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**Issue Date: 28 May 2003**

**CASE NO. 2000-LHC-2878**

**OWCP NO. 08-117647**

**IN THE MATTER OF:**

**DAVID A. DOYLE**

**Claimant**

**v.**

**ROWAN COMPANIES, INC.**

**Employer**

**and**

**RELIANCE NATIONAL INDEMNITY CO.**

**Carrier**

# DECISION AND ORDER ON REMAND

On November 6, 2002, the Benefits Review Board (herein the Board) issued an unpublished Decision and Order vacating the undersigned's award of temporary partial disability compensation subsequent to January 4, 2001, and remanded the matter for reconsideration of Claimant's wage earning capacity consistent with its opinion. In all other respects, the undersigned's Decision and Order and Order Denying Employer/Carrier's Motion for Reconsideration were affirmed. Specifically, for purposes of this Decision and Order on Remand, the Board held that the average weekly wage determination of $696.06 was reasonable and best reflected Claimant's earning capacity with Employer at the time of his injury. (BRB D & O, pp. 6-7).

Claimant's earnings while working for Shamrock Equipment Rental Company (herein Shamrock) from January 4, 2001 and thereafter are in dispute. The Board vacated the undersigned's decision because: (1) Claimant's testimony about the overtime he customarily worked was not considered, nor was (2) his actual post-injury wages paid by Shamrock and (3) the undersigned did

not render a finding as to whether Claimant's post-injury earnings reasonably represent his residual wage earning capacity.

The record in this matter was received from the Board on February 12, 2003. On February 21, 2003, the undersigned issued an Order on Remand instructing the parties to confer as to whether another hearing was necessary or whether the issue on remand could be adjudicated on briefs based on the existing record. The parties advised there was no need for a supplemental formal hearing and that this matter could be decided on briefs based on the existing record as supplemented. On February 18, 2003, an Order Denying Motion to Quash issued concluding that Claimant's actual wage earnings from Shamrock after January 4, 2001 to present are the best evidence of Claimant's residual wage earning capacity.

On March 13, 2003, Claimant submitted a one-page medical report from Dr. Charles B. Clark, III dated May 10, 2002, which he contended was relevant to his wage earning capacity under Section 8(h) of the Act. Otherwise, the parties agreed that issues related to medical entitlement should not be reopened.

On March 17, 2003, a schedule for initial briefs and reply briefs was established. Dr. Clark's report of May 10, 2002 was found to be germane to the issue of Claimant's post-injury wage earning capacity.

Employer/Carrier's brief was filed with the wage records of Claimant from Shamrock attached as Exhibit A and LS-200s filed by Claimant as Exhibit B. Employer/Carrier's Exhibits A and B are hereby received into the record as EX-A and EX-B in supplementation of the formal record.

Claimant's brief was filed with attached Supplemental Exhibit 13 (the Curriculum Vitae of Charles B. Clark, III, M.D.), Exhibit 14 (Records of Beaumont Neurological Spine Associates-Dr. Charles B. Clark, III) and Exhibit 15 (David Doyle's Forms LS-200). Claimant's Exhibits 13, 14 and 15 are received into the record as CX-13, CX-14 and CX-15 in supplementation of the formal record.

Employer/Carrier argue, the wage records of Shamrock show, and I find that Claimant earned $22,686.90 while working for Shamrock from January 1, 2001 to December 31, 2001. During the same year, from March 2001 through June 2001, I find Claimant also worked at Quality Solids Control earning $9,731.00. His total earnings for 2001 were $32,417.90. (EX-A). I further find Claimant's LS-200 for 2002 reveals earnings of $32,399.90 at Shamrock. (EX-B). I find Claimant has earned $10,338.40 during the period January 1, 2003 through April 17, 2003. (CX-15).

Employer/Carrier contend Claimant's average weekly earnings in 2001 are $623.42 ($32,417.90 ÷ 52 = $623.42); gross earnings for 2002 yield an average weekly earnings of $623.75 ($32,399.90 ÷ 52 = $623.07)[1]; and his earnings for 2003 projected on the basis of his $2,800.00 monthly salary are $33,600.00 yielding an average weekly earnings of $646.15 ($33,600.00 ÷ 52 = $646.15) (EX-A). Employer/Carrier have not adjusted Claimant's post-injury weekly earnings based on the percentage change in the national average weekly wage to reflect his wages at the time of injury.

Claimant's initial argument is that Claimant's post-injury wage-earning capacity should be zero since he should not be working according to the testimony of Claimant and his wife and the opinion of his treating physician, Dr. Charles B. Clark, III.

Alternatively, Claimant contends his earnings for the years 2001, 2002 and partial earnings for 2003 should be adjusted pursuant to Richardson v. General Dynamics Corporation, 23 BRBS 327, 330-331 (1990). Based on the adjustments, Claimant's total earnings would be $67,442.48 which he argues should be divided by 119.2857 weeks from January 1, 2001 to April 17, 2003, yielding a post-injury wage earning capacity of $565.39.

In response, Employer/Carrier argue that Dr. Clark did not treat Claimant prior to the formal hearing and his May 10, 2002 report is in contrast to the opinions of Dr. Frederic B. Wilson in March 2000 that Claimant had no cervical changes and expressed no low back pain complaints. Further, it is asserted Claimant has continued to work on a regular basis at a full salary and there is no evidence to support a conclusion that Claimant is physically unable to perform the work at Shamrock.

## I. Claimant's Post-Injury Wage Earning Capacity

As noted by the Board, Claimant's wage-earning capacity shall be his **actual** post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. (BRB D & O, page 7). See Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992). The objective of the inquiry concerning Claimant's wage-earning capacity is to determine the post-injury wages to be paid under normal employment conditions to Claimant as injured. (BRB D & O, p. 7). Abbott v. Louisiana

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[1] The mathematical calculation of Employer/Carrier is incorrect. The average weekly earnings for 2002 are $623.075 not $623.75.

Insurance Guaranty Association, 27 BRBS 192 (1993), aff'd, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994).
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. Metropolitan Stevedore Co. v. Rambo [Rambo I], 521 U.S. 121, 31 BRBS 54 (CRT)(1997).

Claimant's initial argument that his wage-earning capacity is zero based on the prior record and the newly submitted opinion of Dr. Clark is without merit. Dr. Clark's opinion is belied by Claimant's physical capacity to perform work and his work history since his job injury. Moreover, there is no evidentiary or record support for a finding, and none has been made, that Claimant has engaged in extraordinary effort in performing his post-injury work for Shamrock commencing in January 2001 and continuing to present. Dr. Clark's opinion only buttresses the prior finding that Claimant may be in need of further medical treatment and has not reached maximum medical improvement. Accordingly, Claimant's primary argument is rejected.

In the original Decision and Order it was determined that Claimant had not reached maximum medical improvement in view of the recommendations and opinions of Drs. Wilson and Haig that Claimant was in need of further medical treatment. Nonetheless, Claimant was found to be physically able to perform work and had secured various forms of employment with multiple employers, including Shamrock. Thus, Claimant was considered to be temporarily partially disabled for various periods of time including from January 4, 2001 and continuing. As noted above, the parties agree that medical entitlement issues are not re-opened and are not an issue on remand. Nothing in the existing record as supplemented warrants a change in such finding and I conclude it is inappropriate, under these circumstances, to alter the determination that Claimant has not reached maximum medical improvement.

Claimant testified that he was on-call 24 hours a day for Shamrock and was paid $7.00 an hour, 40 hours per week, but was also paid an overtime rate of $10.50 for overtime worked. He estimated he worked 65-75 hours per week. (ALJ D & O, p. 8). Notwithstanding the foregoing, Claimant's weekly wage from Shamrock was calculated on the basis of $7.00 per hour for 40 hours a week or $280.00 per week. (ALJ D & O, p. 27, n. 7).

**A. Claimant's Adjusted Wage-Earning Capacity**

The record reveals that Claimant earned $22,686.90 from January 4, 2001 to December 31, 2001 while working for Shamrock and an additional $9,731.00 from Quality Solids Control from March 2001 through June 2001, yielding a total of $32,417.90. Since Claimant worked substantially all of the year of 2001, I find and conclude that his total earnings should be apportioned by dividing his total earnings by 52 weeks resulting in a weekly wage-earnings of $623.42 for 2001 ($32,417.90 ÷ 52 = $623.42). Pursuant to Section 8(h) of the Act, I further find and conclude that Claimant's 2001 earnings fairly and reasonably represent his wage-earning capacity for the year 2001.

However, the 2001 wages from alternate employment must be back-dated to the date of the injury (December 28, 1999) for comparison with Claimant's average weekly wage at the time of his injury to determine his loss of wage-earning capacity, if any. Richardson, supra; Rambo I, supra. (The Supreme Court noted the wage-earning capacity analysis should properly account for inflation).

To determine a weekly wage-earning capacity, this analysis approximates the period from October 1 through December 31 as 13 weeks, or .25 of one year (13 ÷ 52 = .25), and the period from January 1 through September 30 as 39 weeks, or .75 of one year (39 ÷ 52 = .75), for a total of 52 weeks per year.

The discount rate for 2001 is computed by dividing the National Average Weekly Wage (NAWW) effective October 1, 2000 through September 30, 2001 of $466.91 by the NAWW at the time of Claimant's injury of December 28, 1999 ($450.64) which yields a discount rate of 1.0361 ($466.91 ÷ $450.64 = 1.0361). Claimant's weekly wage-earning capacity from January 4, 2001 to September 30, 2001 as adjusted is $601.70 per week ($623.42 ÷ 1.0361 = $601.70).[2]

The NAWW from October 1, 2001 through December 31, 2001 was $483.04 yielding a discount rate of 1.0719 ($483.04 ÷ $450.64 = 1.0719). Claimant's weekly wage-earning capacity from October 1, 2001 through December 31, 2001 as adjusted is $581.60 per week ($623.42 ÷ 1.0719 = $581.60).

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[2] U.S. Dep't of Labor, National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 10(f)) http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm> (accessed May 28, 2003).

Claimant's wages for the year 2002 amounted to $32,399.90 which I find and conclude fairly and reasonably represent his wage-earning capacity for 2002. His weekly earnings were $623.08 ($32,399.90 ÷ 52 = $623.08). The NAWW from January 1, 2002 through September 30, 2002 was $483.04 which yields a discount rate of 1.0719 ($483.04 ÷ $450.64 = 1.0719). Thus, Claimant's discounted weekly wages for this period of time are $581.29 ($623.08 ÷ 1.0719 = $581.29). The NAWW from October 1, 2002 through December 31, 2002 was $498.27 which yields a discount rate of 1.1057 ($498.27 ÷ $450.64 = 1.1057). Claimant adjusted weekly wage for this period is $563.52 ($623.08 ÷ 1.1057 = $563.52).

Lastly, Claimant's wages from January 1, 2003 through April 17, 2003 amounted to $10,388.40 which results in a weekly wage-earning capacity of $679.62 ($10,388.40 ÷ 15.2857 weeks = $679.62).[3] I find and conclude on the basis of the instant record that Claimant's 2003 earnings fairly and reasonably represent his wage-earning capacity for this time period. The NAWW from January 1, 2003 through September 30, 2003 is $498.27 yielding a discount rate for this period of 1.1057 ($498.27 ÷ $450.64 = 1.1057). Thus Claimant's adjusted weekly wage for this period and continuing is $614.65 ($679.62 ÷ 1.1057 = $614.65).

**B. Claimant's Loss of Weekly Wage-Earning Capacity**

Based on the foregoing, I find and conclude that Claimant had a loss of adjusted weekly wage-earning capacity from January 4, 2001 through September 30, 2001 of **$94.36** per week ($696.06 [AWW] - $601.70 [adjusted weekly wage] = $94.36). From October 1, 2001 to December 31, 2001, his loss of wage-earning capacity was **$114.46** ($696.06 - $581.60 = $114.46). His loss of wage-earning capacity from January 1, 2002 through September 30, 2002 was **$114.77** ($696.06 - $581.29 = $114.77). Claimant's loss of wage-earning capacity from October 1, 2002 to December 31, 2002 was **$132.54** ($696.06 - $563.52 = $132.54). Lastly, from January 1, 2003 through April 17, 2003 and continuing, Claimant has experienced a loss of weekly wage-earning capacity of **$81.41** ($696.06 - $614.65 = $81.41).

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[3] Claimant contends, and I find, that there are 107 days from January 1, 2003 to April 17, 2003 which equates to 15.2857 weeks (107 days ÷ 7 days per week = 15.2857).

## II. Conclusions

Under Sections 8(c)(21) and 8(h) of the Act, Employer/Carrier are liable for two-thirds of the difference between Claimant's average weekly wage and his loss in wage-earning capacity, if any. Thus, Employer/Carrier are liable for the following payments of temporary partial disability compensation:

1. From January 4, 2001 through September 30, 2001, Employer/Carrier shall pay Claimant **$62.90** per week ($94.36 x .6666 = $62.90).

2. From October 1, 2001 through December 31, 2001, Employer/Carrier shall pay Claimant **$76.30** per week ($114.46 x .6666 = $76.30).

3. From January 1, 2002 through September 30, 2002, Employer/Carrier shall pay Claimant **$76.50** per week ($114.77 x .6666 = $76.50).

4. From October 1, 2002 through December 31, 2002, Employer/Carrier shall pay Claimant **$88.35** per week ($132.54 x .6666 = $88.35).

5. From January 1, 2003 through April 17, 2003, and continuing, Employer/Carrier shall pay Claimant **$54.27** per week ($81.41 x .6666 = $54.27).

6. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

**ORDERED** this 28th day of May, 2003 at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge