**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 17-0168
and 17-0168A

| | | |
|---|---|---|
| SCOTT E. HORTON | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| v. | ) | DATE ISSUED: Nov. 15, 2017 |
| | ) | |
| SPECIALTY FINISHES, LLC | ) | |
| | ) | |
| and | ) | |
| | ) | |
| SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| Cross-Respondents | ) | |
| | ) | |
| INDUSTRIAL MARINE, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| AMERICAN EQUITY UNDERWRITERS, INCORPORATED | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| Cross-Respondents | ) | DECISION and ORDER |

Appeals of the Decision and Order Awarding Benefits and the Order Granting Claimant's Motion for Reconsideration of William J. King, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz (Law Offices of Charles Robinowitz), Portland, Oregon, for claimant.

Robert E. Babcock and James R. Babcock (Holmes Weddle & Barcott, P.C.), Lake Oswego, Oregon, for Specialty Finishes and Signal Mutual Indemnity Association, Limited.

Richard A. Nielsen and Nathan J. Beard (Nelson Shields, PLLC), Seattle, Washington, for Industrial Marine and American Equity Underwriters, Incorporated.

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

PER CURIAM:

Specialty Finishes appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2013-LHC-01724) of Administrative Law Judge William J. King 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 rational, supported by substantial evidence, and 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 as a rigger for 26 years, including 13 years at Industrial Marine, where his duties included pressure washing and stripe painting. Tr. at 219-222. The availability of work at Industrial Marine was inconsistent, resulting in gaps in claimant's employment. *Id*. at 59. Claimant started working for Specialty Finishes on January 15, 2013 as a blaster/painter. *Id.* at 224, 229-230.

On January 21, 2013, claimant hurt his lower back when trying to move a heavy dust barrel as part of the sand blasting process. Tr. at 234-236. Claimant sought medical treatment that day, and on January 23, 2013, claimant was diagnosed with lumbar radiculopathy, a thoracic sprain, and a lumbar sprain. JX 12. On February 14, 2013, Dr. Ashok Modha diagnosed claimant with sciatica and recommended that claimant undergo physical therapy and rehabilitation. SFX 5 at 21. Claimant was later referred to People's Injury Network Northwest (PINN) for further physical therapy in an attempt to allow him to return to work in four to six weeks. Claimant was discharged from physical therapy on September 18, 2013, with the conclusion that he was not able to return to the job of blaster because he could not stand or walk on a constant basis and was not able to lift or carry the required amount of weight. JX 29 at 107.

In October 2013, claimant called his supervisor at Specialty Finishes to ask about returning to work. Tr. at 258-259. He did not hear back and was not offered a job. *Id.* at 260.

Claimant called Mark Grimes, his supervisor at Industrial Marine, to inquire about returning to work. Claimant testified that he told Mr. Grimes about his injury at Specialty Finishes, that he had been off work for nine months, and that he had been

released to return to work. Tr. at 345. Claimant worked for Industrial Marine from December 19, 2013 to March 30, 2014, performing a variety of tasks, such as painting and needle gunning. *Id.* at 263-264. When the project for Industrial Marine ended, he was not called to work on the next job. *Id.* at 276-277.

Since then, claimant has unsuccessfully sought work in various entry-level, unskilled jobs. CX 2; Tr. at 280-282. Claimant worked for about one and a half years as part of a work rehabilitation program through the Department of Veterans' Affairs (VA), where his duties included raking and blowing leaves, weeding, and driving a forklift. Tr. at 282-284.

Claimant filed a claim under the Act for compensation, medical benefits and discrimination against Specialty Finishes.[1] The administrative law judge credited PINN's opinions about claimant's maximum functional capacity and concluded that claimant cannot return to his usual work as a rigger or a blaster. Decision and Order at 10-11. The administrative law judge concluded that claimant did not have any wage loss while he was working for Industrial Marine, but that he had no residual wage-earning capacity from April 1, 2014 until December 31, 2014 when Specialty Finishes established the availability of suitable alternate employment.[2] *Id.* at 15. The administrative law judge found that the post-injury work at Industrial Marine did not establish claimant's wage-earning capacity nor did the landscaping position at the VA. *Id.* at 13. The administrative law judge concluded that claimant's post-injury wage-earning capacity is $10.00 per hour as of December 31, 2014 based on the suitable jobs in Specialty Finishes' labor market survey. *Id.* at 14-15.

The administrative law judge determined that claimant's average weekly wage should be calculated under Section 10(c), 33 U.S.C. §910(c). He did not accept as comparable the wages of three co-workers submitted by claimant. Decision and Order at 11. The administrative law judge determined that claimant's earnings from 2011 and

[1] The administrative law judge dismissed claimant's Section 49 claim in response to claimant's unopposed motion to withdraw that claim. *See* Decision and Order at 3. Specialty Finishes joined Industrial Marine as a party to the case on the merits on May 9, 2014. *Id.* at 2.

[2] The administrative law judge awarded claimant temporary total disability benefits from January 21, 2013 to September 18, 2013, when claimant reached maximum medical improvement, and permanent total disability from September 19, 2013 to December 18, 2013 and from April 1, 2013 to December 30, 2014. Decision and Order at 16. He awarded claimant ongoing permanent partial disability from December 30, 2014.

2012 at Industrial Marine provide the best information from which to calculate claimant's average weekly wage. *Id.* at 12. He therefore took the average of claimant's annual earnings at Industrial Marine in 2011 and 2012 to calculate claimant's average weekly wage as $494.95. *Id.*

The administrative law judge concluded that Specialty Finishes is the responsible employer because claimant did not assert that he was injured while working for Industrial Marine and claimant's work for Industrial Marine from December 2013 to March 2014 did not accelerate or aggravate claimant's underlying back injury. Decision and Order at 15. Claimant testified that his back never stopped hurting after the Specialty Finishes accident and that he felt the same after he stopped working for Industrial Marine. The administrative law judge also found that there is no medical evidence that claimant's back condition worsened because of his work at Industrial Marine.

Claimant filed a motion for reconsideration, contending the administrative law judge erred in calculating his average weekly wage. The administrative law judge granted claimant's motion and modified claimant's average weekly wage to $500.08. Order Granting Claimant's Motion for Reconsideration at 2. The administrative law judge also modified the calculation of claimant's wage-earning capacity to reflect post-injury inflation. *Id.* The administrative law judge accordingly modified claimant's post-injury wage-earning capacity to $384.80 per week. *Id.* at 3.

Specialty Finishes appeals the administrative law judge's finding that claimant's salary at Industrial Marine after his injury does not establish his post-injury wage-earning capacity. Specialty Finishes also contests the finding that it is the responsible employer. Industrial Marine filed a response to Specialty Finishes' appeal, urging affirmance of the administrative law judge's responsible employer finding. Claimant responded that the administrative law judge's wage-earning capacity finding should be affirmed. Specialty Finishes filed a reply brief.

Claimant cross-appeals the administrative law judge's decision, contending the administrative law judge erred in not basing claimant's average weekly wage on the salaries of his co-workers. Specialty Finishes and Industrial Marine separately respond to claimant's cross-appeal, urging affirmance of the average weekly wage finding. Claimant filed a reply brief.

*Wage-Earning Capacity*

Specialty Finishes contends that claimant's post-injury employment with Industrial Marine establishes his wage-earning capacity and that the administrative law judge's determination that claimant stopped working for Industrial Marine because he

was physically unable to do the work is unsupported by the evidence in the record. We reject Specialty Finishes' contentions.

Section 8(h) of the Act provides that a claimant's post-injury wage-earning capacity will be equal to the employee's actual earnings if they fairly and reasonably represent his wage-earning capacity. If actual earnings do not fairly and reasonably represent a claimant's wage-earning capacity, the administrative law judge has the discretion to fix a reasonable wage-earning capacity "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." 33 U.S.C. §908(h); *see Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002). An administrative law judge has significant discretion in determining a reasonable post-injury wage-earning capacity under Section 8(h). *See, e.g., Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

In this case, the administrative law judge determined that claimant's work at Industrial Marine after his injury did not establish his wage-earning capacity.[3] Decision and Order at 13. Claimant earned an average of $784.83 per week while working at Industrial Marine. *Id.* at 8. The administrative law judge found that some of claimant's work at Industrial Marine likely exceeded the physical limitations set by PINN and that claimant tried to work beyond his capacity. *Id.* at 13. The administrative law judge reasoned that "Claimant experienced severe pain while performing a mix of light duty and normal work for [Industrial Marine] and eventually had to stop working, and thus could not in fact perform this work." *Id.* Specialty Finishes contends this conclusion is not supported by substantial evidence. It asserts the record demonstrates that claimant ceased working for Industrial Marine in March 2014 because the project ended and that claimant attempted to return to the same work once he learned it was available.

The administrative law judge's conclusion that claimant's post-injury work at Industrial Marine did not establish his wage-earning capacity is supported by substantial evidence. In concluding that claimant worked beyond his capacity, the administrative law judge rationally accepted claimant's testimony that his back injury continued to cause him pain while he worked. Decision and Order at 13 (citing Tr. at 267, 273, 275); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Section 8(h) permits an administrative law judge to

[3] The administrative law judge also found that claimant's work as a landscaping assistant for the VA did not establish his earning capacity. Decision and Order at 13. Specialty Finishes does not appeal the administrative law judge's conclusion in this regard.

consider the restrictions under which claimant works and his pain in fixing his wage-earning capacity. *See Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *see also Container Stevedoring Co. v. Director, OWCP*, 935 F2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991) (affirming an administrative law judge's rational finding that claimant had a loss in wage-earning capacity despite higher post-injury earnings because claimant had a significant physical impairment and worked fewer hours in pain, which the administrative law judge attributed to claimant's disability). Moreover, the administrative law judge rationally concluded that some of the duties claimant performed while working at Industrial Marine likely exceeded the physical limitations set by PINN, which the administrative law judge accepted as being accurate.[4] Decision and Order at 13. Under these circumstances, the administrative law judge was not required to find that claimant's actual earnings represented his ongoing wage-earning capacity. *Container Stevedoring Co.*, 935 F2d 1544, 24 BRBS 213(CRT). In addition, the job at Industrial Marine was no longer available to claimant. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). We therefore affirm the administrative law judge's finding that claimant's post-injury earning capacity is established only through the jobs identified through Specialty Finishes' labor market survey as suitable alternate employment.[5] *Container Stevedoring Co.*, 935 F2d 1544, 24 BRBS 213(CRT).

*Responsible Employer*

Specialty Finishes contends the administrative law judge erred in finding it, not Industrial Marine, to be the responsible employer. In determining the responsible employer in a case involving traumatic injury, the question turns on whether the claimant's disability results from the natural progression of the initial injury, in which case the employer at the time of the initial injury is responsible, or whether a subsequent injury aggravates, accelerates, or combines with claimant's prior injury, thus resulting in claimant's disability, in which case the subsequent employer is responsible. *See Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp.*, 7 F. App'x 547 (9th Cir. 2001). The Ninth Circuit has held that aggravations of an injury, caused by conditions at the subsequent job, constitute new "injuries" that absolve the previous employer from liability, reasoning that "each flare-up of pain represent[s] cumulative trauma and aggravate[s] the

[4] For example, claimant's work at Industrial Marine included setting up the staging, which is heavy work requiring the lowering and raising of 60 pounds, in spite of the fact that claimant was limited to lifting weights up to 35 pounds. Tr. at 293.

[5] The jobs identified as suitable alternate employment are not challenged on appeal nor is the wage-earning capacity calculations based on these jobs.

underlying injury." *See Kelaita v. Director, OWCP*, 799 F.2d 1308, 1311-1312 (9th Cir. 1986), *aff'g Kelaita v. Triple A Machine Shop*, 17 BRBS 10 (1984).

In this case, the administrative law judge determined that the Section 20(a) presumption was not invoked against Industrial Marine because claimant did not assert he was injured while working for Industrial Marine nor did he file a claim against it. Decision and Order at 15. The administrative law judge concluded, therefore, that the burden was on Specialty Finishes to prove that it is not the responsible employer and that Specialty Finishes did not meet its burden. *Id.*

As a preliminary matter, Specialty Finishes argues that the administrative law judge erred by failing to place any burden on Industrial Marine to establish that it was not the responsible employer, citing the Board's holding that in a traumatic injury claim involving two employers, each employer carries the simultaneous burden of persuading the factfinder that it is not the responsible employer. *See* Specialty Finishes' Brief at 9, citing *Buchanan*, 33 BRBS 32. We reject Specialty Finishes' argument. The Board in *Buchanan* clearly stated that its holding relates to cases where "the existence of work-related injuries with more than one covered employer is established." *See Buchanan*, 33 BRBS at 35. That is not the case here.

Claimant filed a claim only against Specialty Finishes and did not assert he sustained an injury in his subsequent employment with Industrial Marine. The Ninth Circuit has held that the Section 20(a) presumption is relevant to the question of employer liability because it is implied in the language of the presumption that "the employment referred to is employment *with a particular employer*, against whom a claim has been filed." *Albina Engine & Machine v. Director, OWCP [McAllister]*, 627 F.3d 1293, 1299, 44 BRBS 89, 91(CRT) (9th Cir. 2010) (emphasis in original). As the court explained, "[w]here only a single employer is claimed against, the claimant would of course not be able successfully to assert a claim that fell within the §20(a) presumption on the basis of evidence relating to employment with some other employer that was not claimed against."[6] *Id.* Because claimant filed his claim only against Specialty Finishes, the Section 20(a) presumption was invoked against it. As in any other case not involving multiple employers, Specialty Finishes therefore retained the burden to rebut the presumption by showing that claimant's disability did not arise out of his injury with it. *See Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992) (rejecting one employer's attempt to use Section 20(a) presumption against a subsequent employer where claimant filed a claim only against it and did not assert he was exposed to injurious noise while

[6] *Albina* is an occupational disease case, not a two-traumatic injuries case, but this distinction is not relevant to the Ninth Circuit's discussion of the Section 20(a) presumption as it relates to the responsible employer issue.

working for the second employer); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). Accordingly, we hold that the administrative law judge correctly placed the burden on Specialty Finishes to establish that it is not the responsible employer. *Id.*

In addition, Specialty Finishes contends the administrative law judge's conclusion that it is the responsible employer is not supported by substantial evidence. It argues that the earlier finding that claimant had to stop working for Industrial Marine because of "severe pain while performing a mix of light duty and normal work for employer," contradicts the administrative law judge's conclusion. Decision and Order at 13. We reject Specialty Finishes' allegation of error.

The administrative law judge noted that claimant did not assert that his work for Industrial Marine accelerated or aggravated his underlying back injury. Decision and Order at 15. The administrative law judge also noted claimant's testimony that the soreness in his legs and back increased at times while he was working and he did need to take some time off because of his back pain. *Id.* The administrative law judge emphasized, however, that claimant testified he felt the same after he stopped working for Industrial Marine as he did following his injury with Specialty Finishes, and that there is no medical evidence that claimant's back condition worsened because of his work at Industrial Marine. Accordingly, the administrative law judge found that Specialty Finishes is the responsible employer. *Id.*

While Specialty Finishes offers a differing characterization of the evidence, it does not provide a basis to overturn the administrative law judge's factual findings. It is well established that the administrative law judge has the discretion to weigh the evidence and to draw inferences from it. *See Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010). The Board may not reweigh the evidence or disregard the administrative law judge's findings because other inferences could have been drawn. *See id.* The administrative law judge's conclusion that Specialty Finishes failed to prove it is not the responsible employer is supported by the evidence in the record. Claimant's testimony regarding the static nature of his condition and the lack of any medical evidence linking claimant's disability to his subsequent work at Industrial Marine is significant because Specialty Finishes did not establish that an aggravating injury occurred there. *Cf. Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004) (second employer liable even though claimant only worked for it one day before undergoing knee surgery where doctors testified that claimant's knee condition deteriorated further because of the day of work); *Foundation Constructors Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991) (affirming a finding of liability for the second employer where claimant's physician testified that claimant's last six months of work was "harmful" to claimant's back condition). As the

administrative law judge's conclusion is rational and supported by substantial evidence, we affirm the administrative law judge's determination that Specialty Finishes is the responsible employer.

*Average Weekly Wage*

In his cross-appeal, claimant assigns error to the administrative law judge's calculation of his average weekly wage. Claimant argues that the administrative law judge erred in finding that neither Ron Anderson, Lance Wilson, nor Jarel Riley were employees comparable to claimant for purposes of calculating claimant's average weekly wage. We disagree.

Section 10(c) of the Act is a catch-all provision that applies when neither Section 10(a) nor 10(b) is applicable.[7] Under Section 10(c), a claimant's average weekly wage may be based on: (1) the previous earnings of the injured employee in the employment in which he was working at the time of the injury; and/or (2) the earnings of other employees of the same or most similar class working in the same or most similar employment; and/or (3) other employment of the employee if it reasonably represents the annual earning capacity of the injured employee. *See* 33 U.S.C. §910(c). An administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *Rhine*, 596 F.3d 1161, 44 BRBS 9(CRT).

The administrative law judge acknowledged claimant's contention that his average weekly wage should be calculated based on an average of the salaries of the three "comparable" workers at Specialty Finishes. Decision and Order at 11. The administrative law judge found, however, that those workers are not actually comparable because Mr. Wilson and Mr. Anderson became supervisors, which meant they worked additional hours at an increased rate of pay, and Mr. Riley was a certified blaster, meaning he also worked more hours and received a pay increase because of the certification. *Id.* The administrative law judge also did not accept the earnings of the workers suggested as comparable by Specialty Finishes and instead determined that the best information on which to base claimant's average weekly wage was his earnings from 2011 and 2012 at Industrial Marine. Claimant was injured only one week into employment with Specialty Finishes in January 2013.

The administrative law judge's conclusion that Mr. Wilson, Mr. Anderson, and Mr. Riley are not, in fact, employees comparable to claimant is supported by substantial evidence in the record. David Oury, the Human Resources Manager for Specialty Finishes, testified that Mr. Anderson, as a supervisor, would have earned more than

[7] The parties do not dispute that Section 10(c) should be applied in this case.

claimant, that Mr. Riley also would have earned more than claimant because he was certified as a sprayer and a blaster, and that Mr. Wilson was not comparable to claimant because he was both a supervisor and a sprayer and a blaster. Tr. at 409-411, 415. Moreover, the administrative law judge was not required to conclude that claimant would have had the potential to earn more by becoming a supervisor or certified sprayer and blaster, had he not been injured, as claimant avers.[8] *Cf. Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806(CRT) (9th Cir. 1980) (remanding for the administrative law judge to reconsider claimant's future earning capacity where claimant was injured shortly after starting a new, higher-paying job). In addition, the administrative law judge rationally concluded that claimant's earnings from 2011 and 2012 provide the best evidence of claimant's earning capacity at the time of the injury. *See generally Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). Therefore, the administrative law judge's calculation of claimant's average weekly wage is affirmed as it is supported by substantial evidence. *See Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006).

[8] The administrative law judge found that "[w]hile claimant now claims that he was willing to train to become a supervisor in order to get more hours, he presents no other evidence to establish this willingness and his work history shows a long career working in one position in a non-supervisory role." Decision and Order at 11.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Granting Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

_____
GREG J. BUZZARD
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge