BRB No. 99-346

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| SANTE RECCHIA | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| GLOBAL TERMINAL & CONVEYER SERVICE | ) | DATE ISSUED: Dec. 20, 1999 |
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| Self-Insured Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Francis M. Womack, III (Weber, Goldstein, Greenberg & Gallagher), Jersey City, New Jersey, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-1123) of Administrative Law Judge Paul H. Teitler 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed as a longshoreman on the New Jersey waterfront. He primarily worked as a hustler driver for employer, a container company, but also performed jobs at other terminals including working as a holdman on a banana ship, driving cars off a car ship, and using heavy chains to unload a steel ship. He was injured on August 11, 1995,

when he was in an accident with another hustler driver, sustaining injuries to his back and right leg. He sought permanent total disability benefits under the Act.

In his decision, the administrative law judge found that claimant was not a credible witness, based on inconsistencies in his testimony, the histories given to the treating physicians, and a surveillance video. Thus, the administrative law judge accorded less weight to the opinion of Dr. Patel as it is based on claimant's complaints of pain and descriptions of his physical abilities. The administrative law judge accorded Dr. Burton's opinion determinative weight and concluded that claimant was capable of performing his usual duties as a hustler driver or hi-lo driver. Thus, as the administrative law judge found that claimant could return to his usual employment, temporary total disability benefits were denied after January 24, 1997.

On appeal, claimant contends that the administrative law judge erred in making "sweeping" credibility determinations based on the surveillance video alone and that the administrative law judge erred in relying on a physical therapist to make a medical finding. Claimant also contends that the administrative law judge erred in finding that claimant can return to his usual duties and thus in denying total disability benefits. Lastly, claimant contends that the administrative law judge should have at least awarded permanent partial disability benefits under Section 8(c), 33 U.S.C. §908(c), for a scheduled loss of use of his right leg.[1] Employer responds, urging affirmance of the administrative law judge's decision as it is supported by substantial evidence.

[1]Claimant also contends that the administrative law judge erred in denying an attorney's fee as there was at least a small amount of success in the original decision. However, there is no evidence that claimant filed a petition for an attorney's fee for work performed before the administrative law judge. Therefore, we decline to address this contention. *See generally Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989).

Initially, we reject claimant's contention on appeal that the administrative law judge erred in making "sweeping" credibility determinations against claimant based on the surveillance video alone. The administrative law judge also considered inconsistencies between claimant's testimony and the other evidence presented, including his testimony at prior depositions and histories he provided the examining physicians. He noted that Dr. Burton testified that the activities shown on the video were inconsistent with claimant's physical capabilities demonstrated in his office, and that the physical therapist, Mr. Phillips, stated that claimant's complaints of pain were not substantiated by physical findings or organic pathologic conditions. He also noted that Mr. Phillips' screening for non-organic signs related to the low back was positive in four of five areas. As the administrative law judge thoroughly reviewed the evidence of record, and claimant has raised no reversible error, we affirm the administrative law judge's determination that claimant was not a credible witness.[2] *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Claimant also contends on appeal that the administrative law judge erred in failing to consider the other duties he performed for other terminals in New Jersey in determining whether he could return to his usual duties. To establish a *prima facie* case of total disability, the employee must show that he cannot return to his regular or usual employment due to his work-related injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). In order to determine whether claimant has shown total disability, the administrative law judge must compare the employee's medical restrictions with the specific physical requirements of his usual employment. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). In the instant case, claimant worked as a longshoreman for a general pool of employers and was entitled to a guaranteed minimum income of $45,000. However, his employment required that he accepted waterfront jobs as offered, and if he failed to accept three jobs, he would be penalized. In addition to the work with employer driving a hustler, claimant, as a holdman, could be called upon to perform a variety of duties including working on a banana ship, driving cars off a car ship, and using heavy chains to unload a steel ship. The evidence indicates that he was hired by numerous employers in the year preceding his injury, in addition to his work for employer. *See* Emp. Ex. T. However, the administrative law judge restricted his discussion of the physical requirements of claimant's usual work to claimant's duties as a hustler driver. He noted that Dr. Burton was provided at his deposition with a detailed description of claimant's duties as a hustler driver and hi-lo driver, and opined that

[2]Moreover, contrary to claimant's contention the administrative law judge did not rely on Mr. Phillips' opinion in resolving the issue of disability; rather, he noted that Mr. Phillips' findings corroborated claimant's lack of credibility. Decision and Order at 15-16.

claimant was capable of performing those duties. The administrative law judge concluded:

> In comparing Mr. Nargi's description of Claimant's usual employment [as a hustler driver with Global] with Dr. Burton's testimony regarding Claimant's physical capabilities, and after reviewing the videotape evidence, I find that Claimant has not shown that he is unable to return to his usual employment.

Decision and Order at 17. However, claimant was not exclusively a hustler driver at Global; rather, his usual employment was as a general longshoreman on the docks, and as such he was available to work as a holdman for a number of employers. While the administrative law judge found claimant had the seniority to be assigned as a hustler driver, he also noted that claimant was penalized if he turned down other work, and the evidence of other jobs he performed in the year prior to injury cannot be disregarded as it indicates work driving a hustler may not have always been offered to him. Thus, as there is evidence in the record that claimant performed various jobs at other terminals as a part of his usual employment at the time of the injury and his performance of this work may be affected by his current restrictions, we vacate the administrative law judge's finding that claimant can return to his usual employment and remand the case for further consideration. *See Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).

Claimant also contends that the administrative law judge erred in failing to consider whether he could work an eight-hour day and the overtime he was performing prior to the injury, in determining whether he could perform his usual employment. The record includes a functional capacities evaluation by Dr. Burton dated January 13, 1998, which indicates that claimant can perform alternating sitting and standing for eight hours.[3] J. Ex. 2. The form also includes Dr. Burton's opinion that claimant could have returned to work for a six-hour day as of September 1997. At his deposition, Dr. Burton testified that claimant could return to his former duties as they were described to him, and that the only restriction he would place on claimant would be to limit lifting to 45-50 pounds. He did not mention a time limit at that time. As there is thus conflicting evidence regarding whether claimant can return to his former duties for a full day, and overtime if necessary, which the administrative law judge did not address, the administrative law judge is instructed on remand to clarify his findings regarding whether claimant is capable of returning to his usual full-time employment, including overtime, as this is relevant in determining whether claimant is able to return to his usual work for purposes of determining whether he established his *prima facie* case of total

[3]The Estimate Functional Capacity Form requests that the doctor estimate the number of hours a patient can perform certain tasks, assuming an eight-hour day. Dr. Burton opined that claimant could perform alternate sitting and standing for the full eight hours, but did not address whether claimant could perform overtime. J.Ex. 2.

disability or, alternatively, whether he sustained a loss of wage-earning capacity with regard to his back.

Lastly, claimant asserts that, if he is not totally disabled, then he is entitled to a permanent partial disability award under the schedule based on a 20 percent impairment of his right leg. A scheduled award is based on physical impairment and is not dependent on proof of economic disability. *See Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15 (CRT) (4th Cir. 1998). Moreover, where a claimant is partially disabled and suffers two distinct injuries, a scheduled injury and a non-scheduled injury, arising from a single accident, he may be entitled to receive compensation under both the schedule and Section 8(c)(21), 33 U.S.C. §908(c)(21). *See Green v. I.T.O. Corp. of Baltimore,* 32 BRBS 67 (1998), *modified*, 185 F.3d 239 (4th Cir. 1999); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Frye v. Potomac Elec. Power Co.*, 21 BRBS 194 (1988).

Dr. Burton testified in his deposition that he would assign a disability rating of 20 percent of the knee under the New York State method, but would need more information to assign a rating under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (the AMA *Guides*).[4] Emp. Ex. X. Claimant raised his entitlement to a scheduled award before the administrative law judge, but he did not address this contention in his decision. As there is evidence which may, if credited, establish entitlement to permanent partial disability benefits under the schedule, the administrative law judge is instructed on remand to consider any residual disability to claimant's right knee due to the work-related injury.

Accordingly, the decision of the administrative law judge denying compensation benefits after January 24, 1997 is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[3]There is no requirement under the Act that a disability rating be based on the AMA *Guides* except in cases involving compensation for hearing loss and voluntary retirees. *See* 33 U.S.C. §§908(c)(13), 902(10); *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993).

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge