U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0458

RONNEIKA BUTLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED (PASCAGOULA OPERATIONS)	)	DATE ISSUED: Mar. 31, 2016
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster and Jeffrey P. Briscoe, Metairie, Louisiana, for claimant.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2014-LHC-1168) of Administrative Law Judge Clement J. Kennington 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On or about June 14, 2013, claimant was hired by employer at its Pascagoula shipyard as a third-class pipefitter, earning $19.66 per hour. Prior to this date, claimant had worked for employer at its Avondale shipyard as a first-class pipefitter, earning

$22.80 per hour, until being laid off on December 14, 2012, due to a slowdown in work that ultimately resulted in the closure of the facility. Tr. at 10, 17. On August 16, 2013, approximately eight weeks after her rehire, claimant injured her left knee while working for employer. EXs 2-3. Claimant's primary care physician, Dr. Vu, took claimant out of work for two days, August 19 and 20, 2013. CX 6. When claimant returned to work with employer on August 21, she reported to employer's infirmary, was diagnosed with a left knee contusion, and was assigned light-duty work sweeping, filing papers, and picking up trash. Tr. at 16-17, 29-31. Thereafter, on September 23, 2013, claimant treated with her choice of orthopedist, Dr. Bourgeois, who continued the light-duty restrictions, ordered a series of injections, and prescribed physical therapy. After completing this treatment, Dr. Bourgeois released claimant to full-duty work on January 6, 2014. CX 4 at 10.

Between the date of her injury, August 16, 2013, and the release to full-duty work, January 6, 2014, claimant alleged she suffered a loss in wage-earning capacity due to her injury, as she was restricted from working for two days and she missed work due to doctor and physical therapy appointments on 16 additional occasions. CXs 2-5; EX 5. Claimant testified that she had to schedule these appointments during the workday and had to clock out of work to go to the appointments. Tr. 1, 6-19, 34. Employer did not pay claimant wages or compensation for the time she missed work due to the medical appointments. Claimant filed a claim on November 1, 2013, seeking compensation for the days she missed work due to medical appointments.[1]

Both parties agreed that claimant's average weekly wage should be calculated under Section 10(c), 33 U.S.C. §910(c), of the Act as claimant worked only 27 weeks in the year before her injury and there was insufficient evidence in the record to determine her average daily wage. Claimant asserted that her average weekly wage should be $816.51.[2] Claimant additionally contended that her post-injury earnings, which were reduced from her average weekly wage, fairly and reasonably represented her post-injury

[1] On April 17, 2014, under "protest," employer paid claimant $479.71 for 36.6 hours, or approximately half of the lost time, in an effort to obviate the need for trial. EX 6 at 4.

[2] Claimant calculated her average weekly wage by dividing her total earnings for services rendered in the year prior to her injury by the 27 weeks she was able to work that year, which yielded an average weekly wage of $816.51 ($22,045.77 ÷ 27). Approximately 19 of the 27 weeks were based upon claimant's work at the Avondale shipyard as a first-class pipefitter, when she earned $22.80 per hour. The remaining eight weeks of the calculation were based on claimant's work at the Pascagoula shipyard as a third-class pipefitter, when she earned $19.66 per hour.

wage-earning capacity, as her injury-related medical treatment and appointments prevented her from working full days on days she had appointments. As her actual weekly earnings were less than her average weekly wage, claimant alleged entitlement to disability benefits for a loss in her wage-earning capacity. Further, as claimant's disability persisted for more than four months, claimant alleged entitlement to disability benefits for the first three days she missed work pursuant to Section 6(a), 33 U.S.C. §906(a), because her disability exceeded 14 days.

Employer contended that claimant's average weekly wage was $646.32.[3] Employer further argued that claimant's medical appointments have no bearing on her post-injury wage-earning capacity and that claimant had no decrease in her wage-earning capacity because she was provided suitable alternate employment at her regular wages. As claimant did not have a disability lasting more than 14 days, employer disputed claimant's entitlement to payment of compensation for the first three days of disability pursuant to Section 6(a). Alternatively, employer contended that a claimant who misses fewer than 14 full days of work is not entitled to payment for the first three days of disability pursuant to Section 6(a).

The administrative law judge accepted claimant's method of calculating average weekly wage and found claimant's average weekly wage is $816.51. Nevertheless, as employer provided claimant with light-duty work at her regular hourly wage, the administrative law judge found claimant had no loss in her wage-earning capacity between August 16, 2013 and January 6, 2014. Finding that neither Section 7 nor Section 8 of the Act, 33 U.S.C. §§907, 908, provides for the payment of compensation for lost wages to attend medical/therapy appointments where there is no loss of the capacity to earn those wages, the administrative law judge denied disability compensation. Decision and Order at 8-9. Moreover, as claimant did not establish a post-injury economic disability lasting more than 14 days, the administrative law judge found she is not entitled to be paid for the first three days of disability pursuant to Section 6(a). *Id*. at 9-10. Claimant appeals the denial of benefits. Employer responds, urging affirmance.

Claimant first contends the administrative law judge erred in failing to award her temporary partial disability benefits under Section 8(e), 33 U.S.C. §908(e), during the period she was restricted to light-duty work. Specifically, claimant asserts that, despite

[3] As claimant earned $19.66 hourly and averaged 32.875 hours per week in the eight weeks she worked before her injury, employer averred that claimant's average weekly wage should exclude her prior higher earnings, take into account her "demotion," and be limited to the number of hours customarily worked at her usual, lower-paying job. Accordingly, employer asserted that claimant's average weekly wage was $646.32 ($19.66 x 32.875).

employer's providing her suitable employment at her pre-injury hourly rate, she suffered a loss in wage-earning capacity as her injury-related medical treatment prevented her from working a full shift on days she had appointments. Although the administrative law judge acknowledged that claimant lost work time (and wages) due to her injury-related medical appointments, the administrative law judge attributed the loss to "scheduling convenience,"[4] and he found that claimant was physically capable of earning her full-time pre-injury wages the entire time she was restricted to light-duty work.[5] Decision and Order at 9. Therefore, as claimant was physically capable of earning her regular wages, the administrative law judge found she did not establish a loss in wage-earning capacity and was not "disabled" under the Act.[6] Contrary to the administrative law judge's finding, however, wage-earning capacity is not determined solely by a claimant's physical capacity to earn pre-injury wages.

Entitlement to temporary partial disability compensation is predicated on a loss of wage-earning capacity due to a claimant's work injury. 33 U.S.C. §908(e);[7] *see McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988). The claimant bears the burden of establishing that her loss of wage-earning capacity is related to her work injury. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985); *see also Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S.

[4] The administrative law judge did not further explain this finding. *See* discussion, *infra*.

[5] In so finding, the administrative law judge observed that employer provided claimant with work she was physically capable of performing, paying her pre-injury hourly rate, and which was available on a full-time basis.

[6] The administrative law judge properly observed that the Act defines "disability" as the "incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment," and it defines "injury" as "accidental injury or death arising out of and in the course of employment." 33 U.S.C. §902(2), (10) (emphasis added); Decision and Order at 9.

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

> Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

960 (2005). Section 8(h) of the Act, 33 U.S.C. §908(h),[8] provides that a claimant's wage-earning capacity shall be her actual post-injury earnings if these earnings fairly and reasonably represent her wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990). The fact that a claimant received actual post-injury wages equal to or greater than her pre-injury earnings does not mandate a conclusion that the claimant has no loss of wage-earning capacity. *See generally Stallings v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 193 (1999), *aff'd in pert. part,* 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). Rather, as stated in Section 8(h), in assessing an injured claimant's wage-earning capacity, the administrative law judge may take into account "any other factors or circumstances in this case which may affect [claimant's] capacity to earn wages in [her] disabled condition. . . ." A reduction in work hours due to the work injury may result in a compensable loss in wage-earning capacity. 33 U.S.C. §908(h); *see generally Kerch v. Air America Inc.*, 8 BRBS 490, 493-494 (1978), *aff'd in pert. part and rev'd on other grounds sub nom. Air America, Inc. v. Director, OWCP,* 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979) (compensation for temporary partial disability benefits was appropriately awarded where an employee's work hours were reduced to accommodate his many medical appointments); *see also Stallings*, 33 BRBS 193 (holding that claimant's work-related injury diminished his post-injury wage-earning capacity, despite greater post-injury wages, where the injury prevented him from working indoors and the record established that, but for the injury, he would have the opportunity to work indoors on days of bad weather and to earn a full day's pay); *compare with Sheek v. General Dynamics Corp.*, 18 BRBS 1 (1985), *modified on recon. on other grounds*, 18 BRBS 151 (1986) (affirming administrative law judge's calculation of post-injury wage-earning capacity based on a 40-hour workweek, where claimant worked only part-time

[8] Section 8(h) of the Act, 33 U.S.C. §908(h), states:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the [administrative law judge] may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

and attended vocational classes 15 hours per week, because "if not for the class attendance, claimant could have worked more than part-time hours").

It is uncontested, in this case, that claimant lost time from work due to medical treatment for her work-related injury. This lost time may have affected her wage-earning capacity and, thus, may be compensable under Section 8. *See Kerch*, 8 BRBS at 493-494; *see also Stallings*, 33 BRBS 193. Consequently, we vacate the administrative law judge's finding that claimant did not demonstrate a loss in wage-earning capacity, and we remand the case for further consideration. *See Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT); *Penrod Drilling*, 905 F.2d 84, 23 BRBS 108(CRT). On remand, the administrative law judge must address claimant's testimony that she had to schedule her appointments during the work day, Tr. at 33-34,[9] and make a specific dollar finding as to claimant's post-injury wage-earning capacity during the entire period she was restricted to light-duty work. In addressing whether there was any loss, the administrative law judge must bear in mind that only a loss in wage-earning capacity due to claimant's work injury is compensable; any loss of earning capacity due to claimant's pre-injury job change, which resulted in her receiving the lower wages of a third-class pipefitter, is not compensable.[10] 33 U.S.C. §908(e); *see Penrod Drilling*, 905 F.2d 84, 23 BRBS 108(CRT); *McBride*, 844 F.2d 797, 21 BRBS 45(CRT).

Claimant also contends the administrative law judge erred in failing to award benefits for the first three days of her disability pursuant to Section 6(a) of the Act,[11] as

[9] To the extent the administrative law judge implied that claimant did not have to miss work to attend medical appointments, the administrative law judge failed to address claimant's testimony that she was unable to schedule the appointments to avoid missing work and could schedule them only when her doctors and therapists were available. Tr. at 33-34.

[10] Thus, a strict computation of average weekly wage minus post-injury weekly earnings is not proper in this case where the pre-injury average weekly wage calculation by the administrative law judge includes earnings from claimant's higher-paying job, and the loss of those wages is not related to claimant's work injury. 33 U.S.C. §§902(10), 908(e), (h).

[11] Section 6(a) of the Act provides:

> No compensation shall be allowed for the first three days of the disability, except the benefits provided for in Section 7. *Provided, however,* That in case the injury results in disability of more than 14 days, the compensation shall be allowed from the date of the disability.

33 U.S.C. §906(a).

he found claimant was not restricted economically from earning pre-injury wages for more than 14 days because employer provided suitable work at her regular wage within three days after the date of injury. Specifically, claimant contends she was incapable "because of injury" to work the same hours and to earn the same wages that she "was receiving at the time of injury." 33 U.S.C. §902(10). Claimant asserts she was unable to work on two full days, and she had to miss work for various hours on an additional 16 occasions in order to treat her injury. Thus, claimant argues that her disability lasted for more than 14 days, and she is entitled to disability benefits for the first three days of disability pursuant to Section 6(a). Employer asserts that claimant was not disabled for more than 14 days because she lost only five full days from work plus an additional 36.6 hours due to her injury and that equates to only nine and one-half days of lost time.[12] In the alternative, employer argues that claimant was not economically disabled at any time while restricted to light-duty work, as it had provided her suitable work that paid her regular wage.

In denying these benefits, the administrative law judge conducted an "exhaustive search of the legislative history of Section 6(a)," and properly found nothing to suggest that the "14 days" must be eight-hour days.[13] Decision and Order at 10 n.9. Thus, he rejected employer's argument. While he appears to have implied that, if claimant's injury caused her to lose wages on more than 14 days, regardless of the actual number of hours lost from work, she would be entitled to disability benefits during her first three days of disability, he concluded she had no loss of wage-earning capacity and, thus, no disability.

[12] Employer argued before the administrative law judge that claimant must miss the equivalent of 14 days, or 112 hours, for an eight-hour per day worker, before she is entitled to recover for the first three days of disability.

[13] The administrative law judge additionally found the legislative history of Section 6(a) demonstrated Congress's intent to expand, not limit, the compensation rights of claimants under this provision. Specifically, the administrative law judge noted that: 1) the Act as originally written in 1927 allowed no compensation for the first seven days of disability unless the injury resulted in more than 49 days of disability; 2) in 1956, Congress reduced the waiting period from seven to three days and the 49 days of disability to 28 days, because Congress believed that disabled employees "should not have to be delayed longer than 28 days in order to collect compensation for the waiting period when their disability is protracted;" and, 3) in 1972, the retroactive period was reduced from 28 days to the current 14 days in accordance with the National Commission's recommended standard and in line with 28 other jurisdictions at the time. Decision and Order at 10 n.9 (internal citations omitted).

Because we have remanded this case for the administrative law judge to determine whether claimant had a loss of wage-earning capacity during her period of light-duty work, we must also vacate the administrative law judge's denial of benefits under Section 6(a). Claimant's entitlement to disability benefits under Section 6(a) turns on the administrative law judge's analysis of whether claimant suffered a loss in wage-earning capacity under Section 8(h), and, if so, whether any such disability lasted more than 14 days. Contrary to the parties' assertions, claimant's disability in this case need not be measured in terms of the number of affected days or the number of lost work hours. In this case, where claimant's injury arguably caused intermittent disability, any loss of wage-earning capacity can be measured over the entire, yet limited, period during which claimant claims benefits.[14] The record here reflects that claimant was restricted to light-duty work for a finite period of approximately 20 weeks. Therefore, if claimant establishes a post-injury loss in wage-earning capacity due to her work injury, she also will have established "a disability of more than 14 days" and her entitlement to payment of compensation for the first three days of disability pursuant to Section 6(a).

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge

[14] The Act states that ongoing disability payments are to be paid "semimonthly." 33 U.S.C. §914(b).