

BRB No. 97-1390

GARY L. POWELL)
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 Claimant-Respondent) DATE ISSUED:
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 v.)
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 NEWPORT NEWS SHIPBUILDING)
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order Granting Temporary Partial Disability Based on A Loss of Overtime of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein and Matthew H. Craft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self- insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Temporary Partial Disability Based on A Loss of Overtime (96-LHC-1326) of Administrative Law Judge Richard K. Malamphy awarding 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).

On June 2, 1994, claimant fell at work injuring his knees and ankles. The injury necessitated a change in claimant's work duties and a move to a different department. Employer voluntarily paid claimant periods of temporary total disability benefits. At issue, however, before the administrative law judge was whether claimant is entitled to temporary partial disability benefits for lost overtime due to claimant's work injury for the period from May 2, 1995 through July 29, 1996. Claimant contended that following his injury, he was unable to work available overtime because of the injury. Employer asserted that claimant is working more overtime after his work injury than he did before; that he has never been passed over for overtime work because of his work injury; and that occasionally claimant refused overtime work offered to him.

The administrative law judge concluded that claimant's actual post-injury wages do not fairly and reasonably represent his wage-earning capacity due to the fact that claimant lost available overtime as a result of his injury. Although claimant worked more overtime in his post-injury department than he did in his pre-injury department, the administrative law judge found that inasmuch as more overtime was available in the post-injury period than was available to comparable employees in claimant's pre-injury job, claimant is entitled to compensation based on the difference between claimant's post-injury overtime and the overtime available in claimant's pre-injury to comparable employees.

On appeal, employer contends that the administrative law judge erred in finding that claimant sustained a loss of wage-earning capacity in the form of lost overtime. Claimant urges affirmance of the administrative law judge's decision.

Employer, specifically, contends that the administrative law judge erred in finding that claimant sustained a loss of wage-earning capacity when his post-injury overtime was greater and more consistently available than pre-injury overtime. Employer asserts that claimant cannot lose post-injury more overtime than he had worked in the fifty-two weeks prior to his injury. The wage-earning capacity of an injured employee such as claimant shall be determined by his actual post-injury earnings if such earnings fairly and reasonably represent his wage-earning capacity.

See 33 U.S.C. §908(h). In the event that claimant's actual post-injury earnings "do not fairly and reasonably represent his wage-earning capacity," Section 8(h) of the Act provides that a wage-earning capacity may be set using factors such as the nature of the injury, the degree of physical impairment, the usual employment, and any other factors which may affect the capacity to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future. See *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Loss of overtime is a factor that the administrative law judge must take into consideration

when determining loss of wage-earning capacity.¹ Claimant must establish that absent his injury, he would have worked available overtime. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989). Moreover, higher post-injury earnings do not preclude compensation if claimant has, nevertheless, suffered a loss of wage-earning capacity. See *Container Stevedoring v. OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir.1991).

Contrary to employer's contention, the administrative law judge rationally determined that claimant's actual wages do not reasonably and fairly represent his wage-earning capacity. The administrative law judge found that claimant changed departments because of his work injury resulting in claimant losing overtime which was available to employees in claimant's pre-injury position, as evidenced by the overtime worked by two comparable employees in claimant's pre-injury crew.² The administrative law judge found further that claimant established his willingness to work overtime post-injury by handing out tools every morning in his post-injury position to receive thirty minutes per day in overtime. The administrative law judge rationally found that claimant's refusal to work overtime on three occasions was not determinative. The administrative law judge then based claimant's award of overtime on the number of hours of overtime averaged by the comparable employees in claimant's pre-injury position during the time periods at issue minus claimant's average post-injury overtime hours and multiplying by claimant's overtime pay rate. Employer does not challenge the administrative law judge's method of calculating the actual number of overtime hours awarded. Thus, as the administrative law judge's findings are rational, supported by substantial evidence and in accordance with law, we affirm the administrative law judge's award of temporary partial disability benefits for a loss of overtime. See *Everett*, 23 BRBS at 320; *Brown*, 23 BRBS at 112-113.

¹Claimant's stipulated average weekly wage at the time of his injury in 1994 was \$502.15, and his payroll records reflect that he worked overtime in that year.

²Employer provided the names and pertinent data for comparable "pre-injury" employees in response to claimant's interrogatories.

Accordingly, the administrative law judge's award of temporary partial disability benefits for the period from May 2, 1995 through July 29, 1996, based on claimant's loss of post-injury overtime is affirmed.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge