BRB Nos. 97-0722
and 97-0722A

GORDON R. VAN ALLEN	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
Cross-Respondent	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK CORPORATION	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein and Matthew H. Kraft (Rutter & Montagna), Norfolk, Virginia, for claimant.

Bradford C. Jacob (Taylor & Walker), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (95-LHC-2489) 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). We must affirm the findings of fact and 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).

On April 18, 1994, claimant, a pipefitter in employer's pipe shop, suffered a work-related injury when a hatch cover fell on his left foot. Claimant's treating physician, Dr. Morales, determined that claimant suffered a severe crush injury with a laceration over the medial aspect of his foot. After providing conservative treatment and physical therapy, Dr. Morales released claimant for light duty work on July 20, 1994. Thereafter, claimant

returned to work for employer in the landscaping and groundskeeping department, a light duty position, where he stayed for four months before returning to employer's pipe shop. However, claimant could not perform his pre-injury work as a pipefitter due to the restrictions imposed upon him by Dr. Morales, specifically that he engage in no stair climbing and climbing of vertical ladders. In February 1995, Dr. Morales imposed the additional requirement that claimant should sit down intermittently for 10 to 15 minutes because of his foot, and in March 1995, added the restriction of no more than 10 hours of overtime per week. Dr. Morales opined that claimant reached maximum medical improvement on April 18, 1995, and assigned a 2 percent impairment rating to claimant's left foot.

Employer voluntarily paid claimant permanent partial disability compensation for a 2 percent impairment to his left foot. 33 U.S.C. §908(c)(4). Alleging that after he returned to work he was unable to work available overtime due to his injury, claimant filed a claim for temporary partial disability benefits under the Act based on a loss of overtime earnings from August 15, 1994 through April 17, 1995. 33 U.S.C. §908(e). In his Decision and Order, the administrative law judge accepted Dr. Morales's opinion that claimant reached maximum medical improvement on April 18, 1995. The administrative law judge denied claimant's claim for temporary partial disability compensation, however, finding that although claimant worked fewer overtime hours after the work-related injury than before the injury, claimant failed to demonstrate that he lost overtime due to his injury.

On appeal, claimant challenges the administrative law judge's determination that he is not entitled to temporary partial disability benefits due to a loss of overtime after the injury. Employer responds, urging affirmance of the administrative law judge's denial of temporary partial disability benefits. In its cross-appeal, employer contends that the administrative law judge erred in concluding that claimant reached maximum medical improvement on April 18, 1995, as opposed to August 10, 1994. Claimant has not responded to employer's cross-appeal.

An award for temporary partial disability 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(e); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1988). 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. *See, e.g., Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992). 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. *Id.; Metropolitan Stevedore Co. v. Rambo,* U.S. , 117 S.Ct. 1953, 31 BRBS 54 (CRT) (1997). 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 administrative law judge must consider all relevant factors and evidence in making findings regarding claimant's wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16

BRBS 56 (CRT)(D.C. Cir. 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. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1990); *Brown v. Newport News Shipbuilding & Dry Dock* Co., 23 BRBS 110 (1989).

Claimant asserts that he carried his burden of showing that he suffered a loss in overtime earnings due to his work-injury and that overtime was available to other employees in employer's pipe shop. Thereafter, claimant contends it was employer's burden to show that claimant's post-injury earnings did not fairly and reasonably represent his post-injury wage-earning capacity. Moreover, claimant argues that the administrative law judge's denial of temporary partial disability is not supported by substantial evidence. In his decision, the administrative law judge determined that claimant asserted his post-injury earnings do not represent his wage-earning capacity and thus that claimant bore the burden of proof on this issue, specifically requiring that he prove that his wage-earning capacity includes more overtime pay. After accepting claimant's evidence that he worked 427.75 hours of overtime in the year preceding his injury, and 88 overtime hours from September 12, 1994 through September 12, 1995, the administrative law judge concluded that the mere decrease in the number of overtime hours worked by claimant after his injury compared to the number of overtime hours worked before the injury was not enough to sustain claimant's burden of establishing that he lost overtime due to his injury. Lastly, the administrative law judge cited the testimony of Mr. Twine, claimant's supervisor, that overtime at employer's shipyard fluctuates depending upon numerous variables.

We agree with claimant that the administrative law judge's determination that he failed to establish a loss of overtime earnings during the period from August 15, 1994 through April 17, 1995, cannot be affirmed. In determining whether a loss of overtime hours constitutes a loss in wage-earning capacity, the focus should be on whether claimant's loss of previously available overtime was due to his work-related injury; thus, claimant must establish that, absent his injury, he would have worked available overtime. *See Brown*, 23 BRBS at 110; *Grimes v. Exxon Co., U.S.A.,* 14 BRBS 573 (1981). In the instant case, it is uncontested that claimant worked substantial overtime hours prior to his injury. Subsequent to claimant's work-related foot injury, Dr. Morales placed claimant on numerous physical restrictions. The evidence of record establishes that claimant was not offered any overtime hours during his four months of post-injury employment while working in the light duty groundskeeping position.[1] Moreover, claimant provided testimony that working overtime was virtually mandatory in the pipe shop and that prior to his injury he never turned overtime down. *See* Tr. at 23. This testimony was corroborated by Mr. Twine, who testified that employees are required to work overtime when requested by a supervisor. *Id*. at 39-40.

[1]Claimant's testimony that overtime was not available to him during his four months in the groundskeeping department was uncontested. Tr. at 23.

Claimant also testified that because of the restrictions imposed on him, including limiting the number of overtime hours he could work per week, he could not perform the full job of a pipefitter after he returned to employer's pipe shop. *Id*. at 20. Again, Mr. Twine corroborated this testimony when he stated that he understood claimant's restrictions to mean that he could not work aboard ships, and that a good deal of overtime is worked aboard ships. *Id*. at 44. Lastly, claimant testified that overtime continued to be available to other employees in the pipe shop. *Id* at 23. In this regard, while the administrative law judge credited Mr. Twine's testimony that the amount of available overtime depends on numerous variables, he never made a determination as to how much overtime was available to pipe shop workers. Although Mr. Twine stated that 1994 was a "slack" year, *id*. at 37, he later stated that 427 hours of overtime in a year was average for a pipe shop employee. *Id.* at 47.

As claimant argues, the administrative law judge never considered the totality of his and Mr. Twine's testimony when addressing the issue of claimant's loss of wage-earning capacity. If credited, this testimony could demonstrate that claimant sustained a loss of overtime due to his injury. *See, e.g., Brown*, 23 BRBS at 113. Based on the foregoing, the administrative law judge's denial of temporary partial disability benefits is vacated, and the case is remanded for the administrative law judge to determine whether claimant demonstrated a loss of overtime from August 15, 1994, through April 17, 1995, due to his work-related injury, and thus, entitlement to temporary partial disability compensation during that period of time.[2] *See, e.g., Brown*, 23 BRBS at 113; *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 137 (1987).

In its cross-appeal, employer challenges the administrative law judge's finding that claimant reached maximum medical improvement on April 18, 1995, rather than on August 10, 1994. Specifically, employer contends that since Dr. Morales's office notes reflect that claimant's physical condition had not changed between August 10, 1994 and May 24, 1995,

[2]We reject employer's contention that claimant should not be entitled to temporary partial disability from March 13, 1995 through April 17, 1995, because he earned in excess of his pre-injury wage for this period. A claimant may still be entitled to temporary partial disability compensation even where post-injury earnings are greater than his average weekly wage, as compensation is based on earning capacity. *See, e.g., Sproull v. Director, OWCP*, 86 F.3d 895, 898-899, 30 BRBS 49, 50-51 (CRT)(9th Cir. 1996), *cert. denied*, 117 S.Ct. 1333 (1997).

the administrative law judge erred in accepting Dr. Morales's opinion that April 18, 1995, was the date of maximum medical improvement. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Thus, a finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bouder Welding & Machine Co.,* 16 BRBS 307 (1984). In his decision, the administrative law judge relied upon the testimony of Dr. Morales in determining the date upon which claimant's condition reached maximum medical improvement.

Dr. Morales's office notes from August 10, 1994 through May 24, 1995 reflect that claimant's foot remained symptomatic, that he continued to treat claimant's condition with physical therapy, and that he maintained restrictions on claimant. Cl. Ex. 4. In a March 28, 1995 letter, Dr. Morales stated that claimant would reach maximum medical improvement on April 18, 1995. Cl. Ex.7a. Although the administrative law judge noted that Dr. Morales's office notes undermine his conclusion that claimant reached maximum medical improvement on April 18, 1995, the administrative law judge found that the physician's conclusion was not undermined to the extent that he could set it aside and substitute some other date. In support of this conclusion, the administrative law judge noted that Dr. Morales's opinion was uncontradicted by any other physician. Indeed, the administrative law judge's finding on this issue is supported by the opinion of Dr. McCoy, who stated in his February 3, 1995 report that claimant had not reached maximum medical improvement. Cl. Ex. 8b. Thus, in rendering his determination on this issue, the administrative law judge specifically considered the totality of the record evidence, and thereafter concluded that claimant reached maximum medical improvement on April 18, 1995. As the record contains substantial medical evidence to support the administrative law judge's determination, we affirm his finding that claimant reached maximum medical improvement on April 18, 1995. *See Ion v. Duluth, Missabe and Iron Range Railway Co.*, 31 BRBS 75 (1997); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989).

Accordingly, the administrative law judge's denial of claimant's claim for temporary partial disability compensation from August 15, 1994 through April 17, 1995 is vacated and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge