BRB No. 11-0195

REGINALD JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICES, LIMITED	)	DATE ISSUED: 09/27/2011
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz (Frischhertz & Associates, L.L.C.), New Orleans, Louisiana, for claimant.

Maurice E. Bostick (Orrill, Cordell & Beary, LLC), New Orleans, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2007-LHC-2130) of Administrative Law Judge Clement J. Kennington awarding benefits 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has been before the Board. To reiterate, claimant injured his back on February 27, 2002, during the course of his employment for employer as a longshoreman. Claimant underwent back surgery for this injury on August 13, 2003. Employer voluntarily paid claimant compensation for total disability from February 28, 2002, to December 29, 2004, after which claimant returned to longshore work. Claimant sought compensation under the Act for permanent partial disability based on a loss of wage-earning capacity after his return to work. Employer controverted the claim on the basis that claimant has higher earnings post-injury than he had at the time of his back injury. The parties stipulated that claimant had an average weekly wage of $989.10 on the date of injury and that his back condition reached maximum medical improvement on August 13, 2004.

In his initial decision, the administrative law judge found that claimant's average weekly wage is $1,731.58 and that claimant's actual post-injury wages do not represent his post-injury wage-earning capacity. The administrative law judge awarded claimant temporary total disability benefits from February 22, 2002, to August 13, 2004, permanent total disability from August 14, 2004, to January 1, 2005, and continuing permanent partial disability benefits thereafter.[1] Employer appealed, and the Board vacated the administrative law judge's compensation award, remanding the case for reconsideration of claimant's average weekly wage and wage-earning capacity because the administrative law judge's calculations were not in accordance with law. *R.J.* [*Johnson*] *v. Universal Maritime Services*, BRB No. 09-0241, slip op. at 3-4 (Aug. 18, 2009) (unpub.).

On remand, the administrative law judge accepted the parties' stipulation as to claimant's average weekly wage of $989.10. He found that claimant's actual post-injury wages do not reasonably represent his post-injury wage-earning capacity because they are a result of his extraordinary effort. The administrative law judge also found that, given the restrictions placed on claimant by Dr. Vogel, and based on the testimony of Carla Seyler, a vocational rehabilitation specialist, that claimant's post-injury wage-earning capacity, adjusted for inflation, is $23,430 annually, or $450.58 per week. Consequently, the administrative law judge awarded claimant temporary total disability benefits from February 27, 2002, to August 13, 2004, at a weekly compensation rate of $659.40, permanent total disability benefits from August 14, 2004, to January 1, 2005, at a weekly compensation rate of $659.40, and ongoing permanent partial disability benefits from January 2, 2005, at a compensation rate of $359.01. Decision and Order on Remand at 13; 33 U.S.C. §§908(a), (b), (c)(21). Employer appeals the administrative law judge's award of ongoing permanent partial disability benefits, and claimant responds, urging affirmance.

[1]Claimant returned to work on January 2, 2005.

Employer contends that claimant's actual post-injury wages of approximately $1,000 per week reasonably represent his post-injury wage-earning capacity and, because claimant's actual post-injury wages are greater than his pre-injury average weekly wage, he has not suffered a loss of wage-earning capacity. In support, employer relies on claimant's December 23, 2004, physical examination at Concentra Medical Center in New Orleans, in which he was released to full-duty work, EX 1 at 7, the October and November 2004 reports from claimant's treating physician, Dr. Vogel, that released claimant to "return to gainful employment" and made no mention of the June 2004 report, in which Dr. Vogel gave claimant an impairment rating and work restrictions, and the fact that claimant, upon returning to work, did not notify anyone that he could not work full duty. Thus, employer argues that claimant is capable of, and has been performing, full-duty work and has no loss of wage-earning capacity. We reject employer's contention that the administrative law judge erred.

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. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). The party contending that the claimant's actual wages do not represent his wage-earning capacity bears the burden of so proving. *Penrod Drilling Co v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990). If the claimant's actual earnings do not fairly and reasonably represent his wage-earning capacity, the administrative law judge should calculate a wage-earning capacity based on "the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances" that may affect claimant's capacity to earn in his injured condition. 33 U.S.C. §908(h); *see Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The administrative law judge must adjust claimant's post-injury earnings to the level paid at the time of injury in order to neutralize the effects of inflation, *see generally Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Richardson v. General Dynamics Corp*., 23 BRBS 327 (1990), and then compare those adjusted earnings to claimant's average weekly wage to determine whether claimant has sustained any loss in wage-earning capacity. *Id.*

In June 2004, Dr. Vogel reported that claimant has a 10-15 percent permanent impairment and that he is to avoid activities that require him to lift, push or pull greater than 50 pounds or to bend repeatedly on a permanent basis. CX 2. In December 2004, Dr. Vogel released claimant to "gainful" work, and in May 2008, Dr. Vogel clarified that

the restrictions he assigned claimant in June 2004 are permanent.[2] Thus, despite the December 2004 letter releasing claimant to work, which did not refer to the June 2004 restrictions, the administrative law judge credited Dr. Vogel's opinion that claimant has permanent work restrictions. Dr. Vogel released claimant to "gainful employment," but he did not state claimant was released to unrestricted full-duty work. The administrative law judge also credited claimant's testimony that he works in pain and must sometimes exceed the 50-pound lifting restriction.[3] The administrative law judge further relied on claimant's testimony that he avoids certain types of work so as to not aggravate his condition. The administrative law judge concluded that claimant puts forth great effort in an attempt to continue working. As questions of witness credibility are for the administrative law judge as the trier-of-fact, the administrative law judge reasonably credited claimant's testimony and his doctor's opinion concerning claimant's work capabilities. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Therefore, because it is rational and supported by the record, we affirm the administrative law judge's determination that claimant's post-injury work exceeds his restrictions. *See generally Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *DeCosta v. General Dynamics Corp.*, 13 BRBS 469 (1981).

If a claimant's post-injury work exceeds his restrictions, then it is reasonable for the administrative law judge to find that his actual earnings from that job are not representative of the post-injury wages he could earn as an injured worker under normal conditions. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999); *Ezell v. Director Labor, Inc.*, 33 BRBS 19 (1999); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). The administrative law judge acknowledged that claimant's post-injury earnings approximated his pre-injury earnings. However, the fact that a claimant receives

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[2]We reject employer's assertion that Dr. Vogel's May 12, 2008, report, produced eight days before the hearing, "was simply an untimely litigation tool to sabotage [c]laimant's full duty clearance from December, 2004." Emp. Br. at 8. As discussed at the hearing, Dr. Vogel's 2008 "report" was a one paragraph letter reiterating his June 14, 2004, opinion and was not a change of position. HT at 7-8.

[3]We reject employer's assertion that the fact that claimant does not take prescription pain medications undermines the administrative law judge's determination to credit claimant's testimony that he endured additional pain post-injury in order to work as a longshoreman. Claimant testified that he took over-the-counter pain medications, such as Tylenol, Advil, or Aleve. EX 5 at 19.

actual post-injury wages similar to his pre-injury earnings does not mandate a conclusion that the claimant has no loss of wage-earning capacity. *See Container Stevedoring Co.*, 935 F.2d 1544, 24 BRBS 213(CRT); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). Although claimant's pre- and post-injury income remained similar, the administrative law judge found that claimant's pay rate increased due to a seniority promotion and renegotiated union contract; thus, despite his working reduced hours, claimant's income remained similar.[4] Therefore, the administrative law judge concluded that claimant's post-injury wages do not reflect his ability to earn wages in his injured condition.

The administrative law judge therefore looked to claimant's wage-earning capacity on the open market, as is within his discretion. *See Cooper*, 33 BRBS at 52. In this regard, the administrative law judge found Ms. Seyler's estimate of claimant's post-injury wage-earning capacity figure, $25,000, which accounted for the work restrictions placed by Dr. Vogel and the availability of suitable work, HT at 16-26, to be a more accurate and fair representation of claimant's post-injury wage-earning capacity in his injured condition. *See Container Stevedoring Co.*, 935 F.2d 1544, 24 BRBS 213(CRT); Decision and Order on Remand at 10. Ms. Segler identified suitable positions available on the open market in 2004, HT at 27, and the wages paid by these jobs. *Id.* at 32-34. Accounting for inflation, the administrative law judge determined that claimant's post-injury wage-earning capacity in 2002 dollars was $23,430 annually, or $450.58 per week.[5] *See Richardson*, 23 BRBS 237; *Pumphrey v. E.C. Ernst*, 15 BRBS 327 (1983); *Bethard*, 12 BRBS 691; Decision and Order on Remand at 11. Because the administrative law judge's findings concerning claimant's wage-earning capacity are rational and supported by substantial evidence of record, they are affirmed. *See Bunol*, 211 F.3d 294, 34 BRBS 29(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Stallings*, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001); *Container Stevedoring Co.*, 935 F.2d 1544, 24 BRBS 213(CRT); *Frye v. Potomac Elec. Power Co.*, 21 BRBS 194 (1988); *see generally Avondale Indus., Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). Consequently, as

[4]Based on claimant's credited testimony, the administrative law judge found that claimant has become more selective in the jobs he works resulting in a loss of available hours and overtime and that claimant's actual wages are a direct result of his willingness to endure additional pain and exceed Dr. Vogel's work restrictions. *See* HT 44-61; CX 10.

[5]The administrative law judge found that the National Average Weekly Wage was $483.04 in September 2002, and $515.39 in September 2004, which was a difference of 6.28 percent.

employer raises no further challenge to the administrative law judge's calculation of benefits, we affirm the administrative law judge's permanent partial disability award.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge