BRB No. 90-1777

WILLIAM FORD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order and Decision Denying Reconsideration of Samuel B. Groner, Administrative Law Judge, United States Department of Labor.

Charles P. Monroe (Friedlander, Misler, Friedlander, Sloan & Herz), Washington, D.C., for the claimant.

Benjamin T. Boscolo, Greenbelt, Maryland, for the self-insured employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order and Decision and Order Denying Reconsideration (88-DCW-8) of Administrative Law Judge Samuel B. Groner awarding 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*. (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (the 1928 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).

Claimant sustained injuries to his neck, lower back, and legs while working as a bus driver for employer on April 7, 1979. Employer voluntarily paid claimant temporary total disability benefits from April 7, 1984, until October 11, 1984, when he returned to work for

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

employer as a bus driver. Based on his seniority, claimant bid for and eventually was transferred to

a position as a Metro subway station attendant on November 15, 1987. Claimant testified that he sought the station attendant job because it was less physically demanding than the bus driving job which caused him to experience continuous back pain. Claimant filed a claim for permanent partial disability benefits under the Act, contending that he sustained a loss in his wage-earning capacity in that his transfer to the station attendant position resulted in both a five percent reduction in his base salary and a loss of overtime wages.

The administrative law judge denied claimant permanent partial disability benefits for the period between October 11, 1984 and November 15, 1987 when he was performing his pre-injury job as bus driver, finding that claimant failed to establish any loss of overtime opportunities resulting from his work injury. The administrative law judge concluded, however, that claimant was entitled to permanent partial disability compensation benefits under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), as of November 15, 1987, when he transferred to the station attendant position. Crediting claimant's subjective complaints of pain while driving the bus post-injury, the administrative law judge determined that his transfer to the lower base pay position of a station attendant had not been voluntary. The administrative law judge further found that claimant's actual post-injury earnings as a station attendant did not fairly or reasonably reflect his reduced post-injury earning capacity because overtime was not guaranteed in that position.

Accordingly, the administrative law judge determined that claimant sustained a loss of wage-earning capacity of $112.50 per week upon his transfer to the station attendant position. He calculated the loss by subtracting the weekly base salary, without overtime, of a station attendant at the time of claimant's injury, $337.44 ($8.436 per hour times 40 hours), from claimant's actual weekly earnings, including overtime, as a bus operator at the time of injury, which the parties stipulated was $449.94. Employer's motion for reconsideration, in which it argued that the administrative law judge erred in including overtime in determining claimant's average weekly wage at the time of injury and then excluding claimant's actual overtime earnings in determining his post-injury wage-earning capacity, was denied. Employer appeals the administrative law judge's finding that claimant sustained a loss in his wage-earning capacity. Claimant responds, urging affirmance.

On appeal, employer initially contends that the Board should conclude as a matter of law that the administrative law judge erred in failing to calculate claimant's post injury wage-earning capacity based on his actual post-injury earnings as a bus operator. Employer asserts that claimant's ability to perform this work is evidenced by the fact that he successfully did so from October 1984 until November 1987, the fact that he was recertified to operate a bus without restrictions or limitations after undergoing an annual Department of Transportation (DOT) examination on March 5, 1987, and the fact that no physician affirmatively indicated that claimant was unable to operate a bus prior to Dr. Green's February 1987 report. Employer thus contends that claimant's work as a bus driver reasonably represented his post-injury earning capacity and that inasmuch as the administrative law judge reasonably found that claimant suffered no wage-earning capacity loss during the period he was working as a bus driver from 1984 to 1987, claimant's permanent partial disability claim should have been denied. In the alternative, employer avers that the administrative law judge erred in calculating claimant's loss in wage-earning capacity in his position as a station attendant by

including overtime wages in determining claimant's pre-injury average weekly wage while excluding them in determining his post-injury wage-earning capacity based on his determination that overtime was not guaranteed. Employer asserts that overtime was readily available in the station attendant position and that claimant averaged 14.68 hours of overtime in the period between January and April 30, 1988. Employer contends that as there is no evidence in the record to support the administrative law judge's finding that overtime was not guaranteed in the station attendant's position, this finding should be reversed, and that when claimant's overtime wages are added to his post-injury earnings, it is evident that claimant did not sustain any loss of wage-earning capacity.

Under Section 8(c)(21), 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. 33 U.S.C. §908(c)(21). 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. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *Id.*, 725 F.2d at 797, 16 BRBS at 61 (CRT); *see Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985). 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, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *Id.*, 725 F.2d at 797, 16 BRBS at 64 (CRT); *see Darcell v. FMC Corp., Marine and Rail Equip. Division*, 14 BRBS 294 (1981); *Devillier v. National Steel Shipbuilding Co.*, 10 BRBS 649, 658 (1979).

After careful review of the record, we affirm the administrative law judge's finding that claimant's post-injury work as a bus driver did not fairly and reasonably represent his wage-earning capacity. The administrative law judge in the present case reasonably found that the residuals from claimant's work-related back injury precluded him from continuing to perform this work without undue pain and necessitated his transfer to the station attendant position. While it is claimant's burden to establish he is unable to perform his former employment due to his work injury, claimant's credible complaints of pain may constitute substantial evidence to meet his burden of proof. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53, 56 (1992). In the instant case, the administrative law judge found credible claimant's testimony regarding pain experienced while driving a bus despite the fact that numerous physicians who had examined claimant since his action could not find any anatomical basis for his complaints. The administrative law judge noted that with the exception of Dr. Gordon, none of the doctors had suggested that claimant's pain was not genuine. The administrative law judge further noted that since his return to work as a bus driver in 1984, claimant had complained consistently about residual back pain, and that he had had the bus he customarily drove fitted with a special cushion to ease the jarring and bouncing which he encountered.

The administrative law judge also credited claimant's testimony that he bid on the station attendant position because that position was easier than the bus driver position, which not only required him to sit continuously for long periods of time, Tr. at 23, but also required a great deal of physical movement inside the bus while driving. Tr. at 41. Moreover, the administrative law judge noted that several of the physicians who examined claimant, Drs. Abend, Stevens, and Green, suggested that a person in claimant's condition could not safely drive a bus. Based on this evidence, the administrative law judge concluded that claimant did indeed suffer the pain he described and that the degree of his pain was such that he could not be charged with the obligation to operate a bus. Inasmuch as claimant's testimony, as corroborated in part by the medical opinions of Drs. Abend, Stevens and Green, provides substantial evidence to support the administrative law judge's finding that claimant could not continue to perform his bus driving work, we reject employer's assertion that the administrative law judge erred in failing to determine claimant's post-injury wage-earning capacity based on his earnings in that employment. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

We agree with employer, however, that the administrative law judge erred in excluding claimant's overtime wages in the station attendant job in his post-injury wage-earning capacity calculation. The Board has previously recognized that an award of permanent partial disability may be based on a loss of overtime wages where, as here, overtime pay was considered in determining the employee's average weekly wage. *See Devillier*, 10 BRBS at 649; *see also Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136-137 (1987).[1] Although the administrative law judge may exclude overtime wages in determining the employee's post-injury wage-earning capacity where the employee's ability to obtain these wages is unduly speculative, *see Thompson v. McDonnel Douglas Corp.*, 17 BRBS 6, 9 (1984), the record in the present case contains uncontroverted evidence which reflects that overtime was available to claimant in the station attendant job. Employer's payroll records indicate that for the pay period commencing January 9, 1988, and ending on April 30, 1988, claimant worked an average of 14.68 hours per week of overtime as a station attendant. Emp. Ex. 12. In addition, claimant testified that he consistently worked overtime in this position, that he occasionally works a double shift, and that he consistently works "a lot" more than eleven hours of overtime hours per week. Tr. at 70-71. On these facts, the administrative law judge's exclusion of claimant's overtime wages from his post-injury earnings because they were not "guaranteed" cannot be accepted. Accordingly, we vacate the award of

[1]Although employer also argues that claimant's opportunity for overtime would have decreased even if he had remained a bus driver because overtime was increasingly less available for Metro bus drivers after claimant's 1979 injury, events occurring in claimant's pre-injury job subsequent to claimant's injury are generally irrelevant to determining whether claimant has sustained a loss in wage-earning capacity. *See generally Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). Claimant is not required to prove overtime was available in his pre-injury job after his injury; the relevant inquiry is whether claimant has sustained the loss of previously available overtime because of his injury. *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989).

permanent partial disability compensation and remand for the administrative law judge to reconsider claimant's loss in wage-earning capacity. In determining whether claimant is entitled to permanent partial disability compensation on remand, the administrative law judge should compare claimant's stipulated average weekly earnings at the time of his injury, $449.94, which included overtime, with his earnings in the station attendant position adjusted back to the time of injury including overtime. *See Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980); *see also Peele,* 20 BRBS at 137.

Accordingly, the administrative law judge's calculation of claimant's loss in wage-earning capacity is vacated, and the case is remanded for reconsideration consistent with this opinion. In all other respects, the Decision and Order and Order Denying Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge