BRB No. 97-0713

JAMES A. EVERETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: _____
	)	
	)	
Self-insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS	)	
	)	
Party-in-interest	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Claimant's Motion for Reconsideration of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Gerald E. W. Voyer and Donna White Kearney (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Claimant's Motion for Reconsideration (95-LHC-2133) of Administrative Law Judge Fletcher E. Campbell Jr., 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).[1] We must affirm the

[1]The Board received claimant's Petition for Review and brief, accompanied by a motion to accept the pleading out of time, on April 29, 1997. 20 C.F.R. §§802.211, 802.217. Employer thereafter filed a motion to dismiss claimant's appeal as untimely on May 9, 1997. 20 C.F.R .§§802.211, 802.217. By Order dated August 8, 1997, the Board granted claimant's motion, and denied employer's motion to dismiss. 20 C.F.R. §802.402. In its response brief, employer renews this motion. Inasmuch as the Board previously fully addressed this issue, denied the motion and accepted claimant's pleading, this motion is

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).

Claimant, a first class painter for employer who worked exclusively on the second (night) shift, sustained head and neck injuries in a work-related accident occurring on September 14, 1989. Employer voluntarily paid claimant various periods of temporary total and temporary partial disability compensation. On March 6, 1995, claimant returned to light duty work as a painter working in employer's tool room on the second shift consistent with the physical restrictions placed upon him by his treating physicians, Drs. Freund and Morales. Under these restrictions, claimant was limited to a 40-hour week. In the interim since claimant's injury, because of environmental concerns employer instituted a new policy that the bulk of the work performed on the second shift would be sandblasting, while painting was done primarily during the day shift. Due to his 40-hour week post-injury restriction, claimant sought permanent partial disability compensation under the Act based on a loss of overtime earnings. Employer argued that this restriction on claimant's hours was not *bona fide.* Moreover, it asserted that any loss of overtime he experienced was due to the fact that he did not want to work overtime, that substantially less overtime is currently available to employees who perform solely painting work on the second shift as the bulk of the work is sandblasting, and that claimant was unwilling to either shift to the day shift or undergo training to become a combination painter/ sandblaster which would afford him greater overtime opportunities on the second shift.

Without addressing the validity of claimant's work restrictions, the administrative law judge found that although claimant worked less overtime since his injury, he did not demonstrate entitlement to permanent partial disability compensation because, while he provided evidence that other employees continued to work substantial amounts of overtime subsequent to his injury, claimant did not demonstrate that these employees were comparable to claimant, a first class painter on the second shift. Moreover, he determined that although Larry Ambrose, employer's paint foreman, testified that overtime would be available to claimant absent his restrictions at a significantly reduced rate, he was unable to calculate a precise dollar amount for claimant's post-injury wage-earning capacity because claimant had not presented any direct or persuasive circumstantial evidence as to the amount of overtime someone in his pre-injury or post-injury job would work. Citing *Walsh v. Norfolk Dredging Co.*, 878 F.2d 380, 22 BRBS 67, 77-8 (CRT) (4th Cir. 1989) (table), for the proposition that a comparison of claimant's pre and post-injury wages does not afford the trier-of-fact the necessary information to compute lost wage-earning capacity, the administrative law judge concluded that it is incumbent upon claimant to show that but for his restrictions overtime would be available to him and in what amount, and therefore denied the claim as claimant failed to do so. Claimant sought reconsideration.

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without merit.

In his Order Denying Claimant's Motion For Reconsideration, the administrative law judge reiterated his prior finding that claimant failed to meet his burden of establishing a basis for calculating his loss of wage-earning capacity based on a loss of overtime earnings. In so concluding, he noted that while he had no doubt that claimant had in fact proffered the best evidence available to him under the circumstances, as it may be that evidence as to what a second shift employee who is solely a painter would earn is unavailable, he could not reward claimant by lowering his burden of production. Claimant appeals, contending that the administrative law judge erred in denying him permanent partial disability compensation based on a loss of overtime wages. Employer, reiterating the arguments it made before the administrative law judge, responds, requesting affirmance.

On appeal, claimant contends that inasmuch as it is undisputed that he worked substantial amounts of overtime prior to his injury, that he is medically restricted to working 40 hours per week, and that he is currently the only employee at employer's facility who works exclusively as a painter on the second shift, the administrative law judge erred in denying his claim based on his failure to quantify the amount of overtime available post-injury to a directly comparable employee. Claimant avers that where, as here, a claimant is precluded from working any overtime post-injury, questions of overtime availability should not come into play. Claimant also contends that because it was his position that his actual post-injury earnings reflect his wage-earning capacity, employer rather than claimant bore the burden of establishing an alternative reasonable wage-earning capacity. Moreover, claimant contends that even if overtime availability was properly considered, the administrative law judge erred in mandating that he provide evidence of overtime hours available to a directly comparable employee to quantify his loss in wage-earning capacity given that there are, in fact, no directly comparable employees. Claimant asserts that on the facts presented it was an abuse of discretion for the administrative law judge to deny compensation completely inasmuch as claimant's loss of overtime earnings could have been calculated by comparing his pre and post-injury wages, or at the very least by comparing his pre-injury earnings with the post-injury earnings inclusive of overtime of whomever he felt was the employee most comparable to claimant among Messrs. Greenlee, Walker, Hoffmann, Jones and Dougherty.

An award for permanent partial disability for an injury which is not covered by the schedule 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); *Johnson v. Newport News Shipbuilding & Dry Dock Co*, 25 BRBS 340, 344-345 (1992). 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. *Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990). The party contending that the employee's actual earnings are not representative of his wage-earning capacity bears the burden of establishing an alternative, reasonable wage-earning capacity. *Metropolitan Stevedore Co. v.* Rambo, U.S. , 117 S.Ct. 1953, 31 BRBS 54(CRT) (1997); *Guidry,* 967 F.2d at 1043, 26 BRBS at 32 (CRT); *Peele v. Newport News*

Shipbuilding & Dry Dock Co., 20 BRBS 133, 136 n.3 (1987). Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's post-injury wage-earning capacity. *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). The same factors are relevant in determining whether claimant's actual earnings represent his wage-earning capacity as are weighed in calculating an alternative wage-earning capacity. *Randall v. Comfort Control, Inc.,* 725 F.2d 791, 16 BRBS 56 (CRT)(1984). Loss of overtime earnings may provide a basis for determining that a claimant has demonstrated a loss in wage-earning capacity where, as here, overtime was a normal and regular part of claimant's pre-injury employment and accordingly was included in determining claimant's average weekly wage. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1990); *Brown v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 110, 112 (1989); *Butler v. Washington Metropolitan Area Transit Authority*, 14 BRBS 321 (1981).

The administrative law judge's denial of compensation cannot be affirmed. The relevant inquiry where claimant is seeking to establish a loss of wage-earning capacity based on loss of overtime earnings is whether claimant has sustained the loss of previously available overtime because of his injury. *Brown,* 23 BRBS at 112. In the present case, however, although claimant asserted that his actual post-injury earnings reasonably represented his post-injury wage-earning capacity in that he was unable to perform any overtime work post-injury, while employer argued that claimant's loss of overtime was not due to his injury, the administrative law judge never actually resolved these issues. Rather, despite noting that Mr. Ambrose, the painting foreman, testified that overtime remained available in claimant's post-injury job but for his restrictions, the administrative law judge concluded that although claimant worked less time after his injury, he did not meet his burden of establishing that but for his injury overtime would be available to him and in what amount.

Initially, the administrative law judge erred in failing to address whether claimant's actual post-injury earnings represent his wage-earning capacity. The administrative law judge erred moreover in summarily allocating the initial burden to claimant, requiring that he produce evidence in the first instance regarding the amount of overtime which would still be available to him and in what amounts. It is well-established that the party contending that claimant's actual earnings are not representative of his wage-earning capacity bears the burden of proof. *See, e.g., Rambo,* ___ U.S. at ___ , 117 S.Ct. at 1964, 31 BRBS at 62(CRT); *Guidry,* 967 F.2d at 1043, 26 BRBS at 32 (CRT). Claimant argues here that his actual post-injury earnings represent his wage-earning capacity. The administrative law judge did not calculate claimant's post-injury earnings or determine which party advocated use of an alternative wage-earning capacity, but instead went directly to whether claimant presented sufficient evidence for him to calculate an alternative amount. This issue, however, is not dispositive until the first inquiry is addressed, although the same factors are relevant to both issues.[2] *See, e.g., Randall*, 725 F.2d at 791, 16 BRBS at 56 (CRT). Thus,

[2]Although the administrative law judge cited *Walsh*, 22 BRBS at 67 (CRT), it does not support his analysis here. The court in that case addressed the administrative law

the administrative law judge's denial of benefits based on his findings that claimant failed to prove that but for his restrictions, overtime would still be available and in what amount cannot be affirmed. If employer is the proponent of a ruling that claimant's actual earnings are not representative, then it bears the burden of proof, a burden it could meet, for example, by showing that claimant's loss in overtime earnings is not due to his work injury because overtime would not be available to claimant even if he had no restrictions.

In this regard, moreover, there is ample relevant evidence as to the post-injury availability of overtime which the administrative law judge did not properly address. Mr. Ambrose provided uncontradicted testimony, credited by the administrative law judge, that some overtime remained available to claimant in his post-injury position on the night shift. Contrary to the administrative law judge's analysis, this testimony does not support the denial of all compensation if claimant is unable to perform any overtime work because his injury restricts him to a 40-hour week. If the administrative law judge finds that claimant's restrictions limit him to no overtime, then Mr. Ambrose's testimony supports a conclusion that he sustained some degree of loss in his wage-earning capacity. Moreover, although the administrative law judge noted that claimant showed no interest in switching to the day shift or training as a sandblaster to increase his overtime opportunities, such evidence is only relevant to claimant's right to compensation if he was medically capable of working some overtime post-injury. As the administrative law judge did not determine whether claimant's actual post-injury wages reasonably represented his post-injury wage-earning capacity or resolve the issue of whether claimant is unable to work any overtime because of his injury, we vacate his denial of benefits and remand the case for reconsideration.

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judge's acceptance of a loss in wage-earning capacity demonstrated by comparing pre- and post-injury earnings which did not weigh the relevant factors, concluding that a bare comparison did not afford the court the information needed to review the case. The case was remanded for the administrative law judge to address the relevant factors, and specifically discussed the two-part statutory scheme. It does not support the administrative law judge's allocation of the burden of proof or his decision to address alternate wage-earning capacity without first determining whether claimant's actual earnings represent his wage-earning capacity.

Claimant's argument that the administrative law judge erred in requiring him to establish the amount of overtime available to a directly comparable employee post-injury in order to establish a loss in wage-earning capacity is also persuasive on the facts presented in this case. The administrative law judge found that although claimant argued that Messrs. Greenlee, Walker, Hoffman, Jones and Dougherty worked substantial amounts of overtime after claimant's injury, their earnings were insufficient to meet claimant's burden of establishing the amount of overtime that would be available to him absent his injury, he found that these individuals were not comparable to claimant because they either worked on the day shift, at a different facility, or as so-called "combination men", *i.e.*, workers who performed both painting and sandblasting and thus had more overtime opportunities.[3] While the administrative law judge could find that the employees were not in the same situation as claimant, there is no support for the proposition that evidence of directly comparable employees is necessary for a claimant to prove a compensable loss in overtime. It is undisputed that claimant is the only employee at employer's facility who works exclusively as a painter on the night shift, and the administrative law judge explicitly stated in his Order on reconsideration that he had no doubt that claimant had "proffered the best evidence available under the circumstances." On these facts, his denial of the claim based on the requirement that claimant prove the amount of overtime available to a directly comparable employee imposes an insurmountable burden on claimant. On remand, in reviewing the evidence regarding available overtime, if the administrative law judge finds that the actual loss in overtime earnings experienced by claimant does not represent his earning capacity, he may calculate claimant's loss in overtime by reference to the employee he deems most comparable to claimant.

[3]We reject claimant's contention that the administrative law judge erred in his factual determination that Messrs. Greenlee, Walker, Hoffman, Jones and Doghtery were not similarly situated to claimant, as the administrative law judge's finding that claimant was the only employee who worked exclusively as a first class painter on the night shift is rational and supported by substantial evidence.

However, the earnings of a comparable employee are not necessary, as there is relevant evidence which could establish the amount of reduced overtime available to claimant post-injury. In this regard, the administrative law judge in denying the claim erred in stating that the record contained no direct or circumstantial evidence as to the amount of overtime available to someone in claimant's pre-injury or post-injury job so as to allow him to compute claimant's lost earning capacity. Decision and Order at 10. Mr. Ambrose did address this issue. Specifically, he testified that subsequent to the institution of the company policy switching the bulk of the sandblasting activity to the second shift, claimant would have had approximately 55 to 60 percent of the overtime previously available to him in his post-injury job but for his injury. CX-19 at 46. Thus, the record does in fact contain evidence relevant to this issue which the administrative law judge did not consider and which, if credited, could serve as a basis for calculating claimant's loss in wage-earning capacity. In light of the administrative law judge's failure to consider this evidence as well as the other errors identified previously, we vacate the administrative law judge's denial of benefits and remand for him to reconsider claimant's entitlement to permanent partial disability compensation based on a loss of overtime earnings.[4]

Accordingly, the administrative law judge's Decision and Order and Order Denying Claimant's Motion for Reconsideration are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[4]Claimant asserts in the alternative that the administrative law judge should have awarded a *de minimis* award of one percent. If, on remand, the administrative law judge finds that claimant has no present loss of wage-earning capacity, he should address whether the record contains evidence of a significant possibility that claimant's injury will diminish his earning capacity in the future. *See Metropolitan Stevedore Co. v. Rambo,* ___ U.S. ___ ,117 S.Ct. 1953, 31 BRBS 54 (CRT) (1997); *Fleetwood v. Newport News Shipbuilding and Dry Dock Company*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

NANCY S. DOLDER
Administrative Appeals Judge