BRB No. 93-0397

HILARIO ROMERO Claimant-Petitioner v. NATIONAL STEEL AND SHIPBUILDING COMPANY Self Insured Employer-Respondent	)))))))))))	 DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of E. Earl Thomas, Administrative Law Judge, United States Department of Labor.

William Turley, San Diego, California, for claimant.

Roy D. Axelrod (Littler, Mendelson, Fastiff, Tichy & Mathiason), San Diego, California, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (89-LHC-3013)[1] of Administrative Law Judge E. Earl Thomas 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 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, who began working as a loft rigger for employer in 1975, testified that on August 2, 1985, while carrying chains aboard a vessel, he started to experience pain in his right shoulder.

[1]Four claims were consolidated for adjudication at the administrative law judge level: A hearing loss claim, 91-LHC-2152, two claims for cumulative trauma injuries to claimant's right shoulder and both arms, 89-LHC-3011 and 89-LHC-3012, and a claim for his right shoulder injury based on injuries he received on August 2, 1985 and October 13, 1986, 89-LHC-3013. Only the claim for the right shoulder injury, 89-LHC-3013, is currently before the Board on appeal.

He was treated at employer's medical facility, which diagnosed claimant with a strain. Thereafter, Dr. Schwab provided conservative treatment for claimant's shoulder, diagnosed claimant's condition as "infraspinatus teves minor strain or syndrome," and indicated that claimant could return to his regular duties. RX 31.

Claimant testified that in October 13, 1986, he re-injured his right shoulder. The record indicates that claimant was seen and treated at employer's medical facility in October and November, 1986 for a right elbow contusion and shoulder pain but that he continued to work. RX 22.

On November 24, 1987, after re-examining claimant based on his renewed complaints concerning his right shoulder, Dr. Schwab obtained authorization to perform an arthrogram on the right shoulder in order to make a fair disability determination. RX 31. The arthrogram revealed a complete tear of the rotator cuff in the right shoulder and surgery was recommended. RX 31.

Claimant was then examined by Dr. Dickinson, an orthopedic surgeon, who diagnosed a rotator cuff tear in claimant's right shoulder and surgery was performed in May of 1988. CX 24. Employer voluntarily paid claimant temporary total disability compensation from May 7, 1988 to August 30, 1988, terminating its payments based on Dr. Schwab's opinion that claimant could return to light duty work. RX 10. Dr. Dickinson released claimant to return to light duty work on September 30, 1988. Rx 34. When claimant returned to light duty work on August 30, 1988, he received training and certification to become a double trolley overhead cab crane operator. After being involved in several accidents, and being warned that any additional accidents or carelessness would result in his discharge, claimant was given the opportunity to transfer to a position of pendant crane operator. Claimant performed this job for several months but alleged that he was physically unable to perform the work because he was required to carry chain-falls and come-alongs involving over the shoulder work. Claimant stopped coming to work after May 10, 1989 and was discharged for being absent without leave in August 1989. He sought temporary total disability compensation from May 12, 1988, until August 29, 1988, and permanent partial disability compensation thereafter.

The administrative law judge denied the claim for temporary total disability compensation, noting that employer voluntarily paid the temporary total disability compensation being claimed. Characterizing claimant's testimony as evasive, selective, self-serving and conflicting with the testimony of the other witnesses or record, the administrative law judge credited the medical opinions of Drs. Schwab and Freeman over those provided by Drs. Dickinson and Levine, and found that claimant had recovered from his 1985 and 1986 shoulder injuries with employer. Accordingly, he concluded that claimant was able to return to his regular work as a loft rigger. The administrative law judge further determined, however, that even assuming that claimant could not perform his usual rigger work, employer provided claimant with suitable alternate employment as a double trolley overhead and pendant crane operator, consistent with claimant's restrictions as set forth by Dr. Dickinson. Finally, the administrative law judge found that claimant's actual earnings in the alternate work, the same wage rate paid to claimant as a rigger, fairly and reasonably represented his post-injury wage-earning capacity. Claimant appeals the denial of permanent partial disability

compensation. Employer responds, urging affirmance.

On appeal, claimant challenges the administrative law judge finding that he could perform his usual work. Claimant maintains that the fact that employer provided claimant with alternate work as a pendant crane and double trolley overhead cab crane operator implicitly suggests that he could not perform his usual work and refutes both Dr. Schwab's and Dr. Freeman's opinion that claimant suffered no permanent disability. Claimant further argues that the May 1990 medical reports of Drs. Dickinson and Levine indicate that he is precluded from heavy and overhead work and that the crane operator jobs provided by employer are not within these restrictions. Moreover, claimant contends that he has suffered a loss in his wage-earning capacity because after he was laid off he was forced to compete in the open market and had to settle for a lower paying job as a store clerk. Finally, claimant contends that the administrative law judge erred in failing to address the issue of payment for claimant's medical treatment.[2]

After review of the administrative law judge's Decision and Order in light of the evidence of record, we affirm his denial of permanent partial disability compensation. Initially, we reject claimant's assertion that in determining the extent of claimant's disability, the administrative law judge erred in failing to apply the Section 20(a) presumption. In the present case, the parties stipulated that claimant's injury was work-related, and the Section 20(a) presumption does not aid claimant in establishing the nature and extent of his disability. *See Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988); *Holten v. Independent Stevedoring Co.*, 14 BRBS 441, 443 (1982). To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49, 53 (1988). If claimant successfully meets this initial burden, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980); *see also Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that employer must point to *specific available* jobs that the claimant can perform in order to meet its suitable alternate employment burden. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *rev'g Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *cert. denied*, 114 S.Ct. 1539 (1994); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988). One way employer may meet this burden is by showing a suitable job that claimant actually performed after his injury. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224

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[2]Claimant also contends that all doubts should have been resolved in his favor. We reject this contention since 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).

(1986).

In the present case, the administrative law judge found that claimant had recovered from his 1985 and 1986 shoulder injuries and was capable of performing his usual work as a rigger as of August 28, 1988, based on the medical opinions of Drs. Schwab and Freeman. The administrative law judge's decision to credit the medical opinions of Drs. Schwab and Freeman over the contrary opinions of Drs. Dickinson and Levine was clearly within his discretion. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Inasmuch, however, as Dr. Schwab did not indicate that claimant's examination was normal and he could return to his usual work as a loft rigger until January 25, 1989, RX 35, and Dr. Freeman did not opine that claimant had no evidence of any organic neurological abnormality until February 12, 1990, RX 35, the administrative law judge erred to the extent that he found that claimant could perform his usual work prior to January 25, 1989 based on these medical opinions. Any error the administrative law judge may have made in this regard is harmless, however, on the facts presented because the administrative law judge's alternate finding that the light duty work claimant performed for employer as a double trolley overhead and pendant crane operator commencing August 29, 1988, constituted suitable alternate employment is supported by substantial evidence.

Although claimant argues on appeal that the alternate crane operator jobs were not within his medical restrictions as set forth by Dr. Dickinson, we disagree. The administrative law judge rationally found that the alternate post-injury work claimant performed for employer was consistent with Dr. Dickinson's opinion that claimant should refrain from heavy lifting and lifting above the shoulder. The administrative law judge weighed the relevant evidence regarding claimant's ability to perform crane operator jobs and rejected claimant's contentions. The administrative law judge's finding that the double trolley and pendant crane operator work claimant performed post-injury constituted suitable alternate employment is rational and supported by substantial evidence. We therefore affirm his determination. *See Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992)(Smith, J., concurring in part and dissenting in part); *Davenport v. Daytona Marine and Boat Works*, 16 BRBS 196 (1984).

We also reject claimant's contention that he is entitled to permanent partial disability compensation because he was laid off and had to settle for a lower paying job on the open market at a 7-Eleven store due to his shoulder problems. 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. 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. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). 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 wage-earning capacity. 33 U.S.C. §908(h). 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. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985); *Mangaliman v. Lockheed Shipbuilding Co.*, ____ BRBS ___, BRB No. 92-

2308 (February 15, 1996). 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 Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The burden of proof is on the party seeking to prove that actual post-injury wages are not representative of claimant's wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992).

In the present case, the administrative law judge rationally found based on the testimony of Carl Hinrichsen that claimant was not laid off from his post-injury work for employer; he had been discharged for being absent without leave. Tr. at 400. Moreover, the administrative law judge reasonably rejected claimant's contention that his ability to compete on the open market was limited because of restrictions in his right shoulder, based on the medical opinions of Drs. Schwab and Dr. Freeman. Finally, the administrative law judge found that claimant's actual post-injury earnings while working for employer, which paid the same hourly rate as his former work as a rigger, fairly and reasonably represented his post-injury wage-earning capacity.[3] Inasmuch as the administrative law judge, reasonably concluded that claimant failed to meet his burden of establishing that his actual post-injury earnings were not representative of his wage-earning capacity, we affirm this determination. *See generally Long,* 767 F.2d 1578, 17 BRBS at 149 (CRT); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 6 (1988).

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[3]Claimant argued below that he was entitled to permanent partial disability compensation because the hourly rate paid to pendant crane operators in 1989 was less than the hourly rate paid to riggers at the time of his injury. The administrative law judge, however, rationally rejected this argument based on the testimony of Carl Hinrichsen and claimant, that NASSCO implemented a wage rollback in 1987 for all employees and that even if claimant had continued to work as a rigger, his salary would have been reduced to the same hourly rate paid to a pendant crane operator. *See* Decision and Order at 8-9.

Finally, we decline to address claimant's contention that the administrative law judge erred in failing to resolve the issue of payment for claimant's medical treatment; claimant is raising this issue for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988); *see generally Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT)(9th Cir. 1988).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge