BRB Nos. 11-0172
and 11-0172A

CAMILO ZAPANTA	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SAN FRANCISCO DRYDOCK, INCORPORATED	)	DATE ISSUED: 11/09/2011
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Steven M. Birnbaum, San Rafael, California, for claimant.

Frank B. Hugg, Oakland, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits (2007-LHC-000720) of Administrative Law Judge Jennifer Gee 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 worked for employer as a machinist. In May 2001, claimant also obtained full-time employment at Berlex, a non-maritime employer, performing facilities maintenance. Claimant worked for employer from June 3 to June 12, 2001, when he was laid off before being recalled on August 9, 2001. After his recall, claimant worked a day shift at Berlex and the swing shift for employer. On August 12, 2001, claimant struck his head on an overhead steel beam during the course of his employment for employer. He continued working for employer notwithstanding his suffering from progressively worsening headaches and neck pain. Claimant sought medical treatment approximately one week after the injury; he was prescribed physical therapy. Claimant was laid off by employer along with six other machinists on August 22, 2001, due to a lack of work. Claimant continued working for Berlex while he received treatment for his work-related neck condition. Claimant sought benefits under the Act for his neck injury.

In her decision, the administrative law judge credited the opinion of Dr. Tse that claimant is unable to return to work for employer as a machinist due to his work-related neck condition. The administrative law judge accepted the parties' stipulation that claimant's neck condition reached maximum medical improvement on October 1, 2003. The administrative law judge found that claimant is partially disabled as he continued working full time at Berlex after he was laid off by employer. The administrative law judge calculated claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), since his longshore employment was intermittent. She added claimant's earnings of $36,145.05 for employer from the year before the work injury and his earnings of $9,968 with Nautical Engineering, another longshore employer, and divided the sum of $46,113.04 by 52 to derive an average weekly wage of $866.79. The administrative law judge found that claimant's wage-earning capacity at Berlex pre-dated the work injury and was unaffected by the injury. Thus, pursuant to *Harper v. Office Movers/E.I. Kane*, 19 BRBS 128 (1986) (*en banc*), the administrative law judge did not include these earnings in calculating claimant's average weekly wage and she, therefore, found that these earnings similarly cannot be included in calculating claimant's post-injury wage-earning capacity. The administrative law judge found employer had the burden to present evidence of suitable alternate employment that claimant could perform to replace the wages he lost due to his work injury. Since employer solely relied on claimant's earnings at Berlex to establish his post-injury wage-earning capacity, the administrative law judge concluded that claimant has no post-injury wage-earning capacity with regard to his longshore employment. The administrative law judge awarded claimant compensation for temporary partial disability, 33 U.S.C. §908(e), from August 21, 2001 to September 30, 2003, and for permanent partial disability, 33 U.S.C. §908(c)(21), from October 1,

2003, based on an average weekly wage of $866.79 and a post-injury wage-earning capacity of zero.

On appeal, both parties challenge the administrative law judge's reliance on *Harper*, 19 BRBS 128, in determining claimant's average weekly wage and post-injury wage-earning capacity. Claimant contends that the administrative law judge's average weekly wage and post-injury wage-earning capacity findings should be modified to include in both calculations a wage-earning capacity at Berlex of $933.78 as of the date of the work injury and continuing thereafter.[1] Alternatively, claimant contends that the administrative law judge's award should be modified from one for temporary and permanent partial disability benefits to one for temporary and permanent total disability benefits, 33 U.S.C. §908(a), (b), since the administrative law judge found that claimant has no post-injury wage-earning capacity. Employer contends that the administrative law judge should have added claimant's actual pre-injury earnings at Berlex to his longshore earnings from the year preceding the work injury to derive an average weekly wage of $1,022.45, and used claimant's actual post-injury yearly earnings at Berlex to derive his post-injury wage-earning capacity. We agree with the parties that *Harper* is distinguishable from this case and that the administrative law judge should have included the Berlex wages in both claimant's pre-injury average weekly wage and post-injury wage-earning capacity.

In *Harper*, 19 BRBS 128, the claimant was employed full time as an insurance claims supervisor with an average weekly wage of $427.84 and part time as a furniture mover for the employer with an average weekly wage of $107.59. He injured his foot while working for the furniture employer, which caused a 15 percent permanent impairment. Claimant did not miss any time from his full-time insurance job. Employer paid the claimant compensation for temporary total disability from October 14, 1980 to December 9, 1980, at a rate of $112.87 per week. On appeal, the claimant challenged the average weekly wage used to determine his compensation rate for permanent partial disability under the schedule.[2] The Board affirmed the administrative law judge's exclusion of claimant's wages as an insurance claims supervisor from the average weekly wage calculation. The Board stated that basing the claimant's average weekly wage on his earnings from both jobs would result in a compensation rate of $358.74, which was

[1]The result claimant advocates is an average weekly wage of $1,820.57 and a post-injury wage-earning capacity of $933.78.

[2]Claimant's compensation rate for temporary total disability was not before the administrative law judge. *See Harper*, 19 BRBS at 129.

greater than his average weekly wage as a part-time mover for employer of $107.59. The Board stated that to hold employer liable for benefits based on the wages of both jobs would be "manifestly unfair" when the wages at the insurance job were unaffected by the foot impairment. *Id*. at 130. Therefore, the Board affirmed the administrative law judge's average weekly wage calculation "based on the facts of this case." *Id*. at 131.

The facts of this case differ from those in *Harper* and thus the result therein is not controlling. Although claimant's job at Berlex is not currently affected by his work-related neck injury,[3] as in *Harper*, the basis for the compensation award differs in the two cases. In *Harper*, the claimant was compensated pursuant to the Act's schedule only for the extent of his permanent physical impairment, *see* 33 U.S.C. §908(c)(4), (19), whereas, in this case, claimant is compensated for his loss in wage-earning capacity. The inclusion of the Berlex wages in both claimant's average weekly wage and wage-earning capacity is consistent with the statute.

With regard to a claimant's average weekly wage, Section 10(c) of the Act was amended to its current form in 1948 to explicitly permit the inclusion of wages earned in non-covered employment as well as that earned in covered employment. Section 10(c) provides:

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c). The legislative history to the 1948 Amendments to the Act states that: "[T]he emphasis is thus shifted from the earning capacity of the average longshoreman or harbor worker to the earning capacity of the particular employee from all sources." H.R. Rep. No. 2095, 80th Cong., 2d Sess. 8 (1948). In addition, "Subsection (c) of Section 10 of the act would be amended by section 4 of the bill so as to permit the inclusion of all earnings of the injured employee to be taken into account in determining

[3]The administrative law judge's implicit finding that the Berlex job constitutes suitable alternate employment is not challenged on appeal. *See* Decision and Order at 24.

the employee's annual earning capacity;" and, "[T]he measurement of an employee's capacity to earn should not be limited to his earnings in the particular employment in which he was engaged when injured, but should be gauged by what the employee is capable of earning in all employments in which he was employed during the year prior to the injury, otherwise harsh results necessarily follow. The proposed change in subsection (c) seeks to avoid such harsh results …." S. Rep. No. 1315, 80th Cong., 2d Sess. 6 (1948). With respect to a claimant's post-injury wage-earning capacity, Section 8(h) of the Act provides that a partially disabled claimant's wage-earning capacity is to be set with reference to his actual post-injury earnings if such earnings fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h).

Thus, when Section 10(c) applies, income from all jobs held concurrently at the time of injury generally is to be included in determining the claimant's average weekly wage. *See, e.g., Liberty Mutual Ins. Co. v. Britton*, 233 F.2d 699 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 918 (1956); *Rex Investigative & Patrol Agency, Inc. v. Collura*, 329 F.Supp. 696 (E.D. N.Y. 1971); *Wilson v. Norfolk & Western Ry. Co.*, 32 BRBS 57 (1998), *rev'd mem. on other grounds*, 7 F. App'x 156 (4th Cir. 2001); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990). For purposes of calculating average weekly wage under Section 10(c) in cases such as this, there is no statutory rationale for inquiring whether the claimant remains capable of working in the "other employment" after sustaining the work injury. This inquiry is relevant only for determining whether the claimant is entitled to total or partial disability benefits for the work injury, as claimant's post-injury earnings in any "other [suitable] employment" will reduce the claimant's compensation rate pursuant to Section 8(h). In this case, the administrative law judge found that claimant retained a wage-earning capacity because he continued to work in a suitable job at Berlex. *See* n.3, *supra*. When claimant's earnings from Berlex are included in both his average weekly wage and post-injury wage-earning capacity, either party can seek modification if the work injury causes a change in the wage-earning capacity premised on those wages. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); 33 U.S.C. §922. Accordingly, we reverse the administrative law judge's finding that claimant's Berlex wages should not be included in his pre-injury average weekly wage and post-injury wage-earning capacity as it does not comport with Sections 10(c) and 8(h) of the Act.

In her decision, the administrative law judge made alternative findings concerning the Berlex earnings. The administrative law judge found that if claimant's Berlex earnings are to be included in his average weekly wage, then those earnings should be the wages claimant earned after his training period ended. The administrative law judge found that claimant was receiving an artificially low pay rate of a trainee at the date of his injury because he had just started working at Berlex and that his post-trainee earnings more accurately reflect his wage-earning capacity at the time of injury. *See* Tr. at 81;

EXs 8 at 1, 17; 11. The administrative law judge did not provide a dollar amount of these wages.

The goal of Section 10(c) is to arrive at the claimant's annual earning capacity at the time of injury. *See generally Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). Absent unusual circumstances, a claimant's average weekly wage is to be based on the wages he earned at or before the time of injury. *See generally Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986). However, a determination of annual earning capacity under Section 10(c) does not preclude consideration of circumstances existing after the date of injury where previous earnings do not realistically reflect claimant's true earning potential. *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980).

The record establishes that claimant continued to work at Berlex after the date of the injury. The parties stipulated to claimant's earnings at Berlex from 2002 to 2006 and that claimant was promoted to a supervisory position there in April 2007, which paid $27 per hour. Decision and Order at 4; *see* EX 8 at 1. Since claimant was receiving lower wages because he was a trainee at Berlex on the date of his work injury with employer, the administrative law judge rationally found that claimant's post-trainee earnings at Berlex better represent claimant's wage-earning capacity at the time of injury. This finding is affirmed as it is supported by substantial evidence and in accordance with law. *See Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *S.K. [Khan] v. Service Employers Int'l, Inc.*, 41 BRBS 123 (2007).

Claimant contends that the administrative law judge's average weekly wage and post-injury wage-earning capacity findings should be modified to reflect a wage-earning capacity at Berlex of $933.78 on the date of the work injury and continuing thereafter. This figure represents claimant's contention these findings should reflect his earnings at Berlex in 2002. *See* EX 8 at 1. The Board is not authorized to engage in fact finding. *See generally Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In view of our holding that the administrative law judge must include in both the average weekly wage and post-injury wage-earning capacity calculations claimant's earnings from both jobs, we remand this case for the administrative law judge to determine a precise dollar figure representing claimant's

average weekly wage pursuant to Section 10(c) and post-injury wage-earning capacity pursuant to Section 8(h) utilizing his post-trainee earnings at Berlex.[4]

Accordingly, the administrative law judge's calculations of claimant's average weekly wage and post-injury wage-earning capacity are vacated, and the case is remanded for further proceedings in accordance with this opinion.[5]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[4]We reject employer's contention that the administrative law judge erred in finding that claimant intended to work two jobs if it were not for his injury. This finding is supported by substantial evidence in the form of claimant's hearing testimony, the deposition testimony of claimant's supervisor, Mr. Kneeland, and claimant's past history of working two jobs simultaneously. *See* Decision and Order at 30; Tr. at 78-80, 100; EX 15 at 107, 114, 205-212; EX 16 at 26-27. We also reject the contention that an average weekly wage combining claimant's longshore earnings in the year before the work injury and his post-injury earnings at Berlex is irrational, as it would far exceed claimant's average weekly wage in the year preceding the work injury. Claimant primarily worked one job before his injury. Since the administrative law judge rationally found that claimant intended to work two jobs as of the date of his injury, claimant's prior years' earnings are not reflective of his wage-earning capacity at the date of injury. *See generally Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

[5]The existing award of benefits remains in effect and employer shall be entitled to a credit for all benefits paid against any benefits awarded on remand. 33 U.S.C. §914(j).