BRB No. 03-0752

DAVID A. DOYLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROWAN COMPANIES, INCORPORATED	)	DATE ISSUED: July 28, 2004
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and the Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Quentin D. Price (Barton, Price & McElroy), Orange, Texas, for claimant.

Stephen L. Roberts (Fulbright & Jaworski L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand and the Order Denying Motion for Reconsideration (2000-LHC-2878) of Administrative Law Judge Lee J. Romero, Jr., 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).

This is the second time that this case is before the Board. On December 28, 1999, claimant experienced neck and back pain while working for employer as a yardman. That same day, claimant was treated at a local hospital where he was given pain medication, muscle relaxers, and was released for light-duty work. Thereafter, claimant continued to complain of pain while performing light-duty work assignments for employer. Subsequently, on January 20, 2000, claimant was sent home by employer. On January 26, 2000, an MRI was performed on claimant=s back and revealed a bulging disc at C5-6, focal herniation at C6-7, and early changes of discogenic disease. On February 24, 2000, claimant was admitted to an emergency room with complaints of shoulder and neck pain; claimant was treated with injections of Demoral and Phenergan, given a prescription for Vicodin, and released. Employer voluntarily paid claimant compensation under the Act from January 21, 2000, through March 16, 2000, at which time claimant was terminated by employer. Claimant, who subsequently sought temporary total and temporary partial disability benefits for various periods of time under the Act, commenced non-longshore employment on July 25, 2000.

In the initial Decision and Order, the administrative law judge concluded that claimant has been temporarily disabled from the date of his work-related injury. The administrative law judge determined that claimant had not reached maximum medical improvement, and that although employer presented no evidence of suitable alternate employment, the record indicates that claimant worked for employer and others post-injury. Accordingly, after calculating claimant=s average weekly wage and post-injury wage-earning capacity, the administrative law judge awarded claimant temporary total disability compensation for the periods from January 21, 2000, through July 24, 2000, and from December 3, 2000, through January 3, 2001, and temporary partial disability compensation for the periods from July 25, 2000, through December 3, 2000, and from January 4, 2001, and continuing, as well as medical benefits and interest.

On appeal, the Board affirmed the administrative law judge's determination that claimant is incapable of resuming his usual employment duties with employer, as well as his determination of claimant's average weekly wage. The Board vacated, however, the administrative law judge's calculation of claimant's post-injury wage-earning capacity subsequent to January 4, 2001, and remanded the case for the administrative law judge to consider all of the relevant evidence in determining whether claimant's post-injury earnings reasonably represent his wage-earning capacity. *See Doyle v. Rowan Companies, Inc.*, BRB No. 02-0158 (Nov. 6, 2002)(unpub.).

Although the parties on remand agreed to have the issue of claimant's post-injury wage-earning capacity adjudicated based upon their respective briefs and the existing record, claimant submitted to the administrative law judge a medical report dated May 10, 2002, from Dr. Clark, and employer attached claimant's post-January 4, 2001 wage records from

Shamrock Equipment Rental Company to its brief. These documents were received into the record by the administrative law judge. Thereafter, in his Decision and Order on Remand, the administrative law judge determined that claimant had not reached maximum medical improvement, that the record did not support a finding that claimant worked post-January 4, 2001, only through extraordinary effort, and that claimant's actual post-January 4, 2001 wages fairly and reasonably represent his post-injury wage-earning capacity. According, after adjusting claimant's post-injury wages for inflation, the administrative law judge awarded claimant temporary partial disability benefits pursuant to Sections 8(e) and (h) of the Act, 33 U.S.C. §908(e), (h). Claimant subsequently sought reconsideration of the administrative law judge's decision on remand, averring that he has worked post-injury only through extraordinary effort and therefore his post-injury wage-earning capacity should be zero. In his Order Denying Motion for Reconsideration, the administrative law judge specifically addressed and rejected each of claimant's contentions; accordingly, claimant's motion was denied.

On appeal, claimant challenges the administrative law judge's determination of his post-January 4, 2001, wage-earning capacity. Employer responds, urging affirmance of the administrative law judge's decision on remand in its entirety.

Claimant contends that, in light of his testimony during the formal hearing in this case and the report of Dr. Clark which was submitted on remand, the administrative law judge erred in concluding that his post-January 4, 2001, wages accurately reflected his post-injury wage-earning capacity. An award for temporary partial disability is based upon the difference between claimant=s pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. '908(e); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1988). 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 reasonably represent his wage-earning capacity. *See 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). The party contending that the employee=s actual earnings are not representative of his wage-earning capacity bears the burden of establishing an alternative reasonable wage-earning capacity. *Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT). Wages earned in a post-injury job must be adjusted to the wages paid at the time of the claimant's injury and then compared with his average weekly wage to compensate for inflationary effects. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *see also Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

In the instant case, it is undisputed that claimant earned $22,686.90 while working for Shamrock from January 4, 2001 to December 31, 2001, and $9,731 while working for Quality Solids Control from March 2001 through June 2001, for a total of $32,417.90 during

calendar year 2001, $32,399.90 while working for Shamrock during 2002, and $10,388.40 while working for Shamrock from January 1, 2003 through April 17, 2003. In finding that claimant's actual wages with these two employers subsequent to January 4, 2001, accurately establish claimant's post-injury wage-earning capacity, the administrative law judge specifically found that claimant has regularly and continuously worked on a weekly basis during the relevant period of time, and that there was no evidence in the record to support a finding that claimant was employed subsequent to January 4, 2001, only through extraordinary effort. In this regard, the administrative law judge noted claimant's testimony that he was on call 24 hours a day and that he worked approximately 65-75 hours per week for Shamrock. Decision and Order on Remand at 4. Moreover, the administrative law judge found Dr. Clark's opinion that claimant should not be working belied by "claimant's physical capacity to perform work and his work history since his job injury." *Id.*

We reject claimant's arguments and affirm the administrative law judge's determination that claimant's actual wages subsequent to January 4, 2001, accurately establish his wage-earning capacity. First, claimant's February 13, 2001, hearing testimony, which was given approximately six weeks after he commenced employment with Shamrock, refers only twice to the requirements of his work. Claimant stated that he needs to stretch after driving, *see* Tr. at 68-69, and he testified that his work with Shamrock does not involve climbing ladders or lifting over ten pounds. *Id.* at 80. As this testimony is insufficient to establish claimant worked only due to extraordinary effort, the administrative law judge properly found that the record is devoid of evidence in this regard. Second, the administrative law judge rationally determined that Dr. Clark's May 10, 2002, opinion regarding claimant's employability[1] was unpersuasive in light of claimant's ongoing employment since January 4, 2001, as well as claimant's failure to seek or receive medical treatment for his alleged symptoms since May 10, 2002. Accordingly, we affirm the administrative law judge's conclusion that claimant's actual post-January 4, 2001, wages fairly and reasonably represent his post-injury wage-earning capacity during this period, as that finding is rational and in accordance with law. *Cook,* 21 BRBS 4. Additionally, as no party challenges the administrative law judge's adjustment of claimant's post-January 4, 2001, wage-earning capacity downward by the percentage increase in the National Average Weekly Wage to the date of claimant's injury, we affirm the administrative law judge's computation as it is rational and in accordance with law. *See Hundley v. Newport News Shipbuilding & Dry Dock Co.,* 32 BRBS 254 (1998).

[1] Dr. Clark opined that claimant's condition had worsened while working and that claimant should not work and should undergo surgery and rehabilitation.

Finally, claimant's counsel seeks an attorney's fee of $12,647.50, representing 1 hour of service performed at a rate of $250 per hour, and 55.1 hours of services performed at a rate of $225 per hour for work performed while this case was initially before the Board. BRB No. 02-0158. In response to this fee request, employer contends only that the requested hourly rates are excessive. Claimant's counsel is entitled to an attorney's fee payable by employer since he was partially successful in defending his award of benefits on appeal. *See Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996). Having reviewed counsel's fee petition and employer's objections thereto, we find the requested fee reasonable for the necessary work performed in defending against employer's initial appeal. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); 33 U.S.C. §928; 20 C.F.R. §802.203. We accordingly award counsel a fee of $12,647.50, to be paid directly to counsel by employer, for services performed while this case was initially pending before the Board. 33 U.S.C. §928; 20 C.F.R. §§802.203, 802.409.

Claimant's counsel has also filed a supplemental fee request seeking $495, representing 2.2 hours of services rendered at an hourly rate of $225 per hour, for services performed between December 3, 2002 and January 20, 2003, after the Board issued its Decision and Order on November 2, 2002. We decline to award a fee for these services, as they were not performed in furtherance of claimant's defense of employer's appeal to the Board; rather, the services itemized by claimant's counsel during the period December 3, 2002, through January 20 2003, clearly relate to services performed by counsel after the case was remanded to the administrative law judge for further consideration.[2] Claimant may file separate fee applications with the appropriate bodies before which this work was performed.

[2] Specifically, the services rendered by counsel during this period include resolving a dispute over a deposition and correspondence with claimant regarding his medication. *See* Claimant's Supplemental Application for Award of Attorney's Fee.

Accordingly, the administrative law judge=s Decision and Order on Remand and Order Denying Motion for Reconsideration are affirmed. Claimant's counsel is awarded a fee of $12,647.50 for work performed before the Board in BRB No. 02-0158, payable directly to counsel by employer.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge