BRB No. 10-0678

RANDOLPH YOUNG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 06/22/2011
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Modification and the Order Denying Motion to Vacate and Denying Motion for Reconsideration of Kenneth A. 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.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Modification and the Order Denying Motion to Vacate and Denying Motion for Reconsideration (2009-LHC-0731) of Administrative Law Judge Kenneth A. 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).

Claimant was hired by employer as a chipper in April 1983. On August 17, 1983, claimant 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. The issue at the original hearing was whether employer had demonstrated the availability of suitable alternate employment. Administrative Law Judge Sarno found that employer failed to establish the availability of suitable alternate employment, but that, in any event, claimant diligently, yet unsuccessfully, attempted to find alternate work. Therefore, Judge Sarno awarded claimant permanent total disability benefits. Decision and Order (Nov. 26, 1990) at 6. The Board affirmed the administrative law judge's finding that the jobs identified by employer were not suitable for claimant and affirmed the award of benefits. *Young v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 91-0609 (Aug. 7, 1992).

In a 1997 pre-hearing statement, employer raised the issue of its entitlement to Section 8(f), 33 U.S.C. §908(f), relief. On October, 22, 1998, employer filed another pre-hearing statement seeking modification of the permanent total disability award and re-raising the Section 8(f) issue. 33 U.S.C. §922. A hearing was scheduled for July 24, 2000, but claimant was unable to participate due to his incarceration.[1] Administrative Law Judge Campbell, based on the agreement of the parties, issued a stay of compensation order on August 15, 2000. The stay was effective until such time as claimant was released and able to pursue his claim. Claimant was released from prison

[1]The criminal complaint stated that claimant did "knowingly, intentionally, and unlawfully combine, conspire, confederate and agree with [others] to distribute and possess with the intent to distribute crack cocaine." Emp. Ex. 5. At the Rule 11 Hearing, claimant pleaded guilty and stated he was in fact guilty. Emp. Exs. 6-7.

on January 6, 2004. A formal hearing was held on October 14, 2009, before Administrative Law Judge Krantz.[2]

Judge Krantz (the administrative law judge) lifted the stay of payments. He found that the parties stipulated to the work-relatedness of claimant's knee injuries and that claimant continued to report symptoms related to his knees after the initial award of benefits. He further found that, although the objective medical evidence does not show significant abnormalities in claimant's knees, that fact does not detract from claimant's subjective complaints, as his original torn meniscus was not revealed on testing but was discovered during surgery; therefore, the administrative law judge found that the absence of objective test findings does not necessarily correlate with the absence of symptoms. Decision and Order on Modif. at 24-26. Thus, the administrative law judge relied on claimant's complaints of pain over the years, and he rejected employer's assertion that claimant's testimony in this regard was impeached by his criminal conduct and conflicting testimony. Rather, the administrative law judge found that claimant was not credible with regard to whether he accurately testified about his criminal activities, but that these discredited statements did not concern his medical symptoms. The administrative law judge found that, as claimant suffered work-related knee injuries and consistently complained of pain in his knees for over 25 years, his statements in that regard are reliable. The administrative law judge thus invoked the Section 20(a), 33 U.S.C. §920(a), presumption linking claimant's current complaints to the work injuries. Decision and Order on Modif. at 26-28. He found that employer rebutted the presumption, as its expert definitively stated that claimant's current symptoms are not related to the 1983 injuries because they are "medial" and not "lateral" knee complaints. *Id.* at 29. On the record as a whole, however, the administrative law judge gave greater weight to Dr. Stiles's long-term treatment of claimant to conclude that claimant established by a preponderance of the evidence that his symptoms are related to his work injuries. *Id.* at 30. Also based on Dr. Stiles's opinion, the administrative law judge found that claimant is permanently disabled and cannot return to his usual work. *Id.* at 31.

The administrative law judge next addressed the work restrictions established by the doctors, giving greater weight to those set forth by Dr. Stiles, and the post-1990 Decision and Order evidence submitted to show the availability of suitable alternate

[2]Judge Krantz issued an order granting the motion to dismiss the request for Section 8(f) relief filed by the Director, Office of Workers' Compensation Programs, as employer failed to raise that issue in the initial hearing where permanency was at issue. This order was not appealed.

employment.[3] The administrative law judge rejected employer's assertions that claimant's illegal activity, his working as a maintenance worker in prison, and his singing in churches at funerals constituted suitable alternate employment. He also rejected those jobs in the labor market surveys that were outside of Ahoskie, North Carolina, as being outside claimant's relevant community. Of the ten remaining jobs, the administrative law judge found that they are within the physical restrictions set by Dr. Stiles and Dr. Cohn, employer's expert, and he found that employer established the availability of suitable alternate employment as of July 2, 2007. Decision and Order on Modif. at 32-35. The administrative law judge also found that claimant failed to establish diligence in his search for employment. *Id.* at 35-40. Accordingly, he awarded claimant permanent total disability benefits from August 17, 2000, when employer ceased paying benefits pursuant to the stay, through July 1, 2007, when employer established suitable alternate employment. 33 U.S.C. §908(a).

As the administrative law judge found that employer established the availability of suitable alternate employment and that claimant's disability is partial, he awarded benefits under the schedule for claimant's knee injuries. 33 U.S.C. §908(c)(2), (19). Based on the 1985 opinion of Dr. Bobbitt, the shipyard physician, which is the only evidence of record concerning the extent of claimant's impairment, the administrative law judge found that claimant has a 10 percent permanent impairment of the right leg and a 15 percent impairment of the left leg. Decision and Order on Modif. at 6-7, 40-41; ALJ Ex. 5; 33 U.S.C. §908(c)(2), (19). The administrative law judge also held employer liable for medical treatment with Dr. Stiles. 33 U.S.C. §907; Decision and Order on Modif. at 42.

With regard to the Section 8(j) forfeiture issue raised by employer, the administrative law judge found that any "income" from claimant's criminal activity between 1993 and 1996 is not required to be reported on the LS-200 "Report of Earnings" form because it is not "earnings from employment or self-employment" and it is not included in the definition of "earnings" in the regulation at 20 C.F.R. §702.285(b). Further, the administrative law judge found that any earnings from the prison maintenance job are not required to be reported because there is no proof that claimant performed that work during his first three months of incarceration, which are the only dates that coincide with the earnings requests. Accordingly, the administrative law judge found that no benefits are subject to forfeiture under Section 8(j), 33 U.S.C. §908(j). Decision and Order on Modif. at 43-44.

[3]Claimant has permanent restrictions: no climbing, kneeling, squatting or lifting over 20 pounds. ALJ Ex. 5 at 1-2A, 1-6; Cl. Ex. 1-B; Emp. Ex. 2-1.

Employer subsequently filed a motion to vacate the Decision and Order on Modification, arguing that the parties did not raise the issue of permanent partial disability compensation under the schedule and had not been put on notice that it would be addressed; therefore, they were not afforded the opportunity to submit evidence on the issue. Employer also filed a motion asking the administrative law judge to reconsider his findings on causation and extent of disability. The administrative law judge denied the motion to vacate, stating that a claim for total disability includes a claim for a lesser degree of disability; therefore, claimant's claim for permanent total disability benefits implicitly included a claim for permanent partial disability benefits. Moreover, he stated that where employer challenged the permanent total disability award and submitted evidence of suitable alternate employment, it cannot assert that it was not arguing that claimant was permanently partially disabled. The administrative law judge denied employer's motion for reconsideration of the causation and disability issues. Order Denying the Motions at 3-4.

Employer appeals the Decision and Order on Modification and the Order Denying the Motions. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds only on the Section 8(j) issue.

Claimant's Credibility

Employer first argues that claimant is not a credible witness and the administrative law judge erred in crediting his statements regarding his injury/disability. It asserts that claimant committed fraud and perjury at the hearing and argues that his contradictory testimony regarding his illegal activities, as well as his felony conviction, serve to impeach his reliability overall and not only with respect to his criminal activities. The administrative law judge found that claimant's testimony in his deposition and at the formal hearing before him was in conflict with the testimony claimant gave at the Rule 11 hearing when he entered his guilty plea. Decision and Order on Modif. at 27-28. He found that claimant's Rule 11 hearing testimony more accurately reflected claimant's criminal conduct, and he discredited claimant's testimony in this case with regard to that conduct. *Id.* at 28. However, the administrative law judge found that these discredited statements do not affect the reliability of the testimony concerning claimant's medical symptoms. Specifically, as he found claimant suffered work-related injuries and consistently complained to physicians about pain and swelling for over 25 years, the administrative law judge found that claimant was credible as to his symptoms and disability. *Id.*

Contrary to employer's assertions, the fact of a criminal conviction does not negate a claimant's right to benefits or require an administrative law judge to discredit the claimant's testimony in its entirety. *See generally Sam v. Loffland Bros. Co.*, 19 BRBS

228 (1987). Rather, evidence of a conviction may be submitted, as it was here, to attack the credibility of a witness. 29 C.F.R. §18.609; *see also* Fed. R. Evid. Rule 609. The regulation does not mandate that the administrative law judge make any particular credibility finding. The purpose of showing that a witness has been convicted of a felony is to "impeach the credibility of the witness [and w]hether or not it affects his credibility is a question for the [fact-finder]." *United States v. Cornett*, 484 F.2d 1365 (6th Cir. 1973). Therefore, as in all cases under the Act, the administrative law judge has the authority to make credibility determinations, and it is solely within his discretion to accept or reject all or any part of any testimony according to his judgment. *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); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The Board will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Phillips v. California Stevedore & Ballast Co.*, 9 BRBS 13 (1978); *Roberson v. Bethlehem Steel Corp.*, 8 BRBS 775 (1978), *aff'd sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 620 F.2d 60, 12 BRBS 344 (5th Cir. 1980).

In this case, the administrative law judge found that claimant's testimony, which related to his criminal conviction, conflicted with statements made at the Rule 11 hearing. Decision and Order on Modif. at 28. Nevertheless, he found that over the span of more than 25 years, medical records show that claimant has been consistent in his complaints regarding his knees. *Id.*; ALJ Ex. 5; Cl. Exs. 1-2; Emp. Ex. 2. Accordingly, the administrative law judge concluded that claimant's testimony in this regard is credible. The administrative law judge is authorized to make credibility determinations, and his conclusion that claimant is credible with regard to his knee conditions is not "inherently incredible" or "patently unreasonable." Therefore, we reject employer's contention of error. *Cordero*, 580 F.2d at 1335, 8 BRBS at 747.

Causation

Employer argues that the administrative law judge erred in applying the Section 20(a) presumption, as he considered whether claimant's knee injuries were work-related instead of whether there was any continuing disability related to the work injuries. Employer also asserts that the administrative law judge erred in relying on Dr. Stiles's opinion solely because he is claimant's treating physician. In determining whether a disabling injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)

(4th Cir. 1997); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Based on claimant's knee injuries at work and claimant's complaints of continuing pain, the administrative law judge properly invoked the Section 20(a) presumption. Decision and Order on Modif. at 28; *see, e.g., Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988).

Upon invocation of the Section 20(a) presumption, the burden shifts to the employer to produce substantial evidence to rebut the presumption that the injury was caused by the claimant's employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Employer presented the opinion of Dr. Cohn, who stated there is no relationship between claimant's knee injuries in 1983 and his current complaints. Emp. Exs. 2, 11.[4] The administrative law judge, therefore, correctly found that employer presented substantial evidence and rebutted the presumption that claimant's current symptoms are work-related. Decision and Order on Modif. at 29; *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

As the presumption drops from the case, the administrative law judge properly considered the record as a whole. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). He noted the opinion of Dr. Stiles who stated that claimant's current condition is "definitely related to his previous injuries." Cl. Ex. 1-D. The administrative law judge stated that whether a doctor is the claimant's treating physician is one factor to consider when determining how to weigh conflicting medical opinions. Decision and Order on Modif. at 30. He stated that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has given a treating physician's opinion "great" but "not necessarily dispositive weight." *Id.* (quoting *Grigg v. Director, OWCP*, 28 F.3d 416, 420 (4th Cir. 1994)). The administrative law judge also found it significant that Dr. Stiles has treated claimant's knees since they were injured, with the exception of the period of incarceration, and that Dr. Cohn had conducted only two examinations of claimant, five years apart. The administrative law judge also rejected Dr. Cohn's statements that claimant's complaints have become "medial" instead of "lateral" and, therefore, cannot be related to the work injuries. Although the surgeries were to the lateral menisci, the administrative law judge concluded there is a history of medial symptoms as well, and substantial evidence of record bears this out. Decision and Order on Modif. at 7-9, 30; *see* ALJ Ex. 5 at 1-1B (1983: tenderness on medial posterior joint line); Cl. Ex. 2-G (1985: medial plica); Cl. Ex. 1-A (2004: mild medial lateral instability); Cl. Ex. 1-C (2004: mild degenerative changes to medial joint line). In addition, in 1989, Dr. Stiles

[4]Dr. Cohn reported: "I would state to much more than a degree of medical certainty, [claimant] has absolutely no disability or symptoms related to any work injury suffered. . . ." Emp. Ex. 11.

predicted that claimant would have continuing difficulties with his knees and that the problems may get worse because he had "internal derangement" of the knees and multiple surgeries. ALJ Ex. 5 at 1-7; Cl. Ex. 1-D. Thus, the administrative law judge gave greater weight to Dr. Stiles's opinion because he had treated claimant for a long time and was familiar with his long-standing complaints, and Dr. Stiles's opinion was supported by the medical reports. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). The administrative law judge rationally weighed the medical evidence, and the conclusion that claimant's disability is work-related is affirmed as it is supported by substantial evidence.[5] *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F.App'x 249 (4th Cir 2007).

Extent of Disability

Claimant's Work

Employer contends claimant's illegal activities, job in prison, and jobs singing in church all serve to show that claimant is capable of work and, thus, the availability of suitable alternate employment before the labor market survey in 2007. Employer contends the administrative law judge erred in finding claimant to be totally disabled since 1993, thereby warranting modification of the prior award. Once a claimant establishes that he is unable to perform his usual work, as here, the burden shifts to the employer to demonstrate the availability of a range of realistic job opportunities within the geographic area where the claimant resides, which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. In demonstrating the availability of suitable alternate employment, the employer may offer the claimant suitable alternate employment or may establish the availability of realistic

[5]We reject employer's argument that the administrative law judge substituted his own opinion for the medical opinions. Dr. Stiles's opinion supports the administrative law judge's findings. Additionally, although Dr. Stiles did not give an opinion more recently than 2004, there is no requirement that the administrative law judge credit the doctor who gave the most recent opinion. We also reject employer's assertion that the administrative law judge erred in giving Dr. Stiles's opinion greater weight "merely" because he was claimant's treating physician. The administrative law judge acted within his discretion in crediting the opinion of Dr. Stiles over that of Dr. Cohn, and clearly stated that *one* of the reasons was Dr. Stiles's status as treating physician. The administrative law judge also stated that the better opinion came from the doctor who had seen claimant many times over a number of years and not from the doctor who had seen claimant only twice. Decision and Order on Modif. at 30.

job opportunities the claimant could secure if he diligently tried. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Evidence of a single job opening is insufficient, as the employer must show a range of suitable jobs. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988).

The administrative law judge found that claimant's illegal activities, job in prison, and singing in church do not constitute suitable alternate employment. He found that the illegal activities were not available on the open labor market and that claimant's prison maintenance work was available to him only because he was incarcerated. Additionally, the administrative law judge found that claimant's duties in prison were limited, that he did not work on a regular basis, and that he received extremely low wages. Similarly, the administrative law judge found that claimant's singing "jobs" were not regular and continuous and he did not always get paid. Decision and Order on Modif. at 33-34. We affirm the administrative law judge's finding that these jobs do not constitute suitable alternate employment as it is rational and in accordance with law.

In rendering his decision, the administrative law judge relied on *Licor v. Washington Metropolitan Area Transit Authority*, 879 F.2d 901, 22 BRBS 90(CRT) (D.C. Cir. 1989). In *Licor*, the claimant twice injured his back and sought temporary total disability benefits from January 1977 until November 1983, and permanent partial disability benefits thereafter. The administrative law judge concluded that the claimant was entitled to temporary total disability benefits until December 1980, at which time the evidence established a wage-earning capacity of $21,000 per year. Therefore, the administrative law judge concluded that the claimant had no loss of wage-earning capacity and denied benefits. The Board affirmed, and the claimant appealed to the United States Court of Appeals for the D.C. Circuit. The court vacated the denial of benefits and remanded the case for the administrative law judge to reconsider the claimant's wage-earning capacity after December 1980. The court stated that the evidence established that the claimant was incarcerated for approximately ten months in 1979-1980, and that he had lied on a loan application when he stated he earned approximately $21,000 during 1980 as the owner-operator of a tractor-trailer. The court stated that the administrative law judge erred by not addressing the claimant's wage-earning capacity based on jobs he could have obtained on the open market, holding that any illegal income the claimant may have earned is not an appropriate basis for determining wage-earning capacity.

In light of *Licor*, it was proper for the administrative law judge to determine that any illegal income claimant earned is not indicative of suitable alternate employment available on the open labor market. Further, employer has not established that the maintenance work claimant performed in prison was available on the open market prior to July 2007, or that the singing jobs are sufficiently regular and continuous to establish a wage-earning capacity. *See generally Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4th Cir. 1999); *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 734 (1978). Therefore, we affirm the finding that these jobs do not establish the availability of suitable alternate employment.

Diligence

Employer contends the administrative law judge erred in not addressing on modification the diligence of claimant's job search prior to the initial award of benefits. Effectively, employer contends that, had the administrative law judge addressed the prior evidence as requested, he would have discovered a mistake in the determination of a fact and found that claimant was entitled to only partial disability benefits all along. We reject employer's contention.

In the initial Decision and Order, Judge Sarno found that claimant followed up with nearly every lead the vocational counselors provided him but he received no offers. Judge Sarno also found that claimant's own job leads proved fruitless. With regard to the jobs identified as suitable in 1989, Judge Sarno noted the counselor's concession that the majority of them may not have fit within claimant's work restrictions and determined that the others were not within claimant's work experience. Decision and Order at 5-6. The Board affirmed the finding that employer did not establish suitable alternate employment, making it unnecessary for the Board to address whether claimant was diligent in looking for work. *See generally Hord*, 193 F.3d 836, 33 BRBS 170(CRT). As employer failed to establish the availability of suitable alternate employment prior to the 1990 Decision and Order, claimant's diligence was not a factor in the award of permanent total disability benefits at that time. *Tann*, 841 F.2d 540, 21 BRBS 10(CRT). At best Judge Sarno's statements on the subject are *dicta*, so Judge Krantz did not need to reconcile claimant's more recent vocational efforts with those occurring prior to 1990. As we affirm the administrative law judge's finding that employer presented evidence of the availability of suitable alternate employment no earlier than July 2007, and as claimant's diligence in

seeking employment prior to that date is irrelevant, we affirm the administrative law judge's award of permanent total disability benefits until July 2007.[6]

Permanent Partial Disability Benefits Under the Schedule

Employer also contends the administrative law judge erred in awarding benefits pursuant to the schedule as no party raised entitlement to benefits under the schedule as an issue, the administrative law judge failed to notify the parties it would be an issue, and neither party had the opportunity to submit evidence on the matter. Employer asserts that although a claim for permanent total disability naturally subsumes a claim for a lesser impairment, that only applies to permanent partial disability under Section 8(c)(21), 33 U.S.C. §908(c)(21), as benefits under the schedule require different evidence. We reject employer's assertion.

A claim for total disability implicitly includes a claim for a lesser degree of disability. *Rambo v. Director, OWCP*, 81 F.3d 840, 843, 30 BRBS 27, 30(CRT) (9th Cir. 1996), *aff'd and remanded sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997); *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201, 204 n.2 (1985). Hence, an administrative law judge may award permanent partial disability benefits even if only permanent total disability was at issue. *Heckstall v. General Port Service Corp.*, 12 BRBS 298 (1980). The schedule is the exclusive remedy for permanent partial disability for parts of the body enumerated therein. 33 U.S.C. §908(c)(1-20); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). Therefore, scheduled benefits begin on the date suitable alternate employment is shown to be available to a permanently disabled claimant. *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009).

Employer knew claimant's injury was to his knees, and it asserted the availability of suitable alternate employment to show that claimant was only partially disabled. Permanency was established at the original hearing and reaffirmed by the administrative law judge on modification. Moreover, contrary to employer's statement, *it* raised the schedule as the appropriate way to calculate claimant's award. In employer's brief to the administrative law judge, wherein it asserted that claimant's actual jobs after 1993 demonstrated he is not totally disabled, employer stated:

[6] We affirm as unchallenged on appeal the administrative law judge's finding that claimant did not diligently seek work after July 2007.

> [claimant] should be found at the very least, to be only permanently and partially disabled and therefore relegated to the exclusive remedy *under the Act's Schedule* for any permanent partial disability.

Emp. Brief at 23 (emphasis added). As employer raised this issue before the administrative law judge, it cannot now claim it was unaware the issue would be addressed. In addition, the record contains evidence of the extent of claimant's permanent physical impairment. ALJ Ex. 5 (Dr. Bobbitt's 1985 reports). The administrative law judge, therefore, properly relied on this evidence to award benefits for the impairment to claimant's knee under the schedule. We affirm the award of benefits for a 15 percent impairment to the left leg and a 10 percent impairment to the right leg. 33 U.S.C. §908(c)(2); *Vina*, 43 BRBS 22.

Section 8(j)

Employer contends the administrative law judge erred in finding that claimant's earnings from illegal activities need not be reported on the LS-200 earnings reports and that claimant's benefits for that time period need not be forfeited. The Director agrees that the administrative law judge erred in finding that any earnings claimant may have received from his illegal activities are *never* required to be reported. Therefore, the Director supports employer's request that the Board reverse the administrative law judge's broad Section 8(j) finding and hold that such earnings must be reported. However, as it is unclear from the record whether claimant actually received any earnings from his illegal activities, the Director states that remand is necessary for the administrative law judge to determine whether there were earnings that should have been reported during the requisite reporting periods.

Section 8(j) of the Act permits an employer to request a claimant to report his post-injury earnings. Once the 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);[7] *Hundley v. Newport News Shipbuilding & Dry Dock Co.*,

[7]Section 8(j)(1), (2), 33 U.S.C. §908(j) (1)-(2), of the Act provides:

> (1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.
>
> (2) An employee who--

32 BRBS 254 (1998); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994) (decision on Recon.); 20 C.F.R. §§702.285-702.286. The forfeiture provision may be applied only to those claimants who are disabled, that is, those receiving compensation, and who knowingly and/or willfully fail to respond timely or accurately to the earnings 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); *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997).

In this case, claimant was awarded permanent total disability benefits in 1990, and employer paid them until August 17, 2000, when it received the stay of payment order. Employer sent two reports of earnings forms to claimant. The first form requested earnings information from January 1, 1992, through October 18, 1996. Claimant reported no earnings and signed the form on October 25, 1996. Emp. Ex. 4. This period covered a majority of the time claimant was accused of engaging in illegal activity. The second form requested earnings information from October 22, 1996, through June 24, 1997. Claimant reported no earnings and signed the form on July 13, 1997. *Id.* This form covered the remainder of the period of illegal activity and the first three months of claimant's incarceration.

The administrative law judge found that claimant need not report any earnings from his illegal activities because they are not from "employment" or "self-employment." We agree with employer and the Director that the administrative law judge concluded incorrectly that claimant need not report any earnings from illegal activities. Although

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> (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.

Although the Act states that an employee may have an obligation to report "not less than semiannually," the implementing regulations state that reporting may not be required "more frequently than semi-annually." *Compare* 33 U.S.C. §908(j)(1) *with* 20 C.F.R. §702.285(a). The Board held that the words of the regulation prevail. *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

Section 8(j) does not define "earnings," the implementing regulation does. Section 702.285(b) provides:

> 'earnings' is defined 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. . . .

20 C.F.R. §702.285(b) (emphasis added). Thus, Section 8(j) contemplates a claimant's reporting "all monies" from "any employment" and "all revenue" from "self-employment," as well as "fees for services." There is no exclusion for earnings from illegal activities. In addition, the regulation specifically states that the earnings are "not limited to" the list given.[8] 20 C.F.R. §702.285(b). Accordingly, the Director's interpretation of the regulation is reasonable: the definition of "earnings" is sufficiently broad to include any earnings from a claimant's illegal activity. *See Briskie*, 38 BRBS 61; 20 C.F.R. §702.285(b). The decision in *Licor*, 879 F.2d 901, 22 BRBS 90(CRT), on which the administrative law judge relied to exclude the earnings from the reporting requirements, does not preclude this result as that case concerned the determination of the extent of a claimant's loss of wage-earning capacity using jobs found on the open market of legal employment as opposed to earnings from illegal conduct. In light of the plain language of the regulation, the holding in *Licor* cannot be extended to Section 8(j).[9] We therefore reverse the administrative law judge's finding that income from illegal activities

[8]While we need not look beyond the Act and regulations to reach this conclusion, further support for including illegal earnings in the report comes from the Tax Code. 26 U.S.C. §61(a) provides that "gross income" includes "all income from whatever source derived." *See Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955); *St. Clair v. U.S.*, 778 F.Supp. 894 (E.D. Va. 1991); *see also* IRS Publication 17, Ch. 12 (2009). Additionally, illegal activity has been held to constitute "substantial gainful activity" under the Social Security Act so as to prohibit someone earning money in criminal activity from receiving benefits under that act. *Bell v. Commissioner of Social Security*, 105 F.3d 244 (6th Cir. 1996).

[9]We note, however, that the Director incorrectly suggests that any earnings reported on the LS-200 form are to be credited against claimant's disability compensation. The Act does not contain any credit provisions of this kind. *See generally Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). An employer is entitled only to a credit of previously paid compensation against compensation due. 33 U.S.C. §§914(j), 922. If an employer wishes to decrease or terminate a compensation *award*, Section 22 of the Act provides the mechanism for doing so.

need never be reported on an LS-200 earnings reporting form, and we hold that, "earnings," as that term is used in Sections 8(j) and 702.285(b), does not exclude income obtained from illegal activities. Therefore, when an appropriate request has been made, a claimant must report all earnings, including income obtained from illegal enterprises; knowing and/or willful failure to report, or to accurately or timely report, such earnings may result in the forfeiture of benefits.

As the Director states, in this case, the administrative law judge made no finding regarding whether claimant had earnings from his illegal activities; therefore, we must remand this case for findings of fact. On remand, the administrative law judge should determine whether claimant had earnings during the periods covered by the LS-200s and whether he knowingly or willfully failed to accurately report such earnings.[10] Compensation would be forfeited for "any period during which the employee was required to file such report," which, here, would be any time between January 1, 1992 and June 24, 1997, as those were the dates for which employer requested income information that correspond to claimant's dates of disability. *Plappert*, 31 BRBS 13; *Zepeda v. National Steel & Shipbuilding Co.*, 24 BRBS 163 (1991); *Denton v. Northrop Corp.*, 21 BRBS 37 (1988); 20 C.F.R. §702.285(a). If the administrative law judge concludes claimant's benefits should be suspended, the case must be remanded to the district director for consideration of claimant's financial situation and establishment of the forfeiture schedule.[11] *Moore*, 28 BRBS at 183-184; 20 C.F.R. §702.286(b), (c).

[10]Pursuant to 20 C.F.R. §702.286(b), an employer who believes a violation has occurred must present evidence of the earnings that have been omitted.

[11]Forfeiture provisions contemplate a suspension of prospective benefits and not an action against a claimant for the reimbursement of benefits paid. 33 U.S.C. §908(j)(3); *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992); *Moore*, 28 BRBS at 181.

Accordingly, the administrative law judge's finding that claimant's benefits are not subject to forfeiture pursuant to Section 8(j) is vacated, and the case is remanded for further findings consistent with this decision. In all other respects, the Decision and Order on Modification and the Order Denying Motion to Vacate and Denying Motion for Reconsideration are 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