BRB Nos. 98-1376, 98-1376A
and 98-1407

PARKER JOHNSTON	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
MATSON TERMINALS	)	DATE ISSUED: July 14, 1999
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order and Order Denying Motion for Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor, and the Compensation Order-Approval of Attorney Fee Application of Karen P. Staats, District Director, United States Department of Labor.

Mary Alice Theiler (Theiler, Douglas, Drachler & McKee), Seattle, Washington, for claimant.

John P. Hayes (Forsberg & Umlauf, P.S.), Seattle, Washington, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order and Order Denying Motion for Reconsideration (97-LHC-1194) of Administrative Law Judge Alfred Lindeman 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). Employer also appeals the Compensation Order-Approval of Attorney Fee Application (Case No. 14-114956) of District Director Karen P. Staats . We must affirm the findings of fact and the 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 272 (1980).

Claimant, while working as a dock supervisor for employer, suffered a work-related back injury on November 26, 1993. He was off work until February 1994. Claimant suffered another episode of low back pain on March 21, 1994, and was again disabled from work. Claimant returned to his job as a dock supervisor on June 21, 1995, working an average of two or three days per week, until electing to undergo a laminectomy on February 21, 1996. In June 1996, Drs. Bradley and Nelson stated that restrictions placed on claimant in February 1995 were permanent, and that claimant was capable of returning to work under those restrictions. Claimant did not return to work after the surgery, opting instead to take his pension and retire. Employer paid claimant temporary total disability compensation while he was off work, but ceased its voluntary payments on October 1, 1996, on the basis that claimant chose to retire instead of returning to work. Claimant sought disability compensation for the period subsequent to October 1, 1996.

The administrative law judge awarded claimant permanent partial disability compensation pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), determining that claimant was capable of returning to work after his February 1996 operation in the same capacity in which he was working prior to the procedure, based upon the opinions of Drs. Bradley and Nelson. The administrative law judge found that claimant suffered a loss in wage-earning capacity after his surgery based upon the difference between claimant's pre-injury average weekly wage and the actual wages he earned while he was working between June 1995 and February 1996. Employer was awarded relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge affirmed his award of disability compensation in an Order Denying [Employer's] Motion for Reconsideration. Subsequent to the administrative law judge's award, the district director awarded claimant's counsel an attorney's fee of $3,791.78 for work performed before her in connection with this case.

Employer appeals, contending that the administrative law judge erred in awarding claimant permanent partial disability compensation and in calculating claimant's average weekly wage. BRB No. 98-1376. Claimant cross-appeals, contending that the administrative law judge erred in failing to award him permanent total disability compensation, and in calculating his post-injury wage-earning capacity and average weekly wage. BRB No. 98-1376A. Employer also appeals the district

director's award of an attorney's fee. BRB No. 98-1407.

Initially, we reject claimant's contention that the administrative law judge erred in finding that he was not totally disabled, and was capable of performing his duties as a dock supervisor, because the administrative law judge erred in his assessment of the exertional requirements of the job. Relying upon the opinions of Drs. Bradley and Nelson, the administrative law judge concluded that claimant was capable of performing the dock supervisor position.[1] The administrative law judge acknowledged claimant's testimony that his job would not allow him to change positions intermittently every 15 minutes, but chose instead to credit the testimony of Clay Edwards, a superintendent, who testified that the dock supervisor job allowed claimant to stand or sit at will. Tr. at 147, 151, 152. The administrative law judge also credited the opinion of employer's vocational witness, Paul Tomita, that the job allowed claimant to change positions. The administrative law judge was persuaded by a videotape placed in evidence, which showed workers performing the job changing positions frequently. EX-29. Claimant asserts that the administrative law judge failed to consider that the dock supervisor duties required a stint as a gate keeper, which involved bending while climbing on refrigeration cars, which was beyond the physical restrictions listed by Drs. Bradley and Nelson. However, contrary to claimant's contention, the administrative law judge considered the exertional requirements of the gate keeper position, and chose to credit the testimony of Mr. Edwards that the job did not involve climbing or bending. Tr. at 153, 174-175. Inasmuch as the administrative law judge is afforded great latitude in assessing the credibility of the evidence, and as claimant has not established that the administrative law judge's weighing of the conflicting evidence is irrational, we reject claimant's contentions of error with regard to the exertional requirements of his position. *Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962).

[1]On February 22, 1995, Drs. Bradley and Nelson found that claimant is limited to lifting 10 to 15 pounds occasionally, should avoid repetitive bending, and should have the ability to change positions from sitting to standing to walking approximately every 15 minutes. EX-22. The physicians reiterated these restrictions in June 1996, finding them at that time to be permanent. EX-23.

Furthermore, we reject claimant's challenge to the administrative law judge's weighing of the medical evidence. Claimant contends that the administrative law judge erred in drawing an adverse inference against the opinion of Dr. Jackson, who concluded that claimant was incapable of working after his February 1996 operation, because Dr. Jackson was not deposed and thus was not subjected to cross-examination. EX-16; Decision and Order at 5 - 6. The administrative law judge, however, provided a number of valid reasons for crediting the opinions of Drs. Nelson and Bradley over that of Dr. Jackson, and he did not rely solely on the adverse inference. Specifically, he found that Drs. Nelson and Bradley had a more complete knowledge of the history of claimant's condition, as they had examined claimant both before and after his operation, and a better comprehension of the duties of claimant's job than did Dr. Jackson based on their viewing Mr. Tomita's videotape. In addition, he relied on the fact that claimant's primary treating physician, Dr. Perkins, concurred with their 1995 opinion that claimant could return to work within restrictions. EX-17; Decision and Order at 5-6. The administrative law judge's reasons for crediting the opinion of Drs. Nelson and Bradley are rational and constitute valid exercises of the administrative law judge's discretion as trier-of-fact. *See, e.g.*, *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30 (CRT) (9th Cir. 1988). Consequently, since claimant has failed to identify reversible error in the administrative law judge's evaluation of the conflicting medical evidence, his finding that claimant is not totally disabled is affirmed.

Employer contends that the administrative law judge erred in awarding claimant permanent partial disability compensation asserting that claimant has not demonstrated any loss in wage-earning capacity due to the injury. Specifically, employer asserts that the evidence fails to support the administrative law judge's finding that claimant is incapable of working more than two or three days per week as a result of the work-related injury and that claimant voluntarily limited his work schedule.

We reject employer's contention, as the administrative law judge addressed employer's argument in his Order Denying Motion for Reconsideration and there is substantial evidence to support the award. The administrative law judge found that claimant's post-surgical wage-earning capacity should be based on the wages claimant earned from June 1995 to February 1996, when claimant worked two to three days per week as a dock supervisor. The administrative law judge recognized that claimant's physicians did not limit his work to fewer than five days per week and that claimant did not seek an award for reduced earning capacity during the June 1995-February 1996 period. Order at 1. Nonetheless, the administrative law judge rationally credited claimant's testimony concerning his reduced work schedule. *Id.* Claimant testified that his back pain required that he take pain medication at work,

Tr. at 50, and he kept a calendar of the days he did not work due to pain. CX-29. Moreover, there is contemporaneous medical evidence documenting claimant's pain and limitations during this period. *See, e.g.,* CX-5 at 130-144. We, therefore, affirm the administrative law judge's finding that the wages claimant earned in the period from June 1995 - February 1996 represent claimant's wage-earning capacity following his clearance to return to work in October 1996.[2] *See generally Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 26-27 (1999).

Next, we address claimant's contention that the administrative law judge erred in failing to adjust his post-injury wage-earning capacity to the wage levels paid at the time of injury in order to neutralize the effects of inflation. The administrative law judge stated that no such adjustment was required in this case because there is no basis in the record for finding that claimant's union contract provided for a wage increase during the relevant period. Decision and Order at 7 n.6.

We must remand this case to the administrative law judge to reconsider this issue. The Board has held that it is necessary to adjust the claimant's post-injury wage-earning capacity to the wages paid at the time of injury in order to insure that the post-injury earning capacity is considered on an equal footing with the claimant's average weekly wage. *See, e.g., Quan v. Marine Power & Equip. Co.,* 30 BRBS 124 (1996). If the record does not contain evidence concerning the wages paid in the post-injury job at the time of injury, the Board has held that the administrative law judge should use the percentage change in the National Average Weekly Wage to account for inflation. *Richard v. General Dynamics Corp.,* 28 BRBS 327 (1990). If claimant has not had any contractual wage increases since his injury in 1993, then such an adjustment is all the more necessary as the value of the wage rate claimant received in 1993 is not the same as its value in 1996. On remand, the administrative law judge should discuss fully claimant's contentions in this regard.[3]

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[2]We reject employer's contention that claimant should not receive permanent partial disability compensation because he is a voluntary retiree. Since this is not an occupational disease case, the issue of claimant's retirement type and its affect on his disability status is not relevant. The sole relevant inquiry in this case is whether claimant has a loss in wage-earning capacity in the job he was, or was capable of, performing in his injured capacity. *See Harmon v. Sea-Land Service, Inc.,* 31 BRBS 45 (1997).

[3]The administrative law judge, however, properly denied an inflation adjustment to claimant's average weekly wage, as absent exceptional circumstances, which are not alleged to be present here, average weekly wage is to be calculated by the earnings of the claimant or comparable co-workers in the

We next address the parties' contentions that the administrative law judge erred in calculating claimant's average weekly wage. The administrative law judge found that claimant earned $98,543.04 in the year prior to his 1993 injury, working 252 days. The administrative law judge determined that, because claimant had worked intermittently as both a five day worker and as a six day worker in the year preceding the injury, he was unable to calculate claimant's average weekly wage under either Section 10(a) or 10(b) of the Act. Thus, utilizing Section 10(c), the administrative law judge divided claimant's annual salary in the year preceding the injury by 52 weeks, finding his average weekly wage to be $1,895.06.

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relevant period prior to the injury. *See generally* *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986).

We reject the parties' contentions that the administrative law judge was mandated to calculate claimant's average weekly wage under Section 10(a), and we affirm the administrative law judge's calculation of claimant's average weekly wage given the facts in this case. A claimant's average weekly wage is determined at the time of injury by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. §910. *See* 33 U.S.C. §910(a)-(c). Section 10(a) applies when claimant has worked in the same or comparable employment for substantially the whole of the year immediately preceding the injury and provides a specific formula for calculating annual earnings. Section 10(c) provides a general method for determining annual earning capacity where Section 10(a) or (b) cannot fairly or reasonably be applied to calculate claimant's average weekly wage at the time of injury.[4] *Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1991).

[4]No party contends that Section 10(b) should be applied here.

In this case, the administrative law judge rationally concluded that the evidence is insufficient to apply the specific formula contained at Section 10(a), because, although it is uncontested that claimant worked substantially the whole of the year preceding the injury for employer and the number of days claimant worked is known, he could not determine from the wage records whether claimant was a five day or six day worker as he had worked intermittently as both a five day and six day worker in the year at issue.[5] *See* CX-1. Thus, the administrative law judge's conclusion that claimant was neither a five day nor a six day worker is rational and supported by substantial evidence.[6] We, therefore, affirm the administrative law judge's use of Section 10(c) to calculate claimant's average weekly wage. Furthermore, we hold that the administrative law judge's method of calculating claimant's average weekly wage by dividing total earnings in the year preceding claimant's injury by 52 was a fair and reasonable approximation of a claimant's wage-earning capacity at the time of his injury under Section 10(c); consequently, his determination is affirmed.[7] *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991); *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979).

Finally, we address employer's appeal of the district director's fee award. In this regard, employer contends merely that it is not liable for an attorney's fee if claimant is not entitled to the additional permanent partial disability benefits awarded by the administrative law judge. As we have affirmed the administrative law judge's award, the fee award is likewise affirmed. *See generally Matulic v. Director, OWCP*,

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[5]Employer concedes that the wage records indicate that claimant worked 32 percent of the year (17 weeks) as a six day worker during the year in question, and as a five day worker for the other portions of that year. CX-1; Employer's Brief at 30.

[6]We note that the recent decision of the United States Court of Appeals for the Ninth Circuit in *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT) (9th Cir. 1998), does not compel a different result. The court held that Section 10(a) must be applied if the claimant worked in 75 percent of the work days of the applicable year preceding the injury, which the claimant herein arguably did. The court in *Matulic*, however, did not discuss the scenario presented in this case where the claimant worked both five-day and six-day weeks during the period prior to injury.

[7]Employer asserts that the administrative law judge erred in failing to consider vacation days in determining that claimant worked 252 days in the year preceding his injury. This argument is moot given the affirmance of the administrative law judge's calculation under Section 10(c); inasmuch as the administrative law judge did not utilize his finding that claimant worked 252 days in calculating claimant's average weekly wage, we decline to address employer's arguments in this regard. *But see Wooley v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 98-501 (June 22, 1999).

154 F.3d 1052, 32 BRBS 148 (CRT) (9th Cir. 1998); 33 U.S.C. §928(b).

Consequently, the administrative law judge's finding that he need not adjust claimant's post-injury wage-earning capacity for inflation is vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed. The district director's fee award is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge