

ALFRED WOLFSKILL)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
STEVEDORING SERVICES)	DATE ISSUED:
OF AMERICA)	
)	
and)	
)	
EAGLE PACIFIC INSURANCE)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

J. Bradford Doyle (Law Offices of J. Bradford Doyle), Seattle, Washington, for claimant.

Richard M. Slagle (Williams, Kastner & Gibbs), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-2591) of Administrative Law Judge Henry B. Lasky 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On September 1, 1989, claimant sustained a left shoulder injury during the course of his employment. On October 30, 1989, claimant underwent surgery to repair a rotator cuff tear and thereafter underwent a manipulation of the left shoulder on January 15, 1990. Employer voluntarily paid temporary total disability benefits from September 7, 1989 through January 14, 1990, from February 1, 1990 through April 1, 1990, and from May 3, 1990 through May 13, 1990. Claimant returned to work, but sought additional temporary total disability compensation under the Act for specific dates documented in his work diary. Claimant asserts that he is entitled to these benefits

because, but for his work injury, he would have worked, with limited exceptions, virtually every day between April 23, 1990, the date he last received compensation, and April 3, 1991.

In his Decision and Order, the administrative law judge determined that although claimant framed the issue in this case as entitlement to temporary total disability benefits for the days claimed, in essence the issue is more appropriately framed as a claim for temporary partial disability benefits. *See* 33 U.S.C. §908(e). The administrative law judge, however, denied claimant temporary partial disability benefits, finding that he had not established a loss in his wage-earning capacity.

On appeal, claimant challenges the denial of benefits, arguing that the administrative law judge erred in denying benefits for total disability for the missed days. Claimant asserts error in the finding that claimant's testimony in conjunction with his work diary was insufficient to establish entitlement to temporary total disability compensation on the days claimed given that claimant's testimony was corroborated in part by the medical opinion of Dr. Snow, who provided contemporaneous treatment for claimant's shoulder complaints, and by the PMA records which document claimant's reduced earnings for the time periods claimed. In the alternative, claimant contends that inasmuch as he is unable to perform some of the work he was previously able to perform prior to his injury, he has sustained a loss in wage-earning capacity sufficient to support an award of temporary partial disability compensation pursuant to Section 8(e). Employer responds, urging that the decision of the administrative law judge be affirmed.

Initially, we conclude that the administrative law judge properly viewed the claim as one for temporary partial rather than temporary total disability. Total disability is premised on claimant's inability to perform any work. Claimant here has returned to work and concedes his ability to perform some work; he argues that he is not able to work his normal hours because of the effects of the work injury. This argument presents a factor which is properly considered in evaluating claimant's post-injury wage-earning capacity. *See* 33 U.S.C. §908(c)(21), (e), (h). Thus, claimant's theory raises a claim for partial rather than total disability.

Claimant initially asserts that the administrative law judge erred in discrediting his testimony regarding the days of work he claimed he missed due to his shoulder injury in its entirety inasmuch as Dr. Snow's medical reports and the PMA records corroborate claimant's testimony. *Compare* CX-1 at 8-9 *with* EX-6 at 30; CXS-2, 3 *with* EX-6; EX-2 at 14 *with* CX-2 at 15; CX-2 at 17 *with* EX-2 at 15. While these records do provide corroboration, they are insufficient to establish reversible error. The administrative law judge rationally concluded based on claimant's earnings records for the period between 1985 and May 16, 1992, that while the claim was premised on claimant's assertion that he was a seven-day per week worker, this premise was incorrect. *See* EX-6. The administrative law judge rationally found that the evidence did not support this conclusion, but rather suggested that between 1985 and 1992 claimant had not worked even a five-day work week. Decision and Order at 5. Because the administrative law judge acted rationally in rejecting the basic premise of claimant's claim, we hold that his denial of benefits may be upheld based on this finding alone. *See generally Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).

In addition, claimant's argument that the administrative law judge erred in failing to award him compensation under Section 8(e) based on two-thirds of the difference between his pre-injury

average weekly wage and his weekly earnings for each of the periods in which his PMA payroll earnings were less than his average weekly wage is without merit. An award of temporary partial disability is determined based on the difference between claimant's pre-injury average weekly wage and his wage-earning capacity thereafter. 33 U.S.C. §908(e). There is no basis for requiring a weekly comparison of actual earnings against average weekly wage. Claimant's argument that the administrative law judge erred by disregarding the future effects of his work injury also fails. The post-injury wage-earning capacity of a partially disabled employee for whom compensation is determined pursuant to Section 8(c)(21) and (e), 33 U.S.C. §908(c)(21), (e), is equal to his actual earnings if they fairly and reasonably represent his wage-earning capacity. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340, 344-345 (1992).

Claimant also argues that the administrative law judge erred in determining that his actual post-injury wages reasonably and fairly represented his post-injury wage-earning capacity. We disagree.¹ Inasmuch as claimant's wage records reflect that he has consistently been able to work more hours and to consequently earn substantially more money in the three years since his injury, the administrative law judge acted reasonably in finding that claimant's actual post-injury wages reasonably represented his wage-earning capacity. *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991). Although the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that higher post-injury earnings do not preclude compensation if claimant has 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), the party seeking to prove that claimant's actual post-injury earnings do not represent his wage-earning capacity bears the burden of proof on this issue. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992).

Claimant argued below that his higher post-injury hours were due, at least in part, to the fact that he has taken night shift employment, alleging he was paid for 10 hours a day, instead of 5 hours, for this work. The administrative law judge rationally rejected this assertion on the basis it was inconsistent with the PMA records which reflect that similar hours were paid for the first, second, and third shifts. Inasmuch as the administrative law judge evaluated the evidence of record consistent with the factors relevant to Section 8(h) and rationally concluded based on the evidence before him that claimant sustained no loss in his wage-earning capacity, his denial of temporary partial disability compensation is affirmed. *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273, 277 (1990).

¹Contrary to claimant's assertions, the Section 20(a), 33 U.S.C. §920(a) presumption does not aid claimant in establishing the nature and extent of disability. *Brown v. Potomac Electric Power Co.*, 15 BRBS 337 (1983); *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981). Furthermore, although claimant asserts that the administrative law judge erred in failing to resolve factual doubt in his favor, the United States Supreme Court has determined that the "true doubt rule" is invalid because it conflicts with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d). *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge