

BRB No. 93-1619

JOHN SEIBERT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HOLT CARGO SYSTEMS,)	DATE ISSUED:
INCORPORATED)	
)	
and)	
)	
NATIONAL UNION FIRE)	
INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of
Ralph A. Romano, Administrative Law Judge United States Department of Labor.

David M. Linker (Freedman & Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Benjamin Rose (Clayton H. Thomas, Jr. & Associates), for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Motion for Reconsideration (92-LHC-2456, 2457) of Administrative Law Judge Ralph A. Romano denying benefits on a claim filed pursuant to the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was injured while working for employer on August 25, 1985, when he fell into a hole and hurt his back. Claimant was injured again on July 11, 1986, when he slipped on sawdust

and twisted his neck and lower back. Claimant received voluntary payments of temporary total and permanent partial disability benefits for various time periods. Claimant returned to work for employer on November 7, 1989, and sought benefits for a loss in wage-earning capacity.

In his Decision and Order, the administrative law judge found that claimant's actual post-injury earnings fairly and reasonably represent his post-injury wage-earning capacity, that claimant has no loss in wage-earning capacity and that claimant is not entitled to permanent partial disability benefits beyond January 1, 1991. The administrative law judge denied claimant's motion for reconsideration requesting an opportunity to submit additional evidence.

On appeal, claimant contends that he is entitled to permanent partial disability benefits beyond January 1, 1991, and that the administrative law judge erred in denying his motion for reconsideration. Employer responds, urging affirmance of the administrative law judge's denial of benefits as claimant's actual post-injury earnings equal or exceed his average weekly wage.

After consideration of claimant's contentions and the administrative law judge's Decision and Order, we affirm the administrative law judge's finding that claimant has no loss in wage-earning capacity. Under Section 8(h) of the Act, 33 U.S.C. §908(h), wage-earning capacity is determined by claimant's actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity; however, if there are no earnings or the actual earnings do not fairly and reasonably represent his wage-earning capacity, the nature of the injury, degree of physical impairment, usual employment, effect of disability in the future, and any other factors affecting the capacity to earn wages in a disabled condition, should be taken into consideration. *Warren v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 149 (1988); *Devillier v. National Steel & Shipbuilding Co.*, 16 BRBS 649 (1979). In this case, the administrative law judge did not rely solely on claimant's higher hourly earnings to determine that claimant has no loss in wage-earning capacity, but rationally relied on the fact that claimant worked a comparable number of hours before and after his injuries. Emp. Exs. F, G, H; Cl. Exs. 6, 8; *see Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991); *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990). Moreover, the administrative law judge found that claimant worked regularly and continuously as a doorway man after the waterboy position was eliminated¹, and that claimant did not thereafter face a decrease in hours and lack of employment stability as he claimed. Cl. Ex. F; Tr. at 50. Further, as claimant testified that he is capable of performing his work, his contention that he has expended extraordinary effort to work post-injury lacks merit. Tr. at 46. Inasmuch as claimant has raised no reversible error committed by the administrative law judge in weighing the evidence of record, we affirm the administrative law judge's finding that claimant does not have a loss in wage-earning capacity.

¹Claimant testified that the position of waterboy was the easiest job on the waterfront. Tr. at 22-28.

Claimant next contends that the administrative law judge abused his discretion in denying claimant's motion for reconsideration. Claimant sought to reopen the record to admit additional evidence indicating he had a substantial reduction in hours in the first quarter of 1993 due to the elimination of the waterboy position. Claimant maintained that this evidence was unavailable at the time of the January 25, 1993, hearing. The regulation at 20 C.F.R. §702.338 provides that, at any time prior to the filing of the compensation order, the administrative law judge may reopen the record for receipt of additional evidence. The Board has interpreted this provision as affording administrative law judges considerable discretion in ruling on requests for the admission of evidence into the record. *See Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988). In the instant case, claimant has failed to demonstrate that the administrative law judge abused his discretion in declining to reopen the record after he issued his decision, and in consequently denying his motion for reconsideration. Accordingly, the administrative law judge's order is affirmed.² *See Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

²We note that claimant may seek to modify the administrative law judge's denial of benefits under the provision of Section 22 of the Act, 33 U.S.C. §922, based on a change in his economic condition. *Metropolitan Stevedore Co. v. Rambo*, 115 S.Ct. 2144, 30 BRBS 1 (CRT) (1995).