BRB Nos. 91-906
and 91-906A

ARTHUR NEAL	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
CARGILL, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
EPIC INSURANCE SERVICES	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

David A. Hytowitz and Kevin Keaney (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

Steven Rasmussen (Schwabe, Williamson & Wyatt), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (90-LHC-2479) of Administrative Law Judge Steven E. Halpern 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 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).

Claimant had been employed as a journeyman millwright in non-longshore employment since 1978. In July 1988, the millwrights' union went on strike. The millwrights' union arranged with the longshore union for its affected members to engage in longshore employment during the strike. In the course of his longshore employment, claimant fractured the fifth metacarpal of his right hand on September 27, 1988. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), based on two-thirds of claimant's average weekly wage in longshore employment of $308.62. Claimant's treating physician, Dr. Marble, released claimant to return to work on November 1, 1988. He also determined that claimant's injury reached maximum medical improvement on February 10, 1989. Claimant did not engage in longshore employment after his work injury. When the strike ended, he returned to his regular non-longshore employment on February 17, 1989.

Claimant filed a claim for benefits under the Act. He sought compensation for an alleged permanent partial arm impairment arising from the work injury. Additionally, claimant sought benefits that accounted for his average weekly wage in his employment prior to the strike. Employer controverted the claim for permanent disability and claimant's entitlement to benefits at a higher average weekly wage than the average weekly wage relied upon by employer when it voluntarily paid compensation for temporary total disability.

The administrative law judge credited claimant's testimony and the report of Dr. Balkovich to find that claimant sustained a 15 percent arm impairment. *See* 33 U.S.C. §908(c)(1),(19). He next determined that claimant was entitled to compensation for temporary total and permanent partial disability based on an average weekly wage of $937.11, which accounted for both claimant's longshore earnings and his millwright earnings during the year prior to the work injury. However, he ordered a remittitur of compensation benefits to employer for claimant's temporary disability to the extent claimant's weekly compensation rate exceeded two-thirds of his average weekly longshore wages of $308.62, to avoid a "windfall" to claimant.

On appeal, employer challenges the administrative law judge award of benefits for permanent partial disability and his determination that claimant's average weekly wage is $937.11. Claimant responds, urging affirmance. Claimant cross-appeals the administrative law judge's remittitur of compensation payable during his period of temporary total disability.

Employer contends that the administrative law judge's award of benefits for permanent partial disability is not supported by substantial evidence. Specifically, employer challenges the administrative law judge's crediting of Dr. Balkovich's opinion over that of Dr. Marble. Employer also argues that Dr. Balkovich did not attribute claimant's impairment to the work injury. In his final evaluation on February 10, 1989, Dr. Marble opined that he did not anticipate any residual permanent impairment. Dr. Balkovich examined claimant on October 30, 1990. A computerized hand evaluation measured a 2 percent hand and upper extremity impairment pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). However, Dr. Balkovich opined that claimant's disability is in the range of 10 to 20 percent because many of the symptoms claimant complained of cannot be tested.

The administrative law judge discussed this evidence and the report of Dr. Nye, who examined claimant on April 6, 1989, on referral from Dr. Marble, and reviewed an EMG of claimant's hand muscles. Dr. Nye stated claimant should have no residual impairment. The administrative law judge credited Dr. Balkovich's impairment rating of 2 percent pursuant to the AMA *Guides* because his testing was more recent and precise in comparison to the testing reviewed by Dr. Nye. He also credited claimant's testimony regarding his symptomatology, which he determined was similar to the complaints recorded by Dr. Balkovich. Because Dr. Balkovich's report is the only medical evidence of record that accounted for all of claimant's symptomatology, the administrative law judge credited Dr. Balkovich's opinion that claimant has a 10 to 20 percent impairment. He therefore concluded that claimant sustained a 15 percent work-related impairment.

Questions of witness credibility are for the administrative law judge as the trier-of-fact, and the Board must respect his evaluation of all testimony, including that of medical witnesses. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Accordingly, to derive a percentage of impairment under the schedule, the administrative law judge may evaluate a variety of medical opinions and claimant's description of his symptomatology. *See Pimpinella v. Universal Maritime Service, Inc.*, BRBS , BRB No. 91-127 (Sept. 17, 1993). In the instant case, the administrative law judge acted within his discretion to credit claimant's subjective complaints and the medical opinion of Dr. Balkovich, over the opinions of Drs. Marble and Nye. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53, 56-57 (1992). Furthermore, notwithstanding the fact that Dr. Balkovich did not offer an opinion as to the etiology of claimant's impairment, the administrative law judge rationally credited Dr. Balkovich's opinion, which addresses the relevant issue of the extent of claimant's disability.[1] *See generally Avondale Shipyards v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990). Accordingly, the administrative law judge's finding that claimant sustained a 15 percent permanent partial disability is affirmed.

Employer next appeals the administrative law judge's determination of the applicable average weekly wage upon which claimant's compensation rate was derived for his awards for temporary total and permanent partial disability. Employer contends that, as a matter of law, claimant's average weekly wage is calculable solely from his 10 weeks of longshore employment prior to the date of injury. Employer argues that the administrative law judge's inclusion of claimant's earnings as a millwright during the year prior to the work injury is a windfall to claimant, as the compensation rate for his permanent partial disability is approximately two times claimant's average weekly wage of $308.62 from his longshore employment. Claimant cross-appeals the administrative law judge's remittitur of benefits during his period of temporary total disability from September 27 to November 6, 1988, to the extent claimant's weekly compensation rate exceeded two-thirds of his average weekly longshore wage of $308.62. Claimant contends that the administrative law judge is without authority to order a remittitur, and that his benefits for temporary total and permanent partial disability should be based on the average weekly wage of $937.11.

[1]There is no indication that employer contested the cause of claimant's impairment.

The administrative law judge found that the parties did not dispute that claimant earned a total of $48,729.88 during the year prior to his injury. He earned $45,643.72 as a millwright and $3086.16 during 10 weeks of longshore employment. At the formal hearing, claimant contended that his average weekly wage and corresponding compensation rate should be derived from his total yearly earnings, while employer contended that claimant's average weekly wage should be based solely on his longshore earnings.

The administrative law judge found that claimant would receive a windfall if he was compensated during the period of temporary total disability based on the sum of claimant's millwright and longshore earnings. Conversely, the administrative law judge found that an average weekly wage based solely on claimant's longshore earnings would undercompensate claimant for the presumed loss of wage-earning capacity caused by his arm impairment, as claimant returned to his millwright employment with a permanent arm impairment after the strike ended and he had no intention of returning to longshore employment. The administrative law judge stated that he was therefore inclined to award claimant benefits for temporary total disability based solely on the average weekly wage of $308.62 from his longshore employment, and to award benefits for permanent partial disability based on claimant's yearly earnings prior to the work injury of $48,729.88, for an average weekly wage of $937.11. He properly stated, however, that there can be only one average weekly wage upon which compensation for an injury may be based. *See generally James v. Sol Salins, Inc.*, 13 BRBS 762 (1988). The administrative law judge therefore found that claimant is entitled to compensation for his temporary total and permanent partial disability based on an average weekly wage of $937.11, or the sum of claimant's earnings during the year prior to the work injury. However, the administrative law judge ordered a remittitur to employer of weekly compensation payments during claimant's period of temporary total disability to the extent his compensation rate exceeded two-thirds of his average weekly wage of $308.62 from longshore employment.[2]

Initially, we agree with claimant that the administrative law judge's order of remittitur is in error. The administrative law judge recognized, but did not properly apply, the applicable law that there can only be one average weekly wage upon which compensation is based, regardless of the type(s) of disability for which benefits are payable. *Thompson*, 26 BRBS at 58; *see also James*, 13 BRBS at 765. In the instant case, the administrative law judge found that claimant was entitled to compensation based on an average weekly wage of $937.11. By ordering a remittitur, however, pursuant to 29 C.F.R §18.29(a) and Federal Rule of Civil Procedure (FRCP) 60(b)(6), the administrative law judge *de facto* found that claimant was entitled to compensation for temporary total disability based on a second average weekly wage of $308.62. The regulations at 29 C.F.R. Part 29 and the Federal Rules of Civil Procedure do not apply to proceedings under the Act if they are inconsistent with the Act. *See Wayland v. Moore Dry Dock Co.*, 21 BRBS 177, 180-181 n.3

[2]The administrative law judge relied on 29 C.F.R. §18.29(a) and Federal Rule of Civil Procedure 60(b)(6) as authority for ordering the remittitur. Section 18.29(a) states the general authority of administrative law judges, including the authority to take action authorized by the Federal Rules of Civil Procedure. Rule 60(b)(6) provides for relief from judgment.

(1988). Accordingly, as Section 10, 33 U.S.C. §910, generally provides that claimant's average weekly wage be calculated based on earnings in the year prior to the injury, the administrative law judge did not have authority under Section 18.29(a) and FRCP 60(b)(6) to order a remittitur and thereby order employer to pay compensation for claimant's temporary total disability based on an average weekly wage for 10 weeks of employment. *See generally Thompson*, 26 BRBS at 58. The administrative law judge's remittitur order is therefore reversed.

Relying on *James*, 13 BRBS at 762, and the precept that the Act should be literally construed in favor of claimant, the administrative law judge found that claimant's average weekly wage is $937.11, based on all of claimant's earnings during the year preceding his work injury. Section 10(c), 33 U.S.C. §910(c), is applicable in this case,[3] and specifically includes the wages earned by the employee in the employment in which he was injured or in other employment in calculating claimant's annual earning capacity. The administrative law judge has broad discretion in determining annual earning capacity under Section 10(c), and the object of Section 10(c) is to reach a fair and reasonable approximation of claimant's wage-earning capacity at the time of the injury. *Wayland v. Moore Dry Dock Co.*, 25 BRBS 53, 59 (1991). Accordingly, all sources of income are included under Section 10(c) to determine claimant's average weekly wage. *Id.; see also Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822-823, 25 BRBS 26, 28-29 (CRT)(5th Cir. 1991); *Lobus v. I.T.O. Corp. of Baltimore, Inc.,* 24 BRBS 137 (1990). We therefore reject employer's argument that claimant's average weekly wage should be calculated based solely on his 10 weeks of longshore employment prior to the work injury.[4] *See Wayland*, 25 BRBS at 59. Furthermore, the administrative law judge acted within his discretion and rationally focused on claimant's entire earnings in the year preceding his injury to find that an average weekly wage based solely on claimant's longshore earnings would undercompensate claimant for the presumed loss of wage-earning capacity caused by his permanent arm impairment. *See Gatlin*, 936 F.2d at 822-823, 25

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[3]The administrative law judge did not explicitly state the subsection of Section 10 he utilized. However, subsections (a) and (b), 33 U.S.C. §910(a), (b), provide specific formulas not utilized by the administrative law judge here. Section 10(a) applies only where claimant was employed in the employment in which he was injured during substantially the whole of the year preceding his injury, while Section 10(b) requires the wages of a co-worker for the calculation.

[4]We also reject employer's reliance on *Harper v. Office Movers/E.I. Kane, Inc.*, 19 BRBS 128 (1986)(*en banc*). In *Harper*, claimant was employed full-time as an insurance claims supervisor. He was injured in the course of his part-time employment as a furniture mover. Under the facts of that case, the Board held that the administrative law judge properly excluded claimant's full-time wages to arrive at his average weekly wage because there was no evidence his sedentary employment was affected by the work injury. *Harper*, 19 BRBS at 130. In the instant case, claimant's credited testimony established that his work injury impaired his job performance after he returned to his usual employment as a millwright. The administrative law judge therefore acted within his discretion to compensate claimant for the presumed loss of wage-earning capacity in his usual employment due to the longshore injury. *See Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991).

BRBS at 28-29 (CRT). Accordingly, we affirm the administrative law judge's finding that claimant is entitled to compensation benefits based on his earnings during the entire year prior to his injury. The administrative law judge's Decision and Order is modified to provide compensation for both temporary total and permanent partial disability based on the administrative law judge's finding that claimant had an average weekly wage of $937.11 during the year preceding his injury.

Accordingly, the administrative law judge's Decision and Order is reversed insofar as it ordered a remittitur to employer during claimant's period of temporary total disability. The Decision and Order is modified to reflect claimant's entitlement to temporary total disability benefits based on an average weekly wage of $937.11. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge