BRB No. 09-0241

R.J.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICES	)	DATE ISSUED: 08/18/2009
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits, the Decision and Order on Reconsideration, and the Decision and Order Denying Employer's Second Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz (Frischhertz & Associates, L.L.C.), New Orleans, Louisiana, for claimant.

Maurice E. Bostick (Orrill, Cordell & Beary, LLC), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits, the Decision and Order on Reconsideration, and the Decision and Order Denying Employer's Second Motion for Reconsideration (2007-LHC-02130) of Administrative Law Judge Clement J. Kennington 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 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 back on February 27, 2002, during the course of his employment for employer as a longshoreman. Claimant underwent back surgery for this injury on August 13, 2003. Employer voluntarily paid claimant compensation for total disability from February 28, 2002, to December 29, 2004, after which claimant returned to longshore work. Claimant sought compensation under the Act for permanent partial disability based on a loss of wage-earning capacity after his return to work. Employer controverted the claim on the basis that claimant has higher earnings post-injury than he had at the time of his back injury. The parties stipulated that claimant had an average weekly wage on the date of injury of $989.10 and that his back condition reached maximum medical improvement on August 13, 2004.

In his decision, the administrative law judge found that claimant's actual wages after he returned to work do not represent his post-injury wage-earning capacity. The administrative law judge found that these wages do not take into consideration claimant's inability to work overtime and certain jobs that are in excess of his work restrictions after the back injury. The administrative law judge credited testimony that A1 longshoremen are able to make up to $100,000 per year. The administrative law judge averaged the pay earned by five comparable A1 men from 2002 to 2007 to derive an average weekly wage of $1,485.46. The administrative law judge found that over the same time period claimant had an average weekly wage of $590.26, and he awarded claimant weekly compensation of $393.51 for permanent partial disability, 33 U.S.C. §908(c)(21), from August 15, 2004. The administrative law judge also awarded claimant compensation for temporary total disability, 33 U.S.C. §908(b), from February 27, 2002 to August 13, 2004, and for permanent total disability, 33 U.S.C. §908(a), from August 14, 2004 to January 1, 2005, based on an average weekly wage of $1,485.46, which was reduced to the statutory maximum compensation rate of $966.08. *See* 33 U.S.C. §906(b).

In his decision on reconsideration, the administrative law judge modified his calculation of claimant's post-injury wage-earning capacity by excluding the earnings of A1 men from 2002 to 2004 when claimant was unable to work. The administrative law judge found that claimant's actual earnings from 2005 to 2007 after he returned to work result in an average weekly wage of $1,060.94 and that the average weekly wage of comparable A1 men during this period is $1,731.58. Claimant was awarded compensation for permanent partial disability of $447.09, which the administrative law judge derived by subtracting claimant's actual post-injury average weekly wage of $1,060.64 from his post-injury wage-earning capacity of $1,731.58. The administrative law judge also amended his decision to award claimant compensation for permanent partial disability from January 2, 2005, when claimant first returned to work. Claimant

was awarded compensation for temporary total disability and permanent total disability at the statutory maximum rate of $966.08 based on an average weekly wage of $1,731.58. In his second decision on reconsideration, the administrative law judge rejected employer's contention that he should use the earnings of comparable A1 men from 2002 to 2007 to establish claimant's post-injury wage-earning capacity.

On appeal, employer challenges the administrative law judge's average weekly wage finding and his finding that claimant sustained a loss of wage-earning capacity upon his return to work. Claimant responds, urging affirmance of the compensation award.

We agree with employer that the administrative law judge's compensation award cannot be affirmed. Initially, we hold that the administrative law judge erred by addressing the issue of claimant's average weekly wage and rejecting without notice the parties' stipulation that claimant had an average weekly wage at the date of injury of $989.10. *See* ALJX 1. The administrative law judge specifically accepted the parties' stipulation in his decision, but did not utilize it in awarding benefits. Decision and Order at 2. In addition, the parties identified the sole issue before the administrative law judge as claimant's post-injury wage-earning capacity. *See* Tr. at 14, 21. While the administrative law judge may expand the hearing to include new issues, 20 C.F.R. §702.336, he may not do so and reject a stipulation without giving the parties notice and an opportunity to present evidence in support of their positions on the issue raised by the administrative law judge. *See, e.g., Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000); *see also Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). Accordingly, we vacate the administrative law judge's finding as to claimant's average weekly wage and the awards premised on an average weekly wage of $1,731.58, and we remand the case. On remand, the administrative law judge must either: (1) accept the parties' stipulated average weekly wage of $989.10 and use it to calculate the awards of benefits, 33 U.S.C. §908(a), (b), (c)(21); or (2) give the parties notice that he will not accept the stipulation and an opportunity to present their arguments and any additional evidence on this issue. The administrative law judge then must determine claimant's average weekly wage in light of the evidence of record and the applicable law.

In this regard, the administrative law judge's use of the wages earned by A1 men from 2005 to 2007 to determine claimant's average weekly wage at the date of his February 2002 back injury is not in accordance with law. The preface to Section 10 of the Act states: "Except as otherwise provided in this chapter, the average weekly wage of the injured employee *at the time of the injury* shall be taken as the basis upon which to compute compensation. . . ." 33 U.S.C. §910 (emphasis added). Sections 10(a) and (b) are specifically premised on the wages of the claimant or comparable employees in the

year prior to the injury. 33 U.S.C. §910(a), (b). The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, has stated that there is nothing in the statute to suggest that Sections 10(a) and (b) may be deemed inapplicable solely on the basis of economic fluctuations in claimant's field of employment subsequent to the time of the injury. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). The prime objective of Section 10(c), 33 U.S.C. §910(c), which applies when neither Section 10(a) nor (b) can be reasonably and fairly applied, is to arrive at a sum that reasonably represents a claimant's annual earning capacity *at the time of injury*. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). Thus, in *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998), the court stated that, "[T]ypically, a claimant's wages at the time of injury will best reflect claimant's earning capacity at that time. It will be the exceedingly rare case where the claimant's earnings at the time of injury are wholly disregarded as irrelevant, unhelpful, or unreliable." *Hall*, 139 F.2d at 1031, 32 BRBS at 96(CRT). In view of this precedent, and claimant's testimony that he was not an A1 man until approximately a year after he returned to work in January 2005 (Tr. at 62), the average of the wages earned by A1 men from 2005 to 2007 cannot serve as a basis for determining claimant's average weekly wage at the time of his February 2002 work injury. Thus, if on remand the administrative law judge addresses the issue of claimant's average weekly wage, he must compute it as of the time of claimant's 2002 injury, consistent with law.

Additionally, we hold that the administrative law judge erred in determining claimant's post-injury loss of wage-earning capacity. 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 reasonable dollar amount that does, having regard for the factors of Section 8(h).[1] *Penrod Drilling Co. v. Johnson*, 905

[1] Section 8(h) states:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however*, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual

F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990); *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). 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), and the party contending that the claimant's actual wages do not represent his wage-earning capacity bears the burden of so proving. *Penrod Drilling Co.*, 905 F.2d 84, 23 BRBS 108(CRT). Under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), claimant is compensated for the amount of wage-earning capacity lost as a result of the 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.[2]

Claimant asserted to the administrative law judge that he is entitled to compensation under Section 8(c)(21) based on the difference between his actual post-injury wage-earning capacity and the wages he would have earned as an A1 man after he returned to work in January 2005. The administrative law judge accepted this contention. Decision and Order at 9-10. This comparison, however, is not permitted by the statute. The inquiry into a claimant's post-injury wage-earning capacity concerns his ability to earn wages in his injured condition, and not what he could be earning absent injury. *See Keenan v. Director, OWCP*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1978) (1st Cir. 1978). The Act plainly requires that a claimant's permanent partial disability award be based on a

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> employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. §908(h).

[2] Section 8(c)(21) provides:

> Other cases: In all other cases in the class of disability, the compensation shall be $66^{2/3}$ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

33 U.S.C. §908(c)(21).

comparison between the claimant's average weekly wage at the time of injury, and his post-injury wage-earning capacity as injured. This concept is based on Section 2(10) of the Act, 33 U.S.C. §902(10), which states that "'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." *Keenan*, 392 F.3d at 1046, 38 BRBS at 93(CRT); *see also Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Pumphrey v. E.C. Ernst*, 15 BRBS 327 (1983); *cf. McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d. 59, 10 BRBS 614 (3d Cir. 1979) (Third Circuit holds that appropriate comparison is between claimant's post-injury earnings and what claimant would be earning in his pre-injury job if not for the injury). Accordingly, the Act contemplates that the current dollar amount of claimant's post-injury wage-earning capacity be adjusted downward (*i.e.*, backward in time) to account for post-injury inflation and general wage increases from the date of injury. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). This adjustment allows post-injury wage-earning capacity to be compared on an equal footing to the pre-injury average weekly wage. *Sestich*, 289 F.3d at 1161, 36 BRBS at 18(CRT).

On remand, therefore, an award of benefits for permanent partial disability cannot be premised on a comparison of claimant's actual post-injury wage-earning capacity and the wages claimant could be earning as an A1 man absent his work injury. In his decision, the administrative law judge found that claimant's actual post-injury earnings do not represent his wage-earning capacity because claimant's injury has caused a loss of overtime and an inability to perform certain jobs. Decision and Order at 9. Factors such as claimant's pain and physical limitations which cause him to avoid certain longshore jobs and decline to work previously available overtime are relevant to a determination of claimant's wage-earning capacity, pursuant to Section 8(h). *See Jennings v. Sea-Land Service, Inc.*, 23 BRBS 312 (1990), *vacating in pert. part on recon.* 23 BRBS 12 (1989). The administrative law judge, however, did not compute a dollar figure accounting for these factors that represents claimant's post-injury wage-earning capacity in a manner consistent with law. *See* discussion, *supra.* On remand, therefore, the administrative law judge must determine a dollar figure that fairly represents claimant's wage-earning capacity in his injured condition. *Long*, 767 F.2d 1578, 17 BRBS 149(CRT). After determining claimant's post-injury wage-earning capacity, the administrative law judge must compare this figure, adjusted for inflation, to claimant's pre-injury average weekly wage in order to determine claimant's entitlement to benefits. *Walker*, 793 F.2d at 320, 18 BRBS at 101(CRT) ("Benefits under §908(c)(21) are only available, of course, if the claimant's current wage-earning capacity is less than his average weekly wages in his pre-injury job.")

Accordingly, the administrative law judge's Decision and Order Granting Benefits, Decision and Order on Reconsideration, and Decision and Order Denying Employer's Second Motion for Reconsideration are vacated, and the case is remanded for further proceedings pursuant to this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge