

BRB Nos. 91-1351
and 91-1351A

CHARLES H. MOORE)
)
 Claimant-Petitioner)
)
 v.)
)
 HARBORSIDE REFRIGERATED,)
 INCORPORATED)
)
 and)
)
 FLORIDA INSURANCE GUARANTY)
 ASSOCIATION)
) DATE ISSUED: _____
 Employer/Carrier-)
 Respondent)
 Cross-Respondent)
)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
)
 Cross-Petitioner) DECISION and ORDER

Appeal of the Decision and Order of E. Earl Thomas, Administrative Law Judge, United States Department of Labor.

John A. Williamson and Edward L. Young, Jr. (Barrs, Williamson, Stolberg & Townsend, P.A.), Tampa, Florida, for claimant.

Roscoe E. Long (Bradham & Bennett, P.A.), St. Petersburg, Florida, for employer/carrier.

Carol B. Feinberg (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant and the Director, Office of Workers' Compensation Programs (the Director), appeal the Decision and Order (90-LHC-2956) of Administrative Law Judge E. Earl Thomas denying benefits 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The parties stipulated that, on June 15, 1983, claimant was off-loading a crate of shrimp from a ship when he slipped and fell. The crate landed on top of him and he injured his lower back.¹ Tr. at 74; Decision and Order at 4. Employer paid claimant temporary total disability benefits from June 25, 1983 through January 6, 1988 at a rate of \$304.02 per week and permanent partial disability benefits from January 7, 1988 through April 13, 1988 at a rate of \$117.39 per week. Decision and Order at 3. Upon the termination of his benefits, claimant filed a claim for reinstatement of compensation.

A hearing was held on December 7, 1990, wherein the parties also stipulated, *inter alia*, that claimant's condition reached maximum medical improvement on July 12, 1984. They disputed claimant's entitlement to compensation, the nature and extent of his disability, whether he fraudulently obtained compensation, whether he should reimburse employer, whether the case should be referred to the United States Attorney for a criminal investigation, and whether employer is liable for an attorney's fee and costs. Decision and Order at 3-4. Based solely on the medical evidence, the administrative law judge found that claimant was temporarily totally disabled from June 15, 1983 through February 27, 1986 and is entitled to benefits for that period. 33 U.S.C. §908(b). He also found, again from a "strictly medical standpoint," that claimant is entitled to permanent partial disability benefits for a 20 percent impairment of the whole person from the date of maximum medical improvement and continuing.² Decision and Order at 15-16; 33 U.S.C. §908(c)(21). The administrative law judge did not convert either award to a monetary figure as required by the Act. 33 U.S.C. §§908(b), (c)(21), (h). Although he determined that claimant is entitled to disability compensation, the administrative law judge concluded that because claimant "deliberately withheld his [post-injury] employment information from the Employer/Carrier in an effort to prolong his temporary total disability payments[.]" claimant "has committed fraud against the Employer/Carrier and will be responsible for remuneration . . . for any and all temporary total disability payments received after June 19, 1983, the date he returned to work at Del Monte as a

¹Doctors diagnosed lumbar strain/sprain with a mild disc bulge. Cl. Exs. 1, 3; Decision and Order at 4-11.

²The administrative law judge credited the 20 percent impairment rating given by Dr. Keller, claimant's treating physician, over the two percent impairment rating determined by Dr. Slonka. Decision and Order at 16.

longshoreman."³ Decision and Order at 18. In light of his conclusion that claimant committed fraud, the administrative law judge referred the case to the United States Attorney, pursuant to Section 31(a), 33 U.S.C. §931(a) (1988), and he determined that claimant is not entitled to continuing permanent partial disability benefits. He also denied claimant's counsel an attorney's fee. Decision and Order at 19. Claimant and the Director appeal the decision. Employer responds, urging affirmance.

Both claimant and the Director contend that the administrative law judge erred in denying benefits and in ordering reimbursement of overpayment of compensation directly from claimant. Employer argues the record clearly shows that claimant misrepresented his earnings during the period he collected temporary total disability benefits and therefore he should not be entitled to collect permanent partial disability benefits and should reimburse employer the amount of \$39,947.98. We agree with claimant and the Director that the administrative law judge erred in ordering reimbursement because there is no basis in the Act allowing employer to be reimbursed for benefits mistakenly paid. *Cooper v. Ceres Gulf*, 24 BRBS 33 (1990); 33 U.S.C. §§908(j), 914(j), 931(a) (1988). In denying benefits, moreover, the administrative law judge failed to properly apply the statutory provisions.

³The record is replete with evidence of claimant's employment at Del Monte as a forklift operator beginning June 27, 1983, and at two security guard companies, during the period he collected temporary total disability benefits. Cl. Ex. 4; Emp. Exs. 1, 4, 6-7. Moreover, claimant admits he worked during this time, although he contends he did not work as many hours as his records reflect. Cl. Ex. 4; Tr. at 31-33, 45-46, 50-52, 59-60. Additionally, there is evidence in the record that claimant owns a real estate brokerage firm and receives income from this self-employment. Tr. at 46; Decision and Order at 14. The administrative law judge determined claimant's "recitation of his employment since his injury" is "devoid of any real value." Decision and Order at 18.

Section 8(j) of the Act provides that a claimant must report any earnings from employment or self-employment.⁴ If the claimant fails to report the earnings or knowingly understates them, he "forfeits his right to compensation with respect to any period" during which he was required to file such a report. 33 U.S.C. §908(j)(1), (2) (1988). Further, employer can recover such compensation "by a deduction from the compensation payable" in the future. 33 U.S.C. §908(j)(3) (1988). Section 14(j) states:

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). Based on these sections, the United States Courts of Appeals for the Fifth and Ninth Circuits have rejected claims by employers for recoupment under the Act. *See Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125 (CRT) (5th Cir. 1992); *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir. 1992), *cert. denied*, 112 S.Ct. 3056 (1992). Further, Section 31(a)(1) of the Act provides:

Any claimant or representative of a claimant who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under this chapter shall be guilty of a felony, and on conviction thereof shall be punished by a fine not to exceed \$10,000, by imprisonment not to exceed five years, or by both.

33 U.S.C. §931(a)(1) (1988). The penalty for misrepresentation in Section 31 does not bar compensation or include the recovery of payments obtained as a result thereof other than by the offset method against future compensation. *Cooper*, 957 F.2d at 1207-1209, 25 BRBS at 132-133 (CRT); *Newport News Shipbuilding & Dry Dock Co. v. Hall*, 674 F.2d 248, 14 BRBS 641 (4th Cir. 1982), *aff'g* 13 BRBS 873 (1981) (Smith, C.J., dissenting); 33 U.S.C. §914(j). Investigation of an alleged misrepresentation is the duty of the United States Attorney. 33 U.S.C. §931(a)(2) (1988). As it is well-settled that an employer may not recover under the Act any overpayment of compensation directly from a claimant, the administrative law judge erred in finding that employer is entitled to reimbursement from claimant for overpaid temporary total disability benefits. *See generally Cooper*, 24 BRBS at 34.

⁴For the purposes of filing a Report of Earnings in accordance with Section 8(j), 33 U.S.C. §908(j) (1988), the term "earnings" is defined as:

all monies received from any employment and includes but is not limited to wages, salaries, tips, sales commissions, fees for services provided, piecework and all revenue received from self-employment even if the business or enterprise operated at a loss of [sic] if the profits were reinvested.

20 C.F.R. §702.285(b).

In this case, the administrative law judge specifically found that the medical evidence supported an award of temporary total and permanent partial disability benefits, but he denied compensation based on claimant's misrepresentation of his earnings. Decision and Order at 19. We reverse the administrative law judge's denial of benefits and his order for claimant to recompense employer, and we remand the case for further consideration. *See Cooper*, 957 F.2d at 1199, 25 BRBS at 125 (CRT); *Eggert*, 953 F.2d at 552, 25 BRBS at 92 (CRT); *see also Zepeda v. National Steel & Shipbuilding Co.*, 24 BRBS 163 (1991) (Board affirmed the administrative law judge's finding that claimant's violation of the reporting requirements of Section 8(j) should result in the forfeiture of payments for a period equivalent to the period of misrepresentation.). On remand, the administrative law judge must determine the periods during which claimant is entitled to temporary total and temporary partial disability benefits,⁵ whether claimant can return to his usual work, and whether he is entitled to permanent partial disability benefits, given his permanent impairment and his post-injury wage-earning capacity.⁶ 33 U.S.C. §908(c)(21), (h). Once the administrative law judge makes the relevant findings in determining claimant's entitlement to benefits, he may suspend payments for specific periods based on claimant's misrepresentation of his earnings and award employer a credit for its continuing compensation liability against any overpayment of temporary total disability benefits. *Cooper*, 957 F.2d at 1207-1209, 25 BRBS at 132-133 (CRT); *Eggert*, 953 F.2d at 556, 25 BRBS at 97 (CRT); *Zepeda*, 24 BRBS at 168; 33 U.S.C. §§908(j), 914(j) (1988).

Claimant next challenges the administrative law judge's findings of fact concerning his post-injury employment. Specifically, claimant argues the record does not contain substantial evidence to support the administrative law judge's findings that he did not report his post-injury employment to a representative at employer's insurer, and that "card swapping" was merely an excuse claimant created. Claimant also contends the administrative law judge erred in his determination of the effective date of claimant's employment with the county government.

Initially, claimant asserts he contacted Maria Rodriguez, a claims examiner at employer's insurance company, and informed her of his post-injury employment. Tr. at 27-28. The record contains no evidence to the contrary; however, the administrative law judge noted that claimant was unable to verify his claim. Decision and Order at 17. The administrative law judge stated:

⁵Although the administrative law judge found claimant to be entitled to temporary total disability benefits, he acknowledged that claimant was not totally disabled while working at post-injury jobs because there was no evidence of extraordinary effort exerted by claimant to perform his work or of a beneficent employer. Decision and Order at 17.

⁶We note the discrepancy between the administrative law judge's finding regarding claimant's entitlement to temporary total disability benefits until February 27, 1986 and his acceptance of the parties' stipulation of July 12, 1984 as the date on which claimant's condition reached maximum medical improvement. *See* Decision and Order at 3, 16. We also note a discrepancy in the administrative law judge's findings concerning the date on which temporary total disability benefits commenced. *See* Decision and Order 3, 18. On remand, the administrative law judge must resolve these discrepancies.

It seems unrealistic at best that an insurance representative would not have transcribed the content of the conversation on such a crucial matter affecting benefits. Indeed, business practices would dictate that an employee would be required to make a notation on the individual's file if she were approving employment. More likely, this decision would not have been approved over the telephone and without any documentation. In light of [claimant's] actions with his physicians,⁷ his testimony regarding "Maria Rodriguez" is entitled to little, if any, substantive weight.

Id. (footnote added). In addition to the "Maria Rodriguez" dispute, claimant contends he did not work as many hours after his injury as his payroll records indicate. He contends that, although Del Monte does not condone it, he swapped cards with casual employees so they could work and he could obtain the requisite hours to qualify for insurance under the local union's policy. The vice president of the local and a co-worker testified concerning the practice. Both acknowledged its existence, but the vice president stated it is not condoned. Tr. at 93-94, 99. The administrative law judge, however, credited the testimony of Mr. Stowe, a warehouse manager at Del Monte, and the "utmost reliability" of the company's payroll records. Decision and Order at 18. Citing Mr. Stowe's testimony that Del Monte had not had any problems with card swapping since 1982, he noted: "[i]llegality aside, [card swapping] was not corroborated, and indeed appears to be refuted[.]" *Id.* The administrative law judge then found that claimant was not working the meager number of hours he claimed. *Id.*

We reject claimant's arguments. Questions of witness credibility are for the administrative law judge as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In this case, the administrative law judge concluded claimant was not a credible witness, and as is within his discretion as the trier-of-fact, he rejected claimant's testimony on these points. *I.T.O. Corp. v. Director, OWCP*, 883 F.2d 247, 24 BRBS 3 (CRT)(5th Cir. 1990).

⁷Claimant admitted he told the doctors who examined him that he had not tried to return to his usual work; however, he failed to tell them he was working at other jobs. Tr. at 80-81.

Additionally, claimant contends the administrative law judge erred in concluding that claimant began work with Hillsborough County on June 20, 1988. Decision and Order at 18. He testified he started work as a Property Appraisal Clerk with the county on November 20, 1989. Tr. at 34. The administrative law judge relied on claimant's June 3, 1988 application and the computerized application abstract which indicates claimant first worked for Hillsborough County on June 20, 1988 to draw his conclusion. Emp. Ex. 6. As there is substantial evidence of record which supports the administrative law judge's finding, we reject claimant's contention concerning his start-date with Hillsborough County. Therefore, we affirm the administrative law judge's findings of fact regarding claimant's post-injury activities.

Finally, claimant contends his counsel should be awarded an attorney's fee. Counsel is entitled to an attorney's fee pursuant to Section 28(b) of the Act if, after voluntary payment of compensation, employer contests claimant's continued entitlement to additional compensation, and counsel thereafter establishes such entitlement. 33 U.S.C. §928(b). In this case, the administrative law judge found that claimant has a permanent impairment but is not entitled to additional disability benefits because of his fraudulent actions. The administrative law judge denied counsel a fee because he did not award claimant any additional benefits.

The Board has held previously that although a claimant may not realize any actual compensation, if he succeeds in establishing employer's liability under the Act, he obtains an inchoate right to compensation and his counsel is entitled to a fee. *Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992) (Attorney's fee awarded where employer was entitled to a Section 3(e), 33 U.S.C. §903(e) (1988), credit.); *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990) (Attorney's fee awarded where employer was entitled to a Section 33(f), 33 U.S.C. §933(f), offset.); *see also McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988). Despite the chance that claimant in this case will never realize future compensation because of the operation of Sections 8(j) and 14(j), employer may be liable to claimant's counsel for an attorney's fee, if the administrative law judge determines that claimant's permanent impairment causes a loss in his wage-earning capacity, thereby entitling him to continuing permanent partial disability benefits. *See Kinnes*, 25 BRBS at 314-315. On remand, if the administrative law judge finds claimant is entitled to compensation, he must consider counsel's entitlement for an attorney's fee under Section 28(b).

Therefore, we reverse the administrative law judge's order requiring claimant to reimburse employer, and we remand the case for him to reconsider whether temporary total, temporary partial and permanent partial disability benefits should be awarded, and if so, to determine the periods of entitlement. Employer is entitled to a credit for overpayment of compensation against any future installments of compensation pursuant to Section 14(j), and to a suspension of benefits for any period of misrepresentation of earnings pursuant to Section 8(j).

Accordingly, the administrative law judge's decision is reversed in part, and the case is remanded for further consideration in accordance with this decision. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge