BRB Nos. 92-1886

GARY HALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CROWLEY MARITIME CORPORATION	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY, C/O CRAWFORD AND COMPANY	)	DATE ISSUED: _____
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Joel R. Williams, Administrative Law Judge, United States Department of Labor.

Donald F. Black (Reinman, Harrell, Graham, Mitchell & Wattwood, P.A.), Jacksonville, Florida, for claimant.

Robert B. Parrish and Melanie E. Shepherd (Taylor, Moseley & Joyner), Jacksonville, Florida, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order - Award of Benefits (91-LHC-2186) of Administrative Law Judge Joel R. Williams 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).

*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).

On December 31, 1986, claimant sustained a back injury while working for employer as an

unassigned lasher crew driver. Claimant received conservative treatment under the care of Dr. Smith, but remained employed as a lasher crew driver, although he continued to experience back pain. On May 21, 1987, claimant's doctor, Dr. Rouse "took him off work" until June 22, 1987, when he returned to his job part-time, working only two days in the next two months. Claimant was paid temporary total disability compensation from May 22, 1987 until June 21, 1987, and temporary partial disability compensation from June 22, 1987 until October 4, 1987. In keeping with the medical advice of Dr. Smith, in October 1987 claimant changed his union classification to that of a material warehouseman, a position that was less jarring to the back but which paid less than his prior work as a lasher crew driver.[1] Claimant was paid temporary partial disability compensation from October 4, 1984 until November 20, 1989, at which time employer suspended its voluntary payment of compensation based on the August 17, 1989, medical opinion of Dr. Bull that claimant was capable of performing full and unrestricted duties.[2] In April 1990, claimant, acting against his doctor's advice, returned to working as a lasher crew driver in an assigned position. Shortly thereafter, claimant had a recurrence of his pain, and was again temporarily totally disabled. Employer voluntarily paid temporary total disability benefits from May 18, 1990 to July 11, 1990, after which time claimant returned to work as a lasher crew driver. Claimant, who was still working as a lasher crew driver as of the date of the hearing, sought additional temporary partial and temporary total disability compensation. Claimant also sought permanent partial disability compensation commencing July 24, 1990.

The administrative law judge held that claimant was temporarily totally disabled as a result of his work-related back injury from July 12, 1990 through July 23, 1990, and temporarily partially disabled from January 1, 1987 to May 21, 1987, June 22, 1987 to August 26, 1988, October 25, 1988 to May 17, 1990, and July 24, 1990 to October 30, 1990. The administrative law judge further determined that claimant was entitled to permanent partial disability compensation commencing October 31, 1990, based on 66 and 2/3 of the difference between his stipulated average weekly as a lasher crew driver, which included overtime,[3] and his post-injury wage-earning capacity as a warehouseman who could work 40 hours of straight time and 20.36 hours of overtime per week. *See* 33 U.S.C. §908(c)(21). Based on the opinion of Dr. Smith and the revised opinion of Dr. Bullock,

---

[1]The administrative law judge's determination that the warehouseman position paid 13.83 per hour straight time and 20.74 per hour for overtime at the time of claimant's injury is not disputed on appeal. EX-1.

[2]Claimant, however, did receive temporary total disability compensation from August 27, 1988 until October 24, 1988, when he was undergoing a work hardening program.

[3]The administrative law judge accepted the stipulation of the parties that claimant's average weekly wage at the time of the injury was $1,057.69. Based on the wage records submitted, the administrative law judge concluded that claimant earned a total of $23,776.37 in overtime pay for the year 1986 which represented 1,059.5 hours of overtime or an average of 20.36 hours of overtime per week. The administrative law judge's calculations regarding the amount of overtime claimant worked in 1986 are not disputed on appeal.

the administrative law judge concluded that although claimant's work as a lasher had been medically contraindicated since the first onset of his symptoms on December 31, 1986, his post-injury work as a warehouseman was in fact suitable. Accordingly, even though claimant continued to perform his "usual" work as a lasher, the administrative law judge found that claimant was permanently partially disabled.

On appeal, claimant contends that the administrative law judge erred in calculating his loss in wage-earning capacity because he wrongfully assumed that claimant's actual lower post-injury overtime earnings did not represent his true post-injury wage-earning capacity as a warehouseman but rather reflected a general economic slowdown at employer's facility. Claimant also asserts that in attempting to estimate an alternative reasonable wage-earning capacity, the administrative law judge wrongfully assumed that claimant could obtain 20.36 hours of overtime work in this assigned position, the same amount of overtime previously available to him in his unassigned lasher position. Accordingly, claimant urges that the administrative law judge's calculation of his loss in wage-earning capacity be reversed and that the award be re-calculated based on 66 and 2/3 percent of the difference between his pre-injury earnings as an unassigned lasher including overtime and the straight time earnings of an assigned warehouseman and claimant's actual average overtime earnings. Employer responds, urging affirmance.

Pursuant to 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); *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192 (1993). 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 party that contends 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. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 n.2 (1987). 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. *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 109 (1991); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). 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. *See Sproull*, 25 BRBS at 109; *Cook*, 21 BRBS at 6. 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. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1990); *Butler v. Washington Metropolitan Area Transit Authority*, 14 BRBS 321.

We agree with the claimant that the administrative law judge's finding that claimant's lower post-injury overtime earnings reflected a general economic slowdown at employer's facility rather than his true post-injury wage-earning capacity cannot be affirmed. The administrative law judge determined that although claimant's actual post-injury yearly earnings were lower than his earnings at the time of injury, this was not, as claimant asserted, primarily due to the loss of overtime opportunities in the assigned warehouseman position. Rather, the administrative law judge concluded that the record supported employer's assertion that any cutback in claimant's overtime work subsequent to 1986 was due to a general economic slowdown at employer's facility, as was evidenced by the fact that when claimant returned to work on the lasher crew in 1991, he worked substantially less overtime that he had in the "same" job prior to his injury. The administrative law judge further noted that claimant worked more overtime in the warehouseman position than he did after switching back to the lasher crew. Decision and Order at 7.

Contrary to the administrative law judge's determination, however, this evidence is insufficient to support a finding of an economic slowdown at employer's facility. Although the administrative law judge inferred that a general economic slowdown had occurred based on the fact that claimant had lower overtime earnings when he returned to work as a lasher, claimant correctly asserts that this inference is flawed; claimant's post-injury lasher work was not the same job he had performed pre-injury. The record reflects that claimant worked pre-injury as a lasher in an unassigned position where overtime work was generally plentiful. His post-injury work as a lasher, however, was in an assigned position. The record establishes that it was employer's corporate policy that assigned workers not perform overtime work unless it was absolutely necessary. CX-14A; Tr. 69-70. Accordingly, as claimant was not working in the "same" lasher job before and after his injury, the administrative law judge's finding that claimant's lower post-injury overtime earnings were due to a general economic slowdown is vacated, and the case is remanded for him to reconsider whether claimant's actual post-injury earnings including overtime fairly and reasonably represent his post-injury wage-earning capacity.[4] Contrary to the administrative law judge's determination, the fact that claimant may have earned more overtime in 1990 in his post-injury work as an assigned warehouseman than he did upon returning to work, as an assigned lasher is irrelevant to this determination.

We also agree with claimant that in attempting to calculate an alternate reasonable post-injury wage-earning capacity, the administrative law judge erred in determining that claimant could obtain 20.36 hours of overtime in his post-injury work as an assigned warehouseman, the same amount of overtime he previously worked as an unassigned lasher. There is simply no evidence of record which supports this determination. The evidence which is in the record is to the contrary; it reflects that although claimant worked 1,059 hours of overtime in 1986 as an unassigned lasher, he

[4]In support of his argument that employer's business did not slow down after 1986, claimant has attached a copy of a newspaper article to his Petition for Review which states that the Jacksonville Port Authority received recognition for its efforts during the Persian Gulf War, when it allegedly handled more ships and cargo than any port in the world. As this article was not a part of the record before the administrative law judge, we cannot consider it in rendering our decision on appeal. *See Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985); 33 U.S.C. §921. However, the administrative law judge may consider this article on remand if he admits it into evidence.

worked only 99.75 hours of overtime in 1988, 90.25 hours in 1989, 260 hours in 1990, and 282 hours in 1991. We therefore reverse the administrative law judge's finding that claimant could obtain 20.36 hours of overtime per week in his post-injury work as an assigned warehouseman. Accordingly, if the administrative law judge determines on remand that claimant's actual post-injury earnings are not representative of his wage-earning capacity, in attempting to calculate a reasonable alternate post-injury wage-earning capacity, he must employ an estimation of claimant's potential for overtime earnings post-injury which has some reasonable basis in the record. *See generally Abbott*, 27 BRBS at 204.

Accordingly, the calculation of claimant's loss in wage-earning capacity contained in the administrative law judge's Decision and Order - Award of Benefits is vacated and the case is remanded for reconsideration of the extent of claimant's permanent partial disability consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge