BRB Nos. 95-1249
and 95-2247

ESTIL BRANEFF	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
FAIRWAY TERMINAL CORPORATION/	)	
I.T.O. CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Order of Clarification, Supplemental Order of Clarification, and Order Granting Director's Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Lewis Fleishman (Richard Schechter, P.C.), Houston, Texas, for claimant.

Michael D. Murphy (Eastham, Watson, Dale & Forney), Houston, Texas, for employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Awarding Benefits, Order of Clarification, Supplemental Order of Clarification, and Order Granting Director's Motion for Reconsideration (93-LHC-649) of Administrative Law Judge James W. Kerr, Jr., 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).[1] 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 is employed through the Clerk and Checkers Local 1924 at the Port of Beaumont and the Port of Orange. Claimant injured his back on October 25, 1988 as a result of a slip and fall

[1]Inasmuch as these appeals are consolidated, the one-year period for purposes of Public Law No. 104-134 runs from the date of the later appeal, September 28, 1995.

at the doorway of employer's office. Claimant sought treatment for his back injury, and returned to work for the period between January 13, 1990 and November 4, 1990. Claimant underwent back surgery in November 1990. Following a year's recuperative period, claimant retired for four months at the advice of his physician, but he returned to work on March 1, 1992 as a Class A checker. Employer voluntarily paid temporary total and partial disability benefits for various periods through November 5, 1991, based on the maximum compensation rate. *See* 33 U.S.C. §§906, 908(b),(e). Claimant sought benefits under the Act for permanent partial disability, inasmuch as he was unable to maintain the same number of working hours as he had before the injury.

The parties stipulated that claimant's average weekly wage at the time of injury was $1,518.30. On February 8, 1991, a Memorandum of Understanding (hereafter, grain agreement) was entered into between the West Gulf Maritime Association and the International Longshoremen's Association, limiting a clerk such as claimant to eight hours of work per grain ship. Prior to this agreement, a clerk could work 40-45 hours per grain ship. In determining claimant's post-injury wage-earning capacity, the administrative law judge first averaged the number of hours worked by the other three Class A checkers for some post-injury period (2,637 hours).[2] The administrative law judge subtracted the number of hours claimant worked during this period (1,995) to conclude that claimant lost 642 hours per year due to his injury. He multiplied this figure by claimant's hourly wage at the time of the hearing, $14.25, to conclude that claimant has an annual loss of wage-earning capacity of $9,148.50.

The administrative law judge awarded benefits for temporary total disability from October 30, 1991 through January 6, 1992, and permanent partial disability benefits thereafter. Despite the parties' stipulation as to average weekly wage, the administrative law judge ordered benefits to be based on an average weekly wage of $722.63, which he calculated by multiplying the co-workers' average hours in the post-injury period (2,637) by the hourly rate of $14.25. Moreover, the administrative law judge concluded that claimant's residual weekly wage-earning capacity is $546.70 (1,995 hours x $14.25 = $28,428.75/52).

In an Order of Clarification, the administrative law judge denied claimant's motion for reconsideration. He stated that the parties' stipulation as to average weekly wage is not supported by the record after the grain agreement went into effect because the agreement results in a loss in earning capacity unrelated to the injury. The administrative law judge again outlined and reaffirmed his original findings in a Supplemental Order of Clarification. Finally, in an Order Granting Director's Motion for Reconsideration, the administrative law judge modified his original order to reflect that claimant's average weekly wage is lowered to $722.63 only as of February 8, 1991, the date of the grain agreement.

[2]It is not clear from the administrative law judge's decision or the record what period of time this encompasses. Claimant's Exhibit 29 is a graph of hours worked by claimant and his co-workers and the reference to the years is "92-3." Claimant returned to work in March of 1992 and presumably the co-workers worked a full year.

On appeal, both claimant and employer contend that the administrative law judge erred in employing two different average weekly wages in calculating claimant's benefits. Claimant contends that the administrative law judge erred in not basing all benefits on the stipulated average weekly wage, and employer contends that the administrative law judge erred in not utilizing the $722.63 figure for all benefits. Claimant also contends that the administrative law judge erred in calculating his post-injury wage-earning capacity. Employer responds, urging affirmance of the administrative law judge's finding on this issue.

Initially, the parties contend that the administrative law judge erred in using two different average weekly wages. We agree. An employee's average weekly wage is to be determined as of the time of the injury, *see Hastings v. Earth Satellite Corp*., 8 BRBS 519 (1978), *aff'd in pert. part*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980), and it is well-established that there can only be one average weekly wage upon which payments of compensation for a single injury may be based. *See Hawthorne v. Ingalls Shipbuilding, Inc*., 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995); *Merrill v. Todd Shipyards Corp.*, 25 BRBS 140 (1991); *James v. Sol Salins, Inc.*, 13 BRBS 762 (1981). Thus, the administrative law judge erred in employing two average weekly wages in this case.

We next consider whether the administrative law judge appropriately calculated claimant's average weekly wage taking the grain agreement into consideration. Claimant's injury occurred in October 1988, and the grain agreement went into effect in February 1991. Post-injury events generally are irrelevant to a determination of average weekly wage, which is usually determined based on earnings in the year preceding injury. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT)(D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1986); *see also Thompson v. Northwest Enviro Services, Inc*., 26 BRBS 53 (1992). Consideration of post-injury events in average weekly wage is limited to calculations under Section 10(c), 33 U.S.C. §910(c), and generally involves a situation where the claimant was involved in seasonal work and there was evidence of increased work opportunities after the injury occurred. *Tri-State Terminals v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Klubnikin v. Crescent Wharf & Warehouse*, 16 BRBS 182 (1984). In *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994), the Board rejected the contention that the claimant's average weekly wage should be reduced to reflect the fact that the wage rate paid at the time of injury was unavailable to the claimant in the period after he suffered his injury. Moreover, the Board held that the administrative law judge correctly held the parties bound to their stipulation as to average weekly wage. *Simonds*, 27 BRBS at 127-128. Similarly in *Thompson*, 26 BRBS at 59, the Board rejected the employer's contention that post-injury wage reductions for longshoremen in the particular ports are relevant to the calculation of average weekly wage at the time of injury.

In the present case, the administrative law judge found that there was sufficient evidence to support the parties' stipulation that claimant's average weekly wage was $1,518.30, although he did not cite supporting documents. Nevertheless, the record contains claimant's wage statements for the year preceding the injury and it is clear from these records that he worked substantially the whole of

the year preceding the injury and that his work is not seasonal or intermittent. Cl. Ex. 27. Thus, the predicates for use of post-injury events to calculate average weekly wage are not present in this case as there are no exceptional circumstances relating to the seasonal nature of the work or an increased post-injury capacity to work. *Walker*, 793 F.2d at 322, 18 BRBS at 104 (CRT)*; see Thompson*, 26 BRBS at 59; *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). Therefore, average weekly wage must be calculated using claimant's earnings in the period preceding the injury. Moreover, the stipulation of fact as to claimant's average weekly wage at the time of injury is binding on the parties, as the administrative law judge did not inform the parties that he would not accept the stipulation, and in fact he stated it is supported by the evidence. *See Thompson*, 26 BRBS at 59; *see generally Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84 (1985); *Fox v. Melville Shoe Corp., Inc.*, 17 BRBS 71 (1985). Thus, we hold that the administrative law judge erred in using the post-injury wages of co-workers and the grain agreement as a basis for calculating claimant's average weekly wage. We hold that the stipulated average weekly wage of $1,518.30 is to be used to calculate all benefits due claimant as a result of the injury on October 25, 1988.

We next address claimant's contention that the administrative law judge erred in calculating his post-injury wage-earning capacity. Correct application of Section 8(c)(21) requires that a claimant's average weekly wage be compared with a precise dollar amount of post-injury wage-earning capacity to determine any loss of wage-earning capacity due to the injury. *See generally Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). The post-injury wage-earning capacity of a partially disabled employee for whom compensation is determined pursuant to Section 8(h), 33 U.S.C. §908(h), is equal to his actual earnings if they fairly and reasonably represent his wage-earning capacity. The party that contends that the employee's actual earnings are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992).

In the present case, the administrative law judge found that claimant worked 1,995 hours during the "pertinent period" at an hourly rate of $14.25. *See* Decision and Order at 8; Cl. Ex. 29; n.1, *supra*. Thus, the administrative law judge concluded that claimant had a post-injury wage-earning capacity of $546.70 (1,995 x $14.25 = $28,428.75/ 52). Decision and Order at 9. While there does not appear to be a dispute that claimant's actual post-injury wages represent claimant's wage-earning capacity, claimant contends on appeal that he has a post-injury wage-earning capacity of $981.50 per week.[3] Cl. Brief at 13. As there is a discrepancy as to claimant's actual post-injury wages, and the administrative law judge did not consider what claimant's actual post-injury wages are and whether they reasonably and fairly represent his wage-earning capacity, we vacate the administrative law judge's finding that claimant has a residual earning capacity of $546.70, and we remand the case to the administrative law judge's to make further findings regarding this issue. *See Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991). On remand, the administrative law judge should note that it is proper to adjust post-injury wage levels to the level paid at the time of injury in order to eliminate the effects of inflation. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990);

[3]Claimant calculates his residual wage-earning capacity by dividing the total amount of wages earned during the period from his return to work on March 6, 1992 through November 11, 1993, a total of $88,334.67, by the number of weeks worked during this period, 90. *See* Cl. Ex. 27.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge finding that claimant had an average weekly wage of $722.63 is reversed, and it is held that the stipulated average weekly wage of $1581.30 is applicable to the computation of all compensation benefits in this case. In addition, the administrative law judge's finding that claimant has a residual wage-earning capacity of $546.70 is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge