BRB No. 87-1593

GUILLERMO GARCIA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	DATE ISSUED:
TODD SHIPYARDS CORPORATION	)	
	)	
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

William H. Shibley, Long Beach, California, for claimant.

Daniel F. Valenzuela (Samuelsen, Coalwell & Gonzalez), San Pedro, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (86-LHC-140) of Administrative Law Judge Thomas Schneider denying benefits 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 February 25, 1982, claimant sustained an injury to his lower back in the course of his employment as a shipfitter. Claimant received compensation for temporary total disability from March 9, 1982 to July 2, 1982, and employer also paid claimant $672.66 in compensation for permanent partial disability. Claimant sought a continuing award for loss of wage-earning capacity.

After consideration of the evidence, the administrative law judge denied the claim, concluding that claimant did not have a loss of wage-earning capacity. In so determining, the administrative law judge considered various factors. The administrative law judge found that since the injury claimant has been working at his usual job as a shipfitter. The administrative law judge then found that although claimant testified he occasionally works with pain, the record showed no substantial loss of time from work. Next, the administrative law judge found that claimant's average weekly wage has increased.[1] Finally, the administrative law judge found that claimant had recently volunteered for overtime.

On appeal, claimant contends that the administrative law judge erred in not finding that he has a loss of wage-earning capacity from his injury. Claimant argues that, in any event, the administrative law judge should have found that he was entitled to a de minimis award. Employer responds, urging affirmance of the denial as supported by substantial evidence and arguing that the administrative law judge properly did not enter a de minimis award because the evidence of record would not support such an award.

Claimant first contends that it was error for the administrative law judge to deny benefits based on the fact that claimant did not have an actual wage loss subsequent to the injury. In support of this contention, claimant argues that the administrative law judge failed to adequately review the medical records and to explain why the disability expressed by the various doctors did not translate into a theoretical loss of wage-earning capacity. Claimant further argues with respect to this contention that the administrative law judge failed to specifically address the issue of his wage-earning capacity in the open labor market. We disagree.

The wage-earning capacity of an injured employee such as claimant shall be determined by his actual post-injury earnings if such earnings fairly and reasonably represent his wage-earning capacity. See 33 U.S.C. §908(h). In the event that claimant's actual post-injury earnings "do not fairly and reasonably represent his wage-earning capacity," Section 8(h) provides that a wage-earning capacity may be set using factors such as the nature of the injury, the degree of physical impairment, the usual employment, and any other factors which may affect the capacity to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future. See generally Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649 (1979). Moreover, the United States Court of Appeals for the

[1] Claimant's average weekly wage at the time of the hearing in 1986 from regular employment was approximately $220 higher than his average weekly wage at the time of the injury which the parties stipulated was $454.66. H.Tr. at 12-13.

Ninth Circuit, in whose jurisdiction this case arises, has stated that higher post-injury earnings do not preclude compensation if claimant has, nevertheless, suffered a loss of wage-earning capacity. See Container Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).

Contrary to claimant's contention, the administrative law judge properly considered the evidence of record in determining that claimant's actual wages reflect his wage-earning capacity. The administrative law judge found that at the time of claimant's last examination by Dr. Latteri on August 11, 1982, the only factor indicative of disability was slight pain that increased with certain activities, such as bending, lifting, or squatting. Dr. Latteri stated claimant had an eight percent whole man impairment, but he placed no formal work restrictions on claimant. The administrative law judge also noted that Dr. Murphy, who examined claimant on October 10, 1982, on behalf of employer, evaluated claimant's pain as "constant minimal" that might occasionally increase to "slight."

The administrative law judge then evaluated the medical diagnoses in the context of claimant's ability to perform the duties of his job. In this regard, the administrative law judge found that since claimant's 1982 injury he had returned to his usual work as a shipfitter. While the administrative law judge noted claimant's testimony that he occasionally works with pain, the administrative law judge found that claimant's employment records show no substantial loss of time except when claimant subsequently sustained injuries to his knee and foot. Additionally, the administrative law judge found that claimant's average weekly wage has increased, and that claimant had recently volunteered for overtime. Lastly, the administrative law judge rejected claimant's contention that pain was an appropriate consideration in this case, citing claimant's lack of consultation with a doctor about his back for more than four years, the absence of medication for the condition, and the lack of time lost from work due to his back pain. The administrative law judge thus concluded that claimant's present earnings fairly and reasonably represent his wage-earning capacity and that he did not sustain a loss thereof due to his injury. As this finding is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant does not have a loss of wage-earning capacity.[2] Burkhardt v. Bethlehem Steel Corp., 23 BRBS 273

[2] As the administrative law judge rationally concluded that claimant's actual wages fairly and reasonably represent his wage-earning capacity, he did not need to consider claimant's wage-earning capacity on the open market. See generally Peele v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 133 (1987); 33 U.S.C. §908(h).

(1990). Similarly, claimant's contention that the administrative law judge erred in not ordering a de minimis award is without merit. In cases where a de minimis award has been deemed appropriate, the claimant has established the existence of a medical impairment and that there is a significant possibility of future economic harm as a result of this impairment. See generally Burkhardt, 23 BRBS at 277-278; Mavar v. Matson Terminals, Inc., 21 BRBS 336 (1988). In the instant case, claimant did not sustain his burden of proving that he has met these criteria, as the administrative law judge specifically found that claimant has not consulted a doctor about his back for more than four years, has taken no medication for a back condition, and has lost no time because of the injury in recent years. Moreover, the record indicates that no formal work restrictions were placed on claimant's activities. See Burkhardt, 23 BRBS at 278.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.[3]

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[3] We note that claimant has not responded to the Board's Order dated August 28, 1992, which notified claimant that the Board's data processing system shows that on January 26, 1988 the Board received a motion to remand from claimant, which the Board has been unable to locate, and gave claimant 10 days to provide a copy.