

SCOTT H. GRANT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BATH IRON WORKS)	DATE ISSUED:
CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order-Denying Additional Benefits and Decision and Order Denying Motion for Reconsideration of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland, Brunswick, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Additional Benefits and Decision and Order Denying Motion for Reconsideration (99-LHC-1873, 1874, 1875) of Administrative Law Judge David W. DiNardi 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).

The parties stipulated that claimant injured his neck on May 3, 1993, and on August 7, 1996, during the course of his employment with a ship-based operating crew. Claimant alleged he sustained a third work-related neck injury on January 5, 1998. After the initial neck injury in May 1993 claimant continued in his usual

employment until January 4, 1998, when employer restricted claimant from working on board ships and he became a member of a land-based operating crew. On April 3, 1998, claimant's treating physician, Dr. Hanley, restricted claimant from working in tight spaces requiring significant overhead activity or from entering or working in spaces with an overhead clearance of less than seven feet. Claimant's employment with employer terminated on September 28, 1999. The parties stipulated that claimant's average weekly wage was \$784.39 at the time of the 1993 injury, \$681.32 at the time of the 1996 injury, and \$683.69 at the time of the alleged injury on January 5, 1998. Employer voluntarily paid claimant compensation from January 5, 1998, to September 27, 1999, for permanent partial disability based on a loss of wage-earning capacity. 33 U.S.C. §908(c)(21). Claimant sought additional compensation for an alleged loss of wage-earning capacity from the date of his first reported neck injury on May 3, 1993, due to lost overtime caused by pain symptomatology from his chronic neck condition. After the hearing, claimant amended his claim to include compensation for permanent total disability commencing September 28, 1999. 33 U.S.C. §908(a).

In his decision, the administrative law judge concluded that, notwithstanding claimant's neck injuries on May 3, 1993, and August 7, 1996, claimant remained able to work at his usual ship-based employment as a member of the operating crew and that claimant failed to establish any loss of overtime due to his neck condition. The administrative law judge found no evidence of medical disability due to claimant's work injuries until employer restricted claimant from shipboard work on January 4, 1998. The administrative law judge also found that any reduction in overtime claimant sustained was due to a decrease in shipbuilding and employer's implementation in 1994 of a no layoff policy and of a proficiency system, pursuant to employer's contract with claimant's union, and not to claimant's injuries. Alternatively, the administrative law judge found the claim filed on November 18, 1998, for the May 3, 1993, injury was untimely and therefore barred under Section 13 of the Act. 33 U.S.C. §913.

With regard to the alleged injury on January 5, 1998, the administrative law judge similarly attributed any reduction of claimant's wage-earning capacity beyond that for which employer paid permanent partial disability benefits to decreased shipbuilding and the no layoff provision in the collective bargaining agreement. Moreover, the administrative law judge credited testimony from claimant's treating physician, Dr. Hanley, and Kenneth Black, employer's classification department head, in finding that claimant is able to return to his usual ship-based employment on the operating crew because employer could accommodate claimant's restrictions prohibiting working in tight or confined spaces and excessive neck movement. Accordingly, claimant was denied any additional compensation for permanent partial

disability based on a loss of wage-earning capacity. Finally, the administrative law judge declined to address claimant's entitlement to compensation for permanent total disability commencing September 28, 1999, which claimant initially raised after the September 23, 1999, formal hearing. The administrative law judge stated that claimant would have to file a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, in order to have this claim considered.

The administrative law judge's decision was filed in the district director's office on Friday, March 3, 2000. On Friday, March 17, 2000, claimant mailed a motion for reconsideration of the administrative law judge's denial of compensation. Claimant's motion was received on Monday, March 20, 2000. In his decision on reconsideration, filed on April 17, 2000, the administrative law judge denied claimant's motion as untimely, since it was not filed within 10 days from the date of the filing of the administrative law judge's initial decision. See 20 C.F.R. §802.206(b)(1). Alternatively, addressing the merits of claimant's motion, the administrative law judge found that claimant generally restated arguments already considered and the motion for reconsideration was denied. Claimant filed a notice of appeal with the Board on May 17, 2000.

On appeal, claimant contends that his motion for reconsideration was timely filed, and that his appeal, therefore is timely. Moreover, claimant challenges the administrative law judge's findings that the claim for the 1993 injury was not timely filed, and that claimant did not sustain a loss of wage-earning capacity due to a loss of overtime resulting from each of his neck injuries. Employer responds with two arguments. First, employer moves to strike or dismiss the appeal, asserting that it was not filed in a timely manner. Alternatively, employer urges affirmance of the administrative law judge's denial of additional compensation.

Before reaching the merits of the case, we must first address the procedural issue. The administrative law judge's Decision and Order-Denying Additional Benefits was filed in the district director's office on Friday, March 3, 2000. Claimant mailed his motion for reconsideration on Friday, March 17, 2000, and it was received on Monday, March 20, 2000. In his Decision and Order Denying Motion for Reconsideration, the administrative law judge found that claimant's motion was not filed within 10 days of the filing of his decision. This Order was filed in the district director's office on April 17, 2000. Claimant appealed both decisions on May 17, 2000. Claimant contends that his motion for reconsideration was timely filed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure. In its response brief, employer asserts that a motion for reconsideration of an administrative law judge's decision must be filed within 10 calendar days of the filing of the decision to be considered timely and to toll the time for appeal pursuant to Section

802.206(a) of the Board's regulations, 20 C.F.R. §802.206(a).¹ Thus, employer argues that claimant's motion should have been filed by March 13, 2000, and as it was not, claimant's appeal was not timely.

Rule 6(a) of the FRCP provides in part:

[i]n computing any period of time prescribed or allowed by these rules, . . . or by any applicable statute, . . . [if] the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Fed. R. Civ. P. 6(a). In *Galle v. Ingalls Shipbuilding Corp.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, F.3d , No.00-60075, 2001 WL 293514 (5th Cir. March 26, 2001), the Board held that Rule 6(a) applies to the filing of motions for reconsideration before the administrative law judge for purposes of

¹20 C.F.R. §802.206(a) states:

A timely motion for reconsideration of a decision or order of an administrative law judge . . . shall suspend the running of the time for filing a notice of appeal.

Section 802.206(b)(1), 20 C.F.R. §802.206(b)(1), provides that a motion for reconsideration is timely if it is filed within 10 days of the date the administrative law judge's decision is filed in the district director's office.

determining whether the tolling provision of Section 802.206(a) applies to an appeal filed with the Board. Moreover, pursuant to Section 802.206(c) of the Board's regulations, 20 C.F.R. §802.206(c), the date a motion for reconsideration is mailed shall be considered the date of filing if using the date of delivery as the date of filing would render the motion untimely.²

²20 C.F.R. §802.206(c) states in pertinent part:

If the motion for reconsideration is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of reconsideration rights, it will be considered to have been filed as of the date of mailing.

By applying FRCP 6(a), we can ascertain whether claimant's motion for reconsideration of the administrative law judge's decision was timely and, consequently, whether the appeal before the Board was filed in a timely manner. March 3, 2000, was a Friday. As intermediate Saturdays, Sundays and holidays are excluded from the time computation, March 4, 5, 11 and 12, are excluded. Accordingly, under Rule 6(a), the 10-day filing period expired on Friday, March 17, 2000. As claimant mailed his motion for reconsideration to the administrative law judge's office on Friday, March 17, 2000, it was filed in a timely manner, and the timely motion for reconsideration tolled the time for filing the appeal to the Board.³ *Galle*, 33 BRBS at 143-145; 20 C.F.R. §802.206(c). Pursuant to either Section 802.206(d) or 802.206(e), the time for filing an appeal begins to run on the date the reconsideration order is filed. Therefore, claimant had 30 days from April 17, 2000, to file his appeal, which he filed on May 17, 2000. 20 C.F.R. §§802.205(a), 802.206(d), (e). Consequently, claimant's appeal of both the Decision and Order Denying Additional Benefits and the Decision and Order Denying Motion for Reconsideration was timely filed, and the merits of his appeal shall be addressed.

We next address claimant's contention that the administrative law judge erred by finding that claimant did not lose any overtime as a result of his neck injuries and that he therefore did not sustain a loss of wage-earning capacity. Under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), an award for 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 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; however, if such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid claimant under normal employment conditions as injured. See *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). Among the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity are 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. See *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT)(5th

³We note that in his Decision and Order Denying Motion for Reconsideration, the administrative law judge found that claimant's motion was mailed on March 17, 2000.

Cir. 1994); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Loss of overtime is also a factor in determining post-injury wage-earning capacity; claimant must establish that, absent his injury, he would have worked available overtime. *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989).

In the instant case, the administrative initially addressed claimant's contention that he sustained a loss of overtime between the date of his first neck injury on May 3, 1993, and his second neck injury on August 7, 1996. The administrative law judge found no evidence that claimant's neck condition was medically disabling during this period. Specifically, claimant sought treatment on only one occasion after his May 1993 injury when he was examined by Dr. Guay on July 27, 1993, and did not seek further treatment until after his August 1996, injury when he was examined by Dr. Hanley on August 12, 1996. The administrative law judge found no evidence of any work restrictions during this period and that the number of hours of overtime worked by claimant was comparable to those of eight operating crew co-workers.⁴ See EX 31. The administrative law judge's finding that claimant did not establish a loss of overtime due to his May 3, 1993, work injury is supported by substantial evidence. See generally *Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987). Consequently, the administrative law judge's finding that claimant had no loss of wage-earning capacity from May 3, 1993, to August 6, 1996, is affirmed.⁵

⁴We note that these findings are not challenged by claimant on appeal.

⁵We therefore need not address claimant's contention that the administrative law judge erred by finding untimely the filing of the claim for the May 3, 1993, injury as any error by the administrative law judge is harmless.

The administrative law judge next determined that claimant's actual wages from the date of his August 7, 1996, work injury to January 5, 1998, represent claimant's wage-earning capacity during this period. The administrative law judge again found no medical evidence supporting claimant's contention of lost overtime. The administrative law judge attributed claimant's decreased wages in this period to a reduction in the number of ships constructed at employer's facility and to changes in the collective bargaining agreement between employer and claimant's union implementing a no layoff policy and proficiency system, which decreased the amount of overtime available to claimant. Contrary to claimant's contention, the record contains substantial evidence supporting these findings. Kenneth Black, employer's classification department head, testified at the September 23, 1999, hearing that the number of ships under construction decreased approximately two years beforehand. Tr. at 105, 127-128. Mr. Black also testified that the collective bargaining agreement was modified in 1994 to include a no layoff provision, which decreased the amount of available overtime. Tr. at 106-107, 142-143. Mr. Black further stated that the proficiency system influences overtime availability depending on the number of proficiencies in which a worker has obtained certification and that claimant has 10 of a possible 25 proficiencies. Tr. at 107-111, 117-118. Inasmuch as the administrative law judge rationally found there is no medical evidence supporting claimant's testimony of lost overtime between August 7, 1996, and January 4, 1998, and there is substantial evidence from which the administrative law judge could rationally infer that the reduction in claimant's actual wages is attributable to changes in the collective bargaining agreement and a reduction in ship construction at employer's facility, the administrative law judge's finding that claimant did not sustain a loss of wage-earning capacity due to his neck condition from August 7, 1996, to January 4, 1998, is affirmed.⁶ See generally *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C.Cir.1994); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

Finally, the administrative law judge found no loss of wage-earning capacity resulting from claimant's alleged injury on January 5, 1998, beyond that for which employer had voluntarily paid claimant for the reduction in wages caused by claimant's removal from ship-based employment. See EX 12, 13. Notwithstanding claimant's removal from shipboard work, the administrative law judge credited the testimony of claimant's treating physician, Dr. Hanley, and the testimony of Mr. Black, and found that claimant is not restricted to working on land as employer could provide claimant with ship-based work within Dr. Hanley's April 3, 1998, restrictions

⁶We note, moreover, that claimant did not introduce any evidence as to the number of overtime hours he worked, or the number of overtime hours worked by co-workers in the operating crew, from 1996 to 1999.

prohibiting work in tight areas and significant overhead activity. The administrative law judge concluded that any additional loss of wage-earning capacity after January 5, 1998, was therefore caused by a decrease in shipbuilding at employer's facility and by the no layoff provision in the collective bargaining agreement. Moreover, claimant introduced no evidence other than his testimony in support of his contention of lost overtime due to his neck condition after January 5, 1998.⁷ Accordingly, we affirm the administrative law judge's finding that claimant did not sustain any additional loss of wage-earning capacity due to his neck condition from January 5, 1998, until he was terminated by employer on September 28, 1999. See generally *Sears*, 19 BRBS 235; see also *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984). We therefore

⁷In this regard, Mr. Black testified that claimant worked 17 hours of overtime in 1997 and 20 hours of overtime in 1998, which was after employer restricted claimant from ship-based work. Tr. at 126. Moreover, we note that Steven Donahue, a union shop steward, testified he would be informed if claimant declined an opportunity to work overtime because of his neck condition. Tr. at 92-93.

affirm the administrative law judge's denial of additional compensation for permanent partial disability.⁸

Accordingly, the administrative law judge's Decision and Order Denying Motion for Reconsideration is reversed insofar as it found claimant's motion for reconsideration to be untimely. The administrative law judge's Decision and Order-Denying Additional Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁸We therefore need not address claimant's contention that the administrative law judge erroneously found that claimant did not sustain a new injury on January 5, 1998, as any error is harmless. Moreover, we need not address claimant's contentions that the administrative law judge erred in calculating claimant's wage-earning capacity as we have affirmed the administrative law judge's ultimate conclusion that claimant did not sustain additional loss of wage-earning capacity due to his neck condition.