

RAYMOND CHURCHILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PERINI NORTH RIVER	)	DATE ISSUED:
ASSOCIATES	)	
	)	
and	)	
	)	
HARTFORD ACCIDENT &	)	
INDEMNITY COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Order of Eric Feirtag, Administrative Law Judge, United States Department of Labor.

David MacRae Wagner (Freedman, Wagner, Tabakman, Weiss, & Insler), New York, New York, for claimant.

Richard A. Cooper (Fischer Brothers), New York, New York, for employer/ carrier.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order (86-LHC-166) of Administrative Law Judge Eric Feirtag 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).

Claimant injured his back on May 20, 1976, during the course of his employment for employer as a dockbuilder. Employer voluntarily paid claimant benefits under the Act from June 21, 1976 until August 22, 1977, when it voluntarily commenced payment of benefits under the worker's compensation laws of New York. On August 29, 1977, employer filed a Notice of Controversion regarding claimant's entitlement to benefits under the Act. Following surgery on his

back, claimant was able to return to work as a dockbuilder foreman in June 1978. Claimant worked in this capacity until May 1983, when he reinjured his back during the course of his employment with another employer. Claimant has not returned to work.

After a formal hearing, Administrative Law Judge Aaron Silverman issued a Decision and Order on October 19, 1981, which addressed claimant's entitlement to benefits for his May 1976 back injury. The administrative law judge found that claimant had not been injured on a covered situs under the Act and thus denied the claim on the basis of a lack of jurisdiction. Claimant appealed, and by Order dated April 9, 1982, the Board held the matter in abeyance pending the outcome of litigation addressing the issue of jurisdiction in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT)(1983).<sup>1</sup>

Following the Supreme Court's decision in *Perini*, which held that the work site at issue was within the jurisdiction of the Act, the Board remanded the instant case, on August 23, 1983, to the Office of Administrative Law Judges for further proceedings. Subsequently, the case was joined for purpose of a formal hearing with the claim which arose as a result of claimant's May 1983 back injury. On July 24, 1987, Administrative Law Judge Eric Feirtag issued a Decision and Order addressing both claims. Regarding the May 1976 injury, the administrative law judge found that claimant sustained a permanent partial back disability upon his return to work in June 1978; the administrative law judge concluded, however, that the record failed to provide a basis for determining any loss of wage-earning capacity sustained by claimant. *See* 33 U.S.C. §908(h). The administrative law judge also found that claimant was entitled to benefits for permanent total disability, 33 U.S.C. §908(a), due to the May 1983 injury.<sup>2</sup>

Claimant petitioned for modification of the administrative law judge's Decision and Order, arguing that the administrative law judge should determine claimant's loss of wage-earning capacity due to the May 1976 back injury, and award claimant a penalty, pursuant to Section 14(e), 33 U.S.C. §914(e), for all compensation found due between February 15, 1978 and May 24, 1983.<sup>3</sup> In an Order issued November 30, 1988, the administrative law judge found that claimant is not entitled to penalties pursuant to Section 14(e). He also instructed the parties to resolve the disputed wage-earning capacity issue based on claimant's actual earnings, and to request a hearing if they were unable to do so.

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<sup>1</sup>Claimant was a party to this case pursuant to a left knee injury he sustained at the same situs on October 9, 1974. All issues regarding this injury have been resolved.

<sup>2</sup>The employer on the claim for the May 1983 injury appealed this determination. In a Decision and Order issued January 31, 1990, the Board affirmed the administrative law judge's finding that the employer at the time of claimant's May 21, 1983, back injury was responsible for all subsequent benefits awarded under the Act, thus resolving all issues regarding this injury.

<sup>3</sup>In a Decision on Motion for Reconsideration issued on October 23, 1987, the administrative law judge found that claimant's back condition reached maximum medical improvement from the May 1976 injury on February 15, 1978. This finding is not challenged on appeal.

On appeal, claimant challenges the administrative law judge's denial of a Section 14(e) penalty and the administrative law judge's instruction that claimant's actual wages between February 1978 and May 1983 provide the basis for determining his wage-earning capacity during this period. Employer responds, urging affirmance.

Claimant initially contends that a penalty should be paid by employer pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), due to the employer's non-payment of benefits. Specifically, claimant contends that employer was obligated to initiate payment under the Act after the Board remanded his appeal to the Office of Administrative Law Judges for further proceedings subsequent to the Supreme Court's decision in *Perini*. Claimant concedes that employer timely controverted the claim after terminating its voluntary payment of compensation under the Act in August 1977; however, claimant asserts that as employer's controversion solely raised the issue of jurisdiction, an issue which the Court in *Perini* conclusively decided in claimant's favor, employer should have reinstated compensation payments under the Act after *Perini* was issued and the Board remanded the claim. We disagree.

Section 14(e) of the Act provides that, if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional 10 percent of such installment, unless it files a timely notice of controversion, pursuant to Section 14(d), 33 U.S.C. §914(d), or the failure to pay is excused by the district director after a showing that, owing to conditions over which employer has no control, such installment could not be paid within the period prescribed for the payment. 33 U.S.C. §914(e). The Section 14(e) penalty is to be imposed only on compensation that was "due" before employer filed a notice of controversion. 33 U.S.C. §914(d), (e); *Denton v. Northrop Corp.*, 21 BRBS 37, 48 (1988). In the present case, claimant concedes that he was paid all compensation due prior to employer's terminating its voluntary payment of compensation and timely filing a notice of controversion. Moreover, the plain language of Section 14 does not require that the particular grounds upon which the claim is ultimately controverted be stated with precision in the notice of controversion. *See Pruner v. Ferma Corp.*, 11 BRBS 201, 208-209 (1979). Thus, it is not relevant for purposes of incurring liability for a Section 14(e) penalty that the initially controverted issue of jurisdiction was conclusively decided by the Supreme Court in *Perini*. Accordingly, as the employer timely filed a notice of controversion following its termination of voluntary payments of compensation under the Act, we affirm the administrative law judge's denial of a Section 14(e) penalty against employer. *See, e.g., Maes v. Barrett & Hilp*, 27 BRBS 128 (1993); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.* 25 BRBS 88 (1991).

Claimant next challenges the instructions set forth by the administrative law judge prior to ordering the parties to resolve claimant's assertion that he sustained a loss of wage-earning capacity between February 1978 and May 1983 due to his May 1976 work injury. In his Order, the administrative law judge stated that any award based on a loss of wage-earning capacity after claimant's work injury is "most accurately computed by determining an amount equal to two thirds of the pre-injury average weekly wage multiplied by the number of weeks between February 15, 1978 and May 24, 1983, minus two thirds of the Claimant's actual earnings during that period." *See*

Order at 1. The administrative law judge then ordered claimant to submit evidence of the results of this computation with a copy to employer and to request a formal hearing if the parties were unable to resolve the claim.

On appeal, claimant argues that the administrative law judge's instructions regarding the resolution of this issue fail to accurately calculate his post-injury wage-earning capacity. Claimant contends that he sustained a loss of wage-earning capacity when he returned to work in June 1978 as a foreman because he could no longer physically perform the work of a dockbuilder. Consequently, claimant asserts that he was deprived of approximately 80 weeks of employment between February 1978 and May 1983 when he could not obtain employment as a foreman, but at which time he allegedly could have obtained work as a dockbuilder had he been physically able to perform that job. Moreover, claimant argues that his actual wages are not representative of his post-injury wage-earning capacity as these wages fail to account for the effects of inflation and wage increases after his May 1976 injury.

Under Section 8(c)(21), 33 U.S.C. §908(c)(21), an award of 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, 33 U.S.C. §908(h), mandates a two part analysis to determine claimant's post-injury wage-earning capacity: (1) if claimant is working post-injury, whether claimant's post-injury wages reasonably and fairly represent his wage-earning capacity; and (2) if they do not, then what is the reasonable dollar amount of his residual wage-earning capacity. *See Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149 (1987); *Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979). The factors to be considered in determining whether claimant's post-injury employment fairly and reasonably represents his post-injury wage-earning capacity include the beneficence of a sympathetic employer, claimant's earning power on the open labor market, whether claimant is required to expend more time, effort, or expertise to achieve pre-injury production or to earn pre-injury wages and claimant's age, education and industrial history. *Darcell v. FMC Corp., Marine and Rail Equipment Division*, 14 BRBS 294 (1981); *Devillier*, 10 BRBS at 651. Higher post-injury earnings do not preclude an award if claimant demonstrates a loss in wage-earning capacity. *See Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 76 BRBS 30 (CRT) (5th Cir. 1992)(available jobs in market can be used to find a higher wage-earning capacity than claimant's actual earnings). Moreover, when an employee who is working in gainful employment alleges that his wage-earning capacity on the open market is diminished, the resolution of the issue may turn on whether his employment is sufficiently regular and continuous, so that his actual wages establish his true wage-earning capacity. *See Creasy v. J.W. Bateson Co.*, 14 BRBS 434 (1981). Relevant questions include whether the work is suitable, claimant is physically capable of it, and claimant has the seniority to stay in the job. *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). Finally, Sections 8(c)(21) and (h) require the administrative law judge to adjust the post-injury wage level, based on either actual wages or the open market, to the level paid pre-injury so that the post-injury wage may be compared with claimant's pre-injury average weekly wage. *See Cook*, 21 BRBS at 4; *Bethard v. Sun Shipbuilding & Dry Dock Co.* 12 BRBS 691 (1980).

In the instant case, we agree with claimant that the administrative law judge erred by summarily stating that any award pursuant to Sections 8(c)(21) and (h) must be computed by comparing claimant's pre-injury average weekly wage with claimant's actual earnings after his return to work, as this statement is not in accordance with law. The administrative law judge must render specific findings, after considering the relevant factors and the evidence before him, as to whether claimant's post-injury employment fairly and reasonably represents his post-injury wage-earning capacity. *See Devillier*, 10 BRBS at 649. In the present case, the administrative law judge made no findings regarding this issue, and the factors asserted by claimant are relevant to his wage-earning capacity. Accordingly, we vacate the administrative law judge's instructions regarding the calculation of claimant's loss in wage-earning capacity from 1978 to 1983 and remand the case for a determination as to whether claimant is entitled to an award of benefits pursuant to Section 8(c)(21) of the Act.

Accordingly, the administrative law judge's denial of a Section 14(e) penalty payable by employer is affirmed. The administrative law judge's instructions regarding the calculation of claimant's loss in wage-earning capacity are vacated, and the case is remanded for consideration of the evidence relevant to this issue consistent with this opinion.

SO ORDERED.

JAMES F. BROWN  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge