BRB No. 02-0294

LONNIE SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: Jan. 9, 2003
	)	
Self-Insured Employer-Respondent	)	
		DECISION and ORDER

Appeal of the Decision and Order and Order Granting in Part and Denying in Part Employer's Motion for Reconsideration and Denying Claimant's Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr. (Law Office of William S. Vincent, Jr.), New Orleans, Louisiana, for claimant.

Joseph J. Lowenthal, Jr., and Christopher S. Mann (Jones, Walker, Wachter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Granting in Part and Denying in Part Employer's Motion for Reconsideration and Denying Claimant's Motion for Reconsideration (00-LHC-2931) of Administrative Law Judge James W. Kerr, 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 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).

Claimant was injured during the course of his employment for employer in the

scaffolding department, when the side mirror of a truck struck his left shoulder on April 22, 1996. Claimant continued working for employer until he underwent an acromioplasty in February 1997. CX 6. Claimant returned to work for employer in June 1997 in the electrical department on board ships. He required a second left shoulder surgery on October 16, 1997. CX 3. Claimant returned to work for employer on January 7, 1998, with permanent restrictions barring lifting over 20 pounds and overhead work. CX 1; Tr. at 35. Thereafter, claimant was assigned to the electrical layout department, where he worked outdoors. Employer voluntarily paid claimant compensation for all periods of temporary total disability. The parties agreed that claimant's left shoulder condition reached maximum medical improvement on January 6, 1998. Claimant underwent an arthrogram of his left shoulder on September 20, 1999, after which his work restrictions were amended to prohibit repetitive pulling with the left arm. Claimant sought compensation for permanent partial disability based on a loss of wage-earning capacity due to loss of overtime and employer's inability to provide suitable work in the electrical layout department when it rained. Claimant also sought compensation based on a higher average weekly wage than that calculated by employer.

In his decision, the administrative law judge found that claimant did not sustain a loss of wage-earning capacity prior to his shoulder reaching maximum medical improvement on January 6, 1998, because claimant voluntarily declined overtime. The administrative law judge also found that claimant did not sustain a loss in wage-earning capacity after reaching maximum medical improvement in January 1998, crediting evidence that claimant was offered overtime when it was available, but chose not to work. Additionally, the administrative law judge found no evidence that claimant lost wages when he was unable to work due to inclement weather. The administrative law judge further determined that claimant is not entitled to a *de minimis* award. He reasoned that no doctor opined that claimant's condition would worsen such that his future earnings would be affected and claimant earns $1.53 per hour more than he earned at the time of injury, concluding that there is not a significant possibility of economic harm in the future due to claimant's left shoulder condition. The administrative law judge determined claimant's average weekly wage under Section 10(a) of the Act, 33 U.S.C. §910(a). The administrative law judge agreed with employer's calculation, which divided by 52 claimant's total wages earned in the year prior to his work injury. On reconsideration, the administrative law judge employed the same methodology to calculate claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), finding it is unclear whether claimant was a five- or six-day per week employee.

On appeal, claimant contends the administrative law judge erred in his average weekly wage determination, in finding no loss of wage-earning capacity either before or after claimant's shoulder condition reached maximum medical improvement, and by denying a *de minimis* award. Employer responds, urging affirmance.

Claimant initially challenges the administrative law judge's average weekly

wage determination. Specifically, claimant contends that the administrative law judge erred by relying on claimant's total earnings during the year preceding the April 22, 1996, work injury instead of on the hourly rate, $13.03, claimant earned at the time of injury, which would fully incorporate a 44-cent per hour raise he received in January 1996.

Section 10(c) of the Act is a catchall provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). The goal of Section 10(c) is to calculate a reasonable approximation of claimant's annual wage-earning capacity at the time of the injury. *See generally New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997). In arriving at this approximation, it is proper for a Section 10(c) computation to reflect an increase in wages claimant received before the injury. *See Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986). In this case, the administrative law judge determined that claimant's average weekly wage is $550.14, by dividing by 52 claimant's total earnings of $28,607.28 during the year preceding his work injury. On reconsideration, the administrative law judge found that it would be "an unfair and unreasonable windfall" to adjust claimant's average weekly wage for the first eight months before the work injury to reflect the raise claimant received four months prior to his injury. Order on Recon. at 3.

We vacate the administrative law judge's calculation of claimant's average weekly wage. The goal of Section 10(c) is to approximate the earnings claimant had the potential and opportunity to earn absent injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). Rather than resulting in a "windfall" to claimant as the administrative law judge found, the use of claimant's hourly wage at the time of injury fully compensates claimant for the earnings he lost due to his injury. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). Specifically, absent his work injury, claimant would have earned an average weekly wage after April 22, 1996, that fully incorporated the 44-cent per hour raise he received four months prior to the date of injury. Thus, we hold that, pursuant to Section 10(c), claimant's average weekly wage at the time of injury must be determined using his hourly wage rate at that time, rather on claimant's total earnings during the year preceding his work injury. *See Le*, 18 BRBS at 177. Accordingly, we vacate the administrative law judge's average weekly wage finding, and we remand for the administrative law judge to re-calculate claimant's average weekly wage utilizing claimant's hourly wage rate of $13.03 at the time of injury.

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[1]The administrative law judge's use, on reconsideration, of Section 10(c) to calculate claimant's average weekly wage is unchallenged on appeal.

We next address claimant's contention that the administrative law judge erred in finding that he did not sustain a loss of wage-earning capacity due to his work injury. An award for permanent partial or 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(c)(21), (e); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). 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 fact that claimant received actual post-injury wages equal to or greater than his pre-injury earnings does not mandate a conclusion that claimant has no loss of wage-earning capacity. *See generally Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). If claimant's actual earnings do not represent his wage-earning capacity, the administrative law judge must determine a reasonable dollar amount that does. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). In either case, relevant considerations include the employee's physical condition, age, education, industrial history, and availability of employment which he can do post-injury. 33 U.S.C. §908(h); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Penrod Drilling Co.,* 905 F.2d 84, 23 BRBS 108(CRT). Loss of overtime also is a factor in determining post-injury wage-earning capacity; claimant must establish that, absent his injury, he would have worked available overtime. *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989). Finally, in determining a claimant's post-injury earnings, the administrative law judge must use the wage rates for the post-injury job in effect at the time of the injury in order to neutralize the effect of inflation. *See, e.g., Sestich v. Long Beach Container Terminal,* 289 F.3d 1187, 36 BRBS 15(CRT) (9th Cir. 2002); *Richardson v. General Dynamics Corp.,* 23 BRBS 327 (1990).

In this case, employer provided claimant with suitable employment at its facility when he was released to return to work with restrictions due to his shoulder condition. Regarding the period before his shoulder condition reached maximum medical on January 6, 1998, claimant asserts he sustained a loss in wage-earning capacity based on a lack of overtime in various departments to which he was assigned when he was able to work, and his inability to "hustle" overtime in other departments due to his work restrictions. The administrative law judge did not address this contention in his initial decision. On reconsideration, the administrative law judge found no loss of wage-earning capacity before claimant's shoulder condition reached maximum medical improvement "for the same reasons that support no loss of wage-earning capacity after Claimant reached maximum medical improvement, namely that claimant made a personal choice not to perform overtime..." Order on Recon. at 4.

The administrative law judge relied on the testimony of claimant and claimant's supervisors, regarding his work after he reached maximum medical improvement on January 6, 1998, to find that claimant refused to work available overtime before January 1998. Decision and Order at 8-9. Jerry Martin is the general foreman of the electrical department. Johnny Rome is claimant's first line supervisor in the electrical layout department. Mr. Martin and Mr. Rome testified that claimant did not begin working for them until sometime in 1998 or early 1999. EXS 10 at 12-13; 11 at 16-20. They did not testify that claimant refused overtime prior to his working for them. The testimony of claimant that the administrative law judge cited also does not address his refusing overtime before January 1998, *see* Tr. at 65-67, and claimant submitted into evidence records showing that he worked fewer hours after his injury than he did before his injury. CX 10. Accordingly, we cannot find evidentiary support for the administrative law judge's conclusion on reconsideration that claimant did not sustain a loss of wage-earning capacity in the period before reaching maximum medical improvement. *See generally Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 356 (3d Cir. 1997). Because substantial evidence does not support the administrative law judge's denial of partial disability benefits prior to claimant's reaching maximum medical improvement, we vacate the administrative law judge's denial of compensation for temporary partial disability. As the administrative law judge must in the first instance evaluate the evidence regarding claimant's wage-earning capacity during the period in question, we remand this case to the administrative law judge for reconsideration of whether claimant established that his injury precluded his working available overtime. *See* 5 U.S.C. §557(c)(3)(A); *McCurley v. Kiewest Co*., 22 BRBS 115 (1989).

Claimant also asserts he sustained a loss in wage-earning capacity after his shoulder condition reached maximum medical improvement on January 6, 1998, based on a lack of available overtime, and, after his assignment to the electrical layout department, due to his inability to work outside during inclement weather. On reconsideration, the administrative law judge found no evidence that claimant missed work when the weather was inclement. Order on Recon. at 4. The administrative law judge determined that claimant did not submit time cards to support his assertion, and that the time sheets in evidence do not indicate claimant was sent home when it rained.

CXS 2, 10. With regard to overtime, the administrative law judge noted the testimony of Mr. Miller and Mr. Rome that daily overtime was available, which entailed working ten-hour days and occasional work on Saturdays. EX 10 at 18-22; *see also* Tr. at 84-86. The administrative law judge credited Mr. Rome's testimony

[2]There is no support for the administrative law judge's inference that the time cards that were not submitted into the record by employer would, or should, support claimant's testimony of a weather-related loss in wage-earning capacity, as there is no evidence that such information appears on the time cards.

that claimant refused daily overtime because he needed to catch a ride home, EX 11 at 16-19, and claimant's testimony that he, at times, chose not to perform overtime on Saturdays due to a previous commitment, and because he wanted to spend more time with his daughter, Tr. at 66-67, 85.

We cannot affirm the administrative law judge's finding that there is no evidence supporting claimant's contention that he sustained a loss in wage-earning capacity after his condition reached maximum medical improvement. Claimant's assertion is premised on evidence showing that he averaged 43.24 hours a week during the year preceding his April 23, 1996, work injury, 37.94 hours after the date of injury to January 6, 1998, when his shoulder condition maximum medical improvement, and 34.46 hours thereafter, when, at an undetermined date, he was assigned to the electrical layout department. CX 10. Claimant asserted that the reduction in his work week is due, in part, to his being sent home when it rained, and in part to the unavailability of overtime in his post-injury positions. Claimant and his supervisor, Mr. Rome, testified to the unavailability of work in the electrical layout department when it rained. Tr. at 41; EX 11 at 8. Thus, there is evidence supporting claimant's contention that, in the suitable job provided by employer, he worked fewer hours post-injury due to inclement weather, and there is no evidence to the contrary. *See generally Newport News Shipbuilding & Dry Dock Co. v. Stallings*, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001), *aff'g in pert. part* 33 BRBS 193 (1999). Accordingly, we vacate the administrative law judge's denial of partial disability benefits after January 6, 1998, and we remand for the administrative law judge to address the relevant evidence of record in this regard.

On remand, the administrative law judge also must reconsider his finding that claimant refused available overtime when he worked for employer in the electrical layout department. If less overtime is available in the light duty positions to which claimant was assigned or if claimant is unable to work available overtime due to his injury, claimant has established a basis for an award of partial disability benefits. *See Everitt v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). If, however, claimant declines available overtime for reasons other than his injury, claimant is not entitled to benefits for a loss of overtime. *See generally Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987). On appeal, claimant challenges the administrative law judge's reliance of the testimony of Mr. Miller and Mr. Rome on the basis that he was not working in the electrical layout department during much of the time they testified overtime was actually available in

that department.

[3]Claimant also challenges the administrative law judge's finding that he refused overtime to spend more time with his daughter. In this regard, claimant testified that he worked fewer hours for this reason at a second job as a security guard with another employer. Tr. at 94. The administrative law judge must address this testimony on remand. However, we reject claimant's challenge to various alleged inconsistencies in the testimony of Mr. Miller and Mr. Rome, as the administrative law judge may credit parts of a witness's testimony and disregard other parts. *Avondale Shipyards v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990).

In support of this assertion, claimant notes that the administrative law judge granted his subpoena requesting documentation from employer showing when, after his return to work in January 1998, claimant transferred from the cable department to electrical layout. *See* Feb.1, 2001, letter from claimant's attorney to the administrative law judge and the attached exhibit list at #10. Claimant alleged that these documents would support his assertion that he was not working in the electrical layout department when overtime was available there, and that overtime was not available in the cable department. Claimant also averred that the records would establish that he did not refuse available overtime. At the hearing, the administrative law judge granted employer's motion to leave the record open for two weeks post-hearing in order for it to comply with claimant's subpoena. Tr. at 20-22. Employer, however, never submitted the requested documentation. In his decisions, the administrative law judge did not address employer's noncompliance with claimant's subpoena. Accordingly, we must vacate the administrative law judge's findings regarding the availability of and claimant's willingness to work overtime after his condition reached maximum medical improvement. On remand, the administrative law judge must either afford employer another opportunity to submit the subpoenaed information or address employer's failure to comply with claimant's subpoena requesting this information. *See generally Denton v. Northrop Corp.*, 21 BRBS 37 (1988) (discussing the adverse inference rule). The administrative law judge then must reassess the issue of claimant's loss in wage-earning capacity due to the alleged loss of overtime in light of any evidence employer submits in accordance with the subpoenaed documents.

Finally, claimant contends that the administrative law judge should, in the alternative, have found him entitled to a *de minimis* award. Claimant argues that his permanent work restrictions prohibiting lifting over 20 pounds, overhead work, and repetitive pulling with his left arm render it highly likely that he would sustain a loss of wage-earning capacity should employer discharge him from light duty employment. A claimant is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity, but there is a significant potential of future economic harm due to the injury. *Metropolitan Stevedore Co. v. Rambo [Rambo II],* 521 U.S. 121, 31 BRBS 54(CRT) (1997). In his order on reconsideration, the administrative law judge denied a *de minimis* award. The administrative law judge found that none of the physicians who examined claimant opined that his shoulder condition would worsen, and there is no evidence of

[4]In denying a nominal award, the administrative law judge first noted that claimant did not request such an award until after his decision was issued. Such an award, however, is encompassed within a claim for a greater partial disability award. *See Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *vacated and remanded on other grounds*, 521 U.S. 121 (1997).

unavailable jobs or that claimant's injury is likely to cause future economic harm. Order on Recon. at 5. The administrative law judge therefore concluded that the evidence does not support claimant's assertion of a significant possibility of future economic harm. As the administrative law judge's conclusion is rational, supported by substantial evidence and in accordance with law, it is affirmed. *See Price v. Stevedoring Services of America*, 36 BRBS 56 (2002); *Buckland v. Dept. of the Army,* 32 BRBS 99 (1997).

Accordingly, the administrative law judge's Decision and Order and Order Granting in Part and Denying in Part Employer's Motion for Reconsideration and Denying Claimant's Motion for Reconsideration are vacated, and the case is remanded for further consideration of claimant's average weekly wage and post-injury wage-earning capacity consistent with this opinion. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

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Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge

[5]The administrative law judge also relied on the fact that claimant is currently earning $1.53 more per hour than he earned prior to his work injury. This fact is relevant to claimant's wage-earning capacity if his increased wage rate is due to promotions or other merit-based enhancements. If, however, claimant's rate increased only as a result of cost-of-living adjustments, it does not indicate an increased wage-earning capacity as inflationary effects on earnings are discounted in computing post-injury wage-earning capacity. *See, e.g., Sestich v. Long Beach Container Terminal,* 289 F.3d 1187, 36 BRBS 15(CRT) (9th Cir. 2002); *Richardson v. General Dynamics Corp.,* 23 BRBS 327 (1990); CX 10.