

CRYSTAL MORRIS)
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 Claimant-Petitioner)
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 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: 09/29/2003
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

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

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-1190) of Administrative
Law Judge Richard D. Huddleston 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 supported by substantial evidence, are rational, and are in
accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls*
Associates, Inc., 380 U.S. 359 (1965).

Claimant sustained an abdominal strain on July 28, 1999, during the course of her
employment for employer as an apprentice electrician. Dr. Hubbard examined claimant
in September 1999. He performed exploratory surgery on claimant's right groin area to
determine if claimant had a hernia, and he resected the round ligament. CX 5 at 7-10.

Dr. Hubbard restricted claimant from climbing ladders and lifting over 20 pounds. CX 4 at 12A. Claimant's job duties alternate between classroom instruction and on-the-job training. Tr. at 20. Employer voluntarily paid claimant compensation for various periods of temporary total disability, 33 U.S.C. §908(b), when claimant was unable to work, and temporary partial disability, 33 U.S.C. §908(e), when claimant was unable to participate in her on-the-job training, but she was able to attend classes. CX 1 at 2. Dr. Hubbard lifted claimant's work restrictions on November 10, 1999. CX 5 at 14-15.

In December 1999, claimant became pregnant. She returned to Dr. Hubbard on January 10 and May 17, 2000, due to bilateral groin pain. Dr. Hubbard re-imposed work restrictions after examining claimant on May 17, 2000. CX 4 at 10A. Employer voluntarily resumed compensation payments for various periods, including temporary partial disability while claimant attended classes for apprentice electricians. CX 1 at 2. On August 10, 2000, claimant's semester ended. Tr. at 21. Claimant received permission from employer to be absent from the next scheduled semester since she planned to be off work for six weeks following childbirth. Tr. at 33-34. On September 6, 2000, claimant delivered her baby. Tr. at 22. On October 18, 2000, claimant was re-examined by Dr. Hubbard, who released claimant to return to work without restrictions. CX 4 at 1. Claimant returned to work on October 31, 2000. Claimant sought compensation under the Act for temporary total disability from August 10 to October 18, 2000. Claimant contended that she was unable to work due, in part, to her work-related abdominal injury.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking her symptomatology and work restrictions from May 17 to October 18, 2000, to the July 28, 1999, work injury. The administrative law judge determined that employer failed to rebut the presumption, and he concluded that claimant's continuing groin pain from May 17, 2000, and resultant restrictions to October 18, 2000, were caused by the July 1999 injury. The administrative law judge credited claimant's testimony that the next semester of class work would have commenced two weeks after the previous semester ended on August 10, 2000, and he found claimant physically capable of performing the classroom portion of her duties as an apprentice electrician. The administrative law judge awarded claimant compensation for temporary total disability from August 10 to August 24, 2000, when no suitable alternate employment was available. The administrative law judge concluded, however, that claimant is not entitled to compensation after August 24, 2000, due to her voluntary withdrawal from the next semester of classes for reasons unrelated to her work injury; *i.e.*, claimant did not work from August 25 to October 18, 2000, solely due to her pregnancy and childbirth.

On appeal, claimant challenges the administrative law judge's finding that employer's classroom training established the availability of suitable alternate

employment from August 24 to October 18, 2000, and that her withdrawal from the workforce affects her entitlement to compensation. Alternatively, claimant contends that she is entitled to compensation for temporary partial disability from August 24 to October 18, 2000. Employer responds, urging affirmance.

We initially address claimant's contention that the administrative law judge erred by finding that she is not entitled to any compensation after August 24, 2000, because of her voluntarily withdrawal from apprenticeship classes due to her forthcoming childbirth. The administrative law judge reasoned that claimant's decision not to work was voluntary and unrelated to her work injury. We cannot affirm the administrative law judge's finding that claimant is not entitled to any compensation after August 24, 2000. Notwithstanding her pregnancy, claimant was unable to return to her on-the-job training with employer from May 17 to October 18, 2000, due to work restrictions imposed by Dr. Hubbard due to her July 1999 work injury. Decision and Order at 11-12. Thus, claimant has established a loss of wage-earning capacity during this period due to her work injury, which is further evidenced by employer's voluntary payments of compensation for temporary total and temporary partial disability from May 18 to August 20, 2000. CX 1 at 2. Once claimant sustains a loss of wage-earning capacity due to her work injury, claimant's subsequent withdrawal from the workforce does not affect her entitlement to compensation for this loss in wage-earning capacity. *Hoopes v. Todd Shipyards Corp.*, 16 BRBS 160 (1984); *see also Sam v Loffland Bros. Co.*, 19 BRBS 228 (1987). In this case, the administrative law judge found that claimant established her inability to perform her usual employment as an apprentice electrician due to her work injury, and she is entitled to compensation for temporary total disability from August 10 to October 18, 2000, unless employer establishes the availability of suitable alternate employment, or to temporary partial disability benefits from the date suitable alternate employment is available should this employment result in a loss in wage-earning capacity. *See generally Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991).

Claimant next contends that employer's classroom instruction for apprentice electricians from August to October 2000 does not meet employer's burden of establishing the availability of suitable alternate employment. Specifically, claimant argues that employer offered no evidence showing either when the classes would begin or the number of hours of weekly instruction. The administrative law judge determined that employer's classroom instruction for apprentice electricians established the availability of suitable alternate employment when he found claimant entitled to compensation for temporary total disability from the date her semester of classes ended on August 10 to August 24, 2000. The administrative law judge also credited claimant's testimony that the break between semesters is normally two weeks to find that the next semester of classes would commence on August 24, 2000, the date on which he terminated claimant's entitlement to compensation. Accordingly, the administrative law judge credited

substantial evidence to find that the next semester of classes began on August 24, 2000, and we reject claimant's contention to the contrary. Moreover, it is undisputed that claimant was physically capable of attending classes while limited by Dr. Hubbard's work restrictions. Thus, we affirm the administrative law judge's finding that employer's classroom instruction for apprentice electricians established the availability of suitable alternate employment after August 24, 2000. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). Claimant, therefore, is not entitled to total disability benefits.

Alternatively, claimant contends she is entitled to compensation at a rate of \$246.29 per week for temporary partial disability from August 25 to October 18, 2000. An award for temporary partial disability is based on the difference between claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. 33 U.S.C. §908(e); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). In this case, it is undisputed that claimant sustained a loss of wage-earning capacity when she was able to attend employer's classroom instruction for apprentice electricians, but was unable to participate in on-the-job training. Employer paid claimant \$246.29 per week in compensation for temporary partial disability during the period from May 18 to August 20, 2000, when claimant was similarly disabled. CX 1 at 2. In its response brief, employer does not dispute claimant's entitlement to compensation at this rate for temporary partial disability. Employer's Brief in Opposition to Claimant's Petition for Review at 12-13. We therefore modify the administrative law judge's decision to award claimant compensation of \$246.29 per week for temporary partial disability from August 25 to October 18, 2000.

Accordingly, the administrative law judge's Decision and Order is modified to award claimant compensation of \$246.29 per week for temporary partial disability from August 25 to October 18, 2000. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

