

BERNADINE LEWIS )  
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 Claimant-Respondent )  
 v. )  
 )  
 TRANSPACIFIC CONTAINER ) DATE ISSUED: Sept. 2, 2004  
 SERVICES CORPORATION )  
 )  
 and )  
 )  
 AMERICAN HOME ASSURANCE )  
 )  
 Employer/Carrier- )  
 Petitioners ) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul A. Mapes,  
Administrative Law Judge, United States Department of Labor.

Michael W. Thomas (Laughlin, Falbo, Levy & Moresi LLP), San  
Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2003-LHC-0304) of Administrative Law Judge Paul A. Mapes 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. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On August 7, 2000, claimant injured her back and neck while working as a tractor driver for employer. Employer voluntarily paid claimant temporary total disability benefits from August 8, 2000 to March 18, 2001. 33 U.S.C. §908(b). Claimant returned to longshore employment on March 19, 2001, but continued to receive medical treatment from Dr. Blackwell, a Board-certified orthopedic surgeon, for her work-related back and neck problems. On July 6, 2002, claimant sustained a second work-related injury, and

she has not returned to work since that date.<sup>1</sup> Claimant sought permanent partial disability benefits as a result of the injuries that she sustained to her back and neck in the August 7, 2000, work-related accident.

In his Decision and Order, the administrative law judge found that as a result of the injuries which she sustained on August 7, 2000, claimant was temporarily totally disabled from August 7, 2000 through March 17, 2001, and permanently partially disabled as of March 18, 2001.<sup>2</sup> The administrative law judge next determined that claimant's actual earnings during the period from March 19, 2001 to July 7, 2002 were indicative of her post-injury wage-earning capacity and that her average weekly earnings during that period were \$1,135.52. Having thus determined that claimant's August 7, 2000 work-related injuries resulted in a loss in wage-earning capacity in the amount of \$290 per week, the administrative law judge awarded claimant permanent partial disability benefits of \$193.33 per week from March 18, 2001, and continuing. Lastly, the administrative law judge ordered employer to provide all reasonable and necessary medical care to claimant for the sequelae of her August 7, 2000 injuries.

On appeal, employer challenges the administrative law judge's award of permanent partial disability benefits to claimant, contending that claimant has neither a physical impairment nor a loss of wage-earning capacity as a result of her August 7, 2000, work-related injuries. Employer further avers that the administrative law judge's order regarding its liability for claimant's medical benefits should be limited to the treatment provided to claimant prior to her July 6, 2002 work-related injury. Claimant has not responded to employer's appeal.

A claimant is considered permanently disabled if she has any residual work-related impairment after reaching maximum medical improvement. *See SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 443, 30 BRBS 57, 61(CRT) (5<sup>th</sup> Cir. 1996). The extent of an employee's disability is evaluated on the basis of both physical and economic factors. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5<sup>th</sup> Cir. 1981); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). In the instant case, employer first avers that the administrative law judge erroneously considered only the economic component of claimant's alleged disability without first having found that claimant had a residual work-related physical impairment. Contrary to employer's assertions in this regard, the administrative law judge found that claimant has residual back and neck impairments limiting her ability to perform some of the longshore jobs that she had previously performed. Decision and Order at 8. In this

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<sup>1</sup> Claimant's separate claim for disability benefits arising from the July 6, 2002 injury is not the subject of the instant appeal.

<sup>2</sup> The parties stipulated, *inter alia*, that claimant reached maximum medical improvement on March 18, 2001, and that her average weekly wage at the time of the August 7, 2000, injury was \$1,425.52. *See* Decision and Order at 6.

regard, after specifically stating that all three of the physicians who examined claimant concerning her August 7, 2000 injury indicated that she is a credible patient, the administrative law judge rationally credited claimant's complaints of continuing back and neck problems. *See, e.g., Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 194, 33 BRBS 65, 67(CRT) (5<sup>th</sup> Cir. 1999). Moreover, the administrative law judge found claimant's description of her limitations to be fully corroborated by Dr. Blackwell's treatment records reflecting her continuing complaints and need for pain medications. *See* Emp. Ex. 12. Lastly, contrary to employer's contention, the administrative law judge provided a thorough and well-reasoned explanation for his decision to give determinative weight to Dr. Blackwell's hearing testimony that claimant had continuing limitations in her ability to perform certain longshore jobs.<sup>3</sup> *See Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 1550, 24 BRBS 213, 221(CRT) (9<sup>th</sup> Cir. 1991).

It is well-established that factors such as claimant's pain and the physical limitations which cause her to avoid certain jobs offered by a hiring hall are relevant in determining a claimant's post-injury wage-earning capacity and may support an award of permanent partial disability benefits under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), based on a reduced wage-earning capacity. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 297, 34 BRBS 29, 31-32(CRT) (5<sup>th</sup> Cir. 2000); *Gross*, 935 F.2d at 1550, 24 BRBS at 220-221(CRT); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41, 45 n.5 (1999). Specifically, Section 8(c)(21) provides for an award of permanent partial disability benefits based on the difference between a claimant's pre-injury average weekly wage and her post-injury wage-earning capacity, while Section 8(h) of the Act, 33 U.S.C. §908(h), provides that a claimant's wage-earning capacity shall be her actual post-injury earnings if they fairly and reasonably represent her wage-earning capacity. The burden of proof is on the party seeking to prove that claimant's actual post-injury

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<sup>3</sup> Specifically, the administrative law judge rationally credited Dr. Blackwell's hearing testimony in which the doctor explained that he had released claimant to return to work without restrictions only because claimant would not have been permitted to return to longshore work if formal work restrictions had been imposed and because claimant could decline those jobs offered by the hiring hall which were outside her physical limitations. Moreover, the administrative law judge reasonably found Dr. Zwerin's opinion that claimant's August 7, 2000, work injury resulted in no physical impairment to be less persuasive than Dr. Blackwell's opinion on the basis that Dr. Zwerin examined claimant only once, while Dr. Blackwell was claimant's treating physician, and that Dr. Zwerin's finding of no impairment is inconsistent with claimant's payroll records following her return to work in March 2001, reflecting that she did not perform certain jobs and shifts as frequently as she had prior to her injury. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9<sup>th</sup> Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9<sup>th</sup> Cir.), *cert. denied*, 528 U.S. 809 (1999).

wages are not representative of claimant's wage-earning capacity. See *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5<sup>th</sup> Cir. 1992).

In the instant case, the administrative law judge found that claimant's physical limitations resulting from her August 7, 2000 injuries caused a loss in wage-earning capacity, having credited claimant's testimony and payroll records reflecting that she was not capable of performing all of the longshore jobs offered by the hiring hall that she had performed prior to her injury. The administrative law judge determined that claimant's actual post-injury earnings during the period March 19, 2001 to July 7, 2002, fairly and reasonably represented her post-injury wage-earning capacity. In challenging this finding, employer avers that the administrative law judge should have considered only claimant's immediate period of earnings preceding her subsequent injury on July 6, 2002. Employer's argument is premised on its position that claimant's physical condition improved in the period following her return to work on March 19, 2001, enabling her to work more hours in the period immediately preceding her second injury. We reject employer's contention that the administrative law judge was required to utilize only the most recent portion of claimant's post-injury earnings, an argument that was similarly rejected by the United States Court of Appeals for the Ninth Circuit in *Gross*, 935 F.2d at 1551, 24 BRBS at 223(CRT). Although employer in the instant case attempts to distinguish *Gross* on its particular facts, the court's holding in *Gross* that it was reasonable to rely on the claimant's earnings during his entire period of employment following the date he reached maximum medical improvement supports the administrative law judge's wage-earning capacity determination in the instant case. In the case at bar, claimant returned to work on the day after she reached maximum medical improvement, and thus it was rational for the administrative law judge to view the entire period of her post-injury employment earnings as fairly and reasonably representing her post-injury wage-earning capacity. See *Gross*, 935 F.2d at 1551, 24 BRBS at 223(CRT). Therefore, as the administrative law judge applied the appropriate standard for determining claimant's post-injury wage-earning capacity, and as his factual findings are rational, supported by substantial evidence, and are in accordance with law, they are affirmed. 33 U.S.C. §908(h). See *Gross*, 935 F.2d at 1551, 24 BRBS at 223(CRT); *Carpenter v. California United Terminals*, 37 BRBS 149, 158 (2003). Consequently, the administrative law judge's calculation of claimant's post-injury wage-earning capacity as \$1,135.52, and resulting award of permanent partial disability benefits, is affirmed. *Id.*

Lastly, employer contends that the administrative law judge's award of medical benefits should be limited to the treatment provided prior to claimant's second work-related injury on July 6, 2002. Medical benefits may be awarded under Section 7(a) of the Act, 33 U.S.C. §907(a), for medical care that is appropriate for and related to the work injury. See generally *Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988). In the instant case, there is no indication in the record before us that claimant is currently claiming entitlement to any medical benefits which employer has declined to pay; moreover, claimant has not identified specific medical treatment for which she has sought authorization from employer and has been denied, or that she has incurred work-related

medical expenses which employer refused to reimburse. *See* Hearing tr. at 12-13. In the absence of evidence of outstanding requests for medical benefits, there presently is no issue regarding medical benefits for the Board to decide. *See generally Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995). Moreover, the administrative law judge's award of medical care is properly limited to that necessitated by claimant's August 7, 2000, injury. Decision and Order at 9. Should a future dispute arise regarding employer's liability for specific medical expenses which cannot be resolved at the district director level, the parties may seek a hearing before the Office of Administrative Law Judges. *See* 33 U.S.C. §907(b), (c); 20 C.F.R. §702.401 *et seq.*; *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge