

BRB Nos. 97-1232  
and 97-1232A

EDWARD E. WEST	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
Cross-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	)
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order on Reconsideration of Pamela Lakes Wood, Administrative Law Judges, United States Department of Labor.

Robert A. Rapaport (Knight, Clarke, Dolph & Rapaport, P.L.C.), Norfolk, Virginia, for claimant.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the May 6, 1997, Decision and Order on Reconsideration (86-LHC-1016) of Administrative Law Judge Pamela Lakes Wood 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 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).

This case, which has been before the Board previously, has a lengthy procedural history. On or about January 21, 1983, while in the course of his employment as a welding machine repairman working the second shift for employer, claimant sustained an injury to his back. Claimant returned to work in a light-duty capacity on July 12, 1983. On May 13, 1985, as a result of his restrictions resulting from his work injury, claimant was transferred to a position as a drawing clerk on the first shift. The parties stipulated that the drawing clerk job paid \$7.16 per hour at the time of claimant’s injury. October 18, 1986 Tr. at 17. Employer voluntarily paid claimant temporary total, temporary partial, and permanent partial disability compensation for various periods of time from the date of claimant’s injury through the date of the hearing. 33 U.S.C. §908(b), (c), (e).

In his original Decision and Order, Judge Lawrence awarded claimant temporary total disability compensation from January 21, 1983 through May 31, 1984, for all periods of time that claimant was off work, and permanent partial disability thereafter, accepting the parties’ stipulation that claimant’s average weekly wage was \$435.72, and finding that he had a post-injury wage-earning capacity of \$286.40 per week adjusted to 1983 wage levels. In addition, the administrative law judge found that employer was entitled to Section 8(f) relief. 33 U.S.C. §908(f). *West v. Newport News Shipbuilding & Dry Dock Co.*, No. 86-LHC-1016 (June 24, 1987).

Employer appealed, contending that the administrative law judge erred in not relying on claimant’s actual earnings to establish his post-injury wage-earning capacity. In a Decision and Order dated October 30, 1989, the Board vacated the administrative law judge’s post-injury wage-earning capacity finding, and remanded for him to explicitly consider whether claimant’s actual post-injury wages, which included a shift differential, overtime, and merit pay increases reasonably represented his post-injury wage-earning capacity. *West v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 87-1819 (Oct. 30, 1989)(unpublished).

In a Decision and Order On Remand dated January 18, 1993, Judge Lawrence found that claimant’s actual post-injury wages reasonably represented his wage-earning capacity and determined that as he was actually earning more post-injury when the \$.47 shift differential, 11 hours of overtime, and merit increases were added to his basic pay rate, he was not entitled to any disability compensation.

*West v. Newport News Shipbuilding & Dry Dock Co.*, No. 86-LHC-1016 (January 18, 1993). Thereafter, however, in response to claimant's motion for reconsideration, Judge Lawrence issued a subsequent Decision and Order on February 3, 1994, in which he found that claimant's actual earnings were not representative of his wage-earning capacity because while claimant's stipulated average weekly wage was based on his working only approximately 3.8 hours of overtime per week, he currently had to work 11 hours of overtime to approximate his prior earnings. Accordingly, Judge Lawrence determined that only the 3.8 hours of overtime previously necessary to reach his pre-injury average weekly wage were properly included in claimant's post-injury wage-earning capacity. Judge Lawrence also determined that the \$.47 shift differential which claimant received for working the second shift should not be included because employer had removed him from the second shift and claimant thus no longer had the capacity to earn these wages. Finally, he determined that while the \$ .21 an hour merit increase claimant received in 1986 was properly included in claimant's post-injury wage-earning capacity, the subsequent merit increase of \$.40 an hour claimant received in 1990 was not as it had not been earned as of the time of the hearing. *West v. Newport News Shipbuilding & Dry Dock Co.*, No. 86-LHC-1016 (Feb. 3, 1994).

Employer then sought reconsideration, arguing that Judge Lawrence erred in refusing to include the \$.47 shift differential and the 1990 merit increase in claimant's post-injury wage-earning capacity, and in considering claimant's loss of overtime as a basis for awarding compensation. In a Decision and Order dated May 6, 1997,<sup>1</sup> Judge Wood agreed with Judge Lawrence that claimant's actual post-injury wages did not represent his wage-earning capacity, but found that his inclusion of 3.8 hours of overtime was speculative because employer conceded in its motion for reconsideration and through the testimony of its personnel supervisor, Mr. Larson, that overtime work is not regularly available. She further found that the \$.47 shift differential should be included, as it was included in setting the average weekly wage, claimant had earned it for at least part of the time post-injury, the shift differential is intended to compensate employees for working a less desirable shift which claimant no longer did as of March 1992, and regardless of whether claimant's transfer back to the first shift in March 1992 was voluntary, there was no evidence that it occurred as a result of his injury. Finally, she concluded that both claimant's 1986 and 1990 merit increases should be included in claimant's wage-earning capacity, noting that although the second increase occurred post-hearing Judge Lawrence had allowed the parties to submit post-hearing evidence, and that it

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<sup>1</sup>Judge Wood received this case due to Judge's Lawrence's retirement.

was in the interest of judicial economy to include the second increase rather than requiring employer to file a motion for modification.

Employer appeals, arguing that inasmuch as claimant has regularly worked overtime every year since he became a drawing clerk in May 1985, Judge Wood erred in excluding overtime earnings entirely in calculating claimant's post-injury wage-earning capacity. Employer avers that the case should be remanded for a determination of the amount of overtime to be included in claimant's residual wage-earning capacity. Claimant cross-appeals, arguing that Judge Wood erred in including the \$.47 shift differential in his post-injury wage-earning and in including the \$.21 and \$.40 merit increases he received in his post-injury wage-earning capacity, as the latter amounts were due to his extraordinary efforts to succeed in his new job and regain his pre-injury earning level. In the alternative, claimant argues that if the Board determines that claimant's merit pay increases are properly included in his post-injury wage-earning capacity, Judge Wood erred in including the last increase which claimant did not receive until December 17, 1990, in his post-injury wage-earning capacity prior to that date. Employer responds, urging affirmance. Claimant replies, reiterating the arguments raised in his Petition for Review.

An award for permanent partial disability for an injury which is not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340, 344-345 (1992). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Avondale Shipyards, Inc. v. Guildry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990). The party contending that the employee's actual earnings are not representative of his wage-earning capacity bears the burden of establishing an alternative reasonable wage-earning capacity. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 n.3 (1987). Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's post-injury wage-earning capacity. *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). The administrative law judge must consider all relevant factors and evidence in making findings regarding claimant's wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). Loss of overtime earnings may provide a basis for determining that a claimant has demonstrated a loss in wage-earning capacity, where, as here, overtime was a normal and regular part of claimant's pre-injury employment and

accordingly was included in determining claimant's average weekly wage. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1990); *Butler v. Washington Metropolitan Area Transit Authority*, 14 BRBS 321 (1981).

We agree with employer that Judge Wood's decision to completely exclude claimant's post-injury overtime earnings from her calculation of claimant's post-injury wage-earning capacity cannot be affirmed. Initially, we note that in concluding that the amount of overtime available was too speculative to be included in assessing claimant's post-injury wage-earning capacity, Judge Wood misinterpreted the testimony of Mr. Larson, employer's personnel supervisor, that planned overtime was not guaranteed and that the amount of overtime varies, 1986 Tr. at 109, to mean that overtime was not regularly available. Although the administrative law judge may exclude overtime wages in determining the employee's post-injury wage-earning capacity where the employee's ability to obtain these wages is unduly speculative, see *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6, 9 (1984), the record in the present case contains uncontroverted evidence which reflects that overtime was available to claimant in the drawing clerk job. Employer's payroll records reflect that between May 1985 and June 28, 1993, claimant worked a total of 2146.7 hours of overtime, or an average of 5.16 hours of overtime each week. Remand EX-2; CX-D.<sup>2</sup> Given this evidence, the administrative law judge's exclusion of claimant's overtime wages from his post-injury earnings because they were not "guaranteed" and were merely speculative cannot be accepted.

In addition, Judge Wood stated that, regardless of the amount of overtime available, if claimant must work additional overtime in his post-injury job in order to maintain his pre-injury earnings in his former employment, the amount of overtime should be discounted. See *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). However, the administrative law judge's factual findings here do not support the conclusion that all of claimant's post-injury overtime was necessary in order for him to earn the same wages. In this case, as claimant was placed in light duty work at a lower base rate of pay, if he maintains earnings comparable to his prior wages only by working more overtime, this fact is properly considered. *Id.* at 658. However, as claimant worked some overtime pre-injury which was included in his average weekly wage, the record does not support the elimination of all overtime

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<sup>2</sup>Employer has attached additional new evidence relating to claimant's overtime earnings to its Petition for Review. The Board, however may not consider this evidence, as its scope of review is limited to consideration of evidence admitted into the record by the administrative law judge. See *Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985).

from his post-injury wage-earning capacity. We therefore vacate the award of permanent partial disability compensation and remand for the administrative law judge to reconsider claimant's loss in wage-earning capacity. On remand, the administrative law judge must reconsider the effect of overtime earnings on claimant's post-injury wage-earning capacity. In addition to employer's evidence, discussed above, the administrative law judge should consider claimant's testimony that there were fewer overtime opportunities available to him in his post-injury drawing clerk job than in his pre-injury work as a welder, 1986 Tr. at 80, and other relevant factors in determining the amount of overtime reasonably representing post-injury wage-earning capacity.

With regard to the shift differential, we agree with claimant that Judge Wood erred in including this amount, which claimant could only earn while working on the second shift, in the calculation of his post-injury wage-earning capacity for the entire period in which permanent partial disability compensation was awarded. At the time of his injury, claimant was working as a tool keeper, primarily on the second shift. Tr. at 83. After undergoing disc surgery on February 17, 1983, claimant returned to work in employer's MRA shop. On May 13, 1985, claimant was permanently transferred to a position on the first shift as a drawing clerk to accommodate his work restrictions due to his January 21, 1983 work injury, and he remained there until June 22, 1985, when as a result of his own initiative, he was able to switch positions with another worker and accordingly returned to work on the second shift. Claimant thereafter remained on the second shift until March 1992, when he was switched back to the first shift, for reasons which are in dispute.

After noting this history, Judge Wood found that as claimant no longer works the less desirable shift, there is no reason he should be compensated for the loss of the \$.47 shift differential and determined accordingly that the shift differential should be included in his post-injury wage-earning capacity. The analysis employed by Judge Woods, however, fails to account both for the fact that the shift differential was a part of claimant's pre-injury earning capacity, and for the fact that claimant lacked the capacity to earn these wages from May 13, 1985 until July 22, 1985, after he was initially transferred to the drawing clerk position on the first shift due to his injury. While the shift differential was clearly properly included in determining claimant's post-injury wage-earning capacity during the period from July 22, 1985 until March 1992, when claimant was actually working the second shift, in March 1992, claimant was again transferred back to the first shift. Although Judge Wood found that it did not matter whether claimant changed shifts voluntarily in March 1992, because there is no evidence that claimant's switch to the first shift was related to his injury, we disagree. If employer transferred claimant to the first shift at that time, and as a result of employer's action, claimant is precluded from earning

the shift differential he had earned pre-injury, claimant has sustained a compensable loss in his wage-earning capacity because of the injury. See generally *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). Accordingly, Judge Wood's finding that the shift differential is properly included in the determination of claimant's post-injury wage-earning capacity is affirmed for the period from July 1985 to March 1992, but is reversed for the period between May 13, 1985 and July 22, 1985, as claimant did not have the capacity to earn the shift differential while working on the first shift.<sup>3</sup> With regard to the period after claimant's return to the first shift in March 1992, we vacate Judge Wood's determination that the shift differential was properly included in claimant's post-injury wage-earning capacity and remand the case for consideration of the reason for claimant's transfer. If, on remand, she determines that the transfer back to the first shift was voluntary, she should reinstate her prior determination that the shift differential was included in claimant's wage-earning capacity for this period, as the loss of the shift differential would be for reasons unrelated to claimant's injury. If, however, the transfer was involuntary, the shift differential should not be included.

Claimant's argument that Judge Wood erred in including the \$.21 per hour merit increase claimant received in 1986 and the \$.40 per hour increase he received in 1990 in determining claimant's wage-earning capacity, however, is without merit. Claimant reiterates on appeal the argument he made below that these wages should not be included in his post-injury wage-earning capacity because they reflect his own extraordinary efforts to succeed in his new job and attempt to regain his pre-injury earning level. Judge Wood considered this argument but rationally determined based on the testimony of claimant's supervisor, David Brown, Tr. 118-119, that the merit increases which claimant received were for performing well in his drawing clerk job and not for taking on additional or harder work. Inasmuch as her finding in this regard is rational and supported by substantial evidence, it is affirmed. See *O'Keefe*, 380 U.S. at 359. Claimant correctly asserts, however, that as he did not receive the second merit pay increase until December 17, 1990, Judge Wood erred in including this increase in his post-injury wage-earning capacity prior to that date. Accordingly, on remand the \$.40 merit increase claimant received in December 11, 1990 is not includable in claimant's post-injury wage-earning capacity prior to that date. In addition, we agree with claimant that in determining his post-injury wage-earning capacity, Judge Wood erred in failing to adjust the level of the merit increases to reflect those paid at the time of claimant's injury to account for inflationary effects. See *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691

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<sup>3</sup> The inclusion of the shift differential for the period between June 1, 1984 and May 13, 1985, prior to his transfer to the drawing clerk position, is also affirmed as it is unchallenged on appeal.

(1980). Accordingly, in recalculating the award of permanent partial disability on remand, the administrative law judge must properly account for inflation; the percentage increase in the National Average Weekly Wage, see 33 U.S.C. §906(b)(1)-(3), may be used to adjust claimant's merit increase downward if the actual amount paid at the time of injury is unknown. See *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124, 127 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).



Accordingly, the post-injury wage-earning capacity determination of Judge Wood is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge