

LARRY GEORGE)	
)	
Claimant-Respondent)	DATE ISSUED:
)	
v.)	
)	
CALIFORNIA STEVEDORE AND)	
BALLAST COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Upon Remand of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Larry George, Novato, California, *pro se*.

Robert E. Babcock (Babcock & Company), Lake Oswego, Oregon, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Upon Remand (88-LHC-3220, 90-LHC-1333) of Administrative Law Judge Thomas Schneider 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).

This is the second time this case is before the Board. Claimant, a longshoreman, suffered injuries to his back during the course of his employment on October 29, 1986, and November 10, 1988. Following the second injury claimant returned to work on March 1, 1989, and continued to work as of the date of the hearing. Claimant is seeking, *inter alia*, compensation for a permanent partial disability arising out of his work injuries.

In his Decision and Order Awarding Benefits, the administrative law judge found,

inter alia, that claimant is entitled to periods of temporary total disability following both the 1986 and 1988 injuries and to continuing compensation for permanent partial disability following his return to work in 1989. In making his award of permanent partial disability benefits, the administrative law judge found that the 1986 injury alone caused claimant's permanent loss of wage-earning capacity. Based on his calculations, he awarded claimant permanent partial disability compensation commencing April 30, 1988, based upon a post-injury wage-earning capacity of \$418.69.

Employer appealed to the Board, contending that the administrative law judge erred in determining claimant's post-injury wage-earning capacity. The Board agreed, and vacated the administrative law judge's findings regarding claimant's loss of wage-earning capacity, remanding the case for the administrative law judge to reconsider the issue under Section 8(h), 33 U.S.C. §908(h), which governs the determination of post-injury wage-earning capacity. *George v. California Stevedore & Ballast Co.*, BRB No. 92-2235 (Aug. 30, 1996)(unpublished).

On remand, the administrative law judge conceded that his initial determination of claimant's post-injury weekly earnings was facially irrational. After determining that claimant's actual post-injury earnings do not fairly and reasonably represent his wage-earning capacity, the administrative law judge addressed several possible methods to determine an accurate calculation but failed to reach a satisfactory conclusion. Because he concluded that there was no accurate way to determine claimant's post-injury wage-earning capacity from the record before him, the administrative law judge reinstated the figure he arrived at in his first decision, *i.e.*, \$418.69. Decision Upon Remand at 3.

Employer again appeals, arguing that the administrative law judge erred by arriving at an unreasonably low figure for claimant's residual wage-earning capacity. Claimant, representing himself, responds, urging affirmance of the administrative law judge's determinations on remand.

Under Section 8(c)(21), 33 U.S.C. §908(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury 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. If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). 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). Among the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably

represent his post-injury wage-earning capacity are claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variables that could form a factual basis for the decision. *See Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994); *Devilleir v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Additionally, in calculating claimant's post-injury wage-earning capacity, the administrative law judge must adjust post-injury wage levels to the levels paid pre-injury in order to neutralize the effects of inflation. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

On appeal, employer contends that the administrative law judge erred in finding that claimant's actual wages do not represent his post-1986 wage-earning capacity and in reinstating the same figure, *i.e.*, \$418.69, which the Board had previously found to be based on irrational reasoning.¹ Employer urges that either an award be entered based upon claimant's actual weekly earnings during the 27 week period of employment between claimant's two injuries, *i.e.*, \$667.86, or that the case be remanded for further fact-finding necessary to establish a more representative figure.

Initially, we affirm the administrative law judge's conclusion that claimant's actual post-injury wages do not fairly and accurately represent his wage-earning capacity. Pursuant to Section 8(h), the administrative law judge properly considered claimant's physical condition, age, education, industrial history, and the beneficence of his employer to make his determination. *See Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); *Darcell v. FMC Corp., Marine & Rail Equip. Div.*, 14 BRBS 294 (1981). In so concluding, the administrative law judge stated that

claimant is well before customary retirement age; has severe medical restrictions on what he can do; works out of necessity and with pain and medication for sleep; and works a job which takes account of his limitations but is not available all the time.

Decision Upon Remand at 3. Employer does not contest the severity of claimant's condition

¹The parties agreed that claimant's benefits should be calculated based upon the difference between his average weekly wage at the time of his 1986 injury, *i.e.*, \$957, and his wage-earning capacity at the time of his November 10, 1988, injury.

or contend that the administrative law judge's findings are inaccurate. As the administrative law judge properly considered the factors necessary to making such a determination, we affirm his conclusion that claimant's post-injury wages do not fairly and accurately represent his wage-earning capacity. *See Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996).

In attempting to calculate a dollar amount which does reasonably represent claimant's wage-earning capacity at the time of his November 1988 injury, the administrative law judge considered several different methods based upon the wages claimant actually earned or the number of hours he worked. Based upon the actual wages earned, *i.e.*, \$18,366.23, divided by the number of weeks worked, *i.e.*, 27.5, during the relevant period, the administrative law judge found that claimant's post-injury wage-earning capacity was \$667.86, resulting in a loss of \$289.14 per week. The administrative law judge then divided claimant's pre-injury weekly wage, *i.e.*, \$957, by the percentage of post-injury hours claimant was able to work, *i.e.*, 37 percent, to find a post-injury wage-earning capacity of \$354.09, resulting in a loss of \$602.91 per week. He found the first amount too low and the second too harsh on employer. Decision Upon Remand at 3. Noting that his prior figure, *i.e.*, \$418.69, is the "best determination possible for a figure which is inherently difficult to compute," he summarily reinstated that amount. Decision Upon Remand at 3.

In arriving at his conclusions, however, the administrative law judge erred in his calculations of the post-injury hours worked by claimant and his ultimate finding of claimant's wage-earning capacity is premised upon these mathematical errors. In the relevant 27.5 weeks of claimant's employment prior to his second injury, claimant's actual wages decreased 30 percent. However, based upon his finding that claimant worked 12.1 hours per week during this period, the administrative law judge concluded claimant suffered a 63 percent loss in hours worked. This second calculation is in error because the administrative law judge used the 12.1 figure from his first decision in which he erroneously stated that claimant worked 45 weeks, rather than 27.5 weeks, prior to the 1988 incident; claimant actually worked 19.25 hours per week during this time.² The correct figure of 19.25

²The administrative law judge also referred to his calculation that claimant worked approximately 12.5 hours per week after his 1988 incident. Decision Upon Remand at 2. However, it is claimant's wage-earning capacity as of November 10, 1988, which is at issue; thus, although the 12.5 figure for the period following his March 1989 return to work may be accurate, it is irrelevant to a comparison between

hours, when compared with claimant's 33 hours worked per week pre-injury, results in a 42 percent loss of hours post-injury, thereby eliminating the large discrepancy noted by the administrative law judge. Using the correct number of hours, the loss of hours, *i.e.*, 42 percent, now relates more closely with claimant's loss of wages, *i.e.*, 30 percent.

claimant's pre- and post-injury hours/earnings ratio.

In attempting to calculate a dollar amount which reasonably represents claimant's wage-earning capacity at the time of his November 1988 injury, the administrative law judge noted that a "more realistic basis for establishing claimant's wage-earning capacity might be to compare the hours worked before and after the [1986] injury." Decision Upon Remand at 3. However, he rejected his resultant calculations based upon his reasoning that not only was the resulting figure too harsh on employer but also that it was so significantly different than the amount arrived at based upon claimant's actual earnings. It is now evident that both the figure he arrived at in making his calculations based upon the percentage of hours worked and his reason for rejecting it were premised on erroneous mathematical calculations. In view of these errors, therefore, we vacate the administrative law judge's post-injury wage-earning capacity finding and remand this case for the administrative law judge to reconsider the issue of claimant's post-injury wage-earning capacity based upon the correct figures.

Accordingly, the administrative law judge's Decision and Order Upon Remand is affirmed in part and vacated in part, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge