

LARRY VAUGHAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter & Montagna), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason & Mason), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2257) of Administrative Law Judge Fletcher E. Campbell, Jr., 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).

On July 31, 1987, claimant was injured while working as a welder for employer when a heavy ring fell from a tank onto his shoulder and arm. Claimant continued to work without restrictions until 1990, at which time his doctor imposed restrictions on performing overhead welding. CX-1. On February 12, 1991, claimant returned to work without restrictions but in June 1991, restrictions regarding overhead welding and line pulling using claimant's right arm were again imposed. Claimant reached maximum medical improvement on October 19, 1992. Employer voluntarily paid claimant compensation for temporary total disability for various periods. Claimant sought temporary partial disability

benefits from February 12, 1991 through October 19, 1992, and permanent partial disability compensation thereafter until May 10, 1995, alleging that he sustained a loss of wage-earning capacity based on a loss of overtime earnings. Claimant alternatively argued that because the overtime work he performs violates his restrictions, his actual post-injury earnings exceeded his true post-injury wage-earning capacity.

In his Decision and Order, the administrative law judge found that claimant failed to establish a loss of wage-earning capacity based on a loss of overtime wages, as he had not worked less overtime due to his injury. The administrative law judge further found that although claimant worked in pain and was compelled while working overtime to perform overhead welding work which exceeded his restrictions, he was not totally disabled from overtime work under the “extraordinary effort” exception, because there was no evidence that the level of his pain was “excruciating.” Decision and Order at 5. Based on this rationale, the administrative law judge found that claimant was neither totally nor partially disabled from performing overtime work, that he in fact did so, and that as he has not been shown to have any lost overtime by virtue of his injury, he was not entitled to the compensation claimed. In light of his denial of the claim for permanent partial disability compensation, the administrative law judge noted that it was not necessary for him to reach the question of employer’s entitlement to Section 8(f), 33 U.S.C. §908(f), relief. Nonetheless for the sake of judicial economy, he proceeded to do so, finding that employer’s petition was untimely pursuant to Section 8(f)(3), and that the medical evidence submitted was insufficient to establish the contribution element of Section 8(f) under *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT) (4th Cir. 1993), *aff’d on other grounds*, 514 U.S. 122, 29 BRBS 87 (CRT) (1995).

On appeal, claimant argues that the administrative law judge erred in denying his claim for permanent partial disability compensation from October 19, 1992, until May 10, 1995, based on a loss of overtime earnings. Claimant asserts he testified at the hearing that since his injury he has not been asked by his supervisors to work as much overtime as his co-workers because of his restrictions. Tr. at 30. In the alternative, claimant argues that because the administrative law judge specifically found that the overtime work which claimant performed post-injury exceeded his restrictions, the administrative law judge erred in failing to find that claimant established a loss in wage-earning capacity. Claimant maintains that because he must perform overtime work which exceeds his restrictions in order to earn an income comparable to that which he had earned pre-injury, he is entitled to permanent partial disability compensation. In the alternative, claimant argues that he is entitled to temporary partial disability benefits from February 12, 1991, through October 19, 1992, because he experienced a loss of wage-earning capacity based on a loss of overtime work which can be calculated by comparing his pre-injury earnings

including overtime with his post-injury earnings after restrictions working 40 hours per week. Employer responds, urging affirmance.<sup>1</sup>

An award for partial disability for an injury which is not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (e); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340, 344-345 (1992). Section 8(h) of the Act, 33 U.S.C. §908 (h), 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. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990). The party that contends that the employee's actual earnings are not representative of his wage-earning capacity bears the burden of establishing an alternative, reasonable wage-earning capacity. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 n.3 (1987). 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 post-injury wage-earning capacity. *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). Loss of overtime earnings may provide a basis for determining that a claimant has demonstrated a loss in wage-earning capacity where, as here, overtime was a normal and regular part of claimant's pre-injury employment and accordingly was included in determining claimant's average weekly wage. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1990); *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110, 112 (1989); *Butler v. Washington Metropolitan Area Transit Authority*, 14 BRBS 321 (1981).

---

<sup>1</sup>Employer also asserts in its response brief that if the Board reverses the administrative law judge's denial of benefits, the case should be remanded for the administrative law judge to fully consider and address the issue of employer's entitlement to Section 8(f) relief. The administrative law judge, however, did address this issue in his initial Decision and Order and found that employer was not entitled to Section 8(f) relief. Inasmuch as employer failed to file a cross-appeal, we need not address employer's Section 8(f) argument, as this issue cannot be properly raised in a response brief. *Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

We affirm the administrative law judge's finding that claimant failed to establish that he worked less overtime due to his injury because it is rational, supported by substantial evidence, and in accordance with law. See *O'Keeffe*, 380 U.S. at 359. In determining that claimant failed to establish an actual loss of overtime hours, the administrative law judge considered claimant's hearing testimony that he was not offered as much overtime as other workers within his department who did not have restrictions, but did not find it persuasive in light of countervailing testimony introduced by employer. Comparing claimant's overtime records with those of his coworkers, Mr. Griffin and Mr. Weber, the administrative law judge rationally concluded that he worked as much or more overtime than comparable workers. Compare EX-12 with EX-1.8. Moreover, the administrative law judge relied on the testimony of Mr. Bircher, a general foreman in employer's welding department, that when overtime was available, everyone at work including those on restrictions, was asked to work, Tr. at 51, as well as claimant's testimony, Tr. at 24-30, to conclude that claimant was offered overtime and that he worked nearly all overtime available. Decision and Order at 3-4. Because the administrative law judge's finding that claimant did not work less overtime is rational and supported by substantial evidence, his denial of partial disability benefits on this basis is affirmed. See generally *Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987); *Brown*, 23 BRBS at 110.

Although we affirm the finding that claimant did not work less overtime, we agree with him that it was incongruous for the administrative law judge to find that claimant's post-injury overtime work exceeded his restrictions, yet conclude that he had no loss in his wage-earning capacity. See Decision and Order at 5. The administrative law judge analyzed this issue in terms of whether claimant was performing this work only with extraordinary effort and in spite of excruciating pain, finding he was not doing so. This test is not dispositive in the present case, as it is relevant where a claimant who is working seeks total disability benefits. See *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978). In the present case, however, claimant is not seeking total disability compensation for periods when he is working. Even if claimant's pain was not "excruciating," the fact he was "compelled to exceed his restriction" is relevant in determining his post-injury wage-earning capacity and may support an award of partial disability based on a reduced earning capacity. See generally *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991). If a claimant is only able to earn wages comparable to his pre-injury earnings by performing work which exceeds his physical restrictions, claimant has demonstrated a basis for finding a loss in wage-earning capacity, as the suitability of work given claimant's restrictions is a relevant factor in evaluating wage-earning capacity. See generally *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 658 (1979). As the administrative law judge found that the overtime work claimant performed post-injury exceeded his restrictions, his finding of no loss in wage-earning capacity cannot be upheld. Accordingly, we vacate the administrative law judge's denial of benefits in this case, and remand for him to reconsider whether claimant must perform overtime work which exceeds his restrictions in order to approximate his pre-injury earnings and to determine the extent to which this factor affects his wage-earning capacity.



Accordingly, the administrative law judge's finding regarding claimant's post-injury wage-earning capacity is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

---

JAMES F. BROWN  
Administrative Appeals Judge

---

NANCY S. DOLDER  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge