded on other grounds*, 462 U.S. 1101 (1983), *decision after remand*, 713 F.2d 462 (9th Cir. 1983). Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when

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[7] Section 10(a) states:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a).

neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[8] *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979).

The administrative law judge first rejected Homeport's assertion that claimant is bound by his pre-hearing contention that his average weekly wage is $1,156.15, calculated under Section 10(c). The administrative law judge also rejected Homeport's assertion that *Marshall v. Andrew F. Mahony Co.,* 56 F.2d 74 (9th Cir. 1932), rather than *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), is controlling in this case. The administrative law judge found that Section 10(a) applies because claimant worked 197 days during the 52 weeks before July 2, 1998, that he was a five-day-per-week worker, and that he therefore worked 75.7 percent of 260 days, which, under *Matulic*, requires application of Section 10(a). The administrative law judge found that employment at the Port of Longview, Washington, was not seasonal or intermittent, but rather was stable and continuous; he found no evidence that the Port was closed seasonally or periodically. Decision and Order at 29. Dividing claimant's actual earnings in the year prior to the injury, $60,119.97, by 52, the administrative law judge arrived at an average weekly wage of $1,156.15.

[8]No party argues that Section 10(b) is applicable in this case.

We reject employer's contention that the administrative law judge was required to calculate claimant's average weekly wage pursuant to Section 10(c). In *Matulic*, 164 F.3d 1052, 32 BRBS 148(CRT), the United States Court of Appeals for the Ninth Circuit held that Section 10(a) must be applied to calculate average weekly wage when the claimant worked 75 percent or more of the workdays in the year preceding the injury, if the number of days worked is known. In *Marshall*, 56 F.2d 74, the Ninth Circuit affirmed the District Court's application of Section 10(c), as the evidence established that the claimant's work was irregular and intermittent and Sections 10(a) and (b) thus could not be fairly applied in such a case. Application of subsection (a) or (b) in such a case would result in an average weekly wage well in excess of what the claimant could have earned. *Id.* at 78. Indeed, in *Matulic*, the court noted that the claimant in *Marshall* worked only 61 percent of available work days. *Matulic*, 154 F.3d at 1057, 32 BRBS at 151(CRT). By setting the threshold for application of Section 10(a) at 75 percent of available days,[9] the court in *Matulic* stated that any "overcompensation" that would result from application of Section 10(a) would not be "unfair." The Court stated that Section 10(c) "may not be invoked in cases in which the only significant evidence that the application of [Section 10(a)] would be unfair or unreasonable is that claimant worked more than 75 percent of the days in the year preceding his injury." *Matulic*, 154 F.3d at 1058-1059, 32 BRBS at 152(CRT). In this case, employer's sole contention is that claimant did not work every day because a ship was not in port every day. This assertion is insufficient to establish the inapplicability of Section 10(a) in view of the fact that claimant worked over 75 percent of available work days and the administrative law judge's specific finding that work at the Port was not intermittent. Therefore, the administrative law judge properly applied *Matulic* to the facts of this case, and his conclusion that claimant's average weekly wage should be calculated under Section 10(a) is affirmed.

A calculation under Section 10(a) is made by determining the total income claimant earned in the 52 weeks preceding the work injury, dividing that sum by the actual number of days claimant worked, multiplying by 260 (for a five day per week worker as here), and dividing that number by 52. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); 33 U.S.C. §910(a), (d). No party disputes the administrative law judge's finding that claimant's earnings during the 52 weeks before his 1998 injury, between July 3,1997, and July 2, 1998, were $60,119.97. Decision and Order at 30; Homeport EX 9 at 57-63. Claimant worked 197 days during this period. *Id.* The administrative law judge in this case did not, however, determine an average daily wage as is required under Section 10(a), and multiply that figure by 260 to obtain claimant's annual earning capacity, which is then divided by 52 under Section 10(d).[10] *See Moore*, 126 F.3d

[9]The court, however, did not preclude the use of Section 10(a) where the claimant works fewer than 75 percent of available days. 154 F.3d at 1058, 32 BRBS at 152(CRT).

[10]Claimant is correct in asserting that "wages" include holiday pay, vacation pay and

256, 31 BRBS 119(CRT); *Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 88, *aff'd,* 204 F.3d 615, 34 BRBS 12(CRT) (5th Cir. 2000). As this computation can be made based on the administrative law judge's findings, we modify his decision to reflect an average weekly wage of $1,525,90.[11]

We now address claimant's argument that the administrative law judge erred in stating that Homeport may be entitled to a credit if claimant's permanent partial and permanent total disability awards exceed the maximum allowable compensation pursuant to Section 8(a), 33 U.S.C. §908(a). Claimant contends such a credit would reduce his permanent total disability award due to the loss of the full benefit of the Section 10(f) adjustments due. Where a claimant sustains an injury which results in permanent partial disability and subsequently suffers a second injury which results in permanent total disability, he may receive concurrent awards for the two disabilities. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). The concurrent awards combined cannot exceed 66 2/3 percent of claimant's average weekly wage at the time of the second injury. *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997). The administrative law judge determined that claimant is entitled to the continuing permanent partial disability award against SAIF for the 1979 injury, and that if the combination of the partial and total awards combined exceed two-thirds of claimant's average weekly wage at

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guaranteed pay. *See* 33 U.S.C. §902(13); *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991), *modified on other grounds sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Siminiski v. Ceres Marine Terminals*, 35 BRBS 136 (2001). The $60,119.97, which the administrative law judge found that claimant earned the year before his 1998 injury, includes holiday, vacation and PGP pay. *See* Decision and Order at 30-31.

[11]Annual earnings of $60,119.67 divided by 197 equals an average daily wage of $305.18. $305.18 x 260 = $79,346.80 ÷ 52 = $1,525.90.

the time of the 1998 injury, Homeport is entitled to a credit for the amount exceeding the maximum compensation allowable under Section 8(a). The administrative law judge specifically found that claimant's increased average weekly wage in 1998 was not the result of an increase in wage-earning capacity, and this finding is not challenged. Thus, there is no basis for reducing the 1979 award, *see Morgan v. Marine Corps Exch.*, 14 BRBS 784, 791 (1982), *aff'd mem.*,718 F.2d 1111 (9th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984), and it is the second award that must be reduced to avoid over- compensation. *Brady-Hamilton,* 58 F.3d 419, 29 BRBS 101(CRT). As claimant is entitled to two-thirds of his 1998 average weekly wage as compensation for his permanent total disability, Homeport's liability will be reduced by the amount of the ongoing permanent partial disability payments, as otherwise claimant would received more than that allowed under Section 8(a).

Claimant challenges Homeport's credit on the basis that it could reduce the full amount of the cost-of-living adjustment to which he is entitled for his permanent total disability award. Section 10(f) provides for annual cost-of-living adjustments, effective October 1 of each year, to the compensation payable for permanent total disability. 33 U.S.C. §910(f); *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT) (9th Cir. 1990). The fact that Homeport will be able to offset a portion of its ongoing liability does not affect claimant's entitlement to annual adjustments under Section 10(f). It is undisputed that claimant is entitled to permanent total disability compensation for the second injury, and he is entitled to Section 10(f) adjustments on that award. The fact that under *Brady-Hamilton,* Homeport receives a credit for the concurrent award does not affect the amount upon which the Section 10(f) adjustment is due. The amount of claimant's entitlement is not affected by the source from which payment is made. Claimant is entitled to two-thirds of his average weekly wage, plus Section 10(f) adjustments on that amount, as compensation for his permanent total disability, for which Homeport is the responsible carrier. Once claimant's entitlement is determined, Homeport is allowed to offset a portion of its liability by the amount of the ongoing permanent partial disability award. Thus, we hold that claimant is entitled to receive the full amount of the Section 10(f) adjustments on his permanent total

disability award in calculating the amount which is then subject to a credit for the permanent partial disability award pursuant to *Brady-Hamilton*.[12]

Accordingly, the administrative law judge's average weekly wage determination is modified to $1,525.90 for the reasons stated in this opinion. The administrative law judge's decisions are also modified to reflect claimant's entitlement to annual Section 10(f) adjustments on his permanent total disability award, prior to the application of any credit due Homeport. In all other regards, the administrative law judge's Decision and Order and Decision and Order On Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[12]As we have modified the average weekly wage to a higher figure, claimant's compensation rate may exceed the statutory maximum, 33 U.S.C. §906(b). If so, claimant's entitlement will be further limited to the applicable maximum compensation rate under Section 6(b), and Homeport will be liable for that amount less the amount of the permanent partial disability award. In other words, claimant's combined awards cannot exceed the amount prescribed for total disability under Section 8(a), plus Section 10(f) adjustments, nor can they exceed the statutory maximum under Section 6(b).