

WADE R. FISH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
GUNDERSON MARINE, INCORPORATED)	DATE ISSUED: <u>July 26, 2004</u>
)	
and)	
)	
LIBERTY NORTHWEST INSURANCE COMPANY)	
)	
Employer/Carrier- Respondents)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Frederickson, L.L.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (1999-LHC-2451) of Administrative Law Judge Jennifer Gee 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 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has come before the Board. To briefly reiterate, claimant injured his back on March 28, 1996, while working as a leadman for employer. Tr. at 35, 54-55. During the course of his treatment, there were periods when he was able to perform light duty work and there were periods when he could not work, and employer voluntarily paid temporary total and temporary partial disability benefits. Cl. Ex. 4; Emp. Exs. 4, 69. Claimant underwent surgery in August 1999 and was released to return to full duty in September 1999. Cl. Exs. 71, 73; Emp. Ex. 61. In November 1999, claimant was promoted to foreman. Tr. at 55.

Administrative Law Judge Lindeman found that claimant's condition reached maximum medical improvement on January 4, 2000, and that he is entitled to temporary partial disability benefits during the periods he performed light duty work prior to reaching maximum medical improvement; however, Judge Lindeman did not adjust his award to account for inflation. Judge Lindeman also determined that claimant did not suffer a loss in wage-earning capacity as a result of an inability to perform overtime work, and therefore he awarded claimant nominal permanent partial disability benefits in the amount of \$1 per week commencing January 5, 2000. Decision and Order at 6-10. Claimant appealed the decision to the Board.

The Board held, *inter alia*, that Judge Lindeman erred in not accounting for the effect of inflation when determining claimant's temporary partial disability benefits. The Board also held that, if credited, there is evidence to show that claimant was unable to work as much overtime as he had worked prior to his injury. The Board remanded the case for reconsideration of these issues and entry of a specific award of benefits based on an actual dollar amount representing claimant's post-injury wage-earning capacity. The Board also held that if the administrative law judge finds there is no present actual loss of wage-earning capacity, then the nominal award is affirmed. *Fish v. Gunderson Marine, Inc.*, BRB Nos. 00-1144/A (Aug. 30, 2001), *reaff'd in pertinent part on recon.* (May 29, 2002).

On remand, Administrative Law Judge Gee¹ (the administrative law judge) computed claimant's entitlement to temporary partial disability benefits based on each period of temporary partial disability, and she adjusted the award for each period to account for the effects of inflation.² She ultimately concluded that employer is liable for

¹Judge Lindeman had retired.

²The administrative law judge found that claimant was temporarily partially disabled during the following periods: April 9 through May 22, 1996; June 12 through August 2, 1996; September 5, 1997 through January 25, 1998; January 28 through February 3, 1998; February 6 through February 16, 1998; February 19 through March 15, 1998; March 18 through April 16, 1998; April 19 through April 27, 1998; April 30 through June 3, 1998; June 6 through June 15, 1998; June 17, 18, 20-21, 1998; June 23 through September 23, 1998; September 26 through October 7, 1998; October 27 through

temporary partial disability benefits in the amount of \$12,816.48. As it had already paid \$10,743.36, employer owed claimant an additional \$2,073.12. Decision and Order on Remand at 4-10. The administrative law judge also found that claimant did not establish a loss of wage-earning capacity due to an inability to perform overtime work, and she reinstated the nominal award of \$1 per week. *Id.* at 10-13. Finally, the administrative law judge awarded interest on the \$2,073.12 at the rate in effect as of the filing date of her decision. *Id.* at 14. Claimant appeals, and employer responds, urging affirmance.

Claimant first contends the administrative law judge erred in calculating his temporary partial disability benefits based on each period of temporary partial disability rather than on a weekly basis. He contends that calculations based on a weekly basis would provide a uniform method of calculation, preventing the need to defer the calculation of benefits until the end of the period of temporary partial disability. He also argues that the administrative law judge's calculations violate Judge Lindeman's decision because Judge Lindeman stated that temporary partial disability benefits should be calculated and paid on a weekly basis and that no party appealed this aspect of his decision. We reject claimant's contention.

Section 8(e) of the Act, 33 U.S.C. §908(e), provides that temporary partial disability benefits are to equal two-thirds of the difference between a claimant's average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act, 33 U.S.C. §908(h), defines the claimant's post-injury wage-earning capacity as his actual wages unless they are not representative of his wage-earning capacity. In most cases, the Act contemplates the determination of a single dollar figure representing a claimant's post-injury wage-earning capacity. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984); *Butler v. Continental Western Lines*, 668 F.2d 1374 (D.C. Cir. 1981); *Brown v. National & Steel Shipbuilding Co.*, 34 BRBS 195 (2001). That figure is then adjusted for inflation and compared with the claimant's average weekly wage, and the resulting amount provides the basis for the claimant's benefits. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Richardson v. General Dynamics Corp.*, 19 BRBS 48 (1986). In this case, the administrative law judge computed 16 different post-injury wage-earning capacities based on claimant's 16 different periods of temporary partial disability. She adjusted each of them to account for inflationary effects and compared them to claimant's average weekly wage to determine his entitlement to benefits for each period. Decision and Order on Remand at 16-21. Because she had the

November 2, 1998; May 25 through August 3, 1999; September 28, 1999 through January 4, 2000. Decision and Order on Remand at 9-10, 16-21; *see also* Decision and Order at 2. These periods were surrounded by periods of temporary total disability. *See* Decision and Order at 1-2.

benefit of hindsight, the administrative law judge's meticulous computations are more accurate than the Act normally requires. Accordingly, her method of computation of claimant's temporary partial disability benefits is rational. *See generally Sestich*, 280 F.3d at 1161, 36 BRBS at 18(CRT); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Devillier v. National Steel & Shipbuilding Co.*, 14 BRBS 598 (1981).

Contrary to claimant's argument, calculating benefits on a weekly basis would not necessarily result in a more uniform calculation. Rather, only the unit of time would be consistent. The actual computation of benefits could vary greatly as, by his own admission, claimant stated that his ability to perform light duty work one week did not affect his ability to perform light duty work the next week. The administrative law judge's conclusion that a weekly calculation could result in a windfall to claimant is reasonable. *See* Decision and Order on Remand at 8. Further, as the administrative law judge stated, claimant misinterpreted Judge Lindeman's statements regarding the payment of benefits on a weekly basis. *Id.* Judge Lindeman did not order temporary partial disability benefits to be *calculated* on a weekly basis; rather, his discussion involved whether claimant is also entitled to benefits for weekends. He concluded that claimant is not entitled to benefits for weekends because claimant was not a seven-day per week worker, so benefits were to be *paid* on a weekly basis. Decision and Order on Recon. at 2. For these reasons, we reject claimant's arguments. As claimant does not challenge the actual dollar figures found to be representative of his post-injury wage-earning capacity, substantial evidence supports the administrative law judge's calculations. Therefore, we affirm the award of temporary partial disability benefits.

Claimant next argues that the administrative law judge erred in failing to discuss whether claimant lost available overtime work due to his work injury. Specifically, claimant seeks compensation for the one day he missed work and the two occasions he turned down overtime work as a result of his injury. We reject claimant's assertion that these three occurrences establish a loss of wage-earning capacity, and we affirm the administrative law judge's reinstatement of the nominal award of permanent partial disability benefits.

The administrative law judge credited claimant's testimony as to the time he missed work or turned down overtime work. However, after thoroughly discussing claimant's overtime work, relying on the payroll records, and noting that the same overtime was available to leadmen and foremen, she determined that claimant worked more overtime after his promotion and after his condition reached maximum medical improvement than he had before his injury. Decision and Order on Remand at 10-13. Thus, she concluded claimant did not suffer a loss of wage-earning capacity. In light of the evidence of record, *see* Emp. Exs. 12-13; Tr. at 51, 61, 64, the administrative law judge's conclusion is rational and is supported by substantial evidence of record. *Del*

Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190, 194 (1984); compare with *Newport News Shipbuilding & Dry Dock Co. v. Stallings*, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001) (the claimant could not work inside, so he lost work time during inclement weather); *Bunol v. George Engine Co.*, 996 F.2d 67, 27 BRBS 77(CRT) (5th Cir. 1993) (the claimant worked in pain); *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991) (the claimant worked in pain and worked fewer hours). In the absence of any loss of post-injury wage-earning capacity, pursuant to the Board's previous decision, we affirm the determination that claimant is entitled to a nominal permanent partial disability award of \$1 per week. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

Finally, claimant contends the administrative law judge erred in awarding interest on the past-due temporary partial disability benefits at the rate in effect on the date her decision on remand was filed. Claimant asserts that using the rate in effect on June 30, 2003, instead of the rate in effect on July 14, 2000, the date Judge Lindeman's decision was filed, violates the holding in *Grant v. Portland Stevedoring Co.*, 17 BRBS 20 (1985), and penalizes him for the administrative delay in calculating his benefits. Employer argues that the administrative law judge's award constitutes an "additional award" and that it is proper to charge interest on that amount at the rate in effect on the filing date of the decision on remand. We agree with claimant.

Although the Act does not expressly provide for interest, the courts and the Board have held that such awards are consistent with the Congressional purpose of compensating claimants for their injuries and making them whole. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Grant*, 17 BRBS 20. Interest is to be calculated based on the rate in effect as of the date the administrative law judge's decision is filed in the district director's office, as that is the date the award becomes effective. *Grant*, 17 BRBS at 23.

Judge Lindeman awarded claimant temporary partial disability benefits. Decision and Order at 11. Because he did not enter a specific award based on an actual dollar amount representing claimant's post-injury wage-earning capacity, and he did not account for the effects of inflation, the Board remanded the case for the administrative law judge to make the necessary findings of fact and determine the specific amount of temporary partial disability benefits to which claimant is entitled. Judge Gee, on remand, determined that amount. Her determination is not an "additional award," as employer asserts; rather, it is the result of making the necessary findings of fact in order to clarify and implement Judge Lindeman's award. Thus, it is part of the original award of benefits, and the award of interest on that portion of claimant's benefits is to be computed at the same rate as the remainder of Judge Lindeman's award. Otherwise, as claimant

argues, he would be penalized by the administrative delay in correctly resolving this case. As the purpose of interest is not to punish the employer, *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989), but to make claimant whole, it follows that interest on the entire award is due at the same rate in effect at the time of the initial finding of entitlement. *See generally Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998) (interest ensures that delay in payment does not diminish amount of compensation entitlement). Therefore, we hold that interest on the unpaid \$2,073.12 is to be calculated at the rate in effect on the date Judge Lindeman's decision was filed, July 14, 2000, as this serves the Act's purpose of making claimant whole. *Smith*, 22 BRBS 46.

Accordingly, the determination of the applicable interest rate on the past-due temporary partial disability benefits is modified to reflect that the proper rate of interest is that which was in effect on the filing date of Judge Lindeman's decision awarding benefits. In all other respects, the Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge