BRB No. 99-1295

JOSEPH E. BECK III	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Modifying Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-2633) of Administrative Law Judge Daniel A. Sarno, 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).

Claimant, a welder, injured his back at work on July 31, 1991, for which employer voluntarily paid claimant temporary total and partial disability benefits for various periods. In a 1997 decision, the administrative law judge awarded claimant continuing temporary partial disability benefits of $137 per week. Following vocational rehabilitation, claimant obtained employment as a phlebotomist at Sentara Hampton General Hospital (Sentara) and

Riverside Regional Medical Center. Claimant later worked as a pharmacy technician at Rite Aid of Virginia, and Farm Fresh, Incorporated (Farm Fresh). Claimant left Sentara and the two succeeding employers with the hope of earning more money, but this did not materialize. Claimant earned the highest wages with Sentara, and the lowest wages in his current job with Farm Fresh.

Employer sought to decrease claimant's temporary partial disability benefits by requesting modification pursuant to Section 22 of the Act, 33 U.S.C. §922. Employer asserted that claimant's post-injury wage-earning capacity should be based solely on his 1997 weekly earnings at Sentara because his actual earnings in 1998 and 1999 with subsequent employers do not fairly and reasonably represent his wage-earning capacity. Claimant also sought modification pursuant to Section 22, seeking to increase his weekly benefits by discounting his post-injury earnings to 1991 wages.

The administrative law judge accepted the parties' agreement that claimant's actual weekly earnings at Sentara in 1997 in the amount of $326.61 fairly and reasonably represented his post-injury wage-earning capacity for that year. However, with regard to 1998 and 1999, the administrative law judge found that claimant's actual weekly earnings in these years did not fairly and reasonably represent claimant's post-injury wage-earning capacity. Consequently, the administrative law judge averaged the weekly wages claimant earned at Sentara in 1997 with the lower actual weekly earnings from his subsequent jobs in 1998 and 1999, resulting in a wage-earning capacity of $226.37 in 1998, and of $226.74 from January 1, 1999, and continuing, as discounted to 1991 dollars. The administrative law judge found that claimant's motivation to leave each job in anticipation of higher earnings was reasonable, and therefore a relevant consideration in determining his wage-earning capacity, even though the higher earnings did not materialize. Thus, the administrative law judge awarded claimant temporary partial disability benefits at a weekly rate of $167.91 per week for 1998, and of $167.66 per week from January 1, 1999, and continuing.

On appeal, employer challenges the administrative law judge's method of calculating claimant's post-injury wage-earning capacity after 1997. Claimant responds in support of the administrative law judge's decision.

Employer argues that claimant's post-injury wage-earning capacity for 1998 and thereafter should be based only on his higher 1997 earnings at Sentara, and not on the average of his earnings at Sentara with his lower earnings with the subsequent employers. Employer asserts that claimant chose to work at each subsequent lower paying job and his 1997 earnings at Sentara establish that he is capable of earning more money than he made in 1998 and 1999. In support of its position, employer relies on the holding in *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT)(5th Cir. 1990). In *Penrod Drilling*, the United States Court of Appeals for the Fifth Circuit affirmed the administrative law judge's

determination of a claimant's post-injury wage-earning capacity based on suitable jobs available on the open market where the claimant chose to work at a job which paid less than he was capable of earning. Employer also argues that the administrative law judge erred in finding that claimant's motivation to leave each job for more money was reasonable and a relevant consideration in determining claimant's wage-earning capacity, inasmuch as the expected higher earnings did not materialize. Unlike the claimant in *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), whose choice to work at a lower paying job in a public hospital was reasonable because it was closer to his home and he did not have to work weekends, employer asserts that, in the instant case, claimant's reason for leaving each job, three separate empty promises of higher pay, was unreasonable.

Under Section 22, any party-in-interest, at any time within one year of the last payment of compensation, may request modification based on a change in conditions. 33 U.S.C. §922. Modification based on a change in conditions may be granted where claimant's economic condition has improved or deteriorated following the entry of an award of compensation. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1 (CRT)(1995). Employer or claimant may attempt to modify a partial disability award pursuant to Section 22 by establishing that claimant's post-injury wage-earning capacity has increased or decreased. *Id.* Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. 33 U.S.C. §908(h). If they do not, the administrative law judge must then determine a dollar amount representative of his wage-earning capacity. In making these determinations, relevant considerations include the employee's physical condition, age, education, industrial history, claimant's earning power on the open market, and any other reasonable variable that could form a factual basis for the decision. *See Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

We affirm the administrative law judge's decision as it is rational and supported by substantial evidence. Contrary to employer's contention, the administrative law judge acted within his discretion in averaging claimant's 1997 wages at Sentara with his subsequent earnings to arrive at a figure representing claimant's wage-earning capacity. *See generally Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65 (CRT)(5th Cir. 1998)(affirming the administrative law judge's determination of claimant's post-injury wage-earning capacity based on the average of the hourly wage of five of 44 jobs found to be suitable for claimant); *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998)(acknowledging the Board's holding that an average of the range of salaries of the jobs identified as suitable alternate employment is a reasonable method for determining claimant's post-injury wage-earning capacity); *Abbott*, 40 F.3d at 122, 29 BRBS at 22 (CRT)(affirming, as reasonable, the

administrative law judge's calculation of the claimant's post-injury wage-earning capacity based on the average of the earnings he made at the lower paying public hospital and the earnings he would have made at the higher paying private hospital); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988)(holding that the administrative law judge reasonably calculated claimant's post-injury wage-earning capacity based on the average pay of two comparable co-workers); Decision and Order Modifying Benefits at 5-6; Jt. Ex. 1; Cl. Exs. 1, 3, 4; Emp. Br. at 5-6. The decision in *Penrod Drilling*, 905 F.2d at 84, 23 BRBS at 108 (CRT), does not mandate otherwise. The court therein held that substantial evidence supported the administrative law judge's decision to find that the claimant's post-injury wage-earning capacity was represented by jobs available on the open market which paid higher wages than the job that claimant actually held. The court held that the Board erred in reversing this determination and holding that the claimant's actual earnings represented his wage-earning capacity. In the instant case, the administrative law judge rationally found that claimant had a valid motivation for leaving each job, that is, the anticipation of earning higher wages, and in view of the fact that the higher earnings did not materialize, the administrative law judge rationally averaged the lower wages with claimant's higher earnings at Sentara to arrive at claimant's wage-earning capacity. *See generally Abbott*, 40 F.3d at 122, 29 BRBS at 22 (CRT); Decision and Order Modifying Benefits at 5-6; Emp. Br. at 6-8; Tr. at 15-17, 21-28, 30-31. Consequently, we affirm, as rational and supported by substantial evidence, the administrative law judge's determination that claimant's discounted post-injury wage-earning capacity for 1998 is $226.37, and is $226.74, from January 1, 1999, and continuing.

Accordingly, the administrative law judge's Decision and Order Modifying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge