BRB No. 88-1811

DALLAS DELAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED:
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision and Order Denying Motion for Reconsideration of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Mary Alice Theiler (Gibbs, Douglas, Theiler & Drachler), Seattle, Washington, for claimant.

Richard M. Slagle (Williams, Kastner & Gibbs), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Decision and Order Denying Motion for Reconsideration (87-LHC-838, 87-LHC-841) of Administrative Law Judge Henry B. Lasky 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).

This appeal involves claims for two injuries. Claimant's first alleged injury occurred on June

21, 1982, when he walked into a "hatch stopper" protruding from the ceiling[1] while working aboard the *Ragni Berg*, unloading cartons of apples. Claimant reported the injury to his supervisor at the end of the shift and sought medical attention the next day.

The initial result of the accident was a blow to the head which dazed claimant, and resulted in some broken teeth. The accident was witnessed by Frank Searles, and claimant's cry of pain was heard by Ray Bjornsen, two fellow longshoremen. Both witnesses saw the hatch stopper which claimant struck. Within a day, claimant also began having problems with his back. He consulted with Dr. Gray, an orthopedist who had treated him previously, and then with Dr. Levine, another orthopedist whose office was more conveniently located. Dr. Gray diagnosed a possible mild concussion, dental injuries, cervical strain, and low back strain with underlying structural defect. According to Dr. Levine, claimant's x-rays showed spondylolysis at the L5-S1 level and mild degenerative change. On April 7, 1983, claimant underwent an orthopedic, neurologic and psychiatric evaluation by the Central Seattle Panel of Consultants. On June 10, 1983, claimant returned to light duty work, performing supervisory "bossing" jobs. Claimant continued to work until June 24, 1984, when he was involved in another accident. Thereafter, claimant again returned to work, but sustained an injury to his right cheekbone and wrist on January 27, 1985, and to his left shoulder on December 22, 1985, each accompanied by a short period where claimant allegedly was unable to work. Claimant sought permanent partial disability compensation and medical benefits in connection with the June 21, 1982 injury, and temporary total disability compensation in connection with the two 1985 work injuries.

The administrative law judge awarded claimant permanent partial disability compensation for the June 21, 1982, injury commencing March 3, 1983. The administrative law judge found that claimant's average weekly wage for this injury as calculated under Section 10(a), 33 U.S.C.§910(a), was $927.23 and that he had sustained a 60 percent loss of wage-earning capacity, entitling him to compensation of $370.89 per week. The administrative law judge also awarded medical benefits and granted employer Section 8(f), 33 U.S.C. §908(f), relief in connection with this injury. The administrative law judge, in addition, determined that claimant was entitled to temporary total disability compensation from January 27, 1985, until February 5, 1985, based upon the stipulated average weekly wage of $583.64 at the time of the January 1985 injury, and from December 22, 1985, until December 22, 1986, based upon the stipulated average weekly wage of $641.64 at the time of the December 1985 injury. Employer's and claimant's motions for reconsideration were subsequently denied.

[1]Hatch stoppers are pieces of metal welded onto the ceiling, which come down about 18 inches supporting "hatch covers," which, when lifted up, facilitate movement between cargo holds or decks.

Employer appeals the administrative law judge's decision with regard to the 1982 and December 1985 injuries. Employer first contends that the administrative law judge erred in awarding claimant permanent partial disability compensation for the June 1982 injury, arguing that the opinions of Drs. Gray and Levine do not provide a proper medical foundation for such an award, and that the administrative law judge erred in calculating claimant's post-injury wage-earning capacity. Employer also challenges the administrative law judge's average weekly wage determination, arguing that the administrative law judge should have applied Section 10(c), 33 U.S.C. §910(c), instead of Section 10(a). Employer additionally maintains that the administrative law judge failed to consider all of the relevant evidence in rendering his decision as is required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A)(the APA). Finally, employer contends that the award of temporary total disability for the December 1985 injury is not supported by substantial evidence. Claimant responds, arguing that the administrative law judge's decision is supported by substantial evidence, accords with the law, and should be affirmed. Employer replies, reiterating the arguments it raised in its original brief.

Initially, we reject employer's assertion that the administrative law judge violated the APA by ignoring evidence submitted by employer which demonstrated that the June 1982 accident could not have occurred in the area where claimant indicated it occurred in his accident report. Contrary to employer's assertions, the administrative law judge specifically noted that although the accident report stated that claimant was injured while working in Hold 3, employer introduced credible evidence which established that there were no hatch stoppers in Hold 3. The administrative law judge, however, did not find this fact determinative of the question of whether claimant was, in fact, injured. Rather, he noted that accident reports are generally filled out after the fact, and accepted claimant's explanation that he was dazed following the accident and filled out the accident report based on information provided to him by his dock foreman. The administrative law judge further determined that although there may have been some confusion regarding the exact location where claimant was injured, this fact was not sufficient to rebut the credible testimony of claimant, as corroborated by the two co-workers who witnessed the accident, that claimant was, in fact, injured while working for employer unloading apples aboard a ship. Moreover, the administrative law judge viewed the fact that claimant timely reported the accident and promptly sought medical attention as consistent with his assertion that he had been injured. Such credibility determinations are within the purview of the administrative law judge; as employer has failed to establish that the administrative law judge's decision to credit claimant's evidence was inherently incredible or patently unreasonable, his finding that claimant sustained an injury while working for employer is affirmed. *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

We also reject employer's assertion that the opinions of Drs. Gray and Levine do not provide a proper medical foundation to support the administrative law judge's award of permanent partial disability compensation because these opinions were based on claimant's subjective complaints and claimant admitted dramatizing his complaints for his physicians. Although employer argues that the administrative law judge should have accorded determinative weight to the opinion of Dr. Green, the orthopedic member of the Central Seattle Panel who found that claimant sustained no permanent limitation as a result of the 1982 injury, it is well established that the administrative law judge is not

bound by the opinion of any particular medical expert, but is free to accept or reject all or any part of the evidence as he sees fit. *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990).

The administrative law judge, in this case, chose to accord greater weight to the opinions of Drs. Gray and Levine than to the contrary opinion of Dr. Green on the basis that they treated claimant more frequently and over a substantial period of time. Dr. Gray, claimant's initial treating orthopedist following the 1982 injury, opined that claimant would not be able to work eight hours on a sustained basis. Dr. Gray diagnosed a low back strain superimposed upon a degenerated disc and superimposed upon a structural abnormality in the lower back. While Dr. Gray conceded that he linked claimant's back condition to the June 1982 accident based on history, he felt that claimant's symptoms were consistent with the accident history given. Moreover, Dr. Gray testified that although claimant's symptoms of pain, limited motion, and tenderness could constitute a significant amount of back disability despite the absence of objective findings, claimant's x-ray and CAT scans evidencing a back abnormality were, in fact, objective findings. Dr. Levine indicated that claimant has chronic low back strain and probably will continue to have difficulty with his back. He advised claimant to get a strictly supervisory position in the longshore industry.

Dr. Green, the orthopedist from the Seattle panel which examined claimant, found no objective evidence of disability by clinical examination, but indicated that on the basis of an x-ray claimant has spondylolisthesis. Dr. Green testified that this back condition is frequently asymptomatic, but can be aggravated by an injury. Dr. Green rated claimant as five percent impaired due to the spondylolisthesis under state standards, but found no disability due to the work accident.

The medical opinions of Drs. Gray and Levine are sufficient to establish that claimant is no longer able to perform his full longshoring duties and is limited to lighter duty work. They therefore are substantial evidence supporting the administrative law judge's determination that claimant is permanently disabled from a medical standpoint as a result of the June 21, 1982 work injury.[2] As employer has failed to raise any reversible error committed by the administrative law judge in weighing the conflicting medical evidence and making credibility determinations, we affirm this decision. *See Thompson*, 26 BRBS at 57; *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

[2]The administrative law judge also observed that other lay witnesses testified that it was quite obvious that claimant's back was causing him distress and caused him to limit the types of jobs he was able to do. Decision and Order at 4.

Employer next argues that the administrative law judge erred in determining claimant's average weekly wage at the time of the 1982 injury under Section 10(a) rather than under Section 10(c). Average weekly wage is calculated as of the time of the injury pursuant to Section 10 of the Act. 33 U.S.C. §910. Based on Pacific Maritime Association employment records submitted by employer, the administrative law judge found that claimant worked "substantially the whole of the year" preceding the injury and accordingly determined that claimant's average weekly wage should be calculated under Section 10(a). *See generally Lozupone v. Lozupone & Sons*, 12 BRBS 148 (1979). The administrative law judge found that claimant worked 2,039 hours and earned a total of $40,959.51 in the period between June 26, 1981 and June 18, 1982. Dividing the number of hours worked into claimant's earnings, the administrative law judge determined that claimant's average hourly rate was $20.09, and that his average daily rate was $160.72. Based on claimant's testimony suggesting that he was a six day worker, the administrative law judge then multiplied the later figure by 300, yielding an annual wage of $48,216 which he then divided by 52 in accordance with Section 10(d) to arrive at an average weekly wage of $927.23.[3]

On appeal, employer argues that the $48,216 annual wage figure which the administrative law judge employed in making his average weekly wage calculation does not fairly and reasonably represent claimant's actual earning capacity, because claimant was a five day rather than a six day per week worker. Employer also maintains that the administrative law judge erred in calculating claimant's average weekly wage by including holiday and vacation pay in his earnings, but not including the non-work hours this pay represented in assessing the number of hours claimant worked.

Initially, we reject employer's argument that Section 10(a) should not be applied in this case because claimant's employment was not permanent and continuous. Although employer asserts that claimant did not have a steady job because he obtained employment through the hiring hall, the PMA records which reflect that claimant either actually worked, or was paid, for every week in the period between June 26, 1981, and June 18, 1982, provide substantial evidence to support the administrative law judge's determination that claimant worked substantially the whole of the year prior to the June 21, 1982 work injury. Thus, the administrative law judge properly determined that Section 10(a) was applicable in this case. *See Thompson*, 26 BRBS at 58-59.

We agree with employer, however, that in finding that claimant was a six day per week, eight hour per day worker, the administrative law judge failed to weigh and consider all of the relevant evidence as is required under the APA. Although the administrative law judge determined that claimant was a six day worker based on claimant's testimony,[4] and may properly rely on this

[3]Claimant argued below that his average weekly wage was $861.22, but did not demonstrate how he arrived at that figure. Decision and Order at 7; Claimant's Proposed Decision and Order, Findings of Fact and Conclusions of Law at 4; Tr. at 22.

[4]Claimant himself appeared unsure whether he was a five or six day per week worker, and the administrative law judge did not permit employer to develop this issue, having determined that given the one and one-half hours of cross-examination allowed, employer's counsel had been given

testimony, he did not address the fact that in the period between June 26, 1981, and June 18, 1982, claimant actually worked 2,039 hours in 51 weeks or an average of only 39.92 hours per week. Moreover, employer correctly asserts that because claimant's holiday and vacation were properly included in his earnings, the 169 hours of compensated non-work hours this pay represented should also have been included in the number of hours claimant worked. *See Sproull v. Stevedoring Services of America*, 25 BRBS 100, 105 (1991)(Brown, J., dissenting on other grounds); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133, 136 (1990). Claimant, therefore, was compensated for a total of 2,208 (2,039 working and 169 non-working) hours in the relevant period, and this figure must be utilized in any Section 10(a) calculation. Due to these factors to be considered, we vacate the administrative law judge's average weekly wage finding and remand for reconsideration of this issue in light of all of the relevant evidence. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 382-383 (1990).

Employer also argues that claimant's actual post-injury earnings do not fairly represent his wage-earning capacity because he is not performing as much suitable alternate work as he is capable of performing and as is available. Employer alleges that both Drs. Gray and Levine testified that claimant could perform driving and checking, as well as "bossing" work, but that claimant has only made himself available for the latter. Claimant responds that not all of the trucking and clerking jobs which were available were suitable and that employer's general statement that such jobs were available does not meet its burden of establishing actual availability.

Under Section 8(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act 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. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). 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. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985); *Sproull*, 25 BRBS at 109. Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *See Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). If the claimant is unable to return to his usual employment as a result of his injury but secures other employment which is representative of his wage-earning capacity, the wages which the new job would have paid at the time of injury are compared to claimant's pre-injury wages to determine if claimant has sustained a loss of wage-earning capacity as a result of his injury. Sections 8(c)(21) and 8(h) require that wages earned in a post-injury job be

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sufficient time to develop this issue. Tr. at 246-247.

adjusted to the wages that job paid at the time of claimant's injury and then compared with claimant's average weekly wage to compensate for inflationary effects. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook*, 21 BRBS at 4; *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). The burden of proof is on the party seeking to prove that actual post-injury wages are not representative of claimant's wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992).

Employer's argument that the administrative law judge erred in finding that claimant's actual post-injury earnings are representative of his post-injury wage-earning capacity is rejected. The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that employer must point to *specific available* jobs that the claimant can perform in order to meet its suitable alternate employment burden. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *rev'g Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991). Employer's unsupported general assertion that suitable trucking jobs were allegedly available to claimant does not suffice to meet its burden of proving the availability of alternate higher-paying employment and thus that claimant's actual post-injury earnings are not representative of his post-injury wage-earning capacity. *See Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988), *quoting Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329, 12 BRBS 660, 662 (9th Cir. 1980).

We agree with employer, however, that the period chosen by the administrative law judge as representative of claimant's post-injury wage-earning capacity is irrational and is premised on erroneous factual assumptions. In analyzing claimant's post-injury wage-earning capacity, the administrative law judge compared the hours he worked in the year prior to his June 1982 injury with the hours he worked in the year between June 1983 and 1984, and the year 1987, allegedly two years when claimant had no injuries. The administrative law judge found that during the year prior to his injury claimant worked approximately 2,000 hours, while during the two representative post-injury years he worked approximately 1,600 hours altogether, or 800 per year, thus suffering a 60 percent loss of wage-earning capacity based on the number of hours worked. Taking 60 percent of claimant's pre-injury average weekly wage of $927.23, the administrative law judge determined that claimant sustained a $556.34 loss in wage-earning capacity. The administrative law judge consequently determined that claimant was entitled to permanent partial disability compensation under Section 8(c)(21) of two-thirds of this amount, or $370.89 per week.[5]

Although the administrative law judge chose 1987 as an example of a supposedly injury-free year in assessing claimant's post-injury wage-earning capacity, as employer asserts the record

[5]It should be noted that while Section 8(h) requires that claimant's actual post-injury earnings be adjusted to represent the wages paid for the same work at the time of claimant's injury, since in this case the determination of wage-earning capacity is based on average weekly wage at the time of injury, the wages are automatically on an equal footing with the Section 10 average weekly wage at time of injury. *See Morgan v. Marine Corps Exchange*, 14 BRBS 784, 789 n.5, *aff'd mem.* 718 F.2d 1111 (9th Cir. 1983), *cert. denied* 465 U.S. 1012 (1984).

reflects that claimant, in fact, sustained an injury on September 30, 1987, and was off from work for 43 days between October 1, 1987 and November 13, 1987. Moreover, as December 18, 1987 was the last day for which earnings information was available, the data for the year 1987 was incomplete. Additionally, while the administrative law judge did not include 1984 and 1985 in his post-injury wage-earning capacity determination because claimant was involved in injuries, the record reflects that claimant worked 1,037 hours in 1984 and 1,135.25 hours in 1985, more hours than during the alleged injury-free years.[6] Because the administrative law judge's assessment of the years representative of claimant's post-injury wage-earning capacity was premised on these faulty factual assumptions, we also vacate his wage-earning capacity determination and remand the case for reconsideration of this issue. *See generally Wayland v. Moore Dry Dock*, 25 BRBS 53, 57-58 (1991).

The final issue in this case pertains to the administrative law judge's award of temporary total disability compensation for the injury claimant sustained to his shoulder on December 22, 1985, when he slipped and fell on some ice. Employer argues on appeal that the administrative law judge erred in awarding claimant temporary total disability compensation for this injury in the period from October 22, 1986 until December 22, 1986, in light of his determination that claimant reached maximum medical improvement on October 22, 1986.

We reject employer's argument. Contrary to employer's assertions, the administrative law judge did not find that claimant reached maximum medical improvement on October 22, 1986. Rather, the administrative law judge noted that it was Dr. Levine's opinion that claimant had reached maximum medical improvement with regard to his shoulder and was capable of light duty employment on that date, but chose to credit claimant's testimony that he experienced an acute episode of back pain and was unable to return to work due to back and shoulder pain until December 22, 1986, when he returned to work. Inasmuch as the administrative law judge's finding that claimant was unable to return to work due to a work-related condition during this period is supported by substantial evidence, the administrative law judge's award of temporary total disability from December 22, 1985 through December 22, 1986, is affirmed. *See Kerch v. Air America, Inc.*, 8 BRBS 490, 494 (1978), *aff'd in pert. part sub nom. Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 555 (1st Cir. 1979). Although employer also asserts that the administrative law judge erred in awarding claimant concurrent permanent partial disability compensation for his back injury and temporary total disability compensation for his shoulder injury in the period at issue, we decline to address this argument, which employer raised for the first time in its reply brief. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We note, however, that concurrent benefits may be awarded under the Act. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980).

Accordingly, the administrative law judge's average weekly wage and post-injury wage-

[6]Employer's argument that the administrative law judge should not have used the year following his accident, June 1983 to June 1984, can be rejected, as the administrative law judge found that claimant reached maximum medical improvement on March 3, 1983, and the finding is not challenged. *See Container Stevedoring Co. v. Director*, 935 F.2d 1544, 1551, 24 BRBS 213, 223 (CRT)(9th Cir. 1991).

earning capacity determinations relevant to the 1982 injury are vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge