BRB No. 90-1859

DONALD CODDINGTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PORT OF PORTLAND	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Robert K. Udziela (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland Oregon, for claimant.

Delbert J. Brenneman (Hoffman, Hart & Wagner), Portland, Oregon, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (89-LHC-912) of Administrative Law Judge Ellin M. O'Shea 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, who began working as a casual longshoreman in 1959, became partially registered in 1964, and fully registered in 1967. Tr. at 24-25. In 1976, he was promoted to the winch board. *Id.* at 25-26. Workers drawn from this board work on lifts, cranes and other hoisting equipment. Claimant sustained an injury to his back on May 3, 1987, when he slipped while climbing a ladder to the transtainer crane he was to operate that day.[1] The initial diagnosis was lumbar strain, rule out lumbar disc involvement. Emp. Ex. 6. Dr. Parsons' subsequent diagnosis of a probable extruded lumbar disc at the L4-5 level, left, was confirmed by a lumbar myelogram, and on June 11, 1987, Dr. Parsons performed a lumbar laminectomy. Emp. Exs. 9, 12, 13, 21, 23. Dr. Parsons released claimant for limited work on October 1, 1987, imposing lifting, bending and sitting restrictions. Emp. Ex. 27. After claimant reached maximum medical improvement on January 31, 1988, Dr. Parsons released him for full duty work, with restrictions against prolonged sitting and repetitive bending. Emp. Ex. 29. On July 31, 1989, claimant told Dr. Parsons that he was able to work full time provided he chose his jobs and did not sit too long or bend too much, and Dr. Parsons assessed claimant's residual impairment as mildly moderate, 20-40 percent. Cl. Ex. 23. Dr. Zivin, a neurologist, examined claimant on January 20, 1989. Emp. Ex. 32. The parties stipulated that employer voluntarily paid all compensation due through January 31, 1988, the date of maximum medical improvement. Decision and Order at 3. Claimant sought additional permanent partial disability compensation under the Act thereafter.

In her Decision and Order, the administrative law judge accepted the parties' stipulation that claimant's average weekly wage at the time of his injury was $986.35. Rejecting employer's argument that claimant suffered no loss in wage-earning capacity because his average hourly rate remained essentially the same both before and after the injury, the administrative law judge determined that claimant's actual average post-injury weekly earnings of $953.06 do not fairly and reasonably represent his post-injury wage-earning capacity. In so concluding, the administrative law judge noted that there had been at least three general wage increases since the time of claimant's injury and that his post-injury wages included a 30 percent premium as a walking boss. Accordingly, she proceeded to attempt to arrive at a dollar figure indicative of claimant's post-injury wage-earning capacity. After determining that claimant worked an average of 17 percent fewer hours after his injury than before, the administrative law judge found that the number of hours claimant worked post-injury in 1988 and 1989 reasonably represents his working ability and capacity.[2] The administrative law judge rejected claimant's argument that the 5.12 hours per week he worked post-injury as a walking boss should not be included in the calculation of his post-injury wage-earning capacity because such work was no longer available to him. She found that claimant would be able to compensate for these lost hours because his status and seniority as a 22 year fully

[1]A transtainer is a crane on rubber tires, which is used to pick up, move, and stack containers about the marine dock. Tr. at 26.

[2]In making this calculation the administrative law judge appears to have employed claimant's hours in 1988 and 1989 because between May 1, 1987 and January 15, 1988, in addition to performing longshore work, claimant worked as a union business agent, an elected position, to which he was not subsequently re-elected.

registered "A" longshoreman would allow him to obtain other suitable work. Based on these facts, and her observation that the physical effects of claimant's injuries will likely affect his ability to work into the future, the administrative law judge concluded that claimant has a post-injury wage-earning capacity of $694 per week. The administrative law judge, therefore, determined that claimant sustained a loss of wage-earning capacity of $292.35 per week. Accordingly, she awarded claimant permanent partial disability compensation pursuant to Section 8(c)(21) at a compensation rate of $194.90 per week commencing January 31, 1988. The administrative law judge also found that employer was not entitled to relief from the Special Fund pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Claimant's attorney was awarded a fee of $3,490.50 plus $32.50 in costs to be paid by employer.

On appeal, employer challenges both the administrative law judge's finding that claimant sustained a loss in wage-earning capacity and her denial of Section 8(f) relief. Claimant responds, urging that the administrative law judge's Decision and Order be affirmed. Employer replies, reiterating its arguments.[3]

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. 33 U.S.C. §908(h). 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. *See Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). 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).

Initially, we reject employer's argument that the administrative law judge erred in determining that claimant's actual post-injury earnings are not representative of his post-injury wage-earning capacity. The administrative law judge found that claimant's average post-injury weekly earnings of $953.06, which approximated his pre-injury average weekly wage of $986.35, did not fairly and reasonably represent his post-injury wage-earning capacity because at least three intervening general wage increases had occurred since the time of claimant's injury. The administrative law judge further noted that claimant's actual post-injury earnings included the walking boss premium, which was no longer available to claimant. These findings are supported by

[3]On March 17, 1994, claimant's attorney notified the Board that claimant died on November 14, 1991, of prostatic carcinoma and requested that the appeal be dismissed because the only issue before the Board, the appropriateness of the permanent partial disability award, had been rendered moot by claimant's death. Employer opposed the motion to dismiss on the ground that the Section 8(f) issue was still outstanding and that employer's request for reduction in disability benefit payments would affect its credit for payments made beyond 104 weeks under Section 8(f). By Order dated September 23, 1994, the Board denied claimant's motion to dismiss.

substantial evidence. Claimant testified that the first raise after he was injured went into effect on July 1, 1987, and was around 12-18 percent. Tr. at 50. John Ronne, a walking boss and member of Local 92, testified that he thought the increases in 1988 and 1989 were 85 cents per hour.[4] While neither Mr. Ronne nor claimant was able to specifically quantify the exact amount of the general wage increases since the time of the claimant's injury, because both testified that several wage increases had, in fact, occurred, the administrative law judge reasonably inferred that these wage increases provided an explanation for claimant's roughly equivalent post-injury earnings despite his decreased hours. She also properly recognized that, in any event, these earnings nonetheless represented a loss in wage-earning capacity because they would have to be adjusted to the equivalent wages paid at the time of his injury to account for the effects of inflation. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

Employer also avers that because claimant performed the walking boss job both before and after his injury, and there is no credible evidence establishing that his subsequent removal from the walking boss list was due to his injury, the administrative law judge should not have relied on this factor to support her finding that claimant's actual post-injury earnings are not representative of his post-injury wage-earning capacity. Although claimant did perform some walking boss work between December 1987 and July 1989, we affirm the administrative law judge's determination that his earnings in this employment should not be included in claimant's post-injury wage-earning capacity because this work subsequently became unavailable when 14 permanent walking boss positions were added at the Local and claimant was not on the list.[5] Furthermore, contrary to employer's contention, the loss of the walking boss premium was not a factor in the administrative law judge's ultimate findings on claimant's loss of wage-earning capacity. Inasmuch as the administrative law judge's finding that claimant's actual post-injury wages do not represent his post-injury wage-earning capacity is rational and supported by substantial evidence, we affirm this determination. *See Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990).

Employer alternatively argues that the administrative law judge erroneously determined that claimant sustained a $292.35 per week loss in his wage-earning capacity. Employer initially avers that, in concluding that claimant sustained a loss in wage-earning capacity, the administrative law judge impermissibly relied on indicia of anatomical medical impairment. Where, as here, however, claimant's actual post-injury wages do not fairly and reasonably represent his post-injury wage-earning capacity, the administrative law judge must calculate claimant's wage-earning capacity by taking into account the nature of the injury, the degree of physical impairment, claimant's usual employment, claimant's earning power on the open market and any other reasonable variable that

[4]Mr. Ronne testified that this increase was on the straight-time rate for the Monday through Friday day shift, but increased for different shifts. Tr. at 54.

[5]Claimant testified that he did not know why he was not among those added to the permanent walking boss list. Tr. at 33. Mr. Ronne testified that claimant was not included on the list because everyone knew he had a serious injury which severely restricted him. Tr. at 55. The administrative law judge, however, "afforded little weight" to Mr. Ronne's testimony. Decision and Order at 6.

could form a factual basis for the decision. *See Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991); *Penrod Drilling Co.*, 905 F.2d at 87, 23 BRBS at 111 (CRT); *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Thus, employer's assertion that the administrative law judge improperly considered the physical effects of claimant's injury in determining that he sustained a loss in his wage-earning capacity as a result of the work injury is without merit. Employer correctly asserts that an award of disability compensation may not be made pursuant to Section 8(c)(21) absent evidence of economic disability. *See generally Jennings v. Sea Land Serv., Inc.*, 23 BRBS 312 (1990), *vacating in part on recon.*, 23 BRBS 12 (1989). In the present case, however, the administrative law judge did not rely solely on claimant's physical impairment in determining that claimant was entitled to compensation. Rather, she also determined that claimant sustained economic injury because the average number of hours he worked had gone from 26.46 hours prior to his injury, to 21.99 hours in 1988 and 1989, a decrease of about 17 percent. Decision and Order at 6; Because the administrative law judge's finding of economic injury is rational and supported by the record, Cl. Ex. 5; Emp. Ex. 3, employer's argument that the administrative law judge erred in finding that claimant sustained a loss in wage-earning capacity in this case is rejected. *Container Stevedoring Co.*, 935 F.2d at 1544, 24 BRBS at 213 (CRT).

While we affirm the administrative law judge's finding that claimant sustained a loss in wage-earning capacity in this case, we agree with employer that the case must be remanded because the administrative law judge failed to provide an adequate explanation as to how she arrived at her finding that claimant's post-injury wage-earning capacity is $694 per week. Although the administrative law judge indicated that she had weighed claimant's physical impairment and medical restrictions, and his decreased work hours, in determining that claimant had a post-injury earning capacity of approximately $694 per week, she provided no explanation as to how each of these factors contributed to her computation of this dollar amount. Accordingly, we vacate the administrative law judge's post-injury wage-earning capacity calculation, and remand to allow her to explain this finding consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(C)(3)(A). *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *see also Owens v. Traynor*, 274 F.Supp. 770 (Dist. M.D. 1966), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968).

We next address employer's challenge to the administrative law judge's denial of Section 8(f) relief. Section 8(f) shifts liability to pay compensation for permanent disability compensation from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes the following three prerequisites: 1) the injured employee has a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. Where an employee is permanently partially disabled, the employer must also show that the current permanent partial disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f)(1); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *Pino v. International Terminal Operating Co., Inc.*, 26 BRBS 81 (1992).

In the present case, employer sought Section 8(f) relief based on claimant's prior back injuries in 1975 and 1978, and other conditions discussed in Dr. Zivin's 1989 report, including trochanteric bursitis, degenerative lumbar changes, and an apparent compression fracture of L1 with spontaneous fusion to L2. The administrative law judge found that, of these conditions, only claimant's chronic trochanteric bursitis, which resulted from a September 21, 1981, job injury, was manifest to employer prior to claimant's May 3, 1987, work injury. The administrative law judge further determined that neither claimant's trochanteric bursitis nor any of his other pre-existing conditions constituted a pre-existing permanent partial disability within the meaning of Section 8(f) because none of these conditions had resulted in a serious lasting physical problem. Finally, the administrative law judge rejected the medical report of Dr. Zivin and the vocational report of Mr. Kleinstuber as evidence indicative that the pre-existing conditions contributed to claimant's disability, finding both opinions incredible because they were inconsistent with the other medical evidence of record, speculative, and had been prepared for the purpose of litigation.

On appeal, employer contends that the administrative law judge erred in denying Section 8(f) relief because claimant's prior 1975 and 1978 back injuries were manifest pre-existing permanent partial disabilities which combined with the work injury and contributed to his permanent partial disability. After review of the Decision and Order in light of the evidence of record, we affirm the administrative law judge's determination that employer is not entitled to Section 8(f) relief based on the 1975 and 1978 back injuries. The record supports the administrative law judge's determination that these back injuries were not manifest to employer because the only medical evidence referencing these injuries are the medical reports of Drs. Post, Geist, and Zivin, which were generated after the May 3, 1987, work injury. *See FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989). While recognizing that Dr. Zivin had diagnosed pre-existing degenerative arthritis at the L5-S1 level and a fracture at L1 based on his review of x-rays performed in 1981 and 1984, the administrative law judge properly determined that Dr. Zivin's *post hoc* reading of these x-rays in 1989 was not sufficient to render these conditions manifest. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Although employer maintains that these conditions were made manifest to employer via Dr. Post's medical records, which indicate that claimant was

selective in the jobs he took as early as 1981, upon reviewing these records the administrative law judge rationally concluded that claimant's care in job selection was due to symptoms associated with his trochanteric bursitis and not because of his prior back injuries. Decision and Order at 13. Inasmuch as the administrative law judge's finding that the 1975 and 1978 back injuries were not manifest to employer is rational and supported by the record, and employer does not challenge the findings the administrative law judge made regarding claimant's other pre-existing conditions, her denial of Section 8(f) relief in this case is affirmed.

Accordingly, the administrative law judge's wage-earning capacity finding is vacated and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge