

BRB No. 03-0378

CHURCHILL CHRISTIE

Claimant-Respondent

V.

WILMINGTON STEVEDORES,
INCORPORATED

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION

Employer/Carrier-Petitioners

DATE ISSUED: Jan 15, 2004

DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Cherry Hill, New Jersey, for claimant.

Francis M. Womack III (Field Womack & Kawczynski), South Amboy,
New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-2234) of Administrative Law Judge Robert D. Kaplan rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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).

Claimant sustained a work-related right shoulder injury on August 1, 1994. Employer paid claimant temporary total disability benefits from August 7, 1994 through March 6, 1998. On September 1, 1998, the district director issued a compensation order awarding claimant ongoing permanent partial disability benefits under Section 8(c)(21), 33 U.S.C. §908(c)(21), commencing May 21, 1998.

Subsequently, employer alleged that claimant violated Section 8(j) of the Act, 33 U.S.C. §908(j), by failing to report his earnings in the years 1998, 1999, and 2000 from the services he performed in his wife's store and his son's restaurant. Employer therefore contended that claimant must forfeit his compensation for the periods of this underreporting. The record reflects that claimant testified that he occasionally helped out at these businesses by taking payments and working the cash register, by opening the store, and by serving food or clearing tables. The administrative law judge credited claimant's uncontradicted testimony that he was not employed by either enterprise and that he did not receive any payments from his wife or son. Thus, the administrative law judge found that claimant did not violate Section 8(j) as he had no earnings to report. Employer appeals, contending the administrative law judge applied an incorrect standard in determining that claimant did not have any "earnings" pursuant to Section 8(j). Claimant responds, urging affirmance of the administrative law judge's decision.

Section 8(j) of the Act states that an employer may require a disabled employee to report his earnings not more frequently than semiannually. The implementing regulation defines "earnings" as:

all monies received from any employment and includes but is not limited to wages, salaries, tips, sales commissions, fees for services provided, piecework and all revenue received from self-employment even if the business or enterprise operated at a loss or if the profits were reinvested.

20 C.F.R. §702.285(b). If an employee fails to report earnings when requested or knowingly and willfully omits or understates any part of his earnings, his compensation, for the period of the underreporting may be forfeited. 33 U.S.C. §908(j); *Floyd v. Penn Terminals, Inc.*, BRBS , BRB No. 03-0342 (Nov. 6, 2003); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); 20 C.F.R. §§702.285, 702.286. The administrative law judge correctly stated that employer has the burden of proof on this issue. 20 C.F.R. §702.286(b);¹ Decision and Order at 4.

¹ Section 702.286(b) states:

Where the employer/carrier is alleging an 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

After consideration of employer's assertions of error, the evidence of record, and the administrative law judge's findings, we reject employer's contentions and affirm the administrative law judge's decision as it is rational, supported by substantial evidence, and in accordance with law. *See generally Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3^d Cir. 2002). The administrative law judge first observed that the record is devoid of any documentation that claimant received any payments for "working" at the store and restaurant. The administrative law judge rationally credited claimant's uncontradicted testimony that he receives no payments for the limited services he performs at those enterprises. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, contrary to employer's contention, the administrative law judge properly found that the definition of "earnings" does not encompass consideration of whether claimant performs services that benefit someone else financially, but whether claimant himself receives remuneration for his services. Finally, the administrative law judge rationally found that the free meals claimant receives from his son's restaurant cannot be viewed as payment for services rendered because other family members, who do not help out at the restaurant, also receive free meals. *O'Keefe*, 380 U.S. at 362. Thus, as the administrative law judge rationally found that claimant had no earnings to report, we affirm the administrative law judge's finding that claimant did not violate Section 8(j).

or any other evidence showing earnings not reported or underreported for the period in question.

Accordingly, 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

PETER A. GABAUER, Jr.
Administrative Appeals Judge