BRB No. 12-0282

TITISHA T. HARVEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIPBUILDING, INCORPORATED	)	DATE ISSUED: 02/22/2013
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

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

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (2010-LHC-02017) of Administrative Law Judge Richard K. Malamphy 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).

Claimant, a service painter, sustained an injury to her right shoulder in a work-related accident on April 8, 2009, and she was restricted to light-duty work until September 2009 when she underwent surgery on her shoulder. Tr. at 16-17. Employer voluntarily paid claimant temporary total disability benefits from September 17, 2009, to February 15, 2010, and from July 20 to September 12, 2010. Cl. Ex. 2.[1] From September 10 through September 16, 2009, February 16 through July 19, 2010, and September 13, 2010, through June 13, 2011, claimant worked in a light-duty capacity for employer. Cl. Exs. 3, 18. Claimant filed a claim for temporary partial disability benefits for the three periods she performed light-duty work, alleging that her injury caused her to lose overtime wages and that she is entitled to compensation for the loss of post-injury overtime.

The administrative law judge rejected claimant's contention regarding the alleged loss of overtime. He found that Ms. Bremby, the only worker comparable to claimant, worked fewer overtime hours than did claimant during the same periods. Moreover, the administrative law judge found that claimant worked more hours of overtime than the other painters averaged, and, thus, there is no basis to conclude that she lost overtime wages due to her injury or that her post-injury wages are not representative of her post-injury wage-earning capacity. Decision and Order at 4-6. Therefore, the administrative law judge denied claimant's claim for temporary partial disability benefits. Claimant appeals the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the administrative law judge's decision and to remand the case for further consideration and explanation in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557.[2]

[1]Employer also voluntarily paid claimant temporary partial disability benefits from May 15-17, 2009. Cl. Ex. 2.

[2]We reject the Director's argument, as well as claimant's alternative argument, that the administrative law judge rendered conflicting findings of fact. As employer properly notes, a comparison between the administrative law judge's decision and the

Under Section 8(e) of the Act, 33 U.S.C. §908(e), an award of temporary partial disability benefits is based on the difference between a claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that a claimant's post-injury wage-earning capacity shall be her actual post-injury earnings if they fairly and reasonably represent her post-injury wage-earning capacity; however, if such earnings do not reasonably represent the claimant's post-injury wage-earning capacity, the administrative law judge must calculate a dollar amount which does so. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). It is well established that the party contending the employee's actual post-injury earnings are not representative has the burden of establishing an alternative reasonable wage-earning capacity. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Thus, it is the claimant's burden to establish that her work injury caused her to lose otherwise available overtime. *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989).

Claimant asserted she suffered a loss of overtime hours due to her injury.[3] Employer countered that claimant did not lose any overtime work as a result of her injury and work restrictions; rather, it alleged that overtime was not as plentiful due to the economic downturn.[4] With regard to the period between September 1 and September 16,

---

parties' briefs reveals that the administrative law judge was summarizing the parties' contentions on page three of his decision – he was not making findings of fact. We also reject the Director's assertion that the administrative law judge's decision does not comply with the APA. The administrative law judge set forth the evidence regarding overtime hours, and his reasoning is discernible.

[3]Claimant admitted on cross-examination that the amount of overtime available to all employees varied according to the ship schedules. Tr. at 23-24.

[4]We reject claimant's assertion that economic considerations are irrelevant to an award of temporary partial disability benefits in light of the decision in *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4th Cir. 1999). *Hord* is inapposite as it involved whether an employer satisfied its burden of establishing the availability of suitable alternate employment when it laid off the claimant from a light-duty post-injury job. The reason for the layoff, economic downturn, was irrelevant, as the job was made unavailable, and the employer could no longer satisfy its burden of establishing the availability of suitable alternate employment with that job. The issue in this case is whether claimant's post-injury wages are representative of her wage-earning capacity and not whether the job she performed post-injury was suitable or

2009, the administrative law judge found that Ms. Bremby did not work any overtime.[5] Decision and Order at 5. The record reflects that claimant worked 16 hours of overtime on September 12 and 13, 2009. Cl. Ex. 4. Claimant's supervisor at that time, Mr. Wilkerson, testified that claimant was not denied overtime as a result of her work restrictions. Rather, claimant was offered overtime, and there was more overtime available for the workers with superior qualifications. Emp. Ex. 7 at 5-6, 12. Although Ms. Bremby is a comparable worker, she did not have the seniority of claimant, and Mr. Wilkerson stated claimant would have been offered overtime before Ms. Bremby. *Id.* at 9-10. Moreover, the record contains a copy of a letter dated September 29, 2009, from a case manager to claimant, responding to her inquiry regarding the loss of overtime hours. The letter stated that claimant's restrictions did not prevent her from being offered overtime hours and that the reduction of overtime hours was the result of a lack of overtime in the department. Emp. Ex. 2. Thus, substantial evidence supports the administrative law judge's finding that claimant did not suffer a loss of overtime wages for the period in September 2009.

Next, claimant contends she lost overtime between February 16 and July 19, 2010. The record supports the administrative law judge finding that Ms. Bremby worked 16 overtime hours during that period. Decision and Order at 5; Cl. Ex. 15. Claimant's records establish that she worked 14.9 hours of overtime on June 26 and 27, 2010. Cl. Ex. 4. Moreover, at the hearing, claimant testified that she did not turn down any overtime offered to her between February 16 and July 19, 2010. Tr. at 17-18, 23-24. A letter from the case manager dated April 23, 2010, informed claimant that she was not losing overtime as a result of her restrictions; there was a lack of overtime in the department. Emp. Ex. 3. Thus, substantial evidence supports the administrative law judge's conclusion that claimant did not establish a loss of overtime wages as a result of her injury during this period.

---

available. As *Hord* is inapplicable, we reject claimant's assertion that the administrative law judge erred in not addressing this argument.

[5]We reject claimant's assertion that her hours should be compared to those of Mr. White, Ms. Seyborn, and Mr. Harvey. Claimant's former supervisor, Mr. Wilkerson, testified that those employees have additional qualifications claimant does not have. Emp. Ex. 7 at 8. The administrative law judge rationally found that only Ms. Bremby was comparable to claimant. Decision and Order at 5.

Finally, claimant contends she was deprived of overtime hours due to her work restrictions for the period between September 13, 2010, and June 12, 2011. The administrative law judge found that Ms. Bremby worked 90 overtime hours between September and December 2010.[6] The record establishes that, following her return to light-duty work, claimant worked 117.7 overtime hours between September and December 2010, for a total of 132.6 overtime hours in 2010. Cl. Ex. 4. The administrative law judge found that claimant's overtime hours exceeded the average of the overtime hours worked by the other painters during the course of 2010. Decision and Order at 5. Moreover, the record shows that claimant worked 102 overtime hours between January 8 and June 14, 2011. Cl. Ex. 4; Emp. Ex. 7 at 11. No overtime is recorded for Ms. Bremby for 2011. Cl. Ex. 15. In addition, the administrative law judge found that the painters identified by employer averaged 38 hours of overtime in 2011. As claimant's actual overtime work exceeded that of Ms. Bremby and the average of the other painters, it was rational for the administrative law judge to conclude that claimant did not lose overtime wages as a result of her work restrictions during this period.[7]

Claimant bears the burden of establishing that her actual post-injury wages do not reasonably represent her post-injury wage-earning capacity, and the administrative law judge's finding that claimant did not sustain her burden is rational and is supported by substantial evidence. *See Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995); *Swain v. Bath Iron Works Corp.*, 17 BRBS 145 (1985). Consequently, we affirm the administrative law judge's conclusion that claimant is not entitled to temporary partial disability benefits for the periods in question.

[6]In his chart, however, he used employer's figure indicating that Ms. Bremby worked a total of 132.5 overtime hours in 2010. Decision and Order at 5; Emp. Ex. 4. Claimant's exhibit establishes that Ms. Bremby worked 98 hours of overtime from September through December, for a total of 114 overtime hours for 2010. Cl. Ex. 15.

[7]Claimant testified that she changed supervisors in June 2011 and the overtime opportunities increased and were fairly distributed. Tr. at 18-19. Her supervisor at that time, Ms. Salis, testified that more overtime work was available because of the ship's schedule and the fact that they were working in the ship's tanks. Tr. at 29-30.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge