

GOLET E. MANN)	
)	
Claimant-Petitioner)	
)	
v.)	
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P&O PORTS OF VIRGINIA,)	DATE ISSUED: 08/15/2006
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Golet E. Mann, Norfolk, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2005-LHC-0560) of Administrative Law Judge Larry W. Price 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). In an appeal filed by a claimant without representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a forklift and hustler driver, fractured his right knee when he fell through a hole in a ship on which he was working on December 18, 2002. Claimant returned to work on June 22, 2003, with restrictions of no pushing or pulling more than ten pounds. Employer paid temporary total disability benefits from the date of the accident until July 9, 2003, at a compensation rate of \$197.65, but refused to assume

liability for medical costs after September 25, 2003, the date it alleged claimant suffered a new injury to his leg.

In his Decision and Order, the administrative law judge found that claimant returned to work on June 22, 2003, and did not suffer an intervening injury on September 25, 2003. The administrative law judge found, therefore, that employer remains liable for medical benefits for claimant's leg condition. He further found that claimant's average weekly wage was \$208.59 and that pursuant to Section 6(b)(2), 33 U.S.C. §906(b)(2), claimant is entitled to receive his full average weekly wage as his compensation rate because it is less than one-half of the national average weekly wage. Consequently, he awarded claimant temporary total disability benefits from December 18, 2002 through June 22, 2003, based upon an average weekly wage of \$208.59, as well as medical benefits.

Claimant, representing himself, appeals the administrative law judge's Decision and Order. Employer responds, urging affirmance and contending that no issues were decided adversely to claimant.

The administrative law judge found that claimant did not suffer an intervening injury on September 25, 2003, and that employer remains liable for all medical bills arising out of and necessary for the treatment of his 2002 injury to his leg. Decision and Order at 6. In determining claimant's pre-injury average weekly wage, the administrative law judge properly calculated claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), because claimant did not work "substantially the whole of the year" prior to his injury and because the wages of co-workers were not submitted into evidence. 33 U.S.C. §910(a), (b); *Story v. Navy Exch. Serv. Center*, 30 BRBS 225 (1997). The administrative law judge properly excluded from consideration the amount claimant received as unemployment compensation, *Strand v. Hansen Seaway Service, Ltd.*, 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980), and rationally divided by 52 claimant's actual earnings in the year preceding his injury to arrive at an average weekly wage of \$208.59. This finding is supported by substantial evidence and is affirmed. *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Moreover, as claimant's average weekly wage is less than half of the applicable national average weekly wage, the administrative law judge properly awarded as claimant's compensation rate for total disability his entire average weekly wage.¹ 33 U.S.C. §906(b)(2).

¹ Section 6(b)(2) states:

Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under

The administrative law judge also found that after claimant returned to work on June 23, 2003, he did not establish he has a loss of wage-earning capacity.² We cannot affirm this finding, as the administrative law judge did not fully address this issue. *See* Decision and Order at 6, n.2. Claimant testified that he has missed work due to his injury since June 23, 2003, *see* Tr. at 16-17, that he worked in pain, *id.* at 20, and that he has work restrictions due to his injury, *id.* The medical evidence establishes that claimant was not taken off work by any physicians, but was told to “work as tolerated.” EX 2 at 4. Claimant was given restrictions of no pushing or pulling more than 10 pounds with his legs. *See, e.g.*, EX 2 at 11; Tr. at 20.

If claimant’s pain and/or restrictions result in a loss of wage-earning capacity, claimant is entitled to an award of temporary partial disability benefits. 33 U.S.C. §908(e); *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002). As the administrative law judge did not fully address this issue, we remand the case for findings of fact as to whether claimant’s injury restricts his ability to work and whether claimant has a loss in wage-earning capacity therefrom.³ 33 U.S.C. §908(h); *Newport News*

paragraph (3), except that if the employee’s average weekly wages as computed under Section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

33 U.S.C. §906(b)(2). The applicable national average weekly wage is \$498.27, and one-half of this is \$249.24. Claimant’s average weekly wage of \$208.59 is less than half of this latter amount and therefore is his compensation rate for total disability. *Smith v. Paul Bros. Oldsmobile Co.*, 16 BRBS 57 (1983).

² The administrative law judge stated that due to a lack of medical treatment, he was not making a finding regarding a date of maximum medical improvement. The record supports the administrative law judge’s finding that claimant has not received a permanent impairment rating for his work injury, and that claimant, therefore is not entitled to an award of permanent partial disability benefits under the schedule at Section 8(c), 33 U.S.C. §908(c). Decision and Order at 6, n.2; *see generally Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998).

³ At the hearing, claimant, who was not represented by counsel, stated he did not have with him the information concerning the work days he missed due to his injury. Tr. at 17. Claimant’s post-injury wage records were admitted into evidence. CX 5; EX 6. In his brief to the Board, claimant alleges that he missed a specific number of days due to

Shipbuilding & Dry Dock Co. v. Stallings, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001).

Claimant contends that employer and/or its representatives made false statements in an effort to knowingly reduce or deny his benefits. We decline to address this issue, as did the administrative law judge. Neither the administrative law judge nor the Board has jurisdiction over such matters. 33 U.S.C. §931(c).

Accordingly, the administrative law judge's finding that claimant did not establish he has a loss in wage-earning capacity is vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, 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

BETTY JEAN HALL
Administrative Appeals Judge

his injury. Claimant may submit this argument to the administrative law judge on remand.