BRB No. 93-1161

CHARLES J. BRYANT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED:
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
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.

Jeffrey S. Mutnick (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

Delbert J. Brenneman (Hoffman, Hart & Wagner), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (92-LHC-1568) 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

While working as a walking boss for employer, claimant was injured on May 28, 1986, when he hit his hard-hat against a low passageway. Though claimant complained of pain and discomfort, he did not lose any time from work until 1988. On January 15, 1988, claimant underwent a diskectomy and fusion. Employer voluntarily paid temporary total disability

compensation to claimant from January 15, 1988, through April 13, 1988, at a rate of $595.24 per week, the maximum compensation rate allowed at the time of claimant's work accident in 1986. Thereafter, claimant returned to his job as walking boss and has sustained no further lost time as a result of his injury.

In his Decision and Order, the administrative law judge found that pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a), claimant's average weekly wage should be based on his earnings in the year prior to his May 1986 accident. Since claimant received temporary total disability compensation at the maximum allowable rate as of May 28, 1986, *i.e.*, $595.24, the administrative law judge determined that claimant was not entitled to additional temporary total disability benefits. Next, the administrative law judge found that claimant's post-injury earnings represented his wage-earning capacity and that claimant did not suffer a post-injury loss in wage-earning capacity. In making this determination, the administrative law judge noted that with the exception of 1988, claimant worked more hours following his injury than in the year preceding that injury. Lastly, the administrative law judge concluded that a comparison of hours and wages earned by similar walking bosses did not establish that claimant sustained a loss in wage-earning capacity due to his injury.

On appeal, claimant contends that the administrative law judge erred in failing to apply the maximum allowable compensation rate applicable at the time of his period of temporary total disability in 1988, $616.96. In addition, claimant contends that the administrative law judge erred in failing to find that he has sustained a loss in post-injury wage-earning capacity. Employer responds, urging affirmance.

We first address claimant's assertion that he is entitled to additional temporary total disability compensation. The United States Court of Appeals for the Ninth Circuit, within whose appellate jurisdiction this case arises, has held that the date of an employee's disability rather than the date the accident occurs is the appropriate date of "injury" for purposes of average weekly wage. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT)(9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *see also Kubin v. Pro-Football, Inc. d/b/a Washington Redskins*, 29 BRBS 117 (1995). In the instant case, while claimant suffered a work-related accident on May 28, 1986, this injury did not become disabling until January 15, 1988, when he underwent surgery. Thus, pursuant to *Johnson*, claimant's average weekly wage should be calculated at the time he became disabled on January 15, 1988, based on his earnings for the year prior to this date. As it is undisputed that claimant's average weekly wage for this period exceeds the maximum allowable rate of compensation under Section 6(b)(1) of the Act, 33 U.S.C. §906(b)(1), claimant is entitled to the maximum allowable rate of compensation applicable for the period of his temporary total disability in 1988, $616.96. *See* 33 U.S.C. §906(b)(1). Accordingly, we vacate the administrative law judge's determination of $595.24 per week as claimant's rate of temporary

total disability compensation, and hold that claimant is entitled to a temporary total disability compensation at weekly rate of $616.96 from January 15, 1988 through April 13, 1988.

Next, claimant contends that the administrative law judge erred in finding that he did not establish a loss in post-injury wage-earning capacity. Specifically, claimant argues that the administrative law judge's crediting of claimant's testimony that claimant turned down certain job assignments because of his neck condition is inconsistent with his finding of no post-injury loss in wage-earning capacity. Pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), an award of 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, 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 reasonable 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); *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996). If such earnings do not represent claimant's wage-earning capacity, the administrative law judge is authorized to calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). 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. *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988); *Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979). Should claimant's post-injury work be found to be continuous and stable, his post-injury earnings are more likely to reasonably represent his wage-earning capacity. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Relevant questions include whether the work is suitable, claimant is physically capable of performing it, and claimant has the seniority to stay on the job. *See Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

In the instant case, in support of his assertion that he has sustained a loss in wage-earning capacity, claimant testified that he presently turns down job assignments that entail working aboard ships with low head room, due to the discomfort it would cause in his neck. Tr. at 22-23. Claimant additionally relied on the payroll records and testimony of two other walking bosses, Jack Grohs and James Bond, in an attempt to establish that he worked fewer hours and earned less money post-injury than similarly classified employees.

In determining that claimant did not suffer a loss in wage-earning capacity, the administrative law judge noted that claimant has returned to his usual employment as a walking boss with no physical restrictions imposed upon him. The administrative law judge further found that claimant did not establish a loss in hours post-injury, since the record indicates that claimant worked more or comparable hours on a yearly basis following his disability than before it, with the exception of 1988, the year in which claimant underwent surgery. *See* Emp. Ex. 20-11, 20-14, 20-23, 20-29. The administrative law judge additionally concluded that no true comparison was possible between

claimant's post-injury hours and the hours of Mr. Grohs and Mr. Bond because work habits and personal circumstances vary among the three employees and have played a significant role the number of hours each has worked. In this regard, the administrative law judge found that Mr. Grohs has always worked more hours than claimant and that claimant, in recent years, has been gaining on Mr. Grohs in the number of hours worked. *See* Emp. Exs. 20-2, 20-3, 20-4; 22-13, 22-15. With regard to Mr. Bond, the administrative law judge determined that the number of hours worked by claimant and Mr. Bond has varied; in some quarters, claimant has worked more hours. *See* Emp. Exs. 20-3, 20-23; 21-12; Decision and Order at 6-7. We hold that the administrative law judge's determinations that claimant's post-injury earnings represent his wage-earning capacity and that claimant has not established a loss in post-injury wage-earning capacity are rational and are supported by substantial evidence. We therefore affirm the administrative law judge's finding that claimant has not established a loss in post-injury wage-earning capacity. *See Long*, 767 F.2d at 1578, 17 BRBS at 149 (CRT).

Accordingly, the administrative law judge's finding that claimant is entitled to temporary total disability compensation at a rate of $595.24 per week is vacated, and the decision is modified to reflect that claimant is entitled to temporary total disability compensation for the period January 15, 1988 through April 13, 1988 at a rate of $616.96 per week. In all other respects, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge