

ROBERT C. USHER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PEAVEY GRAIN COMPANY)	DATE ISSUED:
)	
)	
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Robert J. Brissenden, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Elizabeth A. Trainor (Tooze Marshall Shenker Holloway & Duden), Portland, Oregon, for employer/carrier.

Before: DOLDER and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (87-LHC-499) of Administrative Law Judge Robert J. Brissenden 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 if they are rational, supported by substantial evidence, and in accordance with law. O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant sustained an injury on June 8, 1984, when he slipped on wet corn dust while working as a hatch tender for employer on board ship. Following the accident, although claimant experienced low back and left leg pain which caused him to walk in a humped over position, he continued to work. Claimant consulted numerous physicians who offered various diagnoses and non-surgical treatment. Claimant kept a daily diary of his work habits which indicated that he missed 430 days of work due to his back and leg pain between June 8, 1984 and September 11, 1987. In the spring of 1987, claimant consulted Dr. John Thompson, an orthopedist, who recommended that claimant undergo surgery. On October 5, 1987, claimant underwent the recommended surgery. From September 11, 1987, until the date of surgery, claimant remained off from work on Dr. Thompson's orders and had not yet returned to work as of the time of the March 11, 1988 hearing.

In his Decision and Order, the administrative law judge awarded claimant temporary total disability benefits during the period from June 8, 1984 until September 30, 1987, for the days claimant indicated in his diary that he was off work due to back pain, based on the stipulated average weekly wage of \$939.37. With regard to claimant's disability subsequent to September 30, 1987, during which time claimant did not work at all, the administrative law judge found claimant was unable to work due to surgery for his work-related back injury. He thus found claimant was temporarily totally disabled from September 30, 1987 through the date of the hearing and continuing until such time as his condition becomes permanent.¹

On appeal, employer argues that claimant's compensation should have been calculated to award benefits for temporary partial disability based on a loss in wage-earning capacity under Section 8(e) and (h) of the Act, 33 U.S.C. §908(e), (h), for the entire period from his injury until his return to work after the hearing. Employer further argues that claimant's diary does not provide substantial evidence of his post-injury wage-earning capacity and that reliance on this evidence will result in

¹The administrative law judge also stated that he agreed with employer that awarding claimant compensation for every day from October 1987 to February 1988 would result in claimant's being overcompensated because claimant had not worked every day per month prior to the subject injury. He thus awarded claimant temporary total disability benefits based on his stipulated average weekly wage based on a 4.3 week month. It is unclear what the administrative law judge intended with these statements. Temporary total disability benefits are not calculated on a monthly rate but are due at a rate of 2/3 of average weekly wage per week, subject to the statutory maximum, 33 U.S.C. §906(b)(1).

claimant's being compensated for days on which he would not have worked even if he had not been injured. Employer suggests that the average hours claimant worked in the three years pre-injury should be compared with the hours worked from the 1984 injury through March 1988 to calculate claimant's temporary partial disability benefits. Claimant responds, urging affirmance of the administrative law judge's award. Employer replies, reiterating its argument that the administrative law judge's Decision and Order is not supported by substantial evidence.

We reject employer's contention that the administrative law judge erred in calculating claimant's compensation award. An award of temporary total disability is appropriate where, as here, the employee is absent from work due to a work-related injury. Kerch v. Air America, Inc., 8 BRBS 490, 494 (1978), aff'd in part, part sub nom. Air America, Inc., v. Director, OWCP, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979). Moreover, the testimony of claimant's treating physician, Dr. Thompson, following his surgery indicating that although claimant's condition was not yet stationary he would soon be able to return to his usual work on a full-time basis, also provides a proper basis for an award of temporary total disability. See Martinez v. St. John Stevedoring Co., 15 BRBS 436 (1983). With regard to the period from October 1987 through March 1988 and continuing, the evidence supports the administrative law judge's finding that claimant was unable to work at all due to his surgery. There is no basis for awarding temporary partial disability benefits during this period, as claimant did not work at all and was unable to perform his usual work. The administrative law judge's award is thus affirmed.

With regard to the period from June 1984 through September 30, 1987, claimant performed his usual work and missed intermittent days due to his back injury. We reject employer's argument that the administrative law judge should have fashioned a temporary partial award for this period. It is within the administrative law judge's discretion to award benefits for temporary total disability for the actual days of work missed.

The administrative law judge also acted within his discretion as trier of fact in concluding that claimant was unable to work on the days indicated in his work diary. In making this determination, the administrative law judge noted that claimant had made a habit of recording his work hours even before the accident and that claimant's testimony was uncontroverted. In addition, the administrative law judge found that claimant's efforts to keep working despite his back problems, his care to account only for the days he missed work due to back pain, and his long record of good attendance despite previous work-related injuries, rendered his testimony credible. Inasmuch as such credibility determinations are within the purview of the administrative law judge, and claimant's credible complaints of

pain provide substantial evidence to support a finding that claimant was unable to work on the specified days, we affirm the administrative law judge's finding. See generally Thompson v. Northwest Enviro Services, Inc., 26 BRBS 53, 56-57 (1992); Richardson v. Safeway Stores, Inc., 14 BRBS 855 (1982).

Once claimant shows his inability to perform his usual employment, thus establishing a prima facie case of total disability, the burden shifts to employer to demonstrate the existence of suitable alternate employment, regardless of whether the claim is for permanent total or temporary total disability. See Mills v. Marine Repair Service, 21 BRBS 115, 117 (1988), modified on recon., 22 BRBS 335 (1989); Bell v. Volpe/Head Construction Co., 11 BRBS 377 (1979). Since the administrative law judge in the present case credited claimant's testimony that he was unable to work on the days recorded in his diary, and employer failed to introduce evidence which established claimant's ability to work in any capacity on the days claimed, we affirm the administrative law judge's award of temporary total benefits for those days when claimant was unable to work.

Employer's argument that compensating claimant based on the days recorded in the work diary will result in claimant's being overcompensated because he will receive compensation for days he would not have worked anyway is without merit. In the present case, the administrative law judge acted within his discretion in rejecting employer's argument that claimant's award should be based on a comparison between his average hours following the injury and the average number of hours he actually worked in the years prior to the subject work injury. The administrative law judge felt that calculating the award in this manner was unfair in that it failed to account for the fact that claimant had lost work in the years prior to the work injury due to a non-industrial injury. Because the administrative law judge's calculation of claimant's temporary total disability compensation is rational, supported by substantial evidence, and in accordance with law, we affirm this determination. See O'Keefe, supra.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge