BRB Nos. 13-0113
and 13-0113A

RANDOLPH YOUNG	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 10/31/2013
	)	
Self-Insured Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Kenneth Krantz, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand (2009-LHC-00731) of Administrative Law Judge Kenneth Krantz 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has been before the Board on the Section 8(j), 33 U.S.C. §908(j), issue. The facts of claimant's injury are not in dispute. To reiterate, claimant was hired by employer as a chipper in April 1983, and on August 17, 1983, he injured his right knee during the course of his employment. On November 7, 1983, he injured his left knee during the course of his employment. The parties stipulated that claimant could not return to his usual work, and Administrative Law Judge Sarno found that employer failed to establish the availability of suitable alternate employment, but that claimant diligently, yet unsuccessfully, attempted to find alternate work. Therefore, Judge Sarno awarded claimant on-going permanent total disability benefits. Decision and Order (Nov. 26, 1990) at 6. The Board affirmed the award of benefits. *Young v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 91-0609 (Aug. 7, 1992).

Employer filed a motion for modification of the award of permanent total disability benefits. 33 U.S.C. §922. Employer alleged that claimant was no longer permanently totally disabled and that he knowingly and willfully failed to disclose earnings on the LS-200 Report of Earnings forms sent to him in 1996 and 1997. Administrative Law Judge Krantz found claimant entitled to permanent total disability benefits from August 17, 2000, through July 1, 2007, the date employer established the availability of suitable alternate employment. After that date, Judge Krantz found employer liable for benefits for a 10 percent impairment of claimant's right leg, a 15 percent impairment of his left leg, and medical expenses. 33 U.S.C. §§908(c)(2), 907. Additionally, with regard to the earnings reports, Judge Krantz found that any income claimant may have received between 1993 and 1996 from criminal activity was not required to be reported on the LS-200 Report of Earnings forms; thus, he did not suspend claimant's benefits pursuant to Section 8(j), 33 U.S.C. §908(j). Employer appealed Judge Krantz's decision. The Board affirmed the decision on all issues except Section 8(j). On that issue, the Board held that, based on Section 702.285(b) of the implementing regulations, 20 C.F.R. §702.285(b), "earnings" is defined as "all monies received from any employment" and there is no exclusion for earnings from illegal activities. As earnings are not limited to the examples in the regulation's list, the Board agreed that the Director, Office of Workers' Compensation Programs presented a reasonable interpretation of the regulation and that the definition is sufficiently broad to include illegal earnings. As Judge Krantz had made no findings on whether claimant in fact earned any money from illegal activities, the Board remanded the case for additional fact-finding. *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011).

On remand, Judge Krantz addressed the relevant evidence. He found that claimant earned money during the periods in question and failed to disclose those earnings on the

LS-200 Report of Earnings forms. He based this finding on the facts that claimant: 1) was indicted for participation in a criminal drug ring from August 1993 through his arrest on December 17, 1996; 2) pleaded guilty to participating in a conspiracy to distribute cocaine; and 3) agreed to pay restitution to the state of North Carolina for his crime. Although claimant testified before the administrative law judge that he made no money during the pertinent periods, the administrative law judge found this testimony conflicted with the grand jury testimony and the basis for claimant's plea agreement, and was, therefore, not credible. As he concluded that claimant knowingly failed to report earnings, the administrative law judge applied Section 8(j) and suspended claimant's benefits from September 1, 1993 through October 18, 1996, and from October 22 through December 17, 1996. He remanded the case to the district director for calculation of the amount of the forfeiture. Decision and Order on Remand at 3-4.

Claimant appeals the decision on remand. Employer responds with a motion to dismiss the appeal as not being ripe for Board review, and, alternatively, with a cross-appeal to preserve its appellate rights. Employer does not address the Section 8(j) issue. In response to the motion to dismiss, claimant argues that his appeal is ripe and is not a request for an advisory opinion. Moreover, he asserts that if the Board's prior Section 8(j) holding is reconsidered by the Board and/or Judge Krantz's finding that benefits are suspended is reversed, there will be no forfeiture amount for the district director to calculate.

Motion to Dismiss

Employer asserts claimant's appeal should be dismissed as not ripe for decision by the Board. It contends that, in accordance with the administrative law judge's decision, the case has been remanded to the district director for calculation of the amount of benefits claimant forfeited by failing to report earnings. Employer thus contends that the issue claimant raises is not ripe for decision until such time as the district director calculates the forfeiture amount, if any.

We reject employer's contention. In its prior decision, the Board held that earnings from illegal activities are reportable on LS-200 forms, *Young*, 45 BRBS at 42, and, on remand, the administrative law judge found that claimant knowingly failed to report earnings and forfeited his benefits as a result. Claimant appeals this finding. The legality of the forfeiture order is distinct from the amount to be forfeited. Whether the forfeiture is proper is an issue properly before the Board in light of the findings made by the administrative law judge. Accordingly, we deny employer's motion to dismiss for lack of ripeness, and we shall address the appeals. *See generally Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone]*, 102 F.3d 1385, 31 BRBS 1(CRT) (5th Cir. 1996) (where district director's actions stripped an employer of its procedural rights, the issue was ripe for adjudication); *compare with Deakle v. Ingalls Shipbuilding, Inc.*, 28

BRBS 343 (1994), *and Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994) (where no claims were filed, issues raised were not ripe for adjudication).

Employer's Cross-Appeal

As an alternative to its motion to dismiss, employer filed a cross-appeal. It contends the cross-appeal is "solely for the purposes of a 'pass through' preservation of the right to appeal to the [United States Court of Appeals for the] Fourth Circuit" the Board's original decision affirming the award of benefits to claimant.[1] The Board's prior decision constitutes the law of the case, as employer has not alleged that this doctrine is inapplicable here. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002). Therefore, we affirm the finding that employer is liable for periods of permanent total and permanent partial disability benefits, as well as medical benefits, for claimant's work-related knee injuries.

Claimant's Appeal

In his appeal, claimant first contends the Board erred in holding that income from an illegal enterprise is included in the definition of "earnings" under Section 8(j) and, therefore, reportable on the LS-200 forms. He would have the Board reverse its prior decision and reinstate the administrative law judge's original decision on this basis. We reject claimant's contention. The Board thoroughly addressed the definition of "earnings" under Sections 8(j) and 702.285(b) in view of the contentions of the parties and concluded that Section 8(j) contemplates reporting *all* monies from *any* employment; there is no exclusion for earnings from illegal activities. *Young*, 45 BRBS at 42; *see* 33 U.S.C. §908(j); 20 C.F.R. §702.285(b). Claimant seeks to preserve this issue for appeal to the circuit court, but asks the Board to re-visit this issue and correct its "erroneous determination." Claimant offers no legal support for his assertion, and we decline to re-visit this issue. The Board's holding as to the inclusion of illegal income in the definition of "earnings" under Section 8(j) is the law of the case and is affirmed. *Kirkpatrick*, 39 BRBS 69; *Ravalli*, 36 BRBS 91.

Claimant further contends he did not "knowingly" or "willfully" fail to report earnings during the periods requested by the LS-200 forms (January 1, 1992 – October 18, 1996, and October 22, 1996 – June 24, 1997) so as to invoke Section 8(j)(2). 33 U.S.C. §908(j)(2). Specifically, claimant asserts that employer has not borne its burden of establishing that he knowingly omitted any earnings from the reports. That is, he argues there is no tangible evidence demonstrating that he, in fact, had earnings – there

[1]Employer states it seeks to preserve its right to appeal the Board's affirmance of the administrative law judge's findings on the cause, nature, and extent of claimant's disability.

are no checks, bank statements, receipts from purchases made, etc. Claimant contends he was merely a bondsman who put up his own property as collateral. He contends he was convicted for conspiracy and not for selling or distributing drugs and did not handle finances for any co-conspirator; that is, he states he was a "victim" of having knowledge of the illegal activities of others. He also argues that the fact that he paid restitution does not establish that he earned money for his activities. We reject claimant's contention and affirm the administrative law judge's findings that claimant earned money but knowingly failed to report it and, therefore, that the Section 8(j) forfeiture provision is applicable to this case.

The record contains a copy of the April 1997 indictment filed against claimant and another man. Emp. Ex. 7. Therein, the grand jury charged that they "did knowingly, intentionally, and unlawfully combine, conspire, confederate and agree among themselves, . . . with other persons, both known and unknown to the Grand Jury, to knowingly, intentionally and unlawfully possess with intent to distribute, and to distribute cocaine" in violation of the law. Emp. Ex. 7; *see* Decision and Order on Remand at 2. The record also contains a copy of the transcript of the Rule 11 hearing, pursuant to the Federal Rules of Criminal Procedure, wherein claimant entered his plea. Emp. Ex. 6. Claimant pleaded guilty to the charges in the indictment. The prosecutor explained that the charges in the indictment were based on claimant's having set up drug deals, made deliveries, held money, put property of a co-conspirator in his own name, and posted bonds for co-conspirators. Emp. Ex. 6 at 12; *see also* Emp. Ex. 5 (criminal complaint/affidavit). At the Rule 11 hearing, claimant also agreed to pay restitution if so ordered.

At his 2009 deposition for the longshore case, claimant admitted only to having been "convicted of conspiracy." He claimed he was not in the drug ring and was not a financier of it. He stated he was guilty only of knowing that another was involved in criminal activities. Emp. Ex. 18 at 27-28. Further, he stated he did not make any money from that operation, he never sold cocaine, and he inherited the property he used to post bonds. *Id.* at 31, 33-34. Claimant admitted he paid North Carolina restitution for his crime and that he believed it was less than $10,000. *Id.* at 31-32. At the hearing before the administrative law judge, claimant repeatedly stated that his conviction was for "conspiracy" and not for "distribution," and he did not take care of finances, but he did post bonds for others. Claimant stated that not everything in the indictment was true. Tr. at 19-21.

The administrative law judge found that claimant was involved in a drug ring from August 1993 through December 17, 1996. In light of the evidence from the criminal proceedings, and despite having previously found claimant's testimony regarding his injuries to be credible, the administrative law judge found claimant's assertions that he did not make money from this illegal activity to be incredible. Decision and Order on Remand at 3. The administrative law judge reasonably interpreted the agreement to pay

any restitution requested as an agreement to surrender "any gains he made through his crime. . ." *Id.* Accordingly, the administrative law judge concluded that claimant received earnings from criminal activity but acknowledged the uncertainty of the date in August 1993 when that income commenced. Thus, the administrative law judge set the commencement date as September 1, 1993, and found it continued, essentially, until December 17, 1996, when claimant was arrested. *Id.*

The record also contains copies of the LS-200 Report of Earnings forms at issue. On the first form, employer asked claimant to report income from January 1, 1992, through October 18, 1996. Claimant signed the document on October 25, 1996, declaring he had no earnings during this period. On the second form, employer asked claimant to report earnings from October 22, 1996, through June 24, 1997. Claimant signed the document on July 13, 1997, declaring he had no income during this period. Emp. Ex. 4. The administrative law judge found that claimant had unreported earnings during the requested periods, and that claimant tried to conceal those earnings because they were from illegal activities. Thus, the administrative law judge determined that claimant knowingly failed to report his earnings from September 1, 1993, through October, 18, 1996, and from October 22 through December 17, 1996, and that his benefits under the Act are to be suspended for those periods. Decision and Order on Remand at 3.

Section 8(j), which permits an employer to request a disabled claimant to report his post-injury earnings, provides that a claimant who fails to report earnings or who knowingly and willfully omits or understates his earnings, is subject to forfeiture of his benefits. 33 U.S.C. §908(j);[2] *Delaware River Stevedores, Inc. v. DiFidelto*, 440 F.3d 615, 40 BRBS 5(CRT) (3d Cir. 2006); *Briskie v. Weeks Marine, Inc.*, 38 BRBS 61 (2004), *aff'd mem.*, 161 F. App'x 178 (2d Cir. 2006); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994) (decision on recon.); *Freiwillig v. Triple A South*, 23 BRBS 371 (1990); 20 C.F.R. §§702.285, 702.286. The employer bears the burden of establishing that a violation of Section 8(j) has occurred. 20 C.F.R. §702.286(b). If an administrative law judge finds that forfeiture of benefits is warranted, the period of forfeiture is the period of non-compliance, not the period requested on the form, *Hundley*, 32 BRBS at 258, and the

[2]Section 8(j)(2), 33 U.S.C. §908(j)(2), provides:

> (2) An employee who--
> (A) fails to report the employee's earnings under paragraph (1) when requested, or
> (B) knowingly and willfully omits or understates any part of such earnings, and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.

district director must establish a forfeiture schedule, *Moore,* 28 BRBS at 183-184; 20 C.F.R. §702.286(c).

Claimant contends employer has not borne its burden of establishing that he had earnings during the period he was involved in criminal activity. Specifically, he asserts that employer has not presented documentation that would prove such earnings. *See* 20 C.F.R. §702.286(b). Section 702.286(b) states that an employer alleging a violation of Section 8(j) may file a charge with the district director, including a copy of the LS-200 report. If the employer is alleging omission or understatement of earnings, it:

> shall, in addition, present evidence of earnings by the employee during that period, including copies of checks, affidavits from employers who paid the employee earnings, receipts of income from self-employment or any other evidence showing earnings not reported or underreported for the period in question.

20 C.F.R. §702.286(b). While, as claimant asserts, the record does not contain any documentation such as receipts or checks specifying amounts claimant received while engaged in criminal activities, it was reasonable for the administrative law judge to infer that claimant, nevertheless, made money while he was involved in illegal activities. The administrative law judge credited the criminal complaint and statements from the Rule 11 proceedings, including claimant's guilty plea, that claimant performed numerous duties and handled money for the drug ring, and he discredited claimant's deposition testimony that he did not have any earnings during this time. Questions of witness credibility are for the administrative law judge as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It is solely within his discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Moreover, an inference by an administrative law judge which is rational and supported by substantial evidence must be affirmed. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

The regulation permits an employer to establish a Section 8(j) violation with, *inter alia,* "any other evidence showing earnings[.]" 20 C.F.R. §702.286(b). Although there was no specific evidence of earnings claimant derived from his criminal activity, it was reasonable for the administrative law judge to infer that claimant earned money by engaging in the activities described in the indictment, to which he had pleaded guilty, and that the restitution he agreed to pay was disgorgement of his criminal proceeds. Thus, as the inference is rational and supported by substantial evidence, we affirm the finding that claimant knowingly and willfully omitted reporting his post-injury earnings in an attempt to conceal them. Consequently, we affirm the forfeiture of benefits for the periods of

non-compliance as found by the administrative law judge.[3] *Hundley*, 32 BRBS 254; *Freiwillig*, 23 BRBS 371.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

[3]The statutory scheme in Section 8(j) does not authorize an action against a claimant for the repayment of benefits paid by an employer; it contemplates only a suspension of prospective compensation payments and recovery of benefits paid through a credit. *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT) (5th Cir. 1992); *Stevedoring Services of America, Inc. v. Eggert*, 953 F.2d 552, 25 BRBS 92(CRT) (9th Cir. 1992), *cert. denied*, 505 U.S. 1230 (1992). In this case, the administrative law judges awarded, and the Board affirmed, an award of permanent total disability benefits from August 17, 2000, through July 1, 2007, and permanent partial disability benefits under the schedule thereafter for impairments of the legs. The district director is to determine the forfeiture schedule, as the administrative law judge properly found. *Moore*, 28 BRBS 177; 20 C.F.R. §702.286(c).