BRB No. 09-0333

C.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICE OF AMERICA / SSA MARINE	)	DATE ISSUED: 10/27/2009
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

C.S., Tampa, Florida, *pro se*.

Donovan A. Roper (Roper & Roper, P.A.), Apopka, Florida, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without representation by counsel, appeals the Decision and Order (2007-LHC-0308) of Administrative Law Judge Donald W. Mosser 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). In an appeal by a *pro se* claimant, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a member of the International Longshoreman's Association (ILA), worked as a longshoreman for employer. On November 2, 2005, while unloading steel coils from a ship, claimant was injured when he was hit in the face by a piece of wood that had been supporting the steel coils. Claimant was taken to the hospital and, pursuant to policy, had to submit a urine sample for a drug test. Doctors determined claimant had numerous fractures,[1] including a broken nose, and had to undergo surgery to insert plates in his cheeks. Emp. Exs. 7, 10. In December 2005, claimant's doctors released him to return to full-duty work. Emp. Exs. 7-8. Upon attempting to return to work on December 15, 2005, claimant learned he had been suspended from work because of his second violation of the union's drug policy. Tr. at 22. In April 2006, claimant underwent surgery to remove the plates from his face and his doctor released him to return to full-duty work in May 2006. Following his suspension, claimant returned to work in October 2006 and continued to work in his regular capacity as of the time of the hearing. Employer voluntarily paid claimant temporary total disability benefits between November 3 and December 19, 2005; employer also paid all medical expenses. Emp. Exs. 3-4. Claimant filed a claim seeking additional compensation for the time he was unable to work between mid-December 2005 and October 1, 2006.

The administrative law judge found that the medical evidence establishes that claimant was able to return to his usual work in mid-December 2005 and that when claimant attempted to return to work he found he had been suspended due to his violation of the drug policy. The administrative law judge determined that claimant's inability to earn wages beginning in mid-December 2005 was due solely to his suspension and had nothing to do with his injury as claimant had been released to full-duty work. Decision and Order at 4. Additionally, the administrative law judge found that, although claimant had to undergo a second surgery in April 2006, his loss of wages for this period also was due to the suspension. *Id.* at 4-5. As the administrative law judge found that employer paid all medical expenses related to the November 2, 2005, injury, as well as all temporary total disability benefits due, he concluded that claimant is not entitled to additional benefits, and he denied the claim. *Id.* Claimant, without legal counsel, appeals this decision. Employer responds, urging affirmance.

[1]Claimant had a displaced zygomatic fracture, a left orbital fracture, and a lateral maxillary sinus fracture. Emp. Exs. 2, 7.

Section 2(10) of the Act provides in pertinent part:

> "Disability" means *incapacity because of injury to earn the 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). A claimant is not entitled to benefits when the loss of wages is due to his own misconduct. *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 133 (1980), *vacated and remanded mem.*, 642 F.2d 445 (3d Cir. 1981), *decision following remand*, 19 BRBS 171 (1986); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

In this case, it is undisputed that claimant suffered a work-related injury on November 2, 2005. The record is also undisputed that doctors released claimant to return to work by mid-December 2005 without any restrictions. Claimant was prohibited from returning to his usual work, and unable to earn wages at the shipyard, because his urinalysis from the specimen collected on the date of the accident indicated that he had a controlled substance in his system. That result was later reconfirmed. Emp. Ex. 13. According to the ILA contract, a second violation of the drug policy warranted a permanent suspension with the ability to apply for reinstatement after six months but an inability to return to work for one year and not unless a rehabilitation class was completed.[2] Emp. Ex. 15. As the administrative law judge properly found, claimant's inability to earn wages beginning in mid-December 2005, upon his medical release to return to work, was the result of his suspension and was not related to his injury. Thus, employer is not liable for compensation for claimant's loss of wages, and we affirm the administrative law judge's denial of benefits for this period. *See Brooks*, 2 F.3d 64, 27 BRBS 100(CRT).

However, the administrative law judge also found that claimant suffered headaches related to the work injury and sought additional treatment for them in March 2006. He underwent surgery on April 6, 2006, to remove the plates from his face, and he was released to return to his usual work on May 3, 2006. Decision and Order at 3; Emp. Ex. 7. When a claimant is medically unable to work at all on a temporary basis due to his work injury, he is entitled to temporary total disability benefits. *See generally J.R. v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008); *Martinez v. St. John Stevedoring Co., Inc.*,

[2]Although claimant argued that he was not given timely notice of the positive results of the November 2005 test and should have been given a chance to submit a second specimen, such arguments are beyond the scope of this claim.

15 BRBS 436, 439 (1983); *Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227, 229 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). In this case, the surgery and recuperation period were indisputably related to claimant's work injury and caused him to be totally disabled from any work between April 6 and May 3, 2006.[3] Although claimant was not earning wages at the shipyard at the time of his second surgery due to his suspension from work, claimant's total inability to earn any wages from April 6 to May 3, 2006, was related to his November 2005 work injury. Thus, it was improper for the administrative law judge to deny temporary total disability benefits for that period.[4] 33 U.S.C. §902(10); *see J.R.*, 42 BRBS 95; *Martinez*, 15 BRBS at 439; *Lostaunau*, 13 BRBS at 229. We, therefore, modify the administrative law judge's Decision and Order to reflect claimant's entitlement to temporary total disability benefits from April 6 through May 3, 2006.

[3]Employer voluntarily paid these medical expenses. Tr. at 8.

[4]The administrative law judge specifically stated:

> Had the claimant been working for the employer at that time there is no doubt that he would have lost some wages for which the employer would have been statutorily responsible. … However, I find it would be inequitable to conclude that the claimant should further benefit from this loss of work time to the detriment of the employer. Such a conclusion would run contrary to the purposes of the drug policy provisions. . . .

Decision and Order at 4-5. Contrary to the administrative law judge's conclusion, the ILA suspension affected claimant's ability to earn wages only at the shipyard. It did not affect claimant's ability to earn wages elsewhere. Claimant's injury, however, affected his ability to earn wages anywhere during the period between his second surgery and his subsequent release to return to work.

Accordingly, the administrative law judge's Decision and Order is modified to reflect claimant's entitlement to temporary total disability benefits from April 6 through May 3, 2006. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge