BRB Nos. 07-1003
and 07-1003A

D.T.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ROGERS TERMINAL AND SHIPPING CORPORATION	)	DATE ISSUED: 08/29/2008
	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order and the Supplemental Order: (1) Granting, in part, and Denying, in part, Employer's Motion for Reconsideration; and (2) Amending July 2, 2007 Decision and Order of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler, L.L.P.), Portland, Oregon, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order and the Supplemental Order: (1) Granting, in part, and Denying, in part, Employer's Motion for Reconsideration; and (2) Amending July 2, 2007 Decision and Order (2006-LHC-0477) of Administrative Law Judge Gerald M. Etchingham 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 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The underlying facts of this case are not at issue. Claimant suffered an injury to his left shoulder while working in a gang on a bulk wheat ship for employer on January 11, 2002. After surgery and recuperation, claimant returned to work on October 19, 2002, and his condition reached maximum medical improvement on February 13, 2003. Employer paid medical benefits and temporary total disability benefits for this injury. Cl. Ex. 2; Decision and Order at 2. Claimant filed a claim for additional benefits, and the parties disputed claimant's average weekly wage and the extent of his disability, if any. Claimant continued to work until he injured his right shoulder on August 18, 2003.[1] Following the right shoulder injury, claimant returned to work on October 11, 2004. Decision and Order at 2-4.

The administrative law judge determined that claimant's left shoulder injury is compensable and that Section 10(a), 33 U.S.C. §910(a), applies to the calculation of claimant's average weekly wage. The administrative law judge found that claimant's average weekly wage is $1,365.75. The administrative law judge further found that claimant's adjusted post-injury wage-earning capacity is $1,363.18. 33 U.S.C. §908(h). The administrative law judge awarded claimant temporary and permanent partial disability benefits of $2.57 per week. 33 U.S.C. §908(c)(21), (e). Decision and Order at 22-23. Employer filed a motion for reconsideration, and the administrative law judge treated the arguments in claimant's response brief as claimant's motion for reconsideration. Recon. at 4 n.6. The administrative law judge recalculated claimant's adjusted post-injury wage-earning capacity to be $1,357.41 and amended his decision, ordering increased temporary and permanent partial disability benefits of $8.34 per week.[2] Recon. at 5-6.

Claimant appeals, arguing that the administrative law judge erred in counting paid holidays as "actual work days" when calculating claimant's average weekly wage. Claimant asserts that these holidays should be excluded from the Section 10(a) calculation pursuant to *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). Claimant also contends the administrative law judge erred in finding that he could have worked five days per week after his injury and, therefore, in finding that his actual earnings between October 19, 2002, and August 18, 2003, do not fairly represent his post-injury wage-earning capacity. Employer responds, arguing that

[1]The record contains evidence of settlements for the 2003 right shoulder injury, Cl. Ex. 8; Emp. Ex. 73, as well as for a 2000 aggravation of a previous right knee injury, Emp. Exs. 57, 75. Compensation for those injuries is not at issue in this case.

[2]The administrative law judge found that he mistakenly excluded claimant's previously earned vacation pay and included an extra paid holiday in his initial calculations.

Matulic does not address the average weekly wage issue raised by claimant and that excluding paid holidays would inflate claimant's average weekly wage. Additionally, employer argues that the Board should affirm the administrative law judge's rational explanation of his finding that claimant's actual post-injury earnings are not representative of his wage-earning capacity. BRB No. 07-1003.

Employer cross-appeals, contending the administrative law judge erred in conducting a wage-earning capacity analysis under Section 8(h), 33 U.S.C. §908(h), and awarding permanent partial disability benefits because claimant returned to work with no medical restrictions. Additionally, employer argues that the administrative law judge erred in calculating claimant's average weekly wage under Section 10(a), asserting that section is inapplicable because claimant was not a five-day-per-week worker or, alternatively, if Section 10(a) applies, the administrative law judge erred in not including all vacation days and holidays in the calculation. Claimant responds, arguing that the administrative law judge properly found that he sustained a loss of wage-earning capacity, that he was a five-day-per-week worker and Section 10(a) thus applies pursuant to *Matulic*, and that vacation time and some of the holidays should be excluded from the calculation. BRB No. 07-1003A.

Average Weekly Wage

We first address the parties' contentions that the administrative law judge erred in calculating claimant's average weekly wage. Initially, employer argues on cross-appeal that the administrative law judge erred in applying Section 10(a) rather than Section 10(c), 33 U.S.C. §910(c). We reject this contention. This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, and the administrative law judge properly found *Matulic* controlling on the applicability of Section 10(a).

The Act requires application of Section 10(a) in calculating average weekly wage unless such application would be unreasonable or unfair or if the facts necessary for application of Section 10(a) are not available. 33 U.S.C. §910(a), (c).[3] In *Matulic*, the Ninth Circuit held that: "when a claimant works more than 75 percent of the workdays of the measuring year the presumption that §910(a) applies is not rebutted." *Matulic*, 154 F.3d at 1058, 32 BRBS at 151(CRT). Thus, because the claimant in *Matulic* worked 82 percent of the available work days and because the nature of his employment was stable and continuous, the court held that the administrative law judge should have applied

[3]Section 10(c) applies "[i]f either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied. . . ."

Section 10(a) to determine his average weekly wage. *Id.*, 154 F.3d at 1058, 32 BRBS at 152(CRT); *see also Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

In this case, claimant contends he was a five-day-per-week worker such that Section 10(a) applies. Employer stated at the hearing that claimant was a five-day worker, Tr. at 18, but now argues that claimant should be considered a four-day worker, making Section 10(c) applicable. The administrative law judge found that claimant worked 1,898 hours over 223 days during all 52 weeks of the year. He also stated that, while claimant did not work the "traditional 40 hours" each week, his work was not seasonal or intermittent. He found that claimant actually worked 223 days of the 260 days available to a five-day worker or 86 percent of the possible workdays, and he applied Section 10(a). Decision and Order at 10-12.

Substantial evidence supports the administrative law judge's decision to apply Section 10(a). Not only did *employer's* attorney so state at the hearing, but claimant testified that he worked an average of four or five days per week, working more during the winter so he could take his horses to shows in the summer. Tr. at 46-48. Claimant's payroll record reveals that claimant worked 86 percent of the available work days by working four, five, or six days per week. Cl. Ex. 3. As substantial evidence supports the administrative law judge's finding that "claimant's work history qualifies him as a five-day worker," Decision and Order at 12, whose work was regular and continuous, we reject employer's contention and affirm the administrative law judge's determination that Section 10(a) applies in this case. *Matulic*, 154 F.3d at 1058, 32 BRBS at 151-152(CRT).

Next, both parties contend the administrative law judge improperly computed average weekly wage by excluding and/or including certain holidays and vacation days. Claimant argues that the administrative law judge properly excluded vacation days but improperly included paid holidays as "actual work days." He contends: 1) that *Matulic* requires that those days not be counted, relying on the Ninth Circuit's use of the phrase "days actually worked;" 2) that the holiday pay was earned based on the previous year's earnings; and 3) that *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000), is not controlling law with regard to the holidays claimant worked. Employer contends the administrative law judge should have included all holidays, as well as all vacation days, in the computation and that *Wooley*, not *Matulic*, is on point.

We reject claimant's argument that *Matulic* resolves this issue in his favor. The Ninth Circuit in *Matulic* did not address whether an administrative law judge may include holidays or vacation days paid in lieu of work as a day worked for purposes of calculating the average daily wage under the Section 10(a) formula. In summarizing the Section

10(a)[4] formula, the court stated that average weekly wage is calculated by dividing the total earnings of the claimant during the 52 weeks preceding his injury by the "number of days actually worked." *Matulic*, 154 F.3d at 1056, 32 BRBS at 150(CRT). The issue in *Matulic* involved how many days a claimant must work in order to meet the Section 10(a) requirement of working substantially the whole of the year, and, in context, the court was addressing whether the use of Section 10(a) is prohibited if a calculation under that subsection results in a figure exceeding the claimant's actual earnings.[5] The Ninth Circuit did not specifically address the issue presently before the Board.

Additionally, claimant's argument that the language in *Matulic* controls the outcome of this case ignores the plain language of the Act. Specifically, Section 10(a) states that an employee's average weekly wage shall be "two hundred and sixty times the average daily wage or salary for a five-day worker, *which he shall have earned in such employment during the days when so employed*." 33 U.S.C. §910(a) (emphasis added). Provided that the employee was employed substantially the whole of the year, which *Matulic* sets at 75 percent of the year, then his average weekly wage is based on his daily wage earned "during the days he was so employed." *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 265, 31 BRBS 119, 125(CRT) (4th Cir. 1997) (proper inquiry requires administrative law judge to determine claimant's income during year prior to injury and divide that amount by "the actual number of *days* for which the employee was paid") (emphasis in original); *see also Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133, 136 (1990) ("since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment[;]" six weeks of vacation should have been included as time worked). Thus, the Act does not limit the average weekly wage calculation to include only those

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[4]Section 10(a) of the Act, 33 U.S.C. §910(a), provides:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

[5]The Ninth Circuit found that some overcompensation is built into the system because no one works every working day of every year.

days when the employee was actually at work. To do so, while at the same time including all earnings from all the days he was paid, would unreasonably inflate the employee's average daily wage, and thus his average weekly wage. As *Matulic* did not address the specific issue in the present case, claimant's contention that it is dispositive is rejected. 33 U.S.C. §910(a). *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Duncan*, 24 BRBS 133.

We also reject claimant's assertion that *Wooley*, 204 F.3d 616, 34 BRBS 12(CRT), which addressed the inclusion of vacation time in the Section 10(a) formula, cannot apply because it is not Ninth Circuit law. The Fifth Circuit's decision in *Wooley* is persuasive authority which is on point; moreover, the court affirmed a published decision of the Board, which applies in addressing this issue. *Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 88 (1999), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000). In *Wooley*, the claimant used some of his vacation time on specific days and received the rest of his vacation time in a lump-sum monetary payment.[6] The Board held that where a claimant receives a lump sum for vacation pay in lieu of taking the vacation days off, the determination of the number of days worked for purposes of calculating average daily wage does not include additional days derived from hours for which the claimant received a lump sum payment rather than time off. *Wooley,* 33 BRBS at 90. That is, the administrative law judge may not divide the hours of vacation pay by eight to "create" days. In affirming the Board's decision, the United States Court of Appeals for the Fifth Circuit stated that an employer who chooses to allow lump sum payments for unused time obviously increases the amount that the employee "could ideally have been expected to earn," citing *Duncan,* 24 BRBS 133, and that Section 10(a) envisions a calculation based on that expectation. Declining a bright-line test, the court found it appropriate to charge the administrative law judge with fact-finding regarding whether vacation pay counts as a "day worked" or whether it was "sold back" to employer for additional pay. *Wooley*, 204 F.3d at 618, 34 BRBS at 14(CRT). As the administrative law judge's findings that claimant took four vacation days, which were treated as days worked, and

[6] Claimant was paid for 120 hours of vacation time but took only four days off from work. Including the four vacation days taken, the administrative law judge found claimant worked 256 days, and divided his total earnings by this number to obtain his average daily wage. Employer argued that the additional hours for which the lump sum payment was received, *i.e.,* time "sold back" to employer for pay instead of being used by claimant, as time off from work, should be divided by eight to result in an additional 11 days. In rejecting this argument for the reasons discussed, *infra,* the Board also noted that inclusion of 11 additional days would increase the days worked to a number greater than the 260 days actually available to a five-day worker, thus decreasing his annual earnings to an amount less than he actually earned.

sold back the additional time, which was treated as additional compensation added to his earnings, were supported by substantial evidence, the court affirmed his decision.

Although *Wooley* involved vacation days, its rationale also applies to holidays. Accordingly, we reject both parties' contentions that the administrative law judge erred in arriving at the number of days claimant "worked" for purposes of calculating his average weekly wage. To the contrary, the administrative law judge's factual findings are supported by substantial evidence and his application of the law to those facts is proper.

Claimant testified that the amount of holiday pay and vacation pay he receives each year is determined by the number of hours he worked the preceding year. He also testified that he could work on most holidays and would receive holiday pay as well as overtime wages. He stated he did not have to take vacation days off from work in order to receive his vacation pay. Tr. at 64-65. The administrative law judge found that claimant was actually at work on 223 days of the 260 available for five-day workers. He found that claimant was paid for 14 holidays and 120 hours of vacation time. Citing *Wooley*, the administrative law judge determined that the lump-sum payment for the 120 vacation hours does not count toward claimant's number of days actually worked because claimant would have received that money even if he had worked every day possible and because the money did not replace any actual work days. Decision and Order at 12. However, he distinguished the 10 holidays for which claimant was paid but did not work from the vacation time and from the holidays on which claimant worked. He included the non-worked paid holidays in the calculation because he found that they represented actual paid days off, whereas he excluded the holidays on which claimant worked and received both holiday pay and overtime because those days were already counted as days claimant actually worked. The administrative law judge, therefore, added the 10 non-worked holidays to the 223 days claimant actually worked to arrive at the conclusion that claimant worked 233 days during the year preceding his injury. Decision and Order at 12-13.

A review of claimant's payroll records supports the administrative law judge's calculation. In January/February 2002, subsequent to his injury, claimant was paid for 120 hours of vacation time.[7] Cl. Ex. 3. The administrative law judge rationally found that this lump-sum payment is based on the number of hours claimant worked during the previous work year and is not related to any specific days he took off. Under *Wooley*, the administrative law judge properly declined to "create" days from the vacation hours; only actual days worked or paid in lieu of work may be counted as "days worked" for

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[7]The previous year, claimant received a lump-sum payment for 80 hours of vacation time. Cl. Ex. 3.

purposes of computing average weekly wage. *Wooley*, 204 F.3d at 618, 34 BRBS at 14(CRT). Therefore, we reject employer's argument that the administrative law judge erred in excluding the "vacation days" from his calculation.

The payroll records also clearly and separately denote the holidays for which claimant was paid and identify those on which he worked, and each payment of holiday pay relates to a real day. Cl. Ex. 3. Contrary to the parties' arguments, all the holidays in this case should not be treated alike. The administrative law judge rationally excluded the holidays on which claimant worked, as those days would otherwise be double-counted, and claimant's average weekly wage would be deflated. The administrative law judge also rationally included the holidays on which claimant did not work but received pay for that day. As the administrative law judge's calculations comport with law, we affirm his average weekly wage determination. *See generally Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Duncan*, 24 BRBS 133.

Disability

Next, in its cross-appeal, employer contends the administrative law judge should not have conducted a Section 8(h), 33 U.S.C. §908(h), analysis and awarded any permanent partial disability benefits because he found that claimant has returned to work with no medical restrictions.[8] Claimant argues there is sufficient evidence to demonstrate a greater loss of wage-earning capacity resulting from his left shoulder injury and that his benefits should be increased. In this regard, claimant contends the administrative law judge erred in finding that his earnings between October 2002 and August 2003 do not fairly represent his post-injury wage-earning capacity as he contends his post-injury earnings are representative of his decreased abilities following that injury.

A claimant bears the burden of establishing the extent of his disability, *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985), including any loss in his wage-earning capacity, *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). If a claimant returns to work following his injury with pain and/or limitations, these factors are relevant to the claimant's post-injury wage-earning capacity, even if his actual wages are not diminished. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Claimant's credible complaints of pain can support a disability finding. *See, e.g., Eller & Co. v. Golden,* 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980).

[8]Although temporary partial disability benefits are also based on claimant's post-injury wage-earning capacity, employer does not identify the administrative law judge's award of temporary partial disability as a matter of dispute.

In this case, the administrative law judge found claimant to be a "generally credible witness[,]" and he specifically credited claimant's testimony that lashing and hold jobs bother his left shoulder.[9] Decision and Order at 18; Recon. at 5. The administrative law judge, however, was not persuaded by claimant's assertion that he lost earnings or was unable to take certain jobs to the extent claimed.[10] Decision and Order at 21. On reconsideration, the administrative law judge rejected employer's argument that his findings demonstrate that claimant failed to show a loss of wage-earning capacity. The administrative law judge stated that claimant suffered a serious injury and that he had credited claimant's testimony that some jobs bothered his shoulder. Citing *Stallings v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 193 (1999), *aff'd,* 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001), the administrative law judge stated that this, therefore:

> leaves open the possibility that Claimant may have an economic loss on those days where his left shoulder causes him to miss work opportunities or turn down heavier work, even if specific instances where this happened were not established at trial.

Recon. at 5. Consequently, the administrative law judge rejected employer's argument that it was improper to conduct a Section 8(h) analysis. The administrative law judge also found that the "insubstantial size" of the award is consistent with his finding that claimant can perform "most, if not all, of his pre-injury work" but still has a physical impairment in that some jobs cause him pain. Recon. at 5.

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[9]Claimant also testified in his deposition that Dr. Sedgewick told him to "back off" of any jobs causing pain. Emp. Ex. 80 at 397-398.

[10]The administrative law judge noted that claimant may have taken only one or even no lashing jobs since 2000, well before his injury, and he found speculative claimant's presumption that only lashing jobs were available when he called in some days. He also found unreliable the notations in claimant's work-diary, particularly with regard to any alleged wage loss or reasons for not working on various days. The administrative law judge also credited employer's vocational expert who stated that ample suitable jobs were available for claimant following his return to work on those days he did not work. Decision and Order at 8, 17-20.

The record supports the administrative law judge's finding that claimant does not have a medical impairment and was cleared to return to work without restrictions. Cl. Ex. 26; Emp. Exs. 42, 60, 72.[11] However, as the administrative law judge specifically credited claimant's statement that some jobs bother his shoulder, Decision and Order at 18-19, and he reiterated that finding on reconsideration, Recon. at 5, and as pain alone can establish disability, the administrative law judge properly proceeded to address whether claimant has a loss of wage-earning capacity due to his pain pursuant to Section 8(h). 33 U.S.C. §908(c)(21), (h); *Ezell*, 33 BRBS 19; *see also Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999). We therefore reject employer's argument and affirm the administrative law judge's determination on this point.

Post-injury wage-earning capacity of a partially disabled employee whose compensation is determined under Section 8(c)(21) is equal to his actual earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h).[12] Section 8(h) requires a two-part analysis: 1) if the employee is working post-injury, do his actual wages fairly and reasonably represent his wage-earning capacity? and 2) if not, what is

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[11]Drs. Sedgewick, Steele, Arbeene, and Vessely all stated either that claimant's range of motion and strength in his shoulder were good or that he could return to work without restrictions. Cl. Ex. 26; Emp. Exs. 42, 60, 72. Claimant raises an issue concerning the lack of notice to his attorney regarding Dr. Vessely's examination of claimant's left shoulder. Emp. Ex. 72. Even absent Dr. Vessely's opinion, the record contains substantial evidence supporting the finding that claimant does not have medical restrictions related to his left shoulder injury. In any event, the administrative law judge adequately addressed claimant's lack of notice argument. Tr. at 7-10.

[12]Section 8(h) states:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

the reasonable dollar amount of his post-injury wage-earning capacity, taking into consideration his injury, impairment, usual employment and any other factors which may affect future wage-earning capacity? *Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT); *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1983).

The administrative law judge found that claimant's post-injury wages do not fairly and reasonably reflect his wage-earning capacity, as he determined that claimant was capable of working more hours than he chose to work. Decision and Order at 21. That is, the administrative law judge found that claimant could work a full-time, five-day week, and he concluded that claimant's post-injury wage-earning capacity should be calculated in a manner similar to that used in calculating his pre-injury average weekly wage by multiplying claimant's actual post-injury average daily wage by 260 and dividing by 52. *Id.* Claimant argues that his actual post-injury earnings between October 19, 2002, and August 13, 2003, fairly and reasonably represented his decreased wage-earning capacity resulting from his left shoulder injury. He asserts that he had a serious injury, that he was not a five-day employee,[13] that Mr. Katzen's vocational testimony is not believable,[14] and that claimant should not be forced to give up a hobby he had before his injury.

We affirm the administrative law judge's finding that claimant's actual post-injury earnings are not representative of his wage-earning capacity, as it is supported by substantial evidence. The administrative law judge rejected claimant's testimony regarding the extent of his inability to take certain jobs, noted that he took time off to

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[13]The administrative law judge found, and we have affirmed, that claimant was a five-day worker for purposes of calculating his average weekly wage pursuant to Section 10(a). We reject claimant's assertion that he was not a five-day worker prior to his injury for purposes of calculating his post-injury wage-earning capacity. He cannot be considered a five-day worker prior to his injury for one purpose and not the other. The administrative law judge's decision to treat claimant as a five-day worker for both purposes is consistent and allows for a reasonable comparison between claimant's pre- and post-injury earnings.

[14]Claimant asserts that Mr. Katzen was not fully informed of how jobs are obtained through the dispatch boards. The administrative law judge credited Mr. Katzen's testimony which involved review of the postings and jobs accepted by employees with less seniority than claimant on days when he did not work. Decision and Order at 8, 20-21. This decision is reasonable and is supported by substantial evidence. Emp. Ex. 82-83; Tr. at 121-154.

show his horses, and found that he had no work restrictions. Thus, the administrative law judge concluded that claimant could have worked five days per week from the perspective of his injury and that claimant's actual post-injury earnings do not equate to what a five-day worker could earn. He, therefore, properly found that claimant's actual post-injury earnings are not fairly and reasonably representative of his post-injury earning capacity. *See generally Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984); *Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995). Thereafter, the administrative law judge conducted the second part of the two-part Section 8(h) analysis by computing a dollar figure he found to be representative of claimant's post-injury wage-earning capacity. He opted to parallel the pre-injury average weekly wage computation by calculating claimant's post-injury wage-earning capacity based on his ability to be a five-day worker. In doing so, he accounted for both the finding that claimant can return to work without restrictions and the finding that claimant has pain and discomfort performing certain jobs. The Section 8(h) analysis revealed that claimant sustained a real, but small, loss of wage-earning capacity due to his pain and discomfort. *Stallings*, 250 F.3d 868, 35 BRBS 51(CRT); Decision and Order at 21; Recon. at 2-3. As the administrative law judge's findings are supported by substantial evidence and are rational, we affirm his award of permanent partial disability benefits. *See Jennings v. Sea-Land Service, Inc.*, 23 BRBS 312 (1990) (Decision and Order on Recon.).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge