

BRB No. 92-1752

JAMES R. LaHAIE )  
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 Claimant-Petitioner )  
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 v. )  
 )  
 PORTLAND LINES BUREAU ) DATE ISSUED:  
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 and )  
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 SAIF CORPORATION )  
 )  
 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Decision and Order on Remand of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Michael T. Garone (Jolles, Sokol & Bernstein, P.C.), Portland, Oregon, for claimant.

Norman Cole (SAIF Corporation), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (87-LHC-38) of Administrative Law Judge G. Marvin Bober 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 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. Claimant injured his lower back on August 3, 1984, while working as a linesman for employer. Claimant required surgery to remove a ruptured disc. Claimant received temporary total disability benefits from August 4, 1984 to January 4, 1985, based on an average weekly wage of \$939.28. Claimant returned to work as a linesman on January 4, 1985, and he reached maximum medical improvement on January 5, 1985.

In the original Decision and Order awarding benefits, Administrative Law Judge Matera

found that claimant sustained a weekly loss of wage-earning capacity of \$125 due to his injury and that employer was entitled to relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f). On appeal, the Board remanded the case for the administrative law judge to reconsider whether claimant's actual wages represent his post-injury wage earning capacity and the evidence bearing on whether he has suffered any post-injury wage earning capacity loss, particularly the evidence regarding the number of jobs accepted and declined by claimant. *LaHaie v. Portland Lines Bureau*, BRB No. 87-3767 (Dec. 27, 1990) (unpub.).

On remand, the administrative law judge found that claimant did not demonstrate a loss of wage earning capacity and had no permanent partial disability. Accordingly, benefits were denied. Claimant appeals, contending that he is entitled to an award of permanent partial disability benefits. Employer responds, urging affirmance of the denial of permanent partial disability benefits.

Claimant contends that the administrative law judge erred in finding that consideration of his earning power on the open labor market is irrelevant in determining whether claimant's post-injury earnings are representative of his wage-earning capacity. In its first Decision and Order, the Board stated that it was erroneous as a matter of law to consider the open labor market factor as claimant's post-injury employment was regular and continuous, in that claimant had seniority at his position, and that the medical evidence demonstrated that the work was suitable and claimant was physically able to perform it.<sup>1</sup> *LaHaie*, slip op. at 4. Moreover, on remand the administrative law judge again considered some of the factors bearing on the applicability of the open labor market, and found, in addition to the factors noted by the Board, that no special accommodations were made for claimant. *See generally Darcell v. FMC Corp., Marine & Rail Equip. Div.*, 14 BRBS 294 (1982); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980); *Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979). We therefore affirm the administrative law judge's finding that the open market factor is irrelevant in this case.

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<sup>1</sup>Dr. Tanabe found that claimant was doing well after surgery and had no unusual pain. Joint Exhibits 63, 64, 67. Claimant's treating physician, Dr. Fagan, found some impairment from the injury. Employer's Exhibits 73-1, 73-2. Dr. Pasquesi found that claimant had a 10 percent impairment, was able to do the work, and did not need medical care. Joint Exhibit 70.

Claimant next contends that the administrative law judge erred in concluding that claimant's post-injury earnings reasonably and fairly represent his wage-earning capacity. The administrative law judge found that claimant was medically able to perform his job,<sup>2</sup> that claimant's employment was stable and continuous, that claimant was not accepting or rejecting more jobs in order to maintain pre-injury wages because of his back injury, and that claimant's post-injury earnings were lower than his pre-injury earnings because of changes in economic conditions and declining availability of jobs overall. The administrative law judge found that claimant was earning \$131.49 per week less since his 1984 injury, that the evidence established that work available to the claimant from 1983 to 1985 was reduced by 164 jobs or 16 percent and that claimant's scratch rate for the first 2 years after his injury was the same or lower than his pre-injury scratch rate.<sup>3</sup> We affirm the administrative law judge's finding that market conditions have caused the fluctuations in claimant's hours and earnings since his return to work and that claimant has not demonstrated a loss in wage-earning capacity due to his injury. *See generally* *Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987). Thus, contrary to claimant's contentions, the administrative law judge considered all the relevant factors and stated what considerations prompted his determination. *Warren v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 149 (1988); *Devillier*, 10 BRBS at 651. We therefore affirm the administrative law judge's finding that claimant's earnings reasonably and fairly represent his wage-earning capacity as his finding is rational and supported by substantial evidence.

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<sup>2</sup>The administrative law judge found that since 1987, claimant had not been off work due to back pain and had not seen his doctor. Joint Exhibit 4; Transcript at 25-41.

<sup>3</sup>The administrative law judge considered a manager's testimony about the availability of jobs, which is corroborated by a summary of jobs available in employer's records, that the number of available jobs was high in 1983, declined in 1984, and increased in 1985 and 1986. Transcript at 41. The administrative law judge also noted that claimant scratched 6 percent of jobs in 1983 prior to his injury, 7 percent in 1984 and 1985, and 5 percent in 1986. Joint Exhibit 4.

Accordingly, the administrative law judge's Decision and Order on Remand denying permanent partial disability benefits is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge