

F.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYERS	)	DATE ISSUED: 09/15/2009
INTERNATIONAL, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE	)	
OF PENNSYLVANIA	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

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

Joshua T. Gillelan, II (Longshore Claimants' National Law Center), Washington, D.C., and Dennis F. Nalick, Alton, Illinois, for claimant.

Jerry R. McKenney (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2008-LDA-0087) 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a recovery mechanic for employer in Iraq. In July 2007, claimant noticed heat and redness on his right shoulder and was diagnosed with an abscessed staph infection. He was sent from the facility in Al Assad, Iraq, to Kuwait and subsequently returned to the United States for treatment in late July 2007. When treatment was unsuccessful, he was referred to Dr. Nellore, a specialist in infectious diseases, who diagnosed leishmaniasis.<sup>1</sup> Employer paid temporary disability benefits for the period of July 28, 2007, to October 23, 2007. Claimant sought additional disability compensation and medical benefits.

In his Decision and Order, the administrative law judge found claimant established his *prima facie* case and that employer failed to rebut the presumption of causation at Section 20(a) of the Act, 33 U.S.C. §920(a). The administrative law judge awarded claimant compensation for temporary total disability pursuant to Section 8(b), 33 U.S.C. §908(b), for the period of October 23, 2007, to April 1, 2008.<sup>2</sup> The administrative law judge found that claimant's average weekly wage is \$1,916.73 and that claimant's compensation rate is subject to the maximum rate in effect in July 2007, when claimant's disability commenced. The administrative law judge also held employer liable for medical benefits.

Claimant appeals, contending the administrative law judge erred: in awarding disability compensation from October 23, 2007, to April 1, 2008, rather than from July 28, 2007, subject to credit for the amount employer has already paid; in limiting compensation payable to the maximum rate in effect at the time the disability commenced, *i.e.*, July 2007, rather than at the time of the award, *i.e.*, October 2008; and in failing to address the application of Section 14(e), 33 U.S.C. §914(e). Employer responds arguing that no Section 14(e) assessment is due and even if it were due, it would apply only to the unpaid compensation for the period from August 12 to August 23, 2007. Employer further responds that the administrative law judge correctly determined the maximum compensation rate to be that in effect in 2007. Claimant has filed a reply brief.

---

<sup>1</sup> Leishmaniasis is a disease found in parts of the tropics, subtropics, and southern Europe caused by infectious parasites which are spread by the bite of infected sand flies. EX 9 at 3-4.

<sup>2</sup> The administrative law judge found that claimant reached maximum medical improvement as of April 1, 2008, based on claimant's testimony that his shoulder healed sometime in April 2008 and Dr. Gutwein's report on June 19, 2008, that the treatments were successful and claimant's shoulder was fully functional. CX 17 at 4-8. This finding has not been appealed.

Claimant first contends that the administrative law judge erred in failing to enter an award from the date claimant's disability commenced based on the average weekly wage calculated by the administrative law judge. Employer voluntarily paid benefits from July 28, 2007, to October 23, 2007, based on an average weekly wage of approximately \$1,416.00.<sup>3</sup> The administrative law judge found claimant's average weekly wage is \$1,916.73, but commenced the award only as of October 23, 2007. We agree that this appears to be an oversight on the part of the administrative law judge. Thus, we modify the award to reflect claimant's entitlement to temporary total disability compensation from July 28, 2007, to April 1, 2008, based on an average weekly wage of \$1,916.73, with employer's receiving credit for amounts already paid. 33 U.S.C. §914(j).

Claimant also contends that the administrative law judge erred in awarding compensation at the maximum rate effective in July 2007, when claimant's disability commenced, rather than the rate effective in October 2008, the date the award was entered. Pursuant to Section 8(b) of the Act, compensation for temporary total disability is paid at the rate of two-thirds of the claimant's average weekly wage. 33 U.S.C. §908(b). The administrative law judge found that claimant's average weekly wage at the time of his injury was \$1,916.73. Decision and Order at 17. This award, however, is subject to the maximum rate allowable under the Act. 33 U.S.C. §906. Claimant argues that pursuant to Section 6(c), 33 U.S.C. §906(c), compensation is limited by the maximum rate in effect at the time such compensation is awarded, which he asserts is the time the decision is issued.

We reject this contention for the reasons stated in *Estate of C. H. v. Chevron USA, Inc.*, 43 BRBS 9 (2009) and *Reposky v. Int'l Transportation Services*, 40 BRBS 65 (2006), wherein the Board held that compensation for temporary total disability compensation is limited by the maximum rate in effect when the disability commences. See also *J.T. v. Global Int'l Offshore, Ltd.*, \_\_\_ BRBS \_\_\_, BRB Nos. 08-0199/A (July 29, 2009); *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990). Use of the rate in effect on the date a claimant's disability commences treats similarly situated claimants in an identical manner in that the maximum compensation rate is not dependent upon the vagaries of the date an award is issued. *Estate of C.H.*, 43 BRBS at 16. Moreover, for the reasons expressed in *Estate of C.H.*, 43 BRBS at 16-17, we reject claimant's reliance on *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5<sup>th</sup> Cir. 1997). Accordingly, we affirm the administrative law judge's finding that claimant is entitled to compensation based on the maximum rate in effect in July 2007.

---

<sup>3</sup> Employer paid claimant \$8,917.16 for temporary total disability for the period of July 15, 2007, to October 23, 2007.

Finally, claimant contends that the administrative law judge erred in failing to award additional compensation under Section 14(e), 33 U.S.C. §914(e), for the payments that fell due more than fourteen days before August 23, 2007, when employer filed its late notice of controversion. Contrary to employer's assertion, claimant did raise this issue before the administrative law judge, and the administrative law judge acknowledged it. HT at 20. Moreover, this issue may be raised at any time in the proceedings. *McKee v. D.E. Foster Co.*, 14 BRBS 513 (1981). The administrative law judge did not address the Section 14(e) issue in his decision, and, thus, we remand the case for him to do so. On remand, the administrative law judge shall address the parties' contentions and make the necessary findings. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

Accordingly, the administrative law judge's Decision and Order is modified to reflect claimant's entitlement to temporary total disability compensation from July 28, 2007, to April 1, 2008, based on an average weekly wage of \$1,916.73, subject to employer's credit for benefits paid and to the maximum compensation rate in effect in July 2007. The case is remanded for findings on the Section 14(e) issues raised by the parties. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge