

LARRY GEORGE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CALIFORNIA STEVEDORE AND	)	DATE ISSUED:
BALLAST COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Matthew Stephenson (Law Offices of Lyle C. Cavin, Jr.), Oakland, California, for claimant.

Robert E. Babcock (Littler, Mendelson, Fastiff & Tichy), Portland, 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 Awarding Benefits (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).

Claimant suffered an injury to his back on October 29, 1986, while in the course of his employment with employer. Employer voluntarily paid claimant compensation for temporary total

disability from October 30, 1986 until August 21, 1987, when it discontinued such payments. 33 U.S.C. §908(b). Claimant returned to work for employer on May 1, 1988, and continued to work until he suffered a second back injury on November 10, 1988. Claimant returned to work on approximately March 1, 1989, and continued to work as of the date of the hearing.

In his Decision and Order Awarding Benefits, the administrative law judge found claimant entitled to periods of temporary total disability following both the 1986 and 1988 injuries. The administrative law judge further found that both the 1986 and 1988 injuries contributed to claimant's present permanent partial disability, but determined that only the 1986 injury caused a permanent loss of wage-earning capacity. The administrative law judge found that claimant was entitled to permanent partial disability compensation commencing on April 30, 1988, and that employer was entitled to relief pursuant to Section 8(f), 33 U.S.C. §908(f), of the Act. Thus, the administrative law judge ordered employer to pay claimant permanent partial disability compensation for a period of 104 weeks, after which time the Special Fund would commence payment of compensation to claimant. In making his award of permanent partial disability benefits, the administrative law judge determined that claimant's loss of wage-earning capacity resulting from his October 1986 injury is represented by the difference between his average weekly wage at the time of that 1986 injury, \$957, and his average weekly wage at the time of his November 1988 injury. In calculating claimant's post-injury earnings, the administrative law judge considered the 52- week period preceding the November 10, 1988 injury and, notwithstanding the fact that claimant worked only during that time period from May 1, 1988 to November 10, 1988, the administrative law judge divided claimant's earnings during the prior year by 52, to arrive at an average weekly wage of \$418.69. Subtracting this 1988 average weekly wage from claimant's 1986 average weekly wage, the administrative law judge determined that claimant sustained a post-injury loss of wage-earning capacity of \$538.31, and a resultant compensation rate of \$358.87.

On appeal, employer contends that the administrative law judge, having properly determined that claimant's wages at the time of his subsequent injury in 1988 provided the best measure of the loss of wage-earning capacity resulting from his 1986 injury, erroneously calculated claimant's average weekly wage at the time of the 1988 injury.<sup>1</sup> Specifically, employer asserts that the administrative law judge, rather than dividing claimant's 1988 earnings by 52, should have divided the earnings by the 27.5 weeks of that 52-week period during which claimant actually worked. Claimant responds, asserting that the administrative law judge acted within his discretion under Section 8(h) of the Act, 33 U.S.C. §908(h), in calculating claimant's post-injury wage-earning capacity; specifically, claimant avers that the concept of loss of wage-earning capacity encompasses more than a mere comparison of wages before and after an injury and that, in determining wage-earning capacity, an administrative law judge is not bound by the methods prescribed in Section 10, 33 U.S.C. §910, for determining average weekly wage.

Under Section 8(c)(21), 33 U.S.C. §908(c)(21), an award for permanent partial disability is

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<sup>1</sup>Employer does not contest the administrative law judge's finding that claimant's 1986 average weekly wage was \$957.

based on the difference between claimant's pre-injury average 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. Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge 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). Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity, and if they do not, what dollar amount does represent his residual wage-earning capacity include 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); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 651-662 (1979). Additionally, in calculating claimant's post-injury wage-earning capacity, the administrative law judge, in order to neutralize the effects of inflation, must adjust the post-injury wage levels to the levels paid pre-injury so that they may be compared with claimant's pre-injury average weekly wage. 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).

Initially, we note that the administrative law judge's determination of claimant's post-injury wage-earning capacity does not follow the statutory scheme established in Section 8(h) of the Act, in that the administrative law judge did not make an explicit finding as to whether claimant's actual post-injury earnings fairly and reasonably represent his post-injury wage-earning capacity based on the relevant factors. See *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 153 (1988); *Cook*, 21 BRBS at 6-7; *Devillier*, 10 BRBS at 651-662. Although the administrative law judge made reference to claimant's testimony that he works "out of necessity" and with pain, the administrative law judge did not discuss the factors enunciated in *Devillier*, which must be considered in determining whether a claimant's actual earnings fairly and reasonably represent his post-injury wage-earning capacity and if they do not, what is the reasonable dollar amount of claimant's residual wage-earning capacity. See *Warren*, 21 BRBS at 153; *Devillier*, 10 BRBS at 651-662.

Furthermore, we agree with employer that the calculation used by the administrative law judge to determine claimant's residual wage-earning capacity is irrational. The administrative law judge's calculation, which is based on dividing claimant's earnings by 52 despite the fact that claimant worked for only 27.5 of the 52 weeks preceding his 1988 injury, results in an inordinately low residual wage-earning capacity figure. *See generally Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990); *see also Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120, 127 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994). We, therefore, vacate the administrative law judge's post-injury wage-earning capacity finding and remand this case for the administrative law judge to explicitly consider whether claimant's post-injury wages reasonably and fairly represent his wage-earning capacity. If, on remand, the administrative law judge determines that claimant's post-injury wages reasonably and fairly represent his post-injury wage-earning capacity, the administrative law judge must adjust those wages to the wage levels paid at the time of claimant's injury. *See Richardson*, 23 BRBS at 327. If they do not, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity at the time of his November 1988 injury. *See* 33 U.S.C. §908(h). In either event, the administrative law judge must provide a reasoned discussion of the relevant factors, explaining which factors he relied on and how those factors affected his determination regarding residual wage-earning capacity. *See Warren*, 21 BRBS at 153; *Cook*, 21 BRBS at 6-7.

Accordingly, the administrative law judge's determination as to claimant's post-injury wage-earning capacity is vacated, and the case is remanded for reconsideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge