BRB No. 09-0350

RICHARD STETZER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT, INCORPORATED	)	DATE ISSUED: 12/16/2009
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Decision and Order on Reconsideration, and Opinion and Order Denying Reconsideration of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Montstream & May, L.L.P.), Glastonbury, Connecticut, for claimant.

Peter D. Quay (Law Office of Peter D. Quay, LLC), Taftville, Connecticut, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits, Decision and Order on Reconsideration, and Opinion and Order Denying Reconsideration (2006-LHC-1366) of Administrative Law Judge Daniel F. Sutton 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).

On July 8, 2000, claimant sustained injuries to his back and right hand as a result of a slip and fall accident in the course of his work for employer. He was treated and returned to restricted-duty work on May 13, 2001. Employer voluntarily paid temporary total disability benefits at a rate of $712.79, based on an average weekly wage of $1,069.19, for the period of July 9, 2000, to May 13, 2001. Claimant then filed a claim for additional benefits. Administrative Law Judge Daniel F. Sutton found that employer owed no additional temporary total disability benefits for the period ending May 13, 2001. For the period between May 31, 2001, and March 28, 2002, Judge Sutton found, based on employer's concession, that claimant is entitled to temporary partial disability benefits in a lump sum amount of $5,834.17. Thereafter, he found claimant entitled to ongoing temporary partial disability benefits based on "two-thirds of the difference between the Claimant's actual earnings and those received by the comparable employee."[1] Sutton Decision and Order dated August 11, 2003. Claimant appealed the award, challenging only Judge Sutton's decision to use Section 10(c), 33 U.S.C. §910(c), to calculate claimant's average weekly wage. The Board agreed with claimant and held that his average weekly wage should have been calculated using Section 10(a), 33 U.S.C. §910(a). Using Judge Sutton's calculation under Section 10(a), *i.e.*, an average weekly wage calculation of $1,248.20, the Board modified the award of temporary total disability benefits from July 9, 2000, through May 13, 2001. In all other respects, the decision was affirmed. *Stetzer v. Logistec of Connecticut, Inc.,* BRB No. 03-0785 (Aug. 20, 2004) (unpub.).

On September 20, 2004, claimant filed an LS-18 pre-hearing statement with the district director alleging that employer was in default of Judge Sutton's award and seeking a Section 14(f), 33 U.S.C. §914(f), assessment on the unpaid benefits. The district director did not issue a default order, and instead transferred the case to the Office of Administrative Law Judges because there was an issue of fact to be decided, as claimant argued that three payments made to the comparable worker, Mr. Haggerty, should have been included in the comparison used to determine claimant's compensation rate. In her decision dated March 20, 2006, Administrative Law Judge Colleen A. Geraghty found that claimant failed to establish that the payments to Mr. Haggerty were wages earned for his services to employer, and she thus excluded those payments from the calculation of claimant's loss of wage-earning capacity. Decision and Order at 7-8. Judge Geraghty, therefore, concluded that claimant was entitled to $87.13 per week for

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[1]Claimant's co-worker, Mr. Haggerty, was deemed to be the comparable employee.

the period between March 29, 2002, and January 15, 2005, totaling $12,720.98, and that he is entitled to this same weekly rate of compensation from January 16, 2005, through the remainder of the five-year period under Section 8(e), 33 U.S.C. §908(e). Geraghty Decision and Order at 8-9. Because she concluded it was necessary to consult extra-record facts to compute Judge Sutton's award, Judge Geraghty further found that employer is not liable for a Section 14(f) assessment. Geraghty Decision and Order at 10-11.

Claimant appealed this decision; the Board affirmed Judge Geraghty's decision in its entirety.[2] *Stetzer v. Logistec of Connecticut, Inc.,* BRB No. 06-0537 (Feb. 9, 2007) (unpub.). The Board's decision was affirmed by the United States Court of Appeals for the Second Circuit. *See Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2d Cir. 2008).

Subsequently, claimant, alleging that his work-related injuries had reached maximum medical improvement, sought modification of the award of temporary partial disability benefits to an award of permanent partial disability benefits, pursuant to Section 22 of the Act, 33 U.S.C. §922. In his decision dated August 22, 2008, Judge Sutton (the administrative law judge) initially found that claimant established a change in both his physical and economic conditions.[3] The administrative law judge thus granted claimant's request for modification and awarded him permanent partial disability benefits from July 8, 2001, pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), at the rate of $337.15 per week. The administrative law judge calculated claimant's post-injury wage-earning capacity based on claimant's earnings, after adjustment for intervening contractual wage increases, in the 52-week period following his return to work in May of 2001, and compared that figure, $742.47, to claimant's pre-injury average weekly wage of $1,248.20, to arrive at the compensation rate of $337.15 per week. *See* 33 U.S.C. §908(c)(21), (h).

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[2] The Board vacated Judge Geraghty's award of an attorney's fee, holding that she had not properly considered the limited extent of claimant's success, and thus, the case was remanded for further consideration of the attorney's fee issue.

[3] Specifically, the administrative law judge found that claimant established a change in his physical condition as his work-related back injury reached maximum medical improvement as of July 8, 2001. The administrative law judge found that claimant established a change in his economic condition by showing "that [Mr. Haggerty], the employee previously indentified as most comparable for determining the extent of any wage loss, is no longer comparable." Sutton Decision and Order dated August 22, 2008 at 15.

Employer sought reconsideration of the administrative law judge's award on the ground that he erroneously recalculated claimant's post-injury wage-earning capacity, and had not applied claimant's previously asserted post-injury wage-earning capacity of $1,489.80 per week. On reconsideration, the administrative law judge stated that his determination of a post-injury wage-earning capacity of $742.47 "was clearly erroneous" since the "undisputed" evidence introduced at the time of the 2002 hearing supported a finding that claimant's post-injury wage-earning capacity was $1,489.80, based on his payroll records with employer from May 31, 2001 through March 28, 2002. The administrative law judge thus concluded that claimant is not entitled to an award of permanent partial disability benefits under Section 8(c)(21). The administrative law judge nonetheless found that claimant is entitled to a nominal award of $1 per week from July 8, 2001, as claimant established a significant possibility of future economic harm due to his work-related back injury which imposes permanent physical limitations precluding claimant from performing certain jobs. Claimant's motion for reconsideration of the administrative law judge's Decision and Order on Reconsideration was denied.

On appeal, claimant argues that the administrative law judge erred by modifying his August 22, 2008 Decision and Order on reconsideration, and he thus seeks reinstatement of the administrative law judge's award of permanent partial disability benefits of $337.15 per week. Employer responds, urging affirmance of the administrative law judge's Decision and Order on Reconsideration.

Claimant argues that, on reconsideration, the administrative law judge erred in calculating his post-injury wage-earning capacity at $1,489.80, by applying Section 10(a) to his earnings during the period he worked between May 31, 2001, and March 28, 2002. Claimant contends that his wage-earning capacity should be calculated as $742.47 by dividing his annual earnings, adjusted for inflation, in the one-year period after he returned to work on May 31, 2001, *i.e.*, $40,612.35, by 52.

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).[4] *Penrod*

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[4] Section 8(h), 33 U.S.C. §908(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

Drilling Co. v. Johnson, 905 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.[5] Moreover, the applicable legal standards are the same during Section 22 modification proceedings as during the initial adjudicatory proceedings under the Act. *See Metropolitan Stevedore Co. v. Rambo [Rambo I],* 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Vasquez v. Continental Mar. of San Francisco, Inc.,* 23 BRBS 428 (1990).

Although the administrative law judge acknowledged that he "is not bound by any previous finding of fact," Sutton January 12, 2009, Order at 3, as this is a modification proceeding, he nonetheless relied on his prior determination (from 2003) that claimant's post-injury wage-earning capacity is $1,489.80 because "it is undisputed by the parties

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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 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.

[5] Section 8(c)(21), 33 U.S.C. §908(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.

that the evidence introduced at the time of the 2002 hearing" supports that finding.[6] Sutton Order dated November 5, 2008, at 4. The administrative law judge theorized that the reason for the difference in the wage-earning capacity outcomes between his August 22, 2008, decision, wherein he found that claimant had sustained a loss in wage-earning capacity, and his November 5, 2008, order, wherein he found no loss in wage-earning capacity, partially "lies in the mathematics of pay determinations under Section 10" of the Act. Sutton January 12, 2009, Order at 5. In this regard, the administrative law judge found that claimant's "pre-injury average weekly wage is on the high side because it was calculated under the theoretical assumptions made by Section 10(a)" while his post-injury wage-earning capacity has been calculated by dividing claimant's earnings by the number of weeks which "typically results in a lower weekly average than would be obtained under Section 10(a)." *Id.*

The administrative law judge stated that he was in agreement with claimant's position that it is more appropriate to look at post-injury earnings over the long term, as opposed to a "snapshot," but he found that that approach for this case, is "potentially problematic" because the record lacks the necessary data, *i.e.*, the number of days he actually worked, regarding claimant's earnings in 2002 through 2006, to permit a Section 10(a) calculation, and because the evidence of claimant's relatively lower earnings after 2002 may be attributable to general economic, rather than disability, factors. Given the lack of information for the 2002 through 2006 earnings, the administrative law judge found it more accurate to access claimant's loss of wage-earning capacity based on an "apples to apples" comparison of his pre-injury average weekly wage, as calculated under Section 10(a) at $1,248.20, to claimant's post-injury wage-earning capacity of $1,489.80, which "claimant himself subjected to a Section 10(a) calculation" based on his actual earnings from May 31, 2001, to March 8, 2002.

The administrative law judge further found that claimant's earnings during this brief initial period "would appear to be more reliably reflective of his true residual wage-earning capacity" because there was no reduction in available hours during this period of time, as opposed to an apparent reduction in available work since 2002 from pre-injury levels due to economic factors. The administrative law judge thus concluded that claimant has not shown that it was "clearly erroneous or manifestly unjust to base his residual wage-earning capacity on his own Section 10(a) calculation," and "to disregard his actual earnings subsequent to March 28, 2002." Order dated January 12, 2009 at 7.

[6] As the administrative law judge observed in his subsequent order, claimant "certainly does challenge" employer's position that the 2002 wage evidence supports a finding that his post-injury wage-earning capacity is $1,489.80. Sutton Order dated January 12, 2009, at 3-4. The administrative law judge, however, did not specifically address this particular contention in his order on reconsideration.

The administrative law judge's calculation of claimant's post-injury wage-earning capacity on reconsideration cannot be affirmed, as it does not comport with the Act. First, we note that the administrative law judge was not bound by the wage-earning capacity finding he made in his August 11, 2003, Decision and Order, because the current claim arises under Section 22 of the Act, and claimant specifically raised the issue of his wage-earning capacity during the modification proceedings. The administrative law judge thus was authorized to consider claimant's entitlement to permanent partial disability under Section 8(c)(21) anew based on the appropriate legal standard. 33 U.S.C. §922; *Rambo I*, 515 U.S. at 296, 30 BRBS at 3(CRT).

Moreover, Section 8(h) provides that claimant's post-injury wage-earning capacity is to be based on his actual post-injury earnings where they reasonably and fairly represent claimant's earning capacity. 33 U.S.C. §908(h). The fact that Section 10(a) permits claimant's pre-injury average weekly wage to be calculated on a theoretical basis does not establish that post-injury wage-earning capacity may also be calculated in this manner, given the statute's reference to a claimant's "actual [post-injury] earnings." *See Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002); *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002). Consequently, the administrative law judge's finding that claimant's post-injury wage-earning capacity is $1,489.80 pursuant to Section 10(a) cannot be affirmed as it is not supported by substantial evidence or in accordance with applicable law.[7]

The administrative law judge, after finding that claimant established a change in conditions, was required to first determine whether claimant's actual post-injury earnings fairly and reasonably represent his wage-earning capacity. In this case, the administrative law judge found, in his August 22, 2008, decision, that "claimant's actual earnings after he returned to work in May of 2001 establish his post-injury wage-earning capacity pursuant to Section 8(h)," and moreover, that "employer has not proved that there was any material reduction in hours" over the course of the first 52 weeks after claimant returned to work. Sutton Decision dated August 22, 2008, n.18 at 16. On reconsideration, the administrative law judge added that "claimant's earnings over the first ten months after he returned to work following his injuries rather than his earnings in

[7] In this regard, claimant earned $35,784.39 during the 42 weeks in question (he worked 41 of those weeks), May 2001, through March 28, 2002, such that initially, claimant's wage-earning capacity for this period would be $872.79 ($35,784.39 divided by 41 weeks worked). EX 1. Moreover, a review of the weekly wages earned by claimant over the course of that time reveals that he earned more than $1,489.80 only once and that the vast majority of his weekly earnings (33 of the 41 weeks worked) fell well below $1,000.

later periods would appear to be more reliably reflective of his true residual wage-earning capacity given the evidence in the record that there was no reduction in the amount of available work between 2000 and 2002." Order dated January 12, 2009, at 7. He thus concluded that claimant's actual earnings over this one-year period are representative of claimant's residual wage-earning capacity. Dividing claimant's earnings over that period by 52, and adjusting for inflation, the administrative law judge concluded that claimant's post-injury wage-earning capacity is $742.47. Although, on reconsideration, the administrative law judge made similar calculations of claimant's loss in wage-earning capacity for each year between 2001 and 2006 based on his actual earnings,[8] the administrative law judge stated that claimant's wages during those time periods were not representative of claimant's residual wage-earning capacity because claimant's relatively lower earnings after 2002 "may be attributable to economic rather than disability factors."[9] Sutton Order dated January 12, 2009, at 7; *see also* Sutton Decision dated August 22, 2008, at 16 n.18.

In light of the credited evidence regarding claimant's actual post-injury earnings, the conclusion that claimant's post-injury wage-earning capacity is $1,489.80 must be vacated. As the administrative law judge made the requisite finding that claimant's actual earnings in the year immediately following his return to work are an accurate representation of his post-injury wage-earning capacity under normal employment conditions and this finding is supported by substantial evidence, it must be affirmed. Similarly, we affirm the administrative law judge's calculation, in his decision dated August 22, 2008, that claimant has a post-injury wage-earning capacity, adjusted for inflation, of $742.47, with a corresponding loss in wage-earning capacity of $505.73. We, therefore, vacate the administrative law judge's orders on reconsideration, and specifically, the denial of an award of permanent partial disability benefits and related finding that claimant is entitled to a nominal award of $1 per week, and reinstate the administrative law judge's initial finding that claimant is entitled to an award of permanent partial disability benefits under Section 8(c)(21) at a rate of $337.15 per week.

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[8] The administrative law judge's calculations with regard to these years more closely mirror his wage-earning capacity finding of $742.47, rather than $1,489.80.

[9] The administrative law judge previously found that the time and wage records of a comparable employee indicate an overall reduction in available work hours at employer's operation of approximately 25 percent in 2003 and 2005, and approximately ten percent in 2004 and 2006 as a result of general economic downturn. We, therefore, reject claimant's contention that claimant's wages over a longer period of post-injury employment should be used to calculate his wage-earning capacity.

Accordingly, the administrative law judge's orders on reconsideration are vacated. The administrative law judge's prior finding that claimant has a wage-earning capacity of $742.47, and resulting conclusion that claimant is entitled to an award of permanent partial disability benefits under Section 8(c)(21) at a rate of $337.15 per week are affirmed and reinstated.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge