**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0147

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| NICK ENGELS | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
| | ) | DATE ISSUED: 7/26/2023 |
| PORTS AMERICA | ) | |
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| and | ) | |
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| PORTS INSURANCE COMPANY, INCORPORATED | ) | |
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| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Compensation and Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Sausalito, California, and Paul J. Delay and Daniel P. Thompson (Thompson & Delay), Seattle, Washington, for the Claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for the Employer/Carrier.

Before: ROLFE, BOGGS and BUZZARD, Administrative Appeals Judges.

ROLFE and BUZZARD, Administrative Appeals Judges:

Employer/Carrier (Employer) appeals Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order Awarding Compensation and Benefits (2019-LHC-01091)

rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act).[1] We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working as a longshoreman in 1978; by 2003, he had advanced to a foreman position and was part of the Local 98 union. Hearing Transcript (HT) at 39-40. Prior to his workplace injury, he obtained a position as a steady foreman for Sea Star that guaranteed pay for 50 hours of work per week, as long as he worked two shifts[2] per week. *Id*. at 41, 66, 70-71. In addition, Claimant also worked as a foreman for various other employers out of the Port of Tacoma union hall. HT at 68, 71; Claimant's Exhibit (CX) J at 2-3, 5-20, 22-24.

Claimant's payroll records show, during the year preceding his injury, he earned gross wages of $316,596.96, which included: earnings for hours he actually worked for Sea Star and other employers; hours he did not work but for which he was paid pursuant to his steady foreman agreement with Sea Star; and vacation, holiday, and travel time. CX J at 15-24.

On April 7, 2015, when Claimant was directing longshoremen driving cars off a ship, a car drove over the spring-loaded metal deck plate on which he was standing. This caused the plate to bounce, at which point Claimant felt a jolting pain up through his neck. HT at 43-44; CX N at 9. He continued to work, but as the day went on he began to experience dizziness, blurred vision, slurred speech, and an inability to walk straight. HT at 44-45. A co-worker took him to the hospital, where diagnostic imaging of his head and neck revealed a free-floating clot within the distal left vertebral artery extending into the intracranial segment, consistent with a vertebral artery dissection. CX N at 25. Claimant thereafter suffered a stroke and underwent emergency surgery including occlusion of the left vertebral artery. HT at 46-48; CX N at 29-30, 37.

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained his injuries in Washington state. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[2] Claimant testified a normal shift is 12 hours. HT at 70.

Claimant remained hospitalized for several weeks, first in the Intensive Care Unit (ICU) and then in an inpatient rehabilitation center, for treatment of stroke and stroke-related mild slurred speech, severe dysphagia (inability to swallow), ataxia, blurred vision in the left eye, and impairment of gait and balance. HT at 49; CX N at 33-34; CX Q at 1-2. After his discharge from the hospital on May 2, 2015, Claimant continued to undergo outpatient physical therapy and work conditioning for another year. HT at 50-51; CX Q at 153, 158-159; Employer's Exhibit (EX) 3 at 210-219.

On April 1, 2016, Claimant's primary care physician, Dr. Janis Fegley, released him to restricted-duty work, limited to two to four shifts per week. HT at 53; CX K. Claimant returned to work the same day. HT at 54. After working four shifts over the course of the next week, he reported suffering extreme physical exhaustion, leading Dr. Fegley to reduce his limit to three shifts per week, which Claimant followed for approximately six weeks. *Id*.; CX M at 2.

Since then, Claimant has consistently worked two to four shifts per week as a foreman for Sea Star and various other employers, a practice Dr. Fegley recommended he continue. HT at 54; CX M at 8, 11, 33; CX R-13 at 5-10; CX R-16 at 7; EX 1 at 57-85. He primarily works two weekly shifts for Sea Star, on Wednesday and Friday nights, during what is considered the second shift, or night shift, HT at 67, and he generally avoids double shifts and shifts that require him to use a gangway to board a vessel.[3] HT at 54-56, 59, 80-81. On only two occasions since his return to work has he turned down a shift which was within his capabilities.[4] HT at 66.

[3] Occasionally, his second-shift work will roll over into the "hoot owl" shift (3 a.m. to 8 a.m.) or the day shift (which begins at 8 a.m.), usually due to weather or a late-arriving ship. HT at 67, 72. Claimant testified that because of residual symptoms of fatigue, loss of balance/disequilibrium, and difficulty climbing stairs and walking on uneven surfaces, he also avoids gangways (these are aluminum adjustable stairwells measuring about two to three feet wide, used to get on and off a vessel from the dock). HT at 56. According to Claimant, while gangways usually have a railing, they are not stable and "bounce" around, especially since there is generally more than one person using the gangway at a time. HT at 56, 58.

[4] Claimant testified he turned down both shifts due to obligations related to this litigation. HT at 66.

Claimant filed a claim for compensation against Employer on May 15, 2015.[5] EX 8 at 284. Employer paid him temporary total disability (TTD) benefits at the maximum compensation rate from April 8, 2015, through April 13, 2016, and then paid varying rates of temporary partial disability (TPD) benefits from April 14, 2016, through November 23, 2016, based on his actual post-injury earnings. CX A at 19, 24; CX G. Employer controverted benefits on November 30, 2016, on the grounds that Claimant's post-injury earnings exceeded his pre-injury average weekly wage (AWW). CX A at 18.

Following a formal hearing, the ALJ issued a Decision and Order on December 15, 2021. The ALJ found Claimant invoked the Section 20(a) presumption of compensability, and Employer successfully rebutted it. 33 U.S.C. §920(a); Decision and Order Awarding Compensation and Benefits (D&O) at 20-21. Weighing the evidence as a whole, the ALJ concluded Claimant proved a work-related injury caused his vertebral artery dissection and subsequent strokes, resulting in his continued stroke-related symptoms. D&O at 22-24. The ALJ gave particular weight to Claimant's consistent and credible testimony, as well as vascular surgeon Dr. Kaj Johansen's causation opinion, supported by the opinion of Employer's expert vascular surgeon Dr. Daniel Neuzil, over Employer's expert neurologist Dr. William Stump. *Id*.

The ALJ found Claimant's work-related injury reached maximum medical improvement (MMI) on November 17, 2016. D&O at 25. Despite Claimant's return to his regular employment as a foreman, the ALJ concluded he remained partially disabled, due to evidence of reduced work hours, physician-assigned work restrictions, and Claimant's credible testimony as to his post-injury residual symptoms and abilities. *Id*. at 29-31.

The ALJ then determined Claimant's lost wage-earning capacity and his resulting disability compensation entitlement under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). He used Section 10(a) of the Act, 33 U.S.C. §910(a), to calculate Claimant's

[5] The ILWU-PMA Welfare Plan (Plan) intervened in the claim, requesting reimbursement of indemnity and medical benefits it paid to or on behalf of Claimant as a result of the April 7, 2015 injury. The parties settled the majority of the Plan's reimbursement claims prior to the formal hearing, with Employer agreeing to take over the payment of Claimant's benefits. CX C at 5-6, 9-10; CX D at 1, 5. At the time of the hearing, the Plan continued to seek reimbursement of $4,784.95 in medical benefits from Employer. Administrative Law Judge Exhibit (ALJX) 1. The parties stipulated to Employer's liability for the full amount of this reimbursement claim, should the ALJ find it liable for benefits under the Act. *Id*.; HT at 5-6.

pre-injury AWW of $6,041.93.[6] D&O at 25-27. Although Claimant's actual post-injury wages "appear[ed] to approach his pre-injury earnings," the ALJ found they did not fairly or reasonably represent his post-injury wage-earning capacity, due to his reduced hours and because his post-injury earnings included general wage increases and union-negotiated shift bonuses that he did not receive pre-injury. *Id.* at 32. Instead, the ALJ calculated Claimant's post-injury wage-earning capacity by multiplying the average number of post-injury hours he worked per week by the foremen's rate for second shift work in effect in 2015, according to the 2014-2019 Pacific Coast Walking Bosses and Foremen's Agreement (EX 2 at 95, 133), resulting in a post-injury wage-earning capacity of $4,136.33 per week. The ALJ's subsequent comparison of Claimant's pre-injury AWW and post-injury wage-earning capacity showed Claimant had a lost wage-earning capacity of $1,905.60 per week, with a corresponding partial disability compensation rate of $1,270.40 per week. *Id*.

The ALJ ordered Employer to compensate Claimant with weekly temporary and then permanent partial disability benefits in that amount, beginning on April 1, 2016, through the present and continuing, minus a credit for any sums already paid by Employer during that same time period.[7] D&O at 34. Finally, the ALJ found Employer liable for all reasonable and necessary medical benefits related to Claimant's compensable workplace injury. *Id.*

Employer appeals the ALJ's compensation order, contending he erred in giving more weight to Dr. Johansen's medical opinion over that of Dr. Stump, in finding Claimant incapable of working more hours post-injury, in assessing Claimant's physical work restrictions, and in calculating Claimant's post-injury wage-earning capacity. Claimant responds, urging affirmance. Employer filed a reply brief.

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[6] The parties agreed Claimant earned $316,596.96 in gross wages from April 7, 2014, through April 6, 2015, which included vacation and holiday pay, as well as all earnings pursuant to his steady foreman position with Sea Star (i.e., earnings for hours not actually worked). Because records showed Claimant worked 262 days during the year preceding his injury, only three weeks of which were 6-day work weeks, the ALJ concluded Claimant was a 5-day-per-week worker. D&O at 26. He therefore calculated Claimant's AWW in accordance with Section 10(a) by dividing gross wages of $316,596.96 by 262 days to get an average daily wage of $1,023.79. *Id.* He multiplied this number by 260 days, then divided by 52 weeks to get an AWW of $6,041.93. *Id.*

[7] The ALJ also ordered Employer to reimburse the Plan in the amount of $4,784.95, in accordance with the parties' stipulations. D&O at 34.

## Causation

The ALJ found Claimant invoked the Section 20(a) presumption of compensability, 33 U.S.C. §920(a), and Employer rebutted the presumption with substantial evidence. D&O at 20-21. After weighing the medical evidence, the ALJ found Dr. Johansen's opinion as to causation supported by Dr. Neuzil's opinion and more persuasive than Dr. Stump's. *Id*. at 23-24. On appeal, Employer argues the ALJ erred in giving greater weight to Drs. Johansen and Neuzil, who performed records reviews, over Dr. Stump, who physically examined Claimant.[8]

[8] Employer generally argues the ALJ should not have credited Dr. Johansen's opinion as to any issue because of his failure to physically examine Claimant, the suspension of his surgical privileges in 2007, a history of medical malpractice suits naming him as a defendant, his failure to review the most recent two years of Claimant's medical records, and his inaccurate understanding of Claimant's job duties. But the ALJ addressed Employer's concerns and permissibly found Dr. Johansen to be credible. D&O at 17-18; *see Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Further, even had the ALJ not relied on Dr. Johansen's opinion, his conclusions are still supported by substantial evidence in the record. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 618, 33 BRBS 1, 3(CRT) (9th Cir. 1999). On the issue of causation, the ALJ concluded the workplace incident as described by Claimant caused his vertebral artery dissection, which in turn caused strokes. D&O at 24. While the ALJ credited Dr. Johansen's medical report in coming to this conclusion (D&O at 23-24), he also relied upon the medical report of Employer's expert vascular surgeon, Dr. Neuzil, who opined the "jolting mechanism" Claimant experienced on April 7, 2015, caused the vertebral artery dissection. D&O at 22; EX 13 at 346. As for Claimant's post-injury work restrictions, the ALJ relied on the medical opinions of both Dr. Johansen and Dr. Stump to find Claimant could no longer climb ladders, walk on gangways or gangplanks, or work in circumstances that could compromise his balance. D&O at 30. Notably, although Dr. Johansen initially provided an opinion regarding Claimant's residual physical restrictions (CX R-1 at 3-4), he subsequently deferred to Dr. Stump on this issue, explaining Dr. Stump's expertise as a neurologist (as opposed to his own expertise as a vascular surgeon), made Dr. Stump especially qualified to opine as to Claimant's residual physical condition (EX 17 at 6, 10, 18, 20 [transcript pp. 18, 36, 66, 76]). Dr. Stump recommended against any work involving uneven ground or climbing ladders and stairs (especially without a railing or for long distances), and stated it was unlikely any accommodations existed which would assist Claimant in "navigating gangways, working on uneven surfaces, or climbing stairs or ladders more than on an occasional basis." EX 10 at 308-309. Consequently, substantial evidence apart from Dr.

When an employer rebuts the Section 20(a) presumption, it falls out of the case, and the claimant bears the burden of establishing by a preponderance of the evidence his injury is work-related based on the record as a whole. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). The factfinder has the authority and discretion to weigh, credit, and draw his own inferences from the evidence of record; he is not bound to accept the opinion or theory of any particular expert. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). Questions of witness credibility are for the ALJ as the trier-of-fact, and the Board must respect his evaluation of all testimony, including that of medical witnesses. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997). The Board will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Here, the ALJ permissibly found Dr. Stump, despite his physical examination of Claimant, offered a conclusion on causation[9] that was both unexplained and unsupported, especially when compared to Drs. Johansen and Neuzil, who both provided detailed expert opinions.[10] D&O at 19, 22-23; *Taylor*, 133 F.3d 683, 31 BRBS 178. The ALJ was especially persuaded by Dr. Johansen due to his expertise as a vascular surgeon and his explanation as to how the nature of this particular injury rendered physical examination

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Johansen's opinion supports the ALJ's conclusion as to causation and Claimant's post-injury work restrictions.

[9] Despite acknowledging the vertebral artery dissection occurred during a period of employment and indicating there was no evidence his diagnosis of Claimant pre-dated the alleged incident, Dr. Stump stated he could not "identify an etiology that would lead to the vertebral artery dissection with reference to" the described incident. EX 10 at 308.

[10] Dr. Neuzil opined the incident of April 7, 2015, caused Claimant's injury, as "any jarring of the neck," including the "jolting mechanism" as described by Claimant, "has the potential to cause the vertebrale [sic] artery dissection." EX 13 at 346. Dr. Johansen opined, "[b]ased on [Claimant]'s symptoms, the onset in proximity to the work-related injury, the imaging studies and description of subsequent events, the left vertebral artery dissection and the brainstem strokes that followed can only have resulted from the April 7, 2015 on-the-job injury." CX R-1 at 3.

unnecessary in determining causation.[11] As the ALJ's credibility determinations are not inherently incredible or patently unreasonable, *Cordero*, 580 F.2d at 1335, 8 BRBS 747, and as his conclusion on causation is rational, supported by substantial evidence, and in accordance with the law, *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), we affirm his determination that Claimant established he suffered a work-related injury.

**Disability**

Employer contends the ALJ erred in finding Claimant partially disabled after his condition reached MMI. Disability is defined as the "incapacity *because of injury* to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10) (emphasis added). To be entitled to total disability benefits, a claimant must establish he cannot return to his usual work due to his work injury. *Christie v. Georgia-Pacific Co.*, 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018). A claimant's usual employment is the job he was performing at the time of his injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). In determining whether a claimant can return to his usual work, the ALJ must compare claimant's medical restrictions with the requirements of his usual employment. *See Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). Only after a claimant has established a prima facie case of total disability does the employer bear the burden of establishing the availability of suitable alternate employment to show the claimant's disability is, at most, partial. *See generally Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998).

Claimant returned to his position as a foreman at the Port of Tacoma following his injury. However, the ALJ found Claimant's work-related injury prevented him from performing his usual employment due to his inability to work as many hours and to physically perform all the job duties he did prior to his injury. D&O at 29. Rather, the ALJ found Claimant's post-injury "role, or a description of the work he can actually perform, is more akin to suitable alternative employment." *Id*. at n.14. Consequently, he found Claimant partially disabled under Section 8(c)(21) of the Act. *Id*. at 29.

Employer urges the Board to vacate this finding, alleging it is premised on incorrect facts and thus not supported by substantial evidence. Specifically, Employer maintains the ALJ improperly relied upon Claimant's testimony regarding his reduced ability to work

[11] Dr. Johansen explained due to the nature of a vertebral artery dissection, which occurs "deep…inside the neck," there would be "nothing discernable on physical examination" other than the consequences of the dissection, i.e., the strokes. EX 17 at 4 (transcript p. 11).

double shifts post-injury because it is contradicted by post-injury wage records showing he has in fact worked double shifts since returning to work, as well as pre-injury wage records which show no material difference in the frequency with which he worked double shifts before and after his injury. We disagree, and find substantial evidence supports the ALJ's conclusion. *Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921, 52 BRBS 53(CRT) (9th Cir. 2019).

The ALJ acknowledged Claimant worked double shifts post-injury but found credible Claimant's testimony he only did so when he knew the job would be completed before the double shift was over. D&O at 29; HT at 72, 80-81. Wage records support Claimant's testimony as they show none of the nine double shifts he worked post-injury consisted of two consecutive full 12-hour shifts; rather, the post-injury double shifts generally included one shift lasting 10 to 12 hours, with the consecutive shifts lasting only 7 to 8 hours. EX 1 at 65, 70-71, 73, 88, 92; EX 7 at 276-77. Conversely, Claimant's wage records fail to support Employer's contention that Claimant worked just as few double shifts pre-injury.[12] As Claimant's testimony regarding his double shift work is supported by record evidence, the ALJ's credibility finding is neither inherently incredible nor patently unreasonable. *Cordero*, 580 F.2d at 1335, 8 BRBS at 747.

Moreover, beyond Claimant's ability or inability to work double shifts, substantial evidence supports the ALJ's conclusion that Claimant is physically incapable of safely working as many hours post-injury as he did pre-injury. D&O at 29; *Abdelmeged*, 913 F.3d 921, 52 BRBS 53. In addition to evidence of a reduced number of actual hours worked,[13] Claimant testified he fatigues easily and suffers from balance issues and left-sided weakness, which impact the number of shifts he can work. HT at 53-6; CX M at 2,8.

[12] According to Claimant's pre-injury wage records, he worked 16 double shifts in 2010, 7 double shifts in 2011, 20 double shifts in 2012, 11 double shifts in 2013, and 15 double shifts in 2014. EX 1 at 2-45. During the 52 weeks preceding Claimant's injury on April 7, 2015, he worked a total of 19 double shifts. EX 1 at 40-49. Comparatively, he worked only 9 double shifts over a span of approximately four years post-injury. EX 1 at 65, 70-71, 73, 88, 92; EX 7 at 276-77.

[13] Specifically, Claimant's wage records show from April 8, 2014, through the date of his injury on April 7, 2015, Claimant performed 3,001.7 hours of actual work (i.e., hours Claimant was physically present and working at the jobsite as a foreman, excluding holiday or vacation pay and the hours for which he was paid pursuant to his foreman's guarantee agreement with Sea Star). CX J at 15-24. In comparison, from his return to work on April 1, 2016, through the end of that year, he performed 1,397.5 hours of actual work. EX 1 at 57-63. He performed 1,783 hours of actual work in 2017 (EX 1 at 64-72), 1,663 hours of

We further reject Employer's contention the ALJ incorrectly assessed Claimant's post-injury work restrictions with respect to his inability to use gangways. Citing Drs. Johansen and Stump, the ALJ determined Claimant's residual post-injury symptoms restricted him from climbing ladders, walking on gangways or gangplanks, or working in any other circumstances that would compromise his balance, and as a result, Claimant cannot "board ships as he once did," resulting in "fewer jobs he can take." D&O at 30.

Substantial evidence supports this finding. *Abdelmeged*, 913 F.3d 921, 52 BRBS 53. Dr. Stump specifically recommended Claimant only occasionally board gangways. EX 10 at 309. Dr. Johansen also opined Claimant should avoid gangways and any other activity that could cause a "sense of imbalance," but ultimately deferred to Dr. Stump regarding Claimant's residual physical limitations. CX R-1 at 4. Claimant testified he avoids jobs that would require him to walk onto a ship via gangway or gangplank (HT at 58; CX I at 14 [transcript p. 49]), and his dispatchers know to not call him if a job would require him to board a vessel via gangway or crane bucket (CX I at 15 [transcript p. 50]). This does not mean he has not been on a vessel since his accident; rather, he stated if he needs to board a vessel for a job, he gets a ride up the gangway in the maintenance person's vehicle. HT at 82. Claimant acknowledged he will, however, occasionally walk down a gangway to disembark from a vessel. HT at 83. In other words, he occasionally navigates gangways in order to perform his job. As this activity is consistent with Dr. Stump's work restrictions, EX 10 at 309, we affirm the ALJ's finding of permanent partial disability.

**Post-Injury Residual Wage-Earning Capacity**

Employer maintains the ALJ incorrectly calculated Claimant's post-injury wage-earning capacity under Sections 8(c)(21) and 8(h) of the Act, 33 U.S.C. §908(c)(21), (h), and, therefore, erred in awarding disability benefits. To determine the rate of a claimant's partial disability entitlement under Section 8(c)(21) of the Act, the ALJ must first determine the claimant's lost wage-earning capacity, which can only be established by comparing his pre-injury AWW with his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 652 (1979). Wage-earning capacity is determined under Section 8(h), 33 U.S.C. §908(h),[14]

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actual work in 2018 (EX 12 pp. 1-8), and 1,802.5 hours of actual work in 2019 (EX 12 at 9-13, 18-20; EX 13 at 7-9).

[14] Section 8(h) provides:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e)

which provides that a claimant's wage-earning capacity shall be his actual post-injury wages if these earnings fairly and reasonably represent his wage-earning capacity. If, however, the claimant's actual post-injury wages do not fairly and reasonably represent his wage-earning capacity, the ALJ must, "in the interest of justice, fix such wage-earning capacity as shall be reasonable." 33 U.S.C. §908(h); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982). In making this determination, relevant considerations may include the employee's physical condition, age, education, industrial history, earning power on the open market, and any other reasonable variable that could form a factual basis for the decision. *See Deweert v. Stevedoring Services of Am.*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002); *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *Devillier*, 10 BRBS 649.

Additionally, to account for inflation and make a fair comparison between AWW and post-injury wage-earning capacity, the Board has held a claimant's post-injury earning capacity must be adjusted downward to the rate paid at the time of injury. *See Pumphrey v. E. C. Ernst*, 15 BRBS 327 (1983); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). The mere fact that an employee earns the same or more money post-injury does not establish he has suffered no loss of wage-earning capacity if the higher wages only represent inflationary increases.[15] *Miller v. Cen. Dispatch, Inc.*, 16 BRBS 63 (1984).

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> of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. §908(h) (emphasis in original).

[15] In *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S.1155 (1997), the Ninth Circuit held the Board properly affirmed an ALJ's finding that the claimant's actual post-injury earnings did not fairly and reasonably represent his wage-earning capacity. Rejecting the employer's contention, the court held that even though the claimant's actual post-injury earnings were greater than his AWW,

Employer contends two weeks of earnings, one occurring in 2016, and one occurring in 2018, show Claimant has demonstrated an actual capacity to earn wages exceeding his pre-injury AWW, and therefore he has suffered no loss of wage-earning capacity. We disagree.

Substantial evidence supports, and the ALJ rationally concluded, Claimant's actual post-injury earnings, even though they occasionally approached or exceeded his pre-injury AWW, do not fairly and reasonably represent his wage-earning *capacity*, not only because of his reduced post-injury work hours and work restrictions, but also because his post-injury earnings include general wage increases and union-negotiated shift bonuses that were not available to Claimant prior to his injury.[16] That is, his post-injury earnings are affected (increased) by factors unrelated to his ability to physically perform his job, some of which are akin to inflation adjustments. *See, e.g.*, *Gross*, 935 F.2d at 1549, 24 BRBS at 220(CRT) (claimant's reduced work hours and credible testimony of working through pain and limitations justified finding a loss of wage-earning capacity, despite evidence of higher actual post-injury earnings); *Allan*, 666 F.2d 399, 14 BRBS 427 (claimant's work-related injury rendered him unfit for some jobs, and therefore he suffered a loss of wage-earning capacity despite a post-accident promotion and increased actual earnings); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999) (factors, such as pain and limitations, that caused the claimant to avoid certain jobs offered by the hiring hall supported a finding of lost wage-earning capacity, despite an increase in his actual wages); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39, 44 (1996) ("[T]he fact that claimant received actual post-injury wages equal to his pre-injury earnings does not mandate a conclusion that he had no loss in wage-earning capacity."). It is reasonable for the ALJ to have found Claimant's

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where wage rates had increased approximately 15 percent, the ALJ properly reduced the post-injury earnings by 15 percent and used this adjusted amount to determine benefits. *Id.* at 898-899, 50-51(CRT).

[16] While Claimant was still in the hospital following his injury, the collective bargaining agreement was modified to include a "steady foreman bonus" incentive program, whereby he would receive a $200 bonus for each shift he worked for his steady company. HT at 42, 76. His wage records began reflecting this $200 steady foreman incentive bonus on April 8, 2016. EX 1 at 57. Additionally, his post-injury wages are paid at a higher rate than pre-injury; he has gotten a raise every year as part of his collective bargaining agreement. HT at 42-43; CX 1 at 14 (transcript p. 48).

actual post-injury earnings are not representative of his wage-earning capacity following his serious injury.

Having found Claimant's actual post-injury wages do not fairly or reasonably represent his post-injury wage-earning capacity, the ALJ calculated Claimant's post-injury wage-earning capacity under Section 8(h) of the Act. 33 U.S.C. §908(h); *Allan*, 666 F.2d 399, 14 BRBS 427; D&O at 31-33. He examined Claimant's post-injury wage records and found that, from his return to work on April 1, 2016, through October 16, 2020, a period of 239 weeks, Claimant worked a total of 14,157 hours, resulting in an average of approximately 59 hours of work per week. *Id*. at 33. The ALJ then consulted the Pacific Coast Walking Bosses and Foreman's Agreements and noted a foreman's pay rates changed based on whether he worked the first, second, or third shift. D&O at 32; EX 2 at 95, 133. As Claimant's wage records indicated he primarily worked the second shift since his return from injury, the ALJ found the second-shift foreman's rate in effect in 2015 – $69.83 per hour – reasonably represented Claimant's hourly rate of pay. *Id*. at 33. He therefore multiplied the second shift hourly rate of $69.83 by 59 hours, resulting in an average post-injury earning capacity of $4,136.33 per week. *Id*. The ALJ concluded it was not necessary to further adjust or discount Claimant's post-injury weekly wage-earning capacity to 2015 levels, because he used the second shift foreman's hourly rate that was in effect in 2015. *Id*. at 32.

Employer argues the ALJ's method of calculating Claimant's post-injury residual wage-earning capacity is flawed for two reasons.[17] First, Employer maintains the ALJ erred in using the second shift foreman's rate to calculate Claimant's post-injury wage-earning capacity. We find this argument unavailing.

An ALJ's findings on wage-earning capacity may be overturned only if unsupported by substantial evidence. 33 U.S.C. §921(b)(3); *Long*, 767 F.2d at 1582, 17 BRBS at 153(CRT); *Portland Stevedoring Co. v. Johnson*, 442 F.2d 411, 412 (9th Cir.1971). Here, the ALJ calculated Claimant's post-injury wage-earning capacity by relying upon the stability of his residual injury-related symptoms (thereby justifying the use of average hours worked over a four-year period) and evidence he primarily worked the second shift (thereby justifying the use of the foreman's union-negotiated second shift rate as representative of Claimant's hourly rate). D&O at 33. Employer takes issue with the latter, arguing use of the union-negotiated second shift rate underestimates Claimant's actual

[17] We reject Claimant's contention that Employer waived these arguments by not asserting them below, considering Employer's inability to predict the specific method by which the ALJ would calculate Claimant's post-injury wage-earning capacity in accordance with Section 8(h) of the Act. 33 U.S.C. §908(h).

earnings, which have fluctuated significantly both pre- and post-injury and largely exceed the second shift rate. However, the only concrete example Employer provides as evidence of this error fails to demonstrate the ALJ's calculation was either unreasonable or unsupported by substantial evidence.[18]

Rather, substantial evidence supports the ALJ's finding that Claimant primarily worked the second shift post-injury.[19] The record also supports use of the union rates as representative of Claimant's wage-earning capacity, as approximately half of Claimant's earnings from April 1, 2016, through July 1, 2019,[20] were paid at the union rate in effect at the time of payment.[21] Although the rates of pay Claimant received for working second shifts post-injury generally were higher than the union rates in effect at the time of payment, the difference between the union rates and what Claimant earned from 12 different employers over the four-year time period ranged from $1.50 to $4.00 per hour. EX 1 at 57-86. We do not believe this disparity is sufficient to render unreasonable the ALJ's calculation of wage-earning capacity under Section 8(h), *Long*, 767 F.2d at 1582, 17 BRBS at 153(CRT), especially in light of Claimant's annual union-negotiated wage increases, which he testified had increased by roughly $11.00 since his injury (HT at 42), and which cannot constitute evidence of increased wage-earning capacity, *Petitt v. Sause Bros.*, 730 F.3d 1173, 47 BRBS 35(CRT) (9th Cir. 2013). Additionally, by using the 2015 rates, the ALJ effectively accounted for any inflationary effects. *Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT). As a result, we affirm the ALJ's use of the second-shift foreman's rate in effect in 2015 to calculate Claimant's post-injury wage-earning capacity.

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[18] Employer argues Claimant's actual earnings from July 2, 2016, through July 1, 2017, which totaled $248,688.83 for 3,127 hours of work, exceed the amount Claimant would have earned during the same time period under the foreman's second shift rate of $74.73 per hour, which would result in earnings of $245,637.51. Employer's Petition for Review (PR) at 28. However, the difference between these two amounts is only $3,051.32 for the entire year, or $58.68 per week.

[19] From Claimant's return to work on April 1, 2016, through October 16, 2020, the wage records show out of all the post-injury hours he actually worked (i.e., excluding hours attributed to holiday/vacation pay and pursuant to the foreman's agreement with Sea Star), approximately 75% were second shift work. EX 1 at 57-86; CX R-13; CX R-16.

[20] The record does not contain evidence of the union-negotiated rates beyond July 1, 2019.

[21] Earnings at the union's hourly rates were limited to vacation pay, holiday pay, hours earned pursuant to the foreman's agreement with Sea Star, and overtime. EX 1 at 57-86.

Second, Employer maintains the ALJ's calculation fails to include vacation and holiday pay and cannot reasonably be compared to Claimant's pre-injury AWW, which does include vacation and holiday pay. We agree.

The ALJ found, and the parties did not dispute, Claimant earned gross wages totaling $316,596.96 during the year preceding his injury, an amount that included payment for paid vacation and holiday time. D&O at 26; EX 1 at 40-49. Although the parties disputed whether Claimant was a five- or six-day worker under Section 10(a), neither disputed the ALJ's use of $316,596.96 in gross wages to calculate Claimant's pre-injury AWW. *Id.* The ALJ did not, however, include paid vacation and holiday hours in his calculation of Claimant's post-injury wage-earning capacity from 2016 through 2020, D&O at 32-33, despite payroll records showing Claimant's wages included a significant amount of paid vacation and holiday hours during that same time period.[22] EX 1 at 57-63, 72, 80-85; CX R-13 at 5-10; CX R-16 at 7. As a result, the ALJ's calculations of Claimant's pre-injury AWW and post-injury wage-earning capacity are not comparable, rendering the ALJ's calculation of lost wage-earning capacity incomplete. *Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT).

We therefore partially vacate the ALJ's calculation of Claimant's post-injury wage-earning capacity to the extent it excludes paid vacation and holiday hours Claimant earned post-injury. On remand, the ALJ should include the hours of paid vacation and holiday time Claimant earned from April 1, 2016, through October 16, 2020, as those are the years of wages he used to calculate Claimant's post-injury wage-earning capacity. Thereafter, he must adjust his findings as to Claimant's loss of wage-earning capacity and corresponding partial disability compensation rate.

Accordingly, we vacate the ALJ's Decision and Order Awarding Compensation and Benefits and remand for recalculation of Claimant's post-injury wage-earning capacity and loss of wage-earning capacity in accordance with this Order and Sections 8(c)(21) and 8(h) of the Act. In all other respects, we affirm the ALJ's decision.

[22] Claimant's wage records have separate columns documenting "Non Worked Hours," i.e., holiday and vacation pay, and "Worked Hours," which include payment for hours actually worked as well as payment pursuant to Sea Star's 50-hour guarantee. EX 1; CXs R-13, R-16. Our review of these records confirms the ALJ only considered the hours listed in the "Worked Hours" column in arriving at a total of 14,157 post-injury hours and did not include hours listed in the "Non Worked Hours" column. *Id.*

BOGGS, Administrative Appeals Judge, dissenting in part:

I respectfully disagree with my colleagues in affirming the ALJ's use of the union's second shift hourly rate in calculating Claimant's post-injury wage-earning capacity. Claimant received actual wages following his injury; therefore the proper way to compare his past and present earning capacity is to remove the contractual increases from his post-injury wages and thus have accurate comparable pre- and post-injury figures. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1161, 36 BRBS 15, 18(CRT) (9th Cir. 2002). Employer properly points out that the second shift wage does not accurately reflect Claimant's actual wages. Employer's Brief at 30-31; *see Petitt v. Sause Bros.*, 730 F.3d 1173, 47 BRBS 35(CRT) (9th Cir. 2013). Contrary to my colleagues' analysis, the difference of $3,000 per year between the second shift wage rate and what Claimant received from July 2, 2016, through July 1, 2017, is not minor, particularly considering this is a permanent injury and Claimant will likely receive benefits for decades. Accordingly,

a proper calculation using Claimant's actual post-injury wages, absent contractual increases, is required. In all other respects, I concur in the opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge