BRB Nos. 06-0278

JEFFREY T. ROOTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COLUMBIA GRAIN, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE COMPANY	)	DATE ISSUED: 10/23/2006
	)	
Employer/Carrier-Respondents	)	
	)	
and	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Jennifer A. Weston (Johnson, Nyburg & Anderson), Portland, Oregon, for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand of Administrative Law Judge Jennifer Gee (2003-LHC-0581) 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 if they 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).

This is the second time that this case is before the Board. On August 23, 2001, claimant injured his lower back during the course of his employment for employer. Claimant was diagnosed with a lumbar sprain and it was recommended that he avoid heavy lifting for a week. On August 29, 2001, claimant was released for modified duty; he reported to work the following day, where he declined a job employer offered as a secondary master console operator because he believed the job was not physically suitable. Claimant returned to his physician, who noted that claimant was unable to work due to his injury; thereafter, on September 19, 2001, claimant's physician opined that claimant may be able to perform very light work for up to four hours a day. Claimant returned to work on February 27, 2002. Claimant sought benefits under the Act for temporary total disability from the date of injury to February 26, 2002, and for permanent partial disability after his return to work, based on a loss of wage-earning capacity. Employer sought relief from continuing compensation liability under Section 8(f) of the Act, 33 U.S.C. §908(f).

In her initial decision, the administrative law judge found that claimant was unable to work from August 24 to August 28, 2001, and that the position employer offered on August 29, 2001, was not suitable. The administrative law judge next determined that claimant was unable to work at all from September 5 to September 18, 2001, that employer did not offer any employment from September 19 to October 3, 2001, and that although a physician approved positions at employer's facility as of October 4, 2001, these approved positions were never offered to claimant. Thus, the administrative law judge awarded claimant compensation for temporary total disability from August 24, 2001, to February 25, 2002. Thereafter, the administrative law judge awarded claimant continuing compensation for permanent partial disability based on a weekly loss of wage-earning capacity of $282.81. The administrative law judge calculated claimant's average weekly wage as $1,438.44 under Section 10(a), 33 U.S.C. §910(a), and claimant's inflation-adjusted wage-earning capacity as $1,155.63. Employer's claim for Section 8(f) relief was denied. In her decision on reconsideration, the administrative law judge rejected employer's contention that she committed error in calculating claimant's average weekly wage. The administrative law judge also rejected employer's contention that claimant is not entitled to compensation for temporary total and permanent partial disability.

Claimant's counsel filed an attorney's fee petition with the administrative law judge, requesting a fee of $22,675 and $1,406.05 in costs. In her Order Awarding Attorney Fees, the administrative law judge reduced the requested hourly rate to $225, and awarded claimant's counsel a fee of $21,137.50 and costs of $1,406.05.

Claimant's counsel also filed an attorney's fee petition for work performed before the district director, requesting a fee of $3,912.50 and costs of $40. In her Compensation Order Approval of Attorney Fee, the district director reduced claimant's counsel's requested hourly rate to $225, reduced one-half hour requested for responding to employer's objections, and awarded claimant's counsel a fee totaling $3,781.25.

On appeal, the Board affirmed the administrative law judge's award to claimant of compensation for temporary total disability from August 24 to October 3, 2001, her finding that employer failed to establish suitable alternate employment from October 4, 2001, to February 25, 2002, her application of Section 10(a) in calculating claimant's average weekly wage at the time of his injury, and her determination that claimant's actual post-injury earnings are $1,342.20 per week. The Board vacated, however, the administrative law judge's calculation of claimant's post-injury wage-earning capacity, and remanded the case for the administrative law judge to readjust claimant's post-injury wage-earning capacity for inflation and to determine the extent of claimant's loss of wage-earning capacity accordingly. Next, the Board affirmed the administrative law judge's denial of Section 8(f) relief, and it instructed the administrative law judge and the district director to reconsider the amount of their attorney fee awards if claimant obtains a lower award on remand. *See Roots v. Columbia Grain*, BRB Nos. 04-0679, 04-0761/A (May 25, 2005)(unpub.).

Following the submission of briefs by both parties, the administrative law judge issued her Decision and Order on Remand wherein she determined that $1,308.65 represents claimant's residual post-injury wage-earning capacity after adjusting claimant's post-injury earnings for inflation. Comparing this figure to claimant's average weekly wage at the time of his injury, $1,438.44, the administrative law judge concluded that claimant sustained a loss in wage-earning capacity of $129.79, and she thereafter awarded claimant ongoing permanent partial disability benefits, commencing as of February 26, 2002, based upon that figure.

On appeal, claimant challenges the administrative law judge's method of adjusting claimant's post-injury earnings backward to the date of his injury. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

An award of permanent partial disability compensation in a case not covered by the schedule is based upon the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). Sections 8(c)(21) and 8(h) require that claimant's post-injury wage-earning capacity be adjusted to represent the wages that the post-injury job paid at the time of claimant's injury. *See Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002); *Walker v.*

Washington Metropolitan Area Transit Auth., 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir. 1986); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Thus, the Act contemplates that the current dollar value of a claimant's post-injury "wage-earning capacity" be adjusted downward (*i.e.*, backward in time) to account for post-injury inflation and general wage increases. *See Sestich*, 289 F.3d at 1161, 36 BRBS at 18(CRT). This adjustment, in turn, allows claimant's post-injury wage-earning capacity to be meaningfully compared to his pre-injury average weekly wage.[1] *Id.*

In the instant case, the administrative law judge in her decision on remand determined that, in order to adjust claimant's post-injury earnings downward to the time of his work-injury, she would initially calculate the difference between claimant's hourly rate at the time of his work-injury and the hourly rate paid to claimant upon his return to work. Thus, in calculating the factor to be used to adjust claimant's post-injury wage-earning capacity in this case, the administrative law judge utilized claimant's undisputed actual hourly rate of pay at the time of his injury on August 23, 2001, $27.25, and the average hourly rate paid to claimant after he returned to work on February 27, 2002, $27.96.[2] As the increase in claimant's wages between these two dates was determined to be 2.5 percent [($27.96 - $27.25) / $27.96], the administrative law judge adjusted claimant's post-injury weekly earnings downward to the date of his work-injury by multiplying claimant's post-injury average weekly earnings of $1,342.20 by 97.5 percent to arrive at a sum of $1,308.65. Subtracting this figure from claimant's average weekly wage at the time of his injury, the administrative law judge concluded that claimant sustained a loss of wage-earning capacity of $129.79 per week, and she thereafter awarded claimant ongoing permanent partial disability benefits pursuant to this figure.

We affirm the administrative law judge's calculation of the factor to be used in the case at bar to adjust claimant's post-injury wage-earning capacity downward to the date of his work-injury. It is well-established that, in order to account for the effects of inflation and general wage increases, claimant's post-injury wage levels must be adjusted to represent the levels paid at the time of injury; this resulting figure is then compared to claimant's average weekly wage at the time of his injury in order to determine whether

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[1] In its initial decision, the Board affirmed the administrative law judge's findings that claimant's average weekly wage at the time of his work injury was $1,438.44, and that his post-injury earnings are $1,342.20 per week. *See Roots*, slip op. at 8-11.

[2] We decline to address employer's allegation that the appropriate method of calculating the applicable discount factor requires use of the actual hourly rate paid to claimant at the time claimant returned to work, since this contention should have been raised in a cross-appeal. *See Garcia v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 314 (1988).

claimant has sustained a loss in wage-earning capacity as a result of his work-injury. *See Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT); *Johnston*, 280 F.3d 1272, 36 BRBS 7(CRT); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998). However, as acknowledged by claimant in his brief, there is no caselaw mandating, as claimant urges the Board to do, the use of claimant's average hourly rate in the year preceding his injury in the calculation of the factor to be used in adjusting claimant's post-injury wage-earning capacity. *See* Emp.'s br. at 7. In this regard, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has stated that

> "the touchstone of our inquiry for determining lost earning capacity under §§8(c)(21) and 8(h) is to discern the *time-of-injury equivalent* for the claimant's actual post-injury earnings. . . .this attempt to isolate the true extent of lost earning capacity can be achieved by determining the wage rate *at the time of injury*."

Johnston, 280 F.3d at 1277, 36 BRBS at 11(CRT)(emphasis added). Similarly, the Ninth Circuit in *Sestich* stated that the purpose of the downward adjustment in claimant's post-injury wage-earning capacity to the time of his work-injury is to account for post-injury inflation and general wage increases since the date of his injury. *See Sestich*, 289 F.3d at 1161, 36 BRBS at 18(CRT). Moreover, the fact that Section 10(a) of the Act, 33 U.S.C. §910(a), permits claimant's average weekly wage to be calculated on a theoretical basis does not establish that the wage rate paid to claimant at the time of his injury must similarly be based upon an average of claimant's wage rates in the year preceding his injury when calculating the factor to be used in adjusting claimant's post-injury wage-earning capacity downward to the date of that injury. Accordingly, as the actual wage rate paid to claimant at the time of his injury is not in dispute, we affirm the administrative law judge's use of that rate in calculating the factor to be used in adjusting claimant's post-injury earnings downward to the time of claimant's injury, as that calculation results in a meaningful comparison between claimant's post-injury wage-earning capacity and his pre-injury average weekly wage, and thus is reasonable and in accordance with law. *See Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT); *Johnston*, 280 F.3d 1272, 36 BRBS 7(CRT).

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed while this case was initially before the Board. *See Roots*, BRB Nos. 04-0679, 04-0761/A. 20 C.F.R. §802.203. Specifically, counsel seeks a fee of $5,687.50, representing 20.5 hours of legal services performed by counsel at a rate of $275 per hour and one-half hour of legal services performed by a legal assistant at a rate of $100 per hour. As claimant has successfully defended his award of benefits on appeal, he is entitled to an attorney's fee payable by employer that is reasonably commensurate with the work performed before the Board. *See Love v. Owens-Corning Fiberglas Co.*,

27 BRBS 148 (198); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1996); 33 U.S.C. §928; 20 C.F.R. §802.203.

Employer challenges the hourly rate sought by counsel; additionally, employer avers that counsel's fee request should be examined in light of the administrative law judge's decision on remand. Despite claimant's receipt of a lower amount of weekly benefits on remand, claimant before the Board successfully defended his entitlement to temporary total disability benefits from August 24 to October 3, 2001, as well as the administrative law judge's average weekly wage calculation. Moreover, claimant prevailed on the issue of whether employer established the availability of suitable alternate employment from October 4, 2001, to February 25, 2002. Upon review of claimant's fee petition, we conclude that the 20.5 hours spent by counsel, and the one-half hour spent by a legal assistant, in defending claimant's entitlement against employer's appeal are reasonable for counsel's success in this case. With regard to the hourly rates sought, the hourly rate requested by claimant's counsel is excessive and not commensurate with the rate the Board has previously awarded in the geographic region in similar cases. We therefore reduce the hourly rate to $250 for claimant's counsel. Accordingly, claimant's counsel is awarded a fee in the amount of $5,175, representing 20.5 hours of services performed by counsel at the hourly rate of $250 and one-half hour of services performed by a legal assistant at the hourly rate of $100, to be paid directly to counsel by employer, for services performed while this case was pending before the Board in BRB Nos. 04-0679 and 04-0761/A. *See Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996); *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996); *Canty*, 26 BRBS 147; 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed. Claimant's counsel is awarded a fee of $5,175 for work performed before the Board in BRB Nos. 04-0679 and 04-0761/A, payable directly to counsel by employer.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge