

BRB No. 99-0117

CURTIS L. FAWCETT)
)
 Claimant-Petitioner)
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 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: 9/28/99
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, 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 & Mason, P.C.), 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:

Claimant appeals the Decision and Order (97-LHC-2450) of Administrative Law Judge Fletcher E. Campbell, 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a rigger, injured his back on September 5, 1995, during the course of his employment, and subsequently underwent surgery on June 5, 1996. Claimant continued to work for employer in a number of different positions within the physical restrictions

imposed by his injury;¹ during those periods of time that claimant was unable to work due to his back condition, employer voluntarily paid claimant temporary total disability compensation. 33 U.S.C. §908(b). Upon his return to work claimant was provided suitable alternate employment in his pre-injury position as a rigger which was modified to accommodate his physical restrictions, working on crews supervised by Mr. Goodwin and Mr. Lumpkins. HT at 10, 19, 25. Between September 3, 1996 and July 12, 1997, claimant worked as a hook-on man/safety walker as part of the crew supervised by Mr. Talbott. HT at 10, 19, 32-33, 39-41. Claimant sought temporary partial disability compensation for the period from September 3, 1996 to July 12, 1997, when, claimant contends, he suffered a loss of wage-earning capacity based on a loss of overtime wages.

In his decision, the administrative law judge found that although the number of overtime hours claimant worked post-injury was comparable to the number of overtime hours worked by his pre-injury co-workers, claimant did suffer a loss of overtime opportunities due to his transfer from a rigger position to that of hook-on man/safety walker, as riggers had a greater opportunity to work overtime than hook-on/safety walkers. The administrative law judge concluded, however, that claimant's transfer to the latter position was not due to his injury or resulting physical restrictions; rather, the administrative law judge credited evidence that claimant was temporarily transferred due to his experience performing hook-on work. Accordingly, the administrative law judge found that claimant's loss of overtime was not compensable under the Act.

Claimant now appeals, arguing that the administrative law judge erred in denying him temporary partial disability compensation based on a loss of overtime. Employer responds, urging affirmance of the administrative law judge's decision.

When overtime hours are a regular and normal part of claimant's employment, they should be considered in determining claimant's average weekly wage as well as his loss of wage-earning capacity. *See Peele v. Newport News Dry Dock & Shipbuilding Co.*, 20 BRBS 113 (1987). In determining whether claimant is entitled to temporary partial disability compensation based on a loss of overtime, the focus should be on claimant's loss of overtime because of his injury. *See Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989); *Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987).

¹On August 23, 1996, claimant's physician restricted him from lifting more than 30 pounds for 60 days and 50 pounds thereafter. CX 4.

In denying the relief sought by claimant, the administrative law judge found that claimant was transferred to the Talbott crew for reasons unrelated to his work injury, and that claimant may have had fewer available overtime hours between September 1996 and July 1997 while he was a member of this crew. The administrative law judge found, however, that the lesser availability of overtime was due to the fact that safety walkers generally were not needed on weekends due to low traffic volume and that any overtime available was offered only on a rotation basis. *See* HT at 41. Thus, the administrative law judge concluded that the loss of overtime is not compensable as claimant failed to establish that his transfer was due to or the result of his work injury and its resulting restrictions and that but for his injury he would have had additional overtime wages.

The record supports the administrative law judge's finding that claimant's restrictions, which were the same prior to, during and after his employment with the Talbott crew, neither prevented claimant from performing the accommodated rigger position nor caused his transfer to the Talbott crew. As the administrative law judge noted, the other two riggers transferred with claimant to the Talbott crew were neither injured nor under any physical restrictions. CX 9 at 24. Furthermore, the administrative law judge credited claimant's supervisor's testimony that claimant was able to perform the rigger work available prior to his transfer, HT at 24, and that the transfer was based on claimant's experience as a hook-on man. HT at 32-33. In this regard, the administrative law judge found unsupported claimant's contention that Mr. Lumpkins, his previous supervisor, informed him that workers on light duty were not supposed to work overtime. Thus, the administrative law judge concluded that claimant's work on the Talbott crew was based on employer's needs and claimant's experience, not on either claimant's injury or his restrictions and, therefore, claimant loss of overtime due to the transfer is not compensable under the Act.

It is well-established that an administrative law judge is entitled to weigh the evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Inasmuch as the administrative law judge's findings are rational and supported by substantial evidence in the record, we affirm his conclusion that claimant failed to carry his burden of establishing that he sustained

a loss in overtime wages due to his injury. We therefore affirm the administrative law judge's denial of temporary partial disability compensation during the period from September 3, 1996, to July 12, 1997.

Accordingly, 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