

BRB No. 08-0780

G.M.)
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 Claimant-Respondent)
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 v.)
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 P & O PORTS LOUISIANA,) DATE ISSUED: 05/21/2009
 INCORPORATED)
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 and)
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 PORTS INSURANCE COMPANY)
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 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Order Granting Claimant's Motion for Clarification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

V. William Farrington, Jr. (Farrington & Thomas, LLC), New Orleans, Louisiana, for claimant.

Christopher J. Field (Field Womack & Kawczynski), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Order Granting Claimant's Motion for Clarification (2007-LHC-1803) of Administrative Law Judge Clement J. Kennington 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).

Claimant filed two claims under the Act as a result of injuries which he sustained to his neck, shoulders, and right wrist while working as a marine superintendent for employer on June 26, 2005. The first, seeking disability and medical benefits, was resolved by the administrative law judge's decision dated June 8, 2007, wherein claimant was awarded temporary total disability benefits from July 20, 2005, to February 7, 2007,¹ followed by a continuing award of permanent total disability benefits. The administrative law judge also awarded claimant \$5,923.50 in past due medical benefits, as well as future medical benefits under Section 7, 33 U.S.C. §907. The second, which is the subject of this appeal, involves a claim alleging that employer violated Section 49 of the Act, 33 U.S.C. §948a, because it denied claimant short-term and long-term disability benefits to which he was entitled under the terms of his employment as delineated in Employer's Associate's Guide.

In his decision, the administrative law judge found that employer discriminated against claimant because of his disability claim under the Act by denying claimant short-term and long-term private insurance disability benefits payable to claimant as part of his employment contract. The administrative law judge ordered employer to pay a penalty of \$3,000 to the Special Fund pursuant to Section 49. Additionally, the administrative law judge ordered employer to provide claimant with 26 weeks of short-term disability benefits commencing from June 27, 2005, and long-term disability benefits thereafter in accordance with employer's disability plan. The administrative law judge, however, also noted that claimant's short-term disability payments shall be reduced by claimant's longshore compensation benefits paid by employer during that period.

Employer paid the penalty but did not pay the short-term disability benefits as ordered, so claimant sought enforcement of the award from the district director. 33 U.S.C. §918(a). Following an informal conference on April 15, 2008, the district director, citing *Jones v. Chesapeake & Potomac Tel. Co.*, 11 BRBS 7 (1979)(Miller, J., dissenting in part), *aff'd mem.*, 615 F.2d 1359 (D.C. Cir. 1980)(table), *amended on other grounds*, Nos. 79-1458 *et al.* (D.C. Cir. March 31, 1980),² concluded that the administrative law judge's award is not subject to the Act's enforcement provisions

¹ Employer paid claimant his full wages from June 27, 2005, through July 19, 2005, followed by voluntary payments of temporary total disability benefits from July 20, 2005, to February 7, 2007. *See* Decision and Order dated June 8, 2007 at 2-3.

² In *Jones*, the Board held that sick leave benefits earned by the employee on the basis of seniority and good continuous service are not "compensation" under the Act as defined by Section 2(12) of the Act, 33 U.S.C. §902(12). *Jones*, 11 BRBS at 9.

because Section 18(a) of the Act, 33 U.S.C. §918(a), applies only to awards of “compensation,” which does not include short-term disability benefits. The district director thus refused to enforce the administrative law judge’s order that employer pay claimant 26 weeks of short-term disability benefits.

Thereafter, claimant filed a motion for clarification with the administrative law judge regarding the award of short-term disability benefits. Claimant requested that the administrative law judge specify the amount of the credit to which employer is entitled for its payment of longshore benefits against the award of short-term disability benefits. Employer responded, arguing that the administrative law judge’s order for employer to pay short-term disability benefits is improper because short-term disability benefits are not “compensation” as defined by the Act.

In his Order dated July 29, 2008, the administrative law judge rejected employer’s contention regarding the award of short-term disability benefits. The administrative law judge stated that Section 49 and its implementing regulation, 20 C.F.R. §702.273, gives the administrative law judge the authority to determine if employer discriminated against claimant “in any manner” because claimant claimed compensation. As denial of short and long-term disability compensation was the basis for claimant’s claim, the administrative law judge found that he has the authority to remedy this discrimination. He thus reiterated his prior finding that by denying claimant short-term disability benefits because he filed a claim for compensation under the Act, employer discriminated against claimant in violation of Section 49 of the Act. The administrative law judge clarified his prior decision by stating that employer is liable for 26 weeks of short-term disability benefits, reduced by claimant’s longshore compensation benefits, in the amount of \$7,558.04. The administrative law judge also found employer liable thereafter for long-term disability benefits under its plan.

On appeal, employer challenges the administrative law judge’s order that it provide short-term disability benefits to claimant due to its violation of Section 49. Claimant responds, urging affirmance.

Employer argues that the administrative law judge exceeded his authority by providing claimant a remedy that is not available under the terms of Section 49.³ In this regard, employer maintains that Section 49 provides for a civil money penalty, job

³ The administrative law judge’s findings that employer discriminated against claimant in this case and thus must pay a civil money penalty under Section 49 of \$3,000 are affirmed as they are not challenged on appeal. See *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

reinstatement, and/or reimbursement of lost wages but the provision does not include an order to pay short-term disability benefits of the kind awarded by the administrative law judge in this case. Additionally, employer argues that since these disability benefits are not “compensation” as defined by Section 2(12) of the Act, 33 U.S.C. §902(12), any award of such benefits cannot be enforced under Section 18 of the Act.

Section 49 of the Act provides, in pertinent part, that:

Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination: *Provided*, That if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation.

33 U.S.C. §948a. Section 702.271(d) similarly states that “[a]ny employee discriminated against is entitled to be restored to his employment and to be compensated by the employer for any loss of wages arising out of such discrimination provided that the employee is qualified to perform the duties of the employment.” 20 C.F.R. §702.271(d); *see also* 20 C.F.R. §702.271(a)(2). Thus, the remedy for a claimant who is discriminated against is the reinstatement of his job and back wages, provided that he is qualified to perform this job.

The threshold issue in this case, therefore, is whether claimant is entitled to this remedy. *See Rayner v. Maritime Terminals, Inc.*, 22 BRBS 5 (1988). The relevant regulations state that “[i]f it is determined that the employee has been discriminated against, the district director shall also determine whether the employee is qualified to perform the duties of employment. The district director may use medical evidence submitted by the parties or he may arrange to have the employee examined by a physician selected by the district director.” 20 C.F.R. §702.272(a).⁴ Thus, the question of whether an employee is “qualified” is one of medical restrictions, physical capabilities, and the requirements of the job. In *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005), the administrative law judge reinstated claimant’s employment status in the job from which employer fired her in violation of Section 49 even though she remained temporarily totally disabled, and the judge postponed a determination of her capability to actually perform the job duties until after she reached maximum medical improvement. The Board affirmed this decision as it was reasonable and consistent with

⁴ The administrative law judge also has the authority to make findings relevant to a Section 49 discrimination claim. *See* 20 C.F.R. §702.273.

the purposes of the Act.⁵ *Monta*, 39 BRBS at 111. Thus, the Board determined that claimant's ability to perform the duties of her job and be permanently reinstated was properly determined after she reached maximum medical improvement.

In this case, claimant has reached maximum medical improvement, and it is clear from the administrative law judge's decision on the merits of claimant's disability claim that claimant has not been qualified to perform his job with employer at any time since his injury on June 26, 2005. Specifically, the administrative law judge found in his prior decision that "there is no question that claimant cannot perform his former work as marine superintendent." Decision and Order dated June 8, 2007, at 12. It is evident that claimant's inability to qualify for his prior work with employer commenced from the date of his injury and that claimant continued to be medically unqualified for such work past the date upon which the administrative law judge found claimant reached maximum medical improvement, February 6, 2007. Consequently, since Section 49 provides for recovery of "loss of wages arising out of discrimination" only if claimant is qualified to return to his former employment, and in this case claimant ceased to be qualified for his job with employer as of the date of his injury, it follows that claimant cannot be entitled to recovery of lost wages under Section 49. 33 U.S.C. §948a; *Rayner*, 22 BRBS 5. As the administrative law judge's Order that employer pay claimant contractual short-term disability benefits in addition to his compensation under the Act was premised on allowing claimant a recovery for lost wages, a remedy which is unavailable to him under the plain terms of Section 49, we reverse his July 29, 2008, Order.⁶

⁵ In *Monta*, the administrative law judge ordered claimant reinstated to her employment even though she had not yet reached maximum medical improvement because immediate reinstatement had a tangible significance in that it enabled claimant to shop at its store, a feature not available to former employees. *Monta*, 39 BRBS 104.

⁶ In light of this holding, we need not address the questions of whether the administrative law judge had the authority to order employer to pay the claimant short-term disability benefits provided by his employment contract under any provision of the Act, or whether such benefits are a substitute for lost wages.

Accordingly, the administrative law judge's award of reimbursement of short-term disability benefits to claimant as "lost wages" pursuant to Section 49 is reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge