

GARY ROSS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTERN TRANSPORTATION	)	DATE ISSUED: <u>April 4, 2001</u>
COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order on Remand of Ellin M. O’Shea, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston, Bunnell & Stone, LLP), Portland, Oregon, for claimant.

Delbert J. Brenneman (Hoffman, Hart & Wagner), Portland, Oregon, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order on Remand (95-LHC-1498) of Administrative Law Judge Ellin M. O’Shea 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 which 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 case is on appeal to the Board for the second time. Claimant, a forklift operator and warehouseman, injured his back at work on April 22, 1991. Claimant returned to work and sought permanent partial disability benefits, asserting that his actual post-injury earnings did not fairly and reasonably represent his post-injury wage-earning capacity. Administrative Law Judge Schneider initially found that claimant’s actual post-injury earnings fairly and reasonably represented his post-injury wage-earning

capacity and awarded claimant permanent partial disability benefits of \$82.73 per week continuing from August 20, 1993, the date of maximum medical improvement. Upon employer's motion for reconsideration, Judge Schneider modified the award of permanent partial disability benefits to a nominal award of \$1 per week, concluding that claimant's actual average post-injury earnings would be greater than his pre-injury average weekly wage taking into account a 14 week post-injury strike. The administrative law judge summarily denied claimant's motion for reconsideration. Claimant appealed to the Board.

In *Ross v. Western Transportation Co.*, BRB No. 97-480 (Dec. 16, 1997) (unpublished), the Board vacated the administrative law judge's determination that claimant's actual post-injury earnings fairly and reasonably represent his post-injury wage-earning capacity. The Board held that the administrative law judge's findings that claimant's post-injury work is not within his restrictions and that his restrictions affect his ability to compete in the open market are rational and supported by substantial evidence. The Board held, however, that in light of these findings, the administrative law judge could not conclude that claimant's actual post-injury earnings fairly and reasonably represent his post-injury wage-earning capacity without considering other relevant factors. The other relevant factors, specified by the Board, included claimant's averred loss of wages during the post-injury strike, the alleged extra effort and co-workers' assistance required in his post-injury job, the effect on claimant's future ability to compete in the open market, the vocational evidence offered, and inflation adjustments. Thus, the Board remanded the case to the administrative law judge to consider these other relevant factors under Section 8(h) of the Act, 33 U.S.C. §908(h).<sup>1</sup>

On remand, the case was assigned to Administrative Law Judge O'Shea because of the previous administrative law judge's retirement. The parties agreed that she could issue a decision on remand based on the existing record; thus, no additional evidence was admitted and no new hearing was held. The administrative law judge reinstated the nominal award, concluding that claimant's actual post-injury earnings fairly and reasonably represent his post-injury wage-earning capacity and exceed his pre-injury average weekly wage. In the present appeal, claimant challenges

---

<sup>1</sup>The Board affirmed the administrative law judge's determination that claimant failed to establish a loss in wage-earning capacity based on a loss of overtime earnings. See *Ross*, slip op. at 5.

the administrative law judge's finding that his actual post-injury earnings fairly and reasonably represent his wage-earning capacity. Employer responds in support of the administrative law judge's nominal award to which claimant replied.

Claimant challenges the administrative law judge's determination that his post-injury earnings fairly and reasonably represent his post-injury wage-earning capacity. Specifically, claimant contends that the administrative law judge erred in concluding that his current post-injury job is within the work restrictions imposed by Dr. Rosenbaum and that the work restrictions do not affect his ability to compete in the open market since the Board held that Judge Schneider's contrary findings in this regard were rational and supported by substantial evidence. 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). Section 8(h) of the Act, 33 U.S.C. §908(h), 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. 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 variable that could form a factual basis for the decision. *See Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979); *see also Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). The objective of the inquiry under Section 8(h) is to determine claimant's wage-earning capacity in his injured state. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). The Supreme Court has held that a nominal award may be appropriate where claimant has no present quantifiable loss in wage-earning capacity but has demonstrated a significant possibility of future economic harm. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

We affirm the administrative law judge's finding that claimant's actual post-injury earnings fairly and reasonably represent his post-injury wage-earning capacity. Contrary to claimant's contention, the administrative law judge did not find that claimant's post-injury job is within the restriction enumerated by Dr. Rosenbaum. Rather, the administrative law judge found that claimant is able to perform his job in a manner that fits within Dr. Rosenbaum's restrictions, without the need for significant assistance or for significant medical treatment. Decision on Remand at 7. In this regard, the administrative law judge rationally concluded that claimant failed to establish that he performs his current post-injury job with increased effort or co-workers' assistance, or for a beneficent employer since the testimony of claimant's co-workers, Messrs. Allen, Dorman, and Mixon, is that claimant is treated no differently than any other employee. *See generally Gross*, 935 F.2d 1544, 24 BRBS 213(CRT); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41, 45 n. 5 (1999); Decision on Remand at 3-4, 6; Tr. at 62-64, 66, 97-99, 120-126, 130-133. Moreover, the administrative law judge rationally relied on the absence of significant medical treatment

after claimant returned to work in concluding that claimant's actual wages represent his wage-earning capacity.

With regard to the open market factor, the administrative law judge concluded that claimant's ability to obtain work "is only affected inasmuch as claimant was at the time of trial a 56 year-old man affected by injury's residuals." Decision on Remand at 6. Although this statement could be interpreted as ignoring the open market factor contrary to the dictates of Section 8(h) and the Board's prior decision, we hold that any error in this regard is harmless in this case. The administrative law judge rationally found speculative the opinion of claimant's vocational expert, Richard Ross, that if claimant lost his job with his current employer he would have half the earning capacity on the open market.<sup>2</sup> See generally *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). The administrative law judge also did not credit the testimony of claimant and his wife that claimant made a good faith effort to find work within his restrictions during the 14 week post-injury strike. See generally *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979); Decision on Remand at 2-3, 6-7; see Tr. at 161, 201-202, 244. Lastly, the administrative law judge rationally found the "open market factor" to be less crucial in this case, as she found that claimant's post-injury job is stable in that strikes are infrequent and claimant has seniority to avoid layoffs or assignments to more strenuous work. These findings are supported by substantial evidence, see Tr. at 64, 124, 229, 281, and accord with law. See *Long*, 767 F.2d at 1582-1583, 17 BRBS 153(CRT) (post-injury earnings more likely to represent wage-earning capacity if post-injury work is continuous and stable). As the administrative law judge considered the relevant factors specified by Section 8(h) of the Act, and as her findings in this regard are rational, supported by substantial evidence, and within her discretionary authority as trier-of-fact, we affirm the administrative law judge's conclusion that claimant's higher post-injury earnings fairly and reasonably represent his post-injury wage-earning capacity. See *id.*; *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996), *rev'd on other grounds sub nom. Wausau Ins. Cos. v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997). We, therefore, affirm the administrative law judge's finding that claimant is limited to a nominal award. *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT).

---

<sup>2</sup>We note that Judge Schneider also found this portion of Mr. Ross's opinion to be "mere speculation." Decision and Order at 3.

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

SO ORDERED.

---

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

J. DAVITT McATEER  
Administrative Appeals Judge