

BRB No. 97-659

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

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

John H. Klein (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (95-LHC-2727) 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his right shoulder while working as a painter for employer on October 11, 1992. Prior to the injury, claimant testified he worked substantial overtime and seldom refused overtime offered to him. Subsequent to the injury, however, claimant was restricted from working overtime from June 12, 1995 through September 10, 1995. Employer voluntarily paid claimant temporary partial disability benefits from June 12, 1995 through September 10, 1995, at the rate of \$39.71 per week to compensate him for his lost overtime. Claimant, however, sought additional temporary partial disability benefits based on the difference between the actual number of overtime hours offered to his crew from

June 12, 1995 through September 10, 1995, and the number of hours for which he was compensated.

In his decision, the administrative law judge concluded that the amount of compensation voluntarily paid by employer to compensate claimant for his loss of overtime does not fairly and reasonably represent claimant's loss in wage-earning capacity. The administrative law judge determined claimant's lost overtime for the period from June 12, 1995, through September 10, 1995, is 16.8 hours per week, and thus that a fair and reasonable representation of claimant's wage loss due to lost overtime is \$366.24 per week based on an overtime hourly rate of \$21.80.

On appeal, employer contends that claimant cannot receive an award for lost overtime that exceeds the amount of overtime included in his average weekly wage and that claimant's testimony that he would have worked more overtime if he had not been under the restrictions imposed is insufficient to justify an award of temporary partial disability benefits in excess of that voluntarily paid by employer. Claimant responds in support of the administrative law judge's decision.

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. See *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). If they do not, the administrative law judge must then determine a dollar amount representative of his wage-earning capacity. In making these determinations, relevant considerations include the employee's physical condition, age, education, industrial history, and availability of employment which he can perform post-injury. See *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Randall*, 725 F.2d at 791, 16 BRBS at 56 (CRT); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). A loss of overtime is relevant to a determination of post-injury wage-earning capacity. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

After consideration of employer's contentions on appeal, claimant's response, and the administrative law judge's decision in light of the record evidence, we affirm the administrative law judge's award of temporary partial disability benefits to claimant. Contrary to employer's contention, claimant's testimony that had he not been under restrictions because of his work-related injury, he would have been able to work the substantial overtime worked by his co-workers supports the administrative law judge's finding that claimant has a greater loss in earning capacity as does the fact that claimant regularly worked overtime pre-injury. See generally *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989); Decision and Order at 4; Cl. Ex. 3; Tr. at 16, 18.

Moreover, the administrative law judge's finding that a fair and reasonable representation of claimant's wage-earning capacity is 16.8 lost overtime hours per week for

the period from June 12, 1995 through September 10, 1995 is supported by substantial evidence. The administrative law judge rationally found that 16.8 hours of overtime per week is an accurate reflection of claimant's wage-earning capacity for this time period after extrapolating the average overtime hours in June and July 1995 to the entire period above since he found that it is much less speculative than using an average of the overtime hours worked for the entire year of 1995 by claimant's co-workers.¹ Decision and Order at 4-5; Cl. Ex. 3. Although, as employer notes, the administrative law judge's decision compensates claimant at a rate in excess of the amount of overtime earned by claimant in the 52 weeks prior to his 1992 work injury, the administrative law judge could rationally do so where the record indicates that more overtime hours were available to claimant had he not been injured than there had been in the 52 weeks prior to the 1992 work injury. See *generally Jennings v. Sea-Land Service, Inc.*, 23 BRBS 312 (1990), *vacating in part part on recon.*, 23 BRBS 12 (1989); *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988); Cl. Exs. 2, 3. Consequently, we affirm the administrative law judge's finding that a fair and reasonable representation of claimant's loss in wage-earning capacity from June 12, 1995 through September 10, 1995, is \$366.24 per week, representing 16.8 overtime hours per week.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

¹The administrative law judge arrived at his 16.8 hours per week figure by totaling the available number of overtime hours from June 12, 1995 through July 31, 1995, 120 hours, and then dividing 120 by the amount of weeks in this time period or 7 1/7. He then extrapolated the quotient, 16.8 hours, to the entire period at issue.