BRB No. 93-0347

GEORGE KARADIMOS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OTTENBERG'S BAKERY	)	DATE ISSUED:
	)	
and	)	
	)	
LUMBERMEN'S MUTUAL CASUALTY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Aaron Silverman, Administrative Law Judge, United States Department of Labor.

Eric M. May, Washington, D.C., for claimant.

James D. Reed (Reed, Reed, Kelly & Poggi, P.A.), Towson, Maryland, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-DCW-19) of Administrative Law Judge Aaron Silverman 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.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501-502 (1973)(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).

On November 4, 1980, claimant was involved in an accident when the delivery truck he was driving as a bakery route salesman for employer was struck from the rear by another truck. Claimant was unable to return to work for employer after trying on two occasions to perform the job. In the initial Decision and Order in this case, Administrative Law Judge David A. Clarke, Jr., awarded claimant compensation for temporary total disability in the amount of $306.10 per week

commencing November 1980. Employer requested modification of the temporary total disability award pursuant to Section 22 of the Act, 33 U.S.C. §922, upon claimant's return to work on March 1, 1985, as a radiology technician for North Arundel Hospital (NAH). In his Decision and Order on modification issued on December 8, 1987, Administrative Law Judge Robert J. Feldman ordered employer to pay compensation for permanent partial disability in the amount of $129.70 per week beginning on March 1, 1985, and held employer entitled to a credit for all payments of temporary total disability paid to claimant subsequent to that date.

Employer requested modification pursuant to Section 22 for a second time, seeking the termination or reduction of claimant's permanent partial disability benefits upon learning that claimant's earnings in his present position with NAH as a radiology technician and various part-time employments (working for a "temp" agency and teaching at Prince George's Community College) exceeded his wage-earning capacity as determined in 1987. In his Decision and Order on modification issued on September 30, 1992, Administrative Law Judge Aaron Silverman (the administrative law judge) granted employer's request for modification and reduced claimant's permanent partial disability benefits to $15.43 per week. In calculating claimant's post-injury wage-earning capacity, the administrative law judge included a 25 percent weekend shift differential which claimant receives from NAH.

On appeal, claimant challenges the administrative law judge's inclusion of the 25 percent weekend shift differential in his determination of claimant's post-injury wage-earning capacity. Employer responds in support of the administrative law judge's findings.

Section 8(h) of the Act, 33 U.S.C. §908(h), 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. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). Recently, the Board affirmed an administrative law judge's inclusion of a night shift differential in his determination of post-injury wage-earning capacity as there was no evidence to establish that the night shift differential is not a normal employment condition. *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996).

After consideration of claimant's contentions on appeal and the administrative law judge's decision in light of the record evidence, we affirm the administrative law judge's reduction in claimant's benefits. In determining claimant's loss of wage-earning capacity, the administrative law judge compared what claimant's current job as a radiology technician paid in 1980 to the wages claimant was earning as a bakery route salesman at the time of the injury. Decision and Order at 3-5. The administrative law judge concluded that claimant's earnings in 1980 at NAH would have been at the maximum scale of $8.72 per hour, and he then added a 25 percent weekend shift differential to $8.72 to arrive at a weekly rate of $436.[1] The administrative law judge then determined that claimant's loss of wage-earning capacity was $15.43 per week after subtracting the

[1]Twenty-five percent of $8.72 is $2.18. The amounts of $8.72 and $2.18 equal $10.90 per hour. Although the record establishes that claimant actually works 32 hours per week, he gets paid for a 40 hour week. Tr. of June 15, 1992 at 49. When $10.90 is multiplied by 40, the amount equals $436 per week.

post-injury wage-earning capacity of $436 per week from the pre-injury average weekly wage of $459.15 per week as stipulated by the parties and multiplying that number in the amount of $23.15 by 66 2/3 percent. Contrary to claimant's contention, there is no evidence which establishes that claimant's receipt of a weekend shift differential is not a normal employment condition. *See Guthrie*, 30 BRBS at 52 n. 8. Based on claimant's testimony that he took the weekend shift in order to spend more time with his family, we reject claimant's contention that he made family sacrifices in order to work the weekend shift. Tr. of June 15, 1992 at 30. Moreover, contrary to claimant's contention, his post-injury job did not require extra effort as it involved working fewer hours per week (32 hours per week compared to 45-50 hours per week pre-injury), more days off per week (5 days per week compared to 2 days per week pre-injury), and no heavy lifting (compared to heavy lifting of 20-40 pounds pre-injury). Tr. of June 15, 1992 at 12, 28-29, 38, 53, 63-64. Additionally, claimant can sit down at will at his current job whereas he could not do so in his pre-injury job. Consequently, as it is supported by substantial evidence, we affirm the administrative law judge's award of benefits on modification reducing claimant's permanent partial disability award from $129.70 per week to $15.43 per week.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge