BRB No. 90-1125

RAYMOND SANDERLIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	
AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Theodor P. Von Brand, Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz (Rabinowitz, Rafal, Swartz, Tallaferro & Gilbert, P.C.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason), Newport News, Virginia, for self-insured employer.

BEFORE: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (88-LHC-1739) of Administrative Law Judge Theodor P. Von Brand 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 if they 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).

While working for employer as a welder, claimant fractured and dislocated his right shoulder on March 21, 1984. Claimant returned to light duty work for employer, underwent surgery for his shoulder on September 11, 1985 and May 27, 1987, and thereafter resumed light duty work. On November 18, 1987, Dr. Fithian opined that claimant suffered a 15

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, U.S.C. §921(b)(5)(1988).

percent permanent disability to his shoulder and was unable to perform overhead welding. Claimant testified that, since his injury, he has been unable to weld on board ships, but has continued as a first

class specialist doing table work and horizontal and vertical welding. Claimant testified that he still has discomfort when he holds his arm out too long, that it takes him a little longer to do his work and that he feels he is unable to work nights because of the cold, damp air. Upon discussing this problem with his doctor, his doctor asked him if working days would help. Claimant said it might, whereupon his doctor suggested he give it a try but stated he could not tell claimant whether to return to days or not. Claimant was subsequently placed back on days. Tr. 22-24, 27. Claimant's supervisor testified that claimant does good work and is in no danger of losing his job. Employer voluntarily paid claimant benefits for temporary total disability for various periods of time from March 23, 1984 through June 30, 1987, and for a 5 percent permanent partial disability to claimant's upper left extremity. 33 U.S.C. §908(b), (c)(1).

In his Decision and Order, the administrative law judge found that claimant's post-injury earnings represented his wage-earning capacity and that claimant did not suffer a post-injury loss in wage-earning capacity because claimant had returned to work in his prior department as a first class specialist with no reduction in pay, that claimant's job is not "make-work" but is rather an integral part of the shipbuilding process, and that claimant's job was regular, continuous, and within his physical restrictions. Additionally, the administrative law judge determined that claimant had worked more overtime in the year following his injury than in the two years preceding his injury. Lastly, the administrative law judge modified claimant's average weekly wage, calculated pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a), to $455, thus yielding a compensation rate of $303.03.

On appeal, claimant contends that the administrative law judge erred in failing to find that he has a post-injury loss in wage-earning capacity, and in the calculation of his average weekly wage. Employer responds, urging affirmance.

Claimant initially contends that the administrative law judge erred in determining that claimant's work injury did not decrease his wage-earning capacity. *See* 33 U.S.C. §908(c)(21), (h). Pursuant to Section 8(c)(21) of the Act, an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act 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. *Abbott v. Louisiana Insurance Guaranty Association*, BRBS , BRB No. 91-1991 (Sept. 28, 1993); *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991)(Brown, J., dissenting on other grounds). If such earnings do not represent claimant's wage-earning capacity, the administrative law judge is authorized to calculate a dollar amount which reasonably represents claimant's wage-earning capacity. *See* 33 U.S.C. §908(h); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, and claimant's earning power on the open market. *Sproull*, 25 BRBS at 109; *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979). Should claimant's post-injury work be found to be continuous and stable, his

post-injury earnings are more likely to reasonably and fairly represent his wage-earning capacity. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Relevant questions include whether the work is suitable, claimant is physically capable of performing it, and claimant has the seniority to stay in the job. *See Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). If it is found that claimant's current employment meets the aforementioned standards, the open market factor is irrelevant, and claimant may not be economically disabled even though he continues to suffer some physical impairment as a result of his injury. *See Cook*, 21 BRBS at 6; *Darcell v. FMC Corp., Marine and Rail Equipment Div.*, 14 BRBS 294 (1981).

In this case, the administrative law judge, in determining that claimant did not suffer a loss in wage-earning capacity, considered many of the factors cited in *Devillier, i.e.*, claimant's physical limitations, the beneficence of a sympathetic employer, any loss of overtime, and the stability of claimant's work. Specifically, the administrative law judge determined that claimant has returned to his position as a first class specialist in the same department without a loss of pay, that claimant's job is regular, continuous, and within his physical capabilities, and that claimant is in no danger of losing his job. *See* Decision and Order at 8. The administrative law judge further found that claimant had not established a loss of overtime, since the record indicates that claimant worked more overtime following his injury than before it.[1] We affirm the administrative law judge's finding that claimant's post-injury earnings represent his wage-earning capacity and that claimant has not established a post-injury loss in wage-earning capacity, as those findings are rational and supported by substantial evidence. *See Long*, 767 F.2d at 1578, 17 BRBS at 149 (CRT).

Claimant next contends that the administrative law judge's average weekly wage calculation pursuant to Section 10(a) was erroneous. We disagree. Section 10(a) is to be applied when an employee worked "substantially the whole of the year" immediately preceding his injury.[2] 33 U.S.C. §910(a); *see Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). Section 10(a) requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. This average daily wage must then be multiplied by 260 if claimant was a five-day per week worker; the resulting figure is then to be divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. *See* 33 U.S.C. §910(a); *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290 (1978). Thus, Section 10(a) seeks to approximate claimant's annual earnings. *See generally Johnson v. Newport News Shipbuilding and Dry Dock Co.*, 25 BRBS 340, 343 n.4 (1992); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990).

In the instant case, the administrative law judge, after stating that the actual number of days for which claimant was compensated could not be determined from the record, calculated claimant's average daily wage by adding claimant's hourly wage rate and his average daily overtime earnings and multiplying the resulting sum by 8, thus yielding an average daily wage of $91. The administrative law judge proceeded to multiply this average daily wage by 260; the resulting figure,

[1]Claimant's employment record reveals that claimant worked 8 hours of overtime in the year preceding his injury, and 32.7 hours of overtime in 1985. *See* CX-12, p.1.

[2]As neither party challenges the administrative law judge's use of Section 10(a) to calculate claimant's average weekly wage, the administrative law judge's use of that subsection is affirmed.

$23,660, was then divided by 52 to yield a statutory average weekly wage of $455. We hold that the result reached by the administrative law judge under Section 10(a) is supported by substantial evidence and rationally approximates claimant's annual earnings; we therefore affirm the administrative law judge's finding that claimant's average weekly wage at the time of his injury was $455. *See O'Connor*, 8 BRBS at 290.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge