BRB No. 01-0432

WILLIAM H. RIDDICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Jan. 31, 2002
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Gregory E. Camden (Montagna, Klein & Camden), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2000-LHC-2026) of Administrative Law Judge Richard E. Huddleston denying benefits 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). The Board must affirm the administrative law judge's findings of fact and conclusions of law if they 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).

The parties stipulated to the following: Claimant sustained a work-related injury to his back and right leg on May 23, 1991, and, as a result thereof, claimant is unable to return to his usual employment. Employer paid claimant temporary total disability benefits from May 30 to October 27, 1991, based on claimant's average weekly wage of $473.61. When claimant returned to work on October 28, 1991, employer provided claimant with suitable

light duty work at its facility; claimant did not sustain a loss of actual earnings in this position. On January 12, 2000, claimant was passed out of work because employer no longer had any work available within claimant's restrictions. Claimant obtained a job as a bus driver on February 21, 2000; this job pays $195.75 per week. Employer also has provided all necessary medical treatment. *See* 33 U.S.C. §907. When claimant missed work due medical appointments for his work injury, employer paid claimant his regular wages.

Claimant filed a claim pursuant to Section 13 of the Act, 33 U.S.C. §913, on October 24, 1995. When the claim came before the administrative law judge, claimant asserted entitlement to temporary total disability benefits from January 21 through February 20, 2000, and to continuing temporary partial disability benefits thereafter.[1] *See* 33 U.S.C. §908(b), (e). Employer contended that claimant's claim was untimely filed.[2] Claimant countered that employer's voluntary payment of claimant's regular wages while he attended medical appointments constituted voluntary payment of compensation within the meaning of Section 13(a) such that the claim was timely filed in relation to the last such payment, which occurred on October 16, 1995. The administrative law judge rejected claimant's contention, finding that employer did not intend the payments of salary to be payments of compensation. The administrative law judge thus concluded that as the last payment of compensation was made on October 27, 1991, the claim filed on October 24, 1995, was untimely filed, and he denied the claim.

On appeal, claimant's sole contention is that the administrative law judge erred in finding that the salary payments were not intended as compensation, and thus, in finding that the claim was not timely filed.[3] Employer responds, urging affirmance.

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[1]The parties stipulated that if the claim was timely filed, claimant is entitled to the benefits sought.

[2]The parties stipulated that employer filed a timely first report of injury. *See* 33 U.S.C. §930(a).

[3]Claimant also contends the administrative law judge erred in finding the payments to be "medical benefits." We need not address this contention, as the administrative law judge

Section 2(12) of the Act, 33 U.S.C. §902(12), states that "'compensation' means the money allowance payable to an employee . . . as proved for in this chapter. . . ." Section 13(a) states, *inter alia*, that "if payment of compensation has been made without an award . . . , a claim may be filed within one year after the date of the last payment." 33 U.S.C. §913(a). The Board has held that the filing period under Section 13 is not tolled by an employer's paying claimant's full salary when he was hospitalized due to a work-related injury in the absence of evidence that employer intended the payments as "compensation." *Taylor v. Security Storage of Washington*, 19 BRBS 30 (1986); *see Welch v. Pennzoil Co.*, 23 BRBS 395 (1990)(payments made under the employer's short-term disability and vacation plans not intended as compensation); *see also Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998) (salary payments to be credited against compensation due pursuant to Section 14(j), 33 U.S.C. §914(j), if payments were intended as compensation); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985) (same with salary continuance plan).

The administrative law judge found that employer did not intend the salary payments it made to claimant when he attended medical appointments to be payments of compensation. He found the following two facts dispositive of employer's intent: (1) employer paid claimant his *full* wages, rather than two-thirds of his wages as is proper for compensation payments; and (2) employer's attendance records have different entries for absences due to work injuries and absences due to medical appointments. The absences due to disability are charged as "workers' compensation" and the latter are charged as "absent with notice." *See* Attachment 1 to Stipulations.

We reject claimant's contention of error. The parties submitted into evidence a computer-generated "lost time inquiry" documenting claimant's work absences for, *inter alia*, vacation, workers' compensation injury, tardiness, and funeral leave. On the days claimant had medical appointments, the entries state either "absence w/notice medical appointment paid 8 hours clinic," or "partial day medical appointment." When claimant was actually disabled from work, the report states "workers comp." *Id.* Contrary to claimant's contention, the differing entries on the report support the administrative law judge's conclusion that the payment of salary while claimant attended medical appointments was not intended to be a workers' compensation payment. Similarly, the administrative law judge's finding that if the payments were intended as compensation, they would have been made at

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did not make such a finding in this case.

two-thirds of average weekly wage and not as full salary payments is supported by the plain language of the Act. The various subsections of Section 8 require that compensation payments be made based on two-thirds of the claimant's average weekly wage or on two-thirds of the difference between the claimant's average weekly wage and his post-injury wage-earning capacity. *See* 33 U.S.C. §908(a), (b), (c), (e). Thus, as the administrative law judge's conclusion is rational and supported by substantial evidence, we affirm the finding that the payments of claimant's salary while he attended medical appointments were not intended as payments of compensation and thus did not toll the time for filing a claim

pursuant to Section 13. *See Taylor*, 19 BRBS at 32-33. We therefore affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge