BRB No. 09-0532

LIONEL GRIFFIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PRODUCTION MANAGEMENT INDUSTRIES, LLC	)	DATE ISSUED: 11/25/2009
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Christopher L. Zaunbrecher (Briney & Foret), Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2008-LHC-00631) of Administrative Law Judge C. Richard Avery 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).

On October 21, 2002, claimant sustained on injury to his back while attempting to separate two pieces of grating during the course of his employment for employer as a

rigger. Claimant was initially treated for his injuries at employer's medical clinic; thereafter, from November 22, 2002, to March 12, 2004, claimant was treated conservatively for low back and neck pain by several physicians who shared a medical practice at the New Orleans East Health Care Center and Westbank Health Care Center. During the course of this treatment, claimant's physicians at times took him off work and at other times indicated that he was capable of light duty work. CXs 6, 7. At claimant's March 12, 2004 visit, Dr. Auzine discharged claimant from his care and referred him to an orthopedist, stating that claimant's lumbar strain and cervical strain had "reached maximum benefit of care provided at this facility." CX 7. On April 28, 2004, Dr. Williams, an orthopedic surgeon, conducted an independent medical examination of claimant. Based on his examination and a review of claimant's medical records, including an October 20, 2003 MRI and a March 2004 functional capacity evaluation (FCE), Dr. Williams reported that claimant had chronic low back pain and degenerative lumbar discs, that he had reached maximum medical improvement, that he had a 15 percent permanent impairment of the whole body, and that he was capable of medium level work activities with the restrictions outlined in the FCE. EX 14. On December 7, 2004, employer's vocational specialist, Mr. Nebe, conducted a labor market survey which identified three full-time medium-duty jobs with wages ranging from $6.50 to $7.75 per hour, which were approved by Dr. Auzine; employer notified claimant of these positions by letter dated December 20, 2004. EX 4.

Employer voluntarily paid claimant temporary total disability benefits from November 22, 2002, to January 14, 2005. CX 4; EX 3; *see also* Tr. at 20. Claimant was incarcerated for a parole violation from November 4, 2004 to July 15, 2006. Tr. at 47; EX 10 at 65-66, 81-82. During claimant's incarceration from November 4, 2004 until January 2005, when employer terminated its voluntary compensation payments, claimant authorized first his aunt and subsequently his girlfriend to cash his compensation checks. Tr. at 80-87; EX 10 at 68-72, 83-89.

In his decision, the administrative law judge found that claimant reached maximum medical improvement on April 28, 2004, and that he established a *prima facie* case of total disability as he is incapable of returning to his usual employment duties as a rigger for employer. The administrative law judge next found that employer established the availability of suitable alternate employment commencing on December 20, 2004, based on the three jobs identified by Mr. Nebe in his labor market survey. The administrative law judge calculated claimant's residual wage-earning capacity based upon an hourly rate of $7.75, which was the highest rate paid by the jobs identified by the labor market survey, and he adjusted this figure to $7.36 per hour to neutralize the effects

of inflation.[1] *See* Decision and Order at 12 n.6. The administrative law judge rejected employer's contention that claimant forfeited his entitlement to compensation by virtue of his having authorized his aunt and girlfriend to cash his compensation checks during the period of his incarceration. Lastly, the administrative law judge found that employer is liable for the medical treatment provided at the New Orleans East Health Care Center and the Westbank Health Care Center, and that no further medical care is indicated. The administrative law judge thus awarded claimant compensation for temporary total disability from October 21, 2002, through April 27, 2004, permanent total disability from April 28, 2004 through December 19, 2004, and permanent partial disability from December 20, 2004, and continuing. 33 U.S.C. §908(a), (b), (c)(21).

On appeal, employer challenges the administrative law judge's award of disability benefits to claimant, contending that there was insufficient evidence to establish that claimant had any work-related impairment or a loss of wage-earning capacity after he reached maximum medical improvement. Employer additionally contends that claimant forfeited his entitlement to benefits by misrepresenting his post-injury employment activities, earnings and wage-earning capacity, and by allowing other persons to cash his compensation checks. Claimant has not responded to employer's appeal.

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[1] Relevant to this issue, employer served claimant with a request for admissions, which included admissions regarding the issue of whether claimant worked and earned wages during the period of January 1, 2004, to January 20, 2005. EX 13. As claimant did not respond to employer's request for admissions, the administrative law judge deemed the requests admitted. *See* Decision and Order at 5; Tr. at 12-15. Employer also introduced into evidence a court pleading in a lawsuit for unpaid 2004 wages filed by a person with the same name as claimant. EX 9. Both at the hearing and his deposition, claimant denied that he had filed the wage suit or had worked for the employers named in the suit, and testified that the signature on the pleading was not his. *See* Tr. at 52-54, 80, 90-91; EX 10 at 25-26, 72-74; CX 8. Subsequent to the hearing, employer submitted Social Security Administration (SSA) and Internal Revenue Service (IRS) records indicating that claimant earned wages of $5,116.41 in 2006 and $348.48 in 2007. *See* EC Proffer No. 1; Decision and Order at 5, 9.

The administrative law judge determined that the deemed admissions were "not worded well enough…" to support a finding regarding work performed or wages earned by claimant during the period from January 1, 2004, to January 20, 2005. Decision and Order at 9. The administrative law judge further declined to assume that claimant was the petitioner in the lawsuit for unpaid wages. *Id.* The administrative law judge accepted the proffered SSA and IRS records as evidence of the wages earned by claimant in 2006 and 2007, and he awarded employer a credit in the amount of those earnings against claimant's entitlement to permanent partial disability benefits for those two years. *Id.*

A claimant is considered permanently disabled if he has any residual work-related impairment after reaching maximum medical improvement. *See SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 443, 30 BRBS 57, 61(CRT) (5th Cir. 1996). The extent of an employee's disability is evaluated on the basis of both physical and economic factors. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). Where the claimant is unable to return to his usual employment duties with employer as a result of his work-related injury, the burden shifts to employer to establish the availability of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See Turner*, 661 F.2d 1031, 14 BRBS 156; *see also P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986).

Although employer avers on appeal that there is no credible evidence that, after reaching maximum medical improvement on April 28, 2004, claimant had any residual impairment, employer did not make this argument before the administrative law judge. Rather, as found by the administrative law judge, employer effectively conceded that claimant is not physically capable of performing his usual employment duties for employer as a rigger.[2] Decision and Order at 8. Moreover, the medical evidence is uncontradicted that claimant is capable of working only with restrictions. CXs 6, 7; EX 14; *see also* EX 16. Thus, the administrative law judge properly found that claimant established that he is unable to return to his usual employment duties with employer, and that, accordingly, the burden shifted to employer to demonstrate the availability of suitable alternate employment. Decision and Order at 8; *see Turner*, 661 F.2d 1031, 14 BRBS 156. As it is uncontested that employer established the availability of suitable alternate employment as of December 20, 2004, we affirm the administrative law judge's finding that claimant is entitled to total disability benefits until December 20, 2004, and to partial disability benefits thereafter. Decision and Order at 9, 11-12; *Turner*, 661 F.2d 1031, 14 BRBS 156.

Employer next contends that there was insufficient evidence to establish that claimant sustained a post-injury loss of wage-earning capacity. We disagree. An award for permanent partial disability 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);

[2] At the hearing, employer's counsel specifically stated that the evidence establishes that Dr. Auzine assigned claimant work restrictions and that employer had established the availability of suitable alternate employment within those restrictions. Tr. at 22-24, 95.

Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. If claimant has no actual earnings or if his earnings are determined not to be representative of his wage-earning capacity, the administrative law judge must evaluate all relevant evidence in accordance with a range of relevant considerations, and calculate a dollar amount which reasonably represents claimant's wage-earning capacity. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Louisiana Ins. Guaranty Ass'n. v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *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 wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). The administrative law judge has significant discretion in fashioning a reasonable post-injury wage-earning capacity. *Abbott*, 40 F.3d at 129, 29 BRBS at 27(CRT).

In this case, the administrative law judge determined that claimant's post-injury wage-earning capacity is reasonably represented by the highest wage rate paid by the positions identified in employer's labor market survey, $7.75 per hour, as adjusted for inflation.[3] Decision and Order at 8-9, 12 n.6. Employer has not identified any record evidence sufficient to support a higher post-injury hourly rate than that found by the administrative law judge. Thus, as employer has not shown any reversible error in the administrative law judge's determination of claimant's post-injury wage-earning capacity, that finding is affirmed. *See generally Abbott*, 40 F.3d 122, 29 BRBS 22(CRT).

Employer next contends that claimant forfeited his entitlement to benefits by misrepresenting his post-injury work activities, earnings and wage-earning capacity, and it assigns error to the administrative law judge's failure to address the forfeiture issue in the context of Sections 8(j) and 31(a)(1), of the Act.[4] 33 U.S.C. §§908(j), 931(a)(1).

[3] The administrative law judge properly applied the National Average Weekly Wage to adjust the post-injury wage rate downward in order to account for inflation. Decision and Order at 12 n.6. *See Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996).

[4] Although employer generally averred in its post-hearing brief to the administrative law judge that claimant had forfeited his entitlement to compensation, employer did not cite Sections 8(j) and 31(a) of the Act, and, thus, the administrative law judge did not address those statutory provisions.

Section 8(j) of the Act permits an employer to request a report of post-injury earnings from a disabled employee. Once a valid request is made, the claimant must complete and return the form within 30 days of his receipt whether or not he has any post-injury earnings. The claimant's benefits are subject to forfeiture if earnings are knowingly and willfully omitted or understated. 33 U.S.C. §908(j); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994) (decision on recon.); 20 C.F.R. §§702.285-702.286. An employer or the Special Fund must be paying the claimant compensation, either voluntarily or by virtue of an award, in order for the claimant to be considered "disabled" under Section 8(j), *see* 20 C.F.R. §702.285(a), so that the employer can require the claimant to submit an earnings report. If the employer or the Special Fund is not paying compensation, the forfeiture provision cannot be applied to a claimant who fails to respond timely or accurately to the wage information request. *Delaware River Stevedores 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).

In this case, employer's counsel stated at the hearing that compensation was paid to claimant from November 22, 2002 to January 14, 2005. Tr. at 20. Thus, the provisions of Section 8(j) do not apply subsequent to January 14, 2005. *See DiFidelto*, 440 F.3d 615, 40 BRBS 5(CRT); *Briskie*, 38 BRBS 61. Moreover, the record before the Board contains no indication that, during the period in which employer was paying compensation to claimant, employer submitted a request for information concerning claimant's post-injury earnings in accordance with the applicable regulations at 20 C.F.R. §§702.285-702.286. Where employer has not established that it made such a request, the forfeiture provisions of Section 8(j) do not apply. *See Moore*, 28 BRBS at 182. Thus, contrary to employer's contention on appeal, the administrative law judge did not err by failing to apply the Section 8(j) forfeiture provision to the facts of this case.

Employer's additional contention that claimant's misrepresentations support forfeiture of his benefits pursuant to Section 31(a)(1) of the Act is also without merit. Section 31(a)(1) specifically provides that any false statement or representation, which is knowingly and willfully made for the purpose of obtaining benefits under the Act, is a felony, punishable by a fine of not more than $10,000 or imprisonment not to exceed five years or both. 33 U.S.C. §931(a)(1). Complaints under subsection (a)(1) are to be investigated by the appropriate United States attorney for the district where the injury occurred. 33 U.S.C. §931(a)(2). *Valdez v. Crosby & Overton*, 34 BRBS 69, 77, *aff'd on recon.*, 34 BRBS 185 (2000). As Section 31(a) expressly sets forth the applicable felony sanctions and does not provide for the forfeiture of benefits as a remedy for alleged misrepresentations made by claimants, the administrative law judge did not err in failing to find that claimant forfeited his entitlement to benefits under Section 31(a)(1). *See generally A-Z International v. Phillips*, 323 F.3d 1141, 37 BRBS 1(CRT) (9th Cir. 2003);

Stevedoring Services of America v. Eggert, 953 F.2d 552, 25 BRBS 92(CRT) (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992); *Newport News Shipbuilding & Dry Dock Co. v. Hall*, 674 F.2d 248, 14 BRBS 641 (4th Cir. 1982). Employer's sole remedy under Section 31(a) is to file a complaint with the appropriate United States Attorney. 33 U.S.C. §931(a)(2); *Valdez,* 34 BRBS at 77.

Lastly, employer assigns error to the administrative law judge's rejection of employer's argument that claimant forfeited his entitlement to benefits by allowing his aunt and his girlfriend to cash his compensation checks. *See* Decision and Order at 10. We disagree. The Act does not include a provision authorizing the forfeiture of benefits for an alleged conversion of compensation to a third person, and neither the administrative law judge nor the Board is empowered to engraft such a remedy upon the Act. *See generally Phillips*, 323 F.3d 1141, 37 BRBS 1(CRT); *Eggert*, 953 F.2d 552, 25 BRBS 92(CRT); *Hall*, 674 F.2d 248, 14 BRBS 641.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge