

G.M.)
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 Claimant-Petitioner)
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 v.)
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 P&O PORTS OF VIRGINIA,) DATE ISSUED: 08/11/2009
 INCORPORATED)
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 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand and the Decision and Order Denying Reconsideration and Cancelling Hearing of Larry W. Price, Administrative Law Judge, United States Department of Labor.

G.M., Norfolk, Virginia, *pro se*.

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

PER CURIAM:

Claimant, without assistance of counsel, appeals the Decision and Order on Remand and the Decision and Order Denying Reconsideration and Cancelling Hearing (2005-LHC-00560) of Administrative Law Judge Larry W. Price 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). In an appeal filed by a claimant without representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for a second time. To briefly recapitulate the facts, claimant injured his right knee when he fell through a hole in a ship on which he was working on December 18, 2002. Claimant returned to work on June 22, 2003, with restrictions of no pushing or pulling more than ten pounds. Employer paid temporary total disability benefits from the date of the accident until July 9, 2003, but refused to

assume liability for medical costs after September 25, 2003, the date it alleged claimant suffered a new injury to his leg.

In his original Decision and Order, the administrative law judge found that claimant did not suffer an intervening injury on September 25, 2003, and thus, that employer remained liable for medical benefits for claimant's leg condition. Consequently, he awarded claimant temporary total disability benefits from December 18, 2002 through June 22, 2003, based upon an average weekly wage of \$208.59, as well as medical benefits.

Claimant appealed this decision without assistance of counsel. The Board affirmed the administrative law judge's finding that claimant had not suffered an intervening injury on September 25, 2003, and thus affirmed the award of medical benefits. In addition, the Board affirmed the administrative law judge's finding that claimant's average weekly wage is \$208.59. However, the Board held that the administrative law judge did not adequately address the issue of whether claimant's injury restricted his ability to work and whether claimant has a loss in wage-earning capacity therefrom. Thus, the Board remanded the case to the administrative law judge for further consideration of that issue. *[G.M.] v. P&O Ports of Virginia, Inc.*, BRB No. 06-0102 (Aug. 15, 2006)(unpub.).

On remand, the administrative law judge found that claimant did not specify the dates on which he alleged he was disabled or present evidence regarding lost earnings. Therefore, the administrative law judge found that claimant did not establish that he suffered a loss in wage-earning capacity following his return to work in June 2003.¹ The administrative law judge summarily denied claimant's motion for reconsideration.

Claimant, representing himself, appeals the administrative law judge's Decision and Order on Remand. Employer has not responded to this appeal.

The Board remanded the case to the administrative law judge to consider whether claimant suffered a loss in wage-earning capacity after his return to work in June 2003. The administrative law judge acknowledged that a claim for temporary partial disability benefits may be appropriate during a period in which claimant has difficulty performing light-duty work. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002). However, he found that claimant had not identified the periods of disability for which he

¹ The administrative law judge noted that claimant underwent knee surgery on November 29, 2007, but found that any issues related to the surgery and post-surgery compensation were not before him.

was claiming benefits or any loss of earnings to substantiate his claim, despite repeated orders to show cause. Decision on Remand at 2.

We cannot affirm the administrative law judge's findings. An employee with an injury to a scheduled member which has not reached maximum medical improvement may receive a temporary partial disability award based on a loss in wage-earning capacity.² 33 U.S.C. §908(e); *Cox v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 791(1978), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 858 (4th Cir. 1979)(table). Claimant received temporary total disability benefits for his work-related injury from the date of the accident to July 9, 2003. He returned to work in June 2003, and this is the period from which claimant is seeking partial disability benefits. Claimant is not required to identify specific days he missed work due to his injury.³ Rather, in order to determine whether claimant suffered a post-injury loss in wage-earning capacity, the administrative law judge is required to determine whether claimant's actual post-injury wages fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). If they do not, the administrative law judge must determine the reasonable dollar amount of claimant's wage-earning capacity, giving due regard to the factors enumerated in Section 8(h): the nature of claimant's injury, the degree of his physical impairment, his usual employment, and any other factors or circumstances which may affect his future wage-earning capacity in his disabled condition. 33 U.S.C. §908(h); *see Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). An award for temporary partial disability is based on two-thirds of the difference between claimant's average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(e).

Contrary to the administrative law judge's finding, the record contains evidence relevant to claimant's post-injury wage-earning capacity. Specifically, there are medical reports that claimant suffers from continued pain which was aggravated while he was

² There is no evidence that claimant has a permanent knee impairment such that any recovery would be limited to that set forth in the schedule at 33 U.S.C. §908(c)(2), (19).

³ In *Newport News Shipbuilding & Dry Dock Co. v. Stallings*, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001), the partial disability award was based on the claimant's inability to work outside in inclement weather on specific days. In this case, however, claimant's claim is not based, and indeed need not be based, on his inability to work on specific days, but on the broader concept that he has an overall loss of wage-earning capacity.

working. Cl. Exs. 1-2; Emp. Exs. 2-3. In addition to the restriction against pushing or pulling more than 10 pounds with his legs, Dr. Campbell recommended that the claimant work only “as tolerated.” Cl. Ex. 1; Emp. Ex. 2. The record also contains claimant’s wage records from October 21, 2002 until April 29, 2005. Cl. Ex. 5; Emp. Ex. 6

Factors such as claimant’s pain and physical limitations may be relevant in determining post-injury wage-earning capacity and may support an award of partial disability benefits, based on reduced earning capacity, even if claimant’s actual earnings increased. *See generally Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Container Stevedoring Co.*, 935 F.2d 1544, 24 BRBS 213(CRT). Contrary to the administrative law judge’s apparent finding, claimant does not have to establish a reduction in actual earnings to be found disabled if his wage-earning capacity is reduced. *Dodd*, 36 BRBS at 88. Thus, as the administrative law judge did not address the relevant evidence of record, we must vacate the administrative law judge’s finding that claimant did not establish a post-injury loss in wage-earning capacity and remand the case for a determination of whether an award of temporary partial disability benefits under Section 8(e) is appropriate during this period.

Accordingly, the Decision and Order on Remand of the administrative law judge denying further disability compensation is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge