BRB No. 92-1679

CHARLES EVANS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEALAND SERVICES, INCORPORATED	)	DATE ISSUED:
	)	
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of James J. Butler, Administrative Law Judges, United States Department of Labor.

David Utley (Devirian & Utley), Wilmington, California, for claimant.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Sorkow), San Pedro, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (90-LHC-2781) of Administrative Law Judge James J. Butler 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 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, whose usual employment was as a truck driver, injured his back on October 6, 1986. Dr. Booth found claimant unable to return to his regular work duties due to a variety of work restrictions resulting from his injury. After a period of rehabilitation, claimant underwent retraining to become a documentation clerk. Claimant, however, obtained a release from his orthopedist to return to his former employment because of financial hardship. Beginning August 1, 1989, he secured work as a tow operator, which is considered light duty employment. Claimant maintained

that his overtime opportunities are decreased in the tow operator position, and that he also worked fewer hours than before his injury as he availed himself of "company convenience," under which employees are permitted to leave work early, but without pay for the hours missed.[1]

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on September 8, 1988, and that he is unable to perform his usual employment as a truck driver based on the opinion of Dr. Booth. Moreover, the administrative law judge concluded that claimant's actual wages as a tow operator fairly represent his post-injury wage-earning capacity, and therefore he awarded claimant permanent partial disability benefits based on two-thirds of the difference between his post-injury wage-earning capacity and his pre-injury average weekly wage. 33 U.S.C. §908(c)(21). In this regard, the administrative law judge found that claimant's reduced earning capacity is due to his back injury and that he avails himself of the "company convenience" as a way to alleviate his back pain. The administrative law judge also awarded claimant medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, and interest on outstanding past due benefits.

On appeal, employer contends that claimant's actual post-injury wages are not representative of his wage-earning capacity because claimant's use of the "company convenience" program is not related to his back injury. Employer also contends that the administrative law judge's decision fails to comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). Claimant responds, urging affirmance of the administrative law judge's decision.

Under Section 8(h) of the Act, 33 U.S.C. §908(h), the wage-earning capacity of an injured employee is determined by his actual post-injury earnings if such earnings fairly and reasonably represent his wage-earning capacity. The party contending that actual earnings are not truly representative of the claimant's post-injury wage-earning capacity has the burden of establishing a different wage-earning capacity. *See Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991); *Misho v. Dillingham Marine & Manufacturing Co.*, 17 BRBS 188 (1985). Furthermore, the dispositions of claims arising under the Act are subject to the APA, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). Thus, the administrative law judge must analyze and discuss all the relevant evidence of record. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

In the instant case, employer argues that claimant's decreased earnings are due to his taking advantage of the "company convenience" program, and it contends that the administrative law judge's finding that claimant uses this program because of his back pain in not supported by the

[1]"Company convenience" is a policy under which employer offers employees the opportunity to leave work early if there is not enough work available. The benefit to employer is that it does not have to pay wages to individuals when there is no work for them to perform; otherwise, the collective bargaining agreement requires that if an employee punches in, employer must pay him for eight hours of work whether or not work is available. The contract further provides that employer may not lay off more than ten percent of its employees due to lack of work.

record. Specifically, employer contends that the administrative law judge misconstrued the testimony of claimant's supervisor, Mr. Pequignot, concerning claimant's use of "company convenience," failed to discuss the testimony of claimant's union steward, Mr. Wofford, and failed to discuss the evidence of record demonstrating that claimant could perform light duty work on a full-time basis if he so chose.

We agree with employer that the administrative law judge misconstrued the testimony of Mr. Pequignot and Mr. Wofford in concluding that it supports claimant's testimony that he works fewer hours due to his back pain. Mr. Pequignot testified that he knew of claimant's back injury, but was aware of only one specific occasion that claimant used "company convenience" because of his back pain. Tr. at 62, 69. Mr. Pequignot testified that most of the time an eight hour day is available to claimant due to his seniority, and that some overtime also is available. Tr. at 59, 61. Mr. Wofford, whose testimony the administrative law judge did not specifically address, stated that he is unaware that claimant used "company convenience" because of his back pain. Tr. at 75-76. Inasmuch as the administrative law judge did not address the totality of the evidence or resolve the conflicts among the witnesses' testimony, we must vacate the administrative law judge's decision, and remand the case for reconsideration of the evidence to determine whether employer has met its burden of proving that claimant's actual wages do not represent his post-injury wage-earning capacity. *See generally Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990). On remand, the administrative law judge must address all of the evidence relevant to this issue, and issue a decision in accordance with the APA.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge