

BRB No. 00-0149

BRUCE A. HOLTE)
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 Claimant-Petitioner)
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 v.)
)
 HALL-BUCK MARINE,) DATE ISSUED: Oct. 5, 2000
 INCORPORATED)
)
 and)
)
 F.A. RICHARD & ASSOCIATES)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Ellin O'Shea,
Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Christopher M. Galichon (Dupree Galichon & Associates), San Diego, California,
for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits (98-LHC-0349) of
Administrative Law Judge Ellin O'Shea 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 if they
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).

Claimant, a longshoreman working as a switchman, suffered injuries to his left foot and knee,
right ankle, left wrist and neck when he fell from a moving train on January 27, 1995. All injuries
except those to claimant's left foot have fully resolved. The parties are in agreement that claimant's
condition became medically stationary on May 27, 1997. *See* CXS 9, 21. In her decision, the

administrative law judge found that in addition to the periods of temporary total disability for which employer has already paid compensation, claimant was entitled to temporary partial disability compensation from February 12 to April 26, 1995, and from May 1 to September 27, 1995. *See* 33 U.S.C. §908(e). She further awarded claimant permanent partial disability compensation under the schedule for the disability sustained to claimant's left foot. *See* 33 U.S.C. §908(c)(4), (19).

Claimant appeals, challenging the administrative law judge's finding that he is entitled to no compensation for the period of August 29, 1996, to May 27, 1997, and the administrative law judge's calculation of the amount of compensation to which claimant is entitled during the periods of February 12 to April 26, 1995, and from May 1 to September 27, 1995. Alternatively, claimant contends that the administrative law judge erred in failing to award him additional compensation for fifty days of work that he allegedly lost due to his work injury during this period. Employer responds, urging affirmance of the administrative law judge's decision.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985). An award for temporary partial disability is based on 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). Thus, claimant in the instant case bears the burden of proof in establishing any loss of wage-earning capacity due to his January 27, 1995, work accident. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985); *West v. Port of Portland*, 21 BRBS 87 (1988), *modifying on recon.*, 20 BRBS 162 (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, e.g., Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992). Only if such earnings do not represent the claimant's wage-earning capacity should the administrative law judge calculate a dollar amount which reasonably represents the claimant's wage-earning capacity. *See Ward v. Cascade General Inc.*, 31 BRBS 65 (1995); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). The object of the inquiry concerning the claimant's wage-earning capacity is to determine the post-injury wages that would be paid under normal employment conditions to the claimant as injured. *Long*, 767 F.2d at 1578, 17 BRBS at 149 (CRT). A claimant's pain and limitations are relevant factors in determining his post-injury wage-earning capacity and may support an award based on reduced earning capacity despite the fact that claimant's actual earnings may have increased. *See, e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).

Claimant initially challenges the administrative law judge's determination of his loss in wage-earning capacity from February 13 to April 26, 1995, and from May 1 to September 27, 1995. Specifically, without proposing an alternate method of calculation, claimant asserts that the administrative law judge erred in using claimant's actual wages in her calculation and in failing to consider claimant's pain during these periods of time. In addressing these distinct periods of time, the administrative law judge found that claimant's medical condition during these periods was not

being adequately addressed and concluded that:

[the] §8(h) factors are significant enough in what they reflect claimant had to work with during this period of time to indicate **actual wages in this discrete period were not a reasonable and fair reflection of wage earning capacity** with his undiagnosed conditions, and to justify a separate consideration of the two periods so as to determine any loss of wage earning capacity in each.

Decision and Order at 12 (emphasis added). The administrative law judge went on to say that totaling the actual earnings in these two periods in 1995 for use as claimant's Section 8(h) earning capacity would not be a true reflection of his capacity given the nature of his injury, medical condition and degree of impairment during this time. Thereafter, however, in the next paragraph, the administrative law judge took precisely the action she had just rejected. She divided claimant's actual wages earned during both periods of time in 1995 by the total number of weeks and found that claimant's wage-earning capacity was \$1013.72 for these 31.75 weeks; subtracting this figure from claimant's stipulated average weekly wage of \$1,107.69 resulted in a loss in wage-earning capacity of \$93.97 per week. This finding is inconsistent with the administrative law judge's prior determination that claimant's actual wages in these periods of 1995 were not a reasonable and fair reflection of his wage-earning capacity. Accordingly, we vacate the administrative law judge's finding that claimant suffered a loss in wage-earning capacity of \$93.97 per week from February 13 to April 26, 1995 and from May 1 to September 27, 1995, and remand the case for the administrative law judge to fully consider the impact of claimant's medical condition on his ability to earn wages during these periods and to recalculate, if necessary, claimant's loss in wage-earning capacity during this time. *See Darcell v. FMC Corp., Marine & Rail Equipment Div.*, 14 BRBS 294 (1981); *De villier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1976).

Claimant next challenges the administrative law judge's failure to award temporary disability compensation during the periods of August 30, 1996, to February 24, 1997, and March 17, 1997, through May 27, 1997, during which time claimant, having been released for regular duty without restrictions by his treating physician, performed his usual work for employer. In denying claimant compensation under Section 8(e) during these specific periods of time, the administrative law judge found that claimant's actual post-injury earnings during these periods, which exceeded his pre-injury earnings, reasonably represented his post-injury wage-earning capacity.¹ In so concluding, the administrative law

¹During the 36 week period at issue between August 30, 1996, and February 24, 1997, and March 17, 1997, and May 30, 1997, claimant earned \$45,764.91. The administrative law judge properly adjusted this sum to \$42,057.95, in order to account for inflation. *See Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). Dividing

judge specifically determined, after considering the PMA records of claimant's pre- and post-injury hours worked, that the availability of work post-injury to claimant was as usual and steady as it had been pre-injury. *See* EX 20. Moreover, the administrative law judge found that claimant failed to establish that his injury caused him to take off significantly more time from work than he did pre-injury, and that claimant was capable of working without assistance. *See* Decision and Order at 10. It is well-established that the party seeking to establish that claimant's actual post-injury earnings are not representative of his post-injury wage-earning capacity bears the burden of proof on this issue. *Guidry*, 967 F.2d at 1039, 26 BRBS at 30 (CRT); *Ward*, 31 BRBS at 65. Inasmuch as the administrative law judge reasonably concluded that claimant failed to meet his burden regarding his wages subsequent to August 30, 1996, we affirm the administrative law judge's determination that claimant failed to establish a loss of wage-earning capacity during these periods of time. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994); *see Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 293 (1990).

Lastly, claimant contends that the administrative law judge erred in denying him fifty extra days of compensation based on time allegedly lost from work due to his work injury. In support of this contention, claimant relies upon his personal log, which was not submitted into evidence. The administrative law judge found claimant's contentions regarding these lost days to be unsubstantiated and without merit. Specifically, the administrative law judge found claimant's contentions to be unsupported by the PMA work records. Next, she found claimant to be less than a credible witness based upon the facts that claimant gave misleading responses to his physicians, neglecting to mention a second unrelated injury to his foot, and his conflicting and confusing explanations of how job assignments were made. *See* Decision and Order at 4, 9-11. Thus, the administrative law judge declined to credit claimant's contentions regarding fifty days of lost employment.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses and is not bound to accept the opinion or theory of any particular one and may draw her own inferences and conclusions from the evidence. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). On the basis of the record before us, we cannot say that the administrative law judge's negative assessment of claimant's

\$42,057.95 by 36, the administrative law judge concluded that the resulting average weekly wage of \$1,168.28 was greater than claimant's average weekly wage at the time of his January 27, 1995, injury, \$1,107.69.

credibility is either inherently incredible or patently unreasonable, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331 , 8 BRBS 744 (9th Cir. 1978), *cert. denied* 440 U.S. 911 (1979); *Ezell v. Direct Labor, Inc.*, 33 BRBS 119 (1999), and her decision is rational and within her authority. As the administrative law judge's decision not to credit claimant's testimony regarding the additional fifty days of allegedly lost work is rational, we affirm her denial of compensation for these days.

Accordingly, the administrative law judge's Decision and Order is vacated with regard to the determination concerning claimant's loss in wage-earning capacity in 1995, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge