BRB No. 00-0479

PARKER JOHNSTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MATSON TERMINALS	)	DATE ISSUED: Dec. 27, 2000
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Mary Alice Theiler (Theiler, Douglas, Drachler & McKee), Seattle, Washington, for claimant.

John P. Hayes and Joann L. Pheasant (Forsberg & Umlauf, P.S.), Seattle, Washington, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (97-LHC-1194) of Administrative Law Judge Alfred Lindeman 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 the 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 is before the Board for the second time. To recapitulate, claimant suffered a work-related back injury on November 26, 1993. He was unable to work until February 1994. Claimant suffered another episode of low back pain on March 21, 1994, and was again disabled from work. Claimant returned to his job as a dock supervisor on June 21, 1995, working an average of two or three days per week, until electing to undergo a laminectomy on February 21, 1996. In June 1996, Drs. Bradley and Nelson stated that restrictions placed

on claimant in February 1995 were permanent, and that claimant was capable of returning to work under those restrictions. Claimant did not return to work after the surgery, opting instead to take his pension and retire. Employer paid claimant temporary total disability compensation while he was off work, but ceased its voluntary payments on October 1, 1996, on the basis that claimant chose to retire instead of returning to work. Claimant sought disability compensation for the period subsequent to October 1, 1996.

The administrative law judge awarded claimant permanent partial disability compensation pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), determining that claimant was capable of returning to work after his February 1996 operation in the same capacity in which he was working prior to the procedure, *i.e.*, two or three days per week, based upon the opinions of Drs. Bradley and Nelson. The administrative law judge found that claimant suffered a loss in wage-earning capacity after his surgery based upon the difference between claimant's pre-injury average weekly wage and the actual wages he earned while he was working between June 1995 and February 1996.

Employer appealed, contending that the administrative law judge erred in awarding claimant permanent partial disability compensation and in calculating claimant's average weekly wage. Claimant cross-appealed, contending that the administrative law judge erred in failing to award him permanent total disability compensation, and in calculating his post-injury wage-earning capacity and average weekly wage. The Board affirmed the administrative law judge's award of permanent partial disability benefits based on the rational finding that the wages claimant earned in the period from June 1995 to February 1996 represented claimant's wage-earning capacity following his clearance to return to work in October 1996. *Johnston v. Matson Terminals*, BRB Nos. 98-1376/A (July 14, 1999). The Board also affirmed the administrative law judge's average weekly wage determination.

Relevant to the instant appeal, the Board addressed claimant's contention that the administrative law judge erred in not adjusting claimant's post-injury wage-earning capacity to the wage levels paid at the time of injury in order to neutralize the effects of inflation. The Board remanded the case for consideration of this issue, stating that if the record contained insufficient evidence concerning the wages paid in the post-injury job at the time of injury, the administrative law judge should use the percentage change in the national average weekly wage to account for inflation. *Johnston*, slip op. at 5, citing *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

On remand, the administrative law judge found that the evidence establishes that the wages claimant received in his post-injury job were paid at the same rate as the wages claimant received at the time of injury. Thus, the administrative law judge concluded that resort to the percentage change in the national average weekly wage was unnecessary, and he re-entered his original award. Claimant appeals, contending the administrative law judge erred by failing to account for the effects of inflation by using the percentage change in the national average weekly wage to calculate his post-injury wage-earning capacity. Employer

responds, urging affirmance.

In order to insure that a claimant's post-injury earning capacity is considered on an equal footing with the claimant's average weekly wage in determining benefits under Section 8(c)(21), the proper comparison is between claimant's average weekly wage and the wages claimant's post-injury job paid at the time of injury. *See* 33 U.S.C. §§902(10), 908(c)(21), (h); *White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70(CRT) (1st Cir. 1987); *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); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980); *see generally Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). In this case, the administrative law judge found that claimant worked in the same occupation both before and after his injury, but was limited to working two or three days per week after the injury. He further found that the wage records in evidence establish that claimant was paid the same hourly rate and the same per shift rate at the time of the injury and during the period used to calculate claimant's post-injury wage-earning capacity. *See* CX 1 at 31-32, 36-37; EX 44. Thus, he concluded that as the evidence establishes the wage rates paid by the post-injury job at the time of injury, he need not use the percentage change in the national average weekly wage to adjust the post-injury wages for inflation.

On appeal, claimant does not challenge the factual accuracy of the administrative law judge's findings regarding the wage rates paid at the time of injury and during the post-injury period claimant was employed. Rather, claimant contends that notwithstanding the evidence of record establishing that the wage rates did not change from 1993 to 1995-1996, he is entitled to an inflation adjustment based on the percentage change in the national average weekly wage because the value of the wages decreased due to the effects of inflation.

We affirm the administrative law judge's decision on remand. Although claimant accurately states that the value of a dollar in 1993 is not the same as the value of a dollar in 1996, *see generally LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989), we cannot accept the proposition forwarded by claimant on the facts of this case, as to do so would result in claimant's obtaining a benefit unavailable to his uninjured co-workers. Claimant returned to his usual work, but working fewer days, following his injury, at the same wage schedule as

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We so hold, notwithstanding the statement in the Board's previous decision that an inflation adjustment is warranted even if the wage rates did not change between those paid at the time of injury and those paid in the post-injury period of employment. *Johnston*, slip op. at 5.

that in effect at the time of his injury. In this case, the fact that the wages claimant earned in his post-injury job may not have kept pace with inflation is not due in any part to claimant's injury. *See generally Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). Moreover, the purpose of the Board's holding in *Richardson*, 23 BRBS at 330-331, regarding the use of the percentage increase in the national average weekly wage, is to account for inflation when the evidence of record does not contain information about the wage levels paid by the post-injury job at the time of injury. *See also Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996). In the instant case, that information is contained in the record. That the evidence demonstrates the same wage rates at the two relevant times does not provide a basis for using the percentage change in the national average weekly wage. Inasmuch as the administrative law judge's decision is rational, supported by substantial evidence, and in accordance with law, we affirm his decision on remand. *See generally Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988).

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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge