

BRB No. 10-0287

JUDITH HARRIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 09/03/2010
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton,
Administrative Law Judge, United States Department of Labor.

Judith Harris, Hartford, Connecticut, *pro se*.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for
self-insured employer.

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

PER CURIAM:

Claimant, appearing without legal representation, appeals the Decision and Order Awarding Benefits (2008-LHC-01619) of Administrative Law Judge Daniel F. Sutton 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed. *Id.*

Claimant worked for employer as a painter. She painted submarines in confined spaces but developed breathing problems. She was transferred to a tank watch position but was still exposed to fumes and dust and continued to have difficulty breathing. Claimant continued to work until July 29, 2005, when she left work because of vertigo. While claimant was off work, employer requested medical documentation of claimant's

condition, which she did not send, and thus claimant's employment was terminated. Claimant began working as a school bus driver in October 2006 and she continued to work in this employment part-time through the date of the hearing. Claimant sought permanent partial disability benefits under the Act.

In his Decision and Order, the administrative law judge found that the claim for benefits was timely filed pursuant to Section 13 of the Act, 33 U.S.C. §913. The administrative law judge also found that the evidence is sufficient to establish invocation of the 20(a) presumption, 33 U.S.C. §920(a), that claimant's breathing condition is related to her employment and that employer did not submit sufficient evidence to rebut the presumption. The administrative law judge found that claimant reached maximum medical improvement on August 11, 2006, and that claimant cannot return to her former work as either a painter or tank watch. The administrative law judge found that claimant's employment as a school bus driver is suitable alternate employment and that employer's vocational counselor identified 13 school bus driver jobs within a fifty mile radius of claimant's home in a labor market survey dated October 14, 2008. Thus, the administrative law judge concluded that claimant's actual wages from August 11, 2006 to October 13, 2008 are representative of claimant's post-injury wage-earning capacity, but that, commencing October 14, 2008, claimant's wage-earning capacity is established by an average of the three full-time bus driver positions identified by the vocational counselor.¹ The administrative law judge also found that employer is entitled to a credit pursuant to Section 3(e), 33 U.S.C. §903(e), in the amount of \$4,212.16 for payments it made to claimant under the Connecticut workers' compensation program.

Claimant, without legal representation, appeals the administrative law judge's decision. We will review the administrative law judge's adverse findings regarding claimant's post-injury wage-earning capacity and employer's entitlement to a credit pursuant to Section 3(e) of the Act, as the administrative law judge's other findings are favorable to claimant. Employer responds to claimant's appeal, urging affirmance of the administrative law judge's decision.

¹ The parties stipulated that claimant's average weekly wage for employer was \$408.11. Decision and Order at 2. The administrative law judge awarded claimant permanent partial disability benefits of: (1) \$222.05 per week from August 11 through December 31, 2006; (2) \$151.23 per week from January 1 through December 31, 2007; (3) \$102.74 per week from January 1 through October 13, 2008; and (4) \$2.98 per week commencing October 14, 2008 and continuing. Employer notes that due to a transcription error by the administrative law judge, the amount of benefits should be \$3.06 per week rather than \$2.98. *See infra*.

Under Section 8(c)(21), 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 her post-injury wage-earning capacity.² Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be her actual post-injury earnings if these earnings fairly and reasonably represent her wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). If they do not, or if claimant does not have any actual earnings, the administrative law judge must determine a reasonable dollar amount that does, having regard for the factors of Section 8(h).³ *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990); *De villier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured, *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985), and the party contending that the claimant's actual wages do not represent her wage-earning capacity bears the burden of so proving. *Penrod Drilling Co.*, 905 F.2d 84, 23 BRBS 108(CRT). Section 8(c)(21) and 8(h) require that wages earned in a post-injury job be adjusted to the wages that job paid at the time of claimant's injury and then compared with claimant's average weekly wage to

² Section 8(c)(21), 33 U.S.C. §908(c)(21), provides:

Other cases: In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

³ Section 8(h), 33 U.S.C. §908(h), states:

The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however*, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

compensate for inflationary effects. *See Sestich v. Long Beach Container Terminal*, 289 F.3d 1161, 36 BRBS 15(CRT) (9th Cir. 2002); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

The administrative law judge found that claimant's actual post-injury job is suitable and that the wages she received as a school bus driver reasonably reflected her wage-earning capacity until October 13, 2008. The administrative law judge found that employer's vocational counselor conducted a labor market survey on October 14, 2008, and identified thirteen driver positions within 50 miles of claimant's home. Of these positions, three offered full-time hours. The administrative law judge found that claimant was able and willing to work a full-time schedule and that she was successfully employed as a school bus driver. *See* Tr. at 68. Thus, he concluded that the positions identified in the labor market survey established the availability of jobs claimant would be able to obtain considering her age, education, work experience and physical restrictions.⁴ However, as employer did not show the availability of full-time jobs until October 14, 2008, the administrative law judge based his calculation of claimant's permanent partial disability benefits until that date on her actual wages. For the period from August 11, 2006 to December 31, 2006, the administrative law judge found that claimant earned an average of \$80.92 per week. The administrative law judge properly adjusted these wages to account for inflation and found that claimant's adjusted weekly pay rate was \$76.03. *See generally Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996). The administrative law judge found that claimant earned \$195.04 per week in 2007, which is \$183.27 after adjustment for inflation, and \$284.79 per week in 2008, which is \$257.01 after adjustment for inflation. The administrative law judge's use of claimant's actual wages for these periods and his adjustment of these post-injury wages for inflation accord with law. Thus, the award of permanent partial disability benefits is affirmed. *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

The administrative law judge found that after October 13, 2008, claimant's actual wages do not represent her wage-earning capacity as employer established the availability of jobs as a full-time bus driver that pay higher wages. If claimant's wage-earning capacity is not set with reference to her actual post-injury wages, her inflation-adjusted wage-earning capacity can be set with reference to other suitable jobs identified by employer, and the administrative law judge may properly use an average of the range of salaries of the jobs identified. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). The administrative

⁴ The finding that employer established the availability of suitable alternate employment by virtue of its labor market survey is affirmed as it is supported by substantial evidence. *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002).

law judge found that claimant is capable of working and willing to work full-time, *see* Tr. at 68, and thus he averaged the wages of the three full-time bus driver positions identified by employer's vocational counselor. The decision to average the wages of the credited positions identified in the labor market survey is rational and in accordance with law. *See Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT); *Penrod Drilling Co.*, 905 F.2d 84, 23 BRBS 108(CRT). Therefore, we affirm the administrative law judge's finding that claimant has a continuing post-injury wage-earning capacity of \$462.66 per week, which the administrative law judge properly adjusted to \$403.52 to account for inflation. The administrative law judge's award of permanent partial disability benefits therefore is affirmed.⁵

The administrative law judge also found that employer is entitled to a credit pursuant to Section 3(e) of the Act for payments made to claimant under the Connecticut state workers' compensation act. Section 3(e) of the Longshore Act provides that "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law ... shall be credited against any liability imposed by this chapter." 33 U.S.C. §903(e); *see D'Errico v. General Dynamics Corp.*, 996 F.2d 503, 27 BRBS 24(CRT) (1st Cir. 1993); *Shafer v. General Dynamics Corp.*, 23 BRBS 212 (1990); *see also Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980). Attorney's fees paid as part of a state workers' compensation award are not included in an employer's Section 3(e) credit. *See Lustig v. U.S. Dep't of Labor*, 881 F.2d 593, 595-596, 22 BRBS 159(CRT) (9th Cir. 1989); *Landry v. Carlson Mooring Service*, 643 F.2d 1080, 1088, 13 BRBS 301, 307 (5th Cir. 1981), *cert. denied*, 454 U.S. 1123 (1983); *Shafer*, 23 BRBS at 214.

The administrative law judge found that claimant received benefits under the state workers' compensation program for the same injury as was claimed under the Longshore Act, *i.e.*, the lung injury. Under a voluntary agreement between the parties, claimant received a total of \$5,265.10 on the state claim, of which \$1,052.94 was for an attorney's fees and costs. Emp. Ex. 1. Thus, the administrative law judge properly awarded employer a credit to offset claimant's award of benefits under the Act pursuant to Section 3(e) in the amount of \$4,212.16. *Shafer*, 23 BRBS at 214. We affirm this finding as it

⁵ We note that employer correctly contends that the administrative law judge erred in setting the compensation rate as of October 14, 2008. Rather than deducting the inflation-adjusted post-injury wage-earning capacity of \$403.52 from claimant's pre-injury average weekly wage for a difference of \$4.59, the administrative law judge deducted \$403.65, for a difference of \$4.46. Thus, we modify the administrative law judge's award of permanent partial disability benefits from \$2.98 to \$3.06 per week to reflect two-thirds of the actual difference between claimant's average weekly wage and her residual wage-earning capacity.

accords with law. *See Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT) (2^d Cir. 1992).

Accordingly, the administrative law judge's award of permanent partial disability benefits from October 14, 2008, and continuing, is modified to reflect a compensation rate of \$3.06 per week. *See* n.5, *supra*. The administrative law judge's decision is affirmed in all other respects.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge