BRB No. 09-0665

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| Claimant-Respondent | ) | |
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| v. | ) | |
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| THE DAYTON POWER & LIGHT COMPANY | ) | DATE ISSUED: 02/26/2010 |
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| Self-Insured Employer-Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order-Awarding Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Kirk E. Karamanian (O'Bryan Baun Cohen Kuebler Karamanian), Birmingham, Michigan, for claimant.

Todd M. Powers and Megan C. Ahrens (Schroeder, Maundrell, Barbiere & Powers), Mason, Ohio, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (2007-LHC-02023) of Administrative Law Judge Larry S. Merck 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 worked for employer as an A-operator and his duties included operating a tow boat and the barge unloader, as well as shoveling coal, unloading coal from barges, and working with the coal that had been unloaded. Claimant first injured his back on February 11, 1994, when he slipped at the top of icy stairs outside the scale house and fell down the stairs on his buttocks. Claimant was treated conservatively and was released

for full-duty work after some weeks. His second back injury occurred on February 17, 1997, while he was shoveling coal from conveyor belt 21 into the silo house. He was treated conservatively and the pain improved in two to three weeks. However, claimant contends that the pain increased with strenuous activities. Claimant also contends that he injured his back a third time on July 13, 1999, while driving a dump truck between two ash pits. In early 2000, claimant's back pain became unbearable, and he stopped working on April 2, 2000. He began physical therapy in May 2000 and was prescribed medication and epidural injections. However, his symptoms worsened and claimant's physician recommended surgery, which he underwent on April 23, 2001. Claimant reported that his back pain improved following the surgery, but that his daily activity is limited, and he has not returned to work. Claimant sought benefits under the Act.

In his decision, the administrative law judge found that all of claimant's injuries occurred at the J.M. Stuart Station (Stuart Station), employer's electricity generating facility, which is located directly on the Ohio River without any public roads or buildings separating it from the waterfront and that the unloading of maritime cargo (*i.e.*, coal) is a significant function of the site. The administrative law judge found that the first injury occurred at the scale house, which is located in the area where coal is unloaded from barges. The administrative law judge found this injury occurred on a covered situs because the scale house is in close proximity to the river and is used in the unloading process.[1] Decision and Order at 30. The administrative law judge found that the second injury occurred while claimant was shoveling coal from under conveyor belt 21 into a silo house, where coal is stored. The silo house is approximately 150 feet from the river. The administrative law judge noted that after the coal is unloaded, it travels on conveyors 1-4, and then goes to surge bin 1 or onto other conveyor belts into one of several silos for storage. The administrative law judge found that the system of conveyor belts which brings the coal from the river to the storage area is integral to the unloading process. Thus, the administrative law judge concluded that the second injury occurred on a covered situs. However, the administrative law judge found that the third injury occurred when claimant was driving a dump truck to move ash from the electricity plant to an ash pit. Thus, while it occurred in the same general maritime area as the other injuries, the administrative law judge found that the site of this injury does not have a functional nexus to the unloading process or to other maritime activity, and is not a covered situs.

In considering the claim on the merits, the administrative law judge found that claimant suffered an injury on February 11, 1994, when he slipped and fell down stairs, and that he was injured again on February 17, 1997. He also found that claimant's

[1] The administrative law judge also found that claimant was a covered employee pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3), a finding that is undisputed on appeal.

continuing back pain is causally related to these injuries. *See* Decision and Order at 40; 33 U.S.C. §920(a). In addition, the administrative law judge found that claimant established a *prima facie* case of total disability, and he rejected the positions identified by employer as suitable alternate employment. Thus, the administrative law judge found that claimant is entitled to temporary total disability benefits from April 3, 2000 through March 26, 2002, permanent total disability benefits from March 26, 2002, and continuing, and medical benefits. The administrative law judge found that employer is entitled to a credit under Section 3(e), 33 U.S.C. §903(e), for payments it made to claimant under the Ohio workers' compensation program, but he denied employer a credit under Section 14(j), 33 U.S.C. §914(j), for payments made under employer's Illness and Disability Plan.

On appeal, employer contends that the administrative law judge erred in finding that claimant's two compensable injuries occurred on a covered situs as the scale house stairs, the site of the 1994 injury, are not contiguous with navigable water or used for unloading a vessel, and as the silo, the site of the 1997 injury, is not contiguous to navigable water and the conveyor belt is not actually used for unloading a vessel. In addition, employer contends that if the Board affirms the award of benefits, the administrative law judge erred in finding that it is not entitled to a credit for payments made under its disability plan because they were advance payments of compensation as contemplated by Section 14(j) of the Act. Claimant responds, urging affirmance of the administrative law judge's award of benefits.

Employer contends that the administrative law judge erred in finding that claimant's 1994 and 1997 injuries occurred on a site covered by Section 3(a) of the Act. Employer urges the Board to apply the decision of the United States Court of Appeals for the Fourth Circuit in *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996), to hold that the site of the injuries in this case are not covered under the Act as they are not discrete structures or facilities actually contiguous to navigable water. Employer also contends that the injuries occurred on sites which are functionally removed from the coal unloading process at its Stuart Station facility, and, therefore, that claimant was not injured on an "adjoining area" used for loading, unloading, repairing, dismantling or building a vessel.

To obtain benefits under the Act, an injury must occur on a covered situs. Section 3(a) of the Act states:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock,

> terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a). In this case, as claimant was not injured on navigable waters or on an enumerated site, his injury must have occurred in an "other adjoining area customarily used by an employer" in loading or unloading a vessel. *See generally Rizzi v. Underwater Constr. Corp.*, 84 F.3d 199, 30 BRBS 44(CRT) (6th Cir.), *cert. denied*, 519 U.S. 931 (1996). The Board recently addressed a case in which the claimant was injured at employer's Stuart Station facility in the area under the conveyor belts used to unload coal from vessels. *See Dryden v. The Dayton Power & Light Co.*, BRB No. 09-0315, ___ BRBS ___ (Dec. 31, 2009). The Board extensively discussed case precedent addressing the Act's requirement that the place of injury have both a functional and a geographic nexus with navigable waters. *Id*., slip op at 4. Initially, the Board held that it need not address whether, in a case arising within the jurisdiction of the Sixth Circuit, a site must be actually adjacent to navigable water to be an "adjoining area" as in *Sidwell*, as the administrative law judge found that the entire Stuart Station facility is in fact adjacent to navigable water. Similarly, in this case, at the same facility, the administrative law judge found that the entire plant is adjacent to the Ohio River and is not divided by any public roads. The administrative law judge found that claimant's first injury occurred on the stairs of the scale house, which is used to weigh the coal coming off the barges, and his second injury occurred near the conveyor belt outside of the silo house, where coal is stored, which is approximately 150 feet from the water. We affirm the administrative law judge's findings that the sites have a geographical nexus to navigable water as they are supported by substantial evidence and in accordance with law. *See Dryden*, slip op. at 4; *see also Pearson v. Jered Brown Brothers*, 39 BRBS 59 (2005), *aff'd on recon. en banc*, 40 BRBS 2 (2006).

Moreover, in *Dryden*, the Board held that the outdoor system of conveyor belts commences at the river and is used in unloading the barges on the river, and that the belts are not within the power plant itself.[2] The Board noted that employees involved in the intermediate steps of loading and unloading are covered under the Act. *P.C. Pfeiffer Co.*

[2] The Board noted, however, that the power plant at employer's facility is used for generating electricity, and thus, the area of the plant itself cannot be brought into coverage simply because coal is shipped by barge and unloaded at another portion of the facility. *Dryden*, slip op. at 6; *see Bianco v. Georgia Pacific Corp.*, 35 BRBS 99 (2001), *aff'd*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002); *see also D.S. [Smith] v. Consolidation Coal Co.*, 42 BRBS 80 (2008); *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003); *Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58 (2003); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

*v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979). Thus, the Board concluded that the conveyor belt system used to carry coal from the river to the power plant has a functional relationship with the Ohio River and affirmed the administrative law judge's finding that the site of the claimant's injury under the conveyor belts is an "adjoining area" pursuant to Section 3(a). *Dryden*, slip op. at 7-8. In this case, claimant was injured at the scale house, which is used to weigh the coal unloaded from the barges, and while shoveling coal underneath conveyor belt 21 into a silo. As in *Dryden*, these sites have a functional relationship with the Ohio River. For the reasons stated in *Dryden*, we affirm the administrative law judge's finding that claimant's first two injuries occurred on sites covered under Section 3(a) of the Act. *See also D.S. [Smith] v. Consolidation Coal Co.*, 42 BRBS 80 (2008). As employer does not raise any other contentions concerning claimant's entitlement to benefits, we affirm the award of benefits.[3]

Employer next contends that the administrative law judge erred by disallowing it a credit for payments claimant received under its Illness and Disability Plan (the Plan). Claimant received disability pay totaling $31,141.94 for the period from January 2003 through April 2008. Employer sought reimbursement for payments it made for long-term benefits for a disability lasting longer than 40 weeks. EX 11 at 7. The amount of the disability payment is based on the employee's years of service. *Id*. at 9. The administrative law judge found that employer's Employee Manual states that the Plan does not cover disabilities covered by workers' compensation. *Id*. at 11. Employer stated in its brief to the administrative law judge that it provided claimant long-term disability benefits under the Plan because it maintained that claimant's degenerative disc disease and radiculopathy were not work-related; however, should the administrative law judge find these conditions work-related, then employer contended that its payments should be construed as advance payments of compensation subject to Section 14(j). Employer's Post-Hearing Brief at 37-38.

The administrative law judge found that employer did not offer any evidence that its disability payments under the Plan were intended as compensation payments, nor does the Plan contain language stating that the payments would be considered advance compensation if the condition causing the disability were later found to be work-related. The administrative law judge also found that since the benefits were based, in part, on claimant's length of employment, they were earned for years of service. Accordingly, the administrative law judge denied employer a Section 14(j) credit for long-term disability benefits claimant received under the Plan.

[3] The administrative law judge's findings regarding claimant's entitlement to benefits are affirmed as they are unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*¸ 41 BRBS 57 (2007).

On appeal, employer contends that since the sole condition precedent to claimant's receipt of the long-term benefits is that he is disabled, and since this is the same condition precedent to his receiving benefits under the Act, the Plan description constitutes clear evidence that the disability payments claimant received were advance payments of compensation. Moreover, employer contends that the administrative law judge erred by finding that claimant's entitlement to disability compensation under the Plan is based on his years of service, since service time governs only the amount of a disability payment.

Pursuant to Section 14(j), employer is entitled to a credit only for advance payments of compensation against any compensation subsequently found due.[4] *Trice v. Virginia Int'l Terminals, Inc.*, 30 BRBS 165 (1996). Employer must establish that the benefits were intended as advance payments of compensation in order to be entitled to a credit under Section 14(j). *Dryden*, slip op. at 9; *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). For example, employer is not entitled to a credit under a salary continuance plan unless it shows that these payments were intended to be advance payments of compensation. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). In *Dryden*, the Board addressed the applicability of Section 14(j) to payments made under the same long-term disability benefits plan that is at issue in this case. The Board affirmed the administrative law judge's denial of a Section 14(j) credit, as there was no indication that employer intended the payments under its plan to be advance payments of compensation. For the reasons stated in *Dryden*, we affirm the administrative law judge's denial of a Section 14(j) credit under the facts in this case as there is no evidence that the payments were intended to be compensation payments. *See Dryden*, slip op. at 9.

[4] Section 14(j) provides:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. §914(j).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge