BRB Nos. 05-0773
and 05-0773A

| | | |
|---|---|---|
| SAMUEL L. LEPRESTI | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| MARINE REPAIR SERVICES | ) | DATE ISSUED: 05/30/2006 |
| | ) | |
| and | ) | |
| | ) | |
| SIGNAL MUTUAL INDEMNITY ASSOCIATION c/o THE SHAFFER COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| Cross-Petitioners | ) | DECISION and ORDER |

Appeals of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Rutter Mills, L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (2004-LHC-2548) of Administrative Law Judge Richard K. Malamphy 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 if they 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, a container repairman, suffered an injury to his right knee when he knelt or squatted down during a chassis inspection on May 25, 2004. He has not worked since that time. Claimant sustained prior knee injuries for which he had undergone three operations. These injuries resulted in a permanent impairment of 17 percent. Following the 2004 injury, claimant sought benefits for temporary total disability. Employer controverted the claim on the ground that claimant was working outside of his restrictions and thus "willfully intended to injure himself." *See* 33 U.S.C. §903(c).

In his Decision and Order, the administrative law judge rejected employer's contention that claimant willfully intended to injury himself, and awarded claimant temporary total disability compensation based on an average weekly wage of $69.80,[1] and medical expenses related to his injury. Claimant appeals the administrative law judge's determination of his average weekly wage. Employer appeals the administrative law judge's finding that claimant did not willfully intend to injure himself, as well as his calculation of the minimum compensation rate due claimant pursuant to 33 U.S.C. §906(b)(2).

We address first employer's appeal of the administrative law judge's finding that claimant did not willfully intend to injure himself. While employer does not contest that the subject injury occurred in its workplace, *see* 33 U.S.C. §902(2), employer argues that it rebutted the Section 20(d) presumption by presenting evidence that claimant willfully intended to injure himself by his "blatant" misrepresentation that he was fit for full duty.

Section 3(c) sets forth the following exclusion from coverage for an employee's disability resulting from an injury arising under the Act:

> No compensation shall be payable if the injury was occasioned . . . by the willful intention of the employee to injure or kill himself or another.

33 U.S.C. §903(c). Section 20(d) of the Act affords a claimant the benefit of the presumption "that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." 33 U.S.C. §920(d). In order to rebut the Section 20(d) presumption, employer must present substantial evidence that claimant willfully intended to injure himself. *See Rogers v. Dalton Steamship Corp.*, 7 BRBS 207

[1] The administrative law judge found claimant's compensation rate to be $257.70, the National Average Weekly Wage in effect for injuries that occurred between October 2003 and September 2004. Decision and Order at 11.

(1977); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935). The administrative law judge found that employer failed to rebut the Section 20(d) presumption because claimant's alleged negligence of performing work outside his physical restrictions does not fulfill Section 3(c)'s stringent intent requirement. Decision and Order at 6-8.

On February 16, 2001, following his third knee injury, claimant was assigned permanent restrictions prohibiting his climbing vertical or inclined ladders, kneeling, squatting, or the use of foot controls, and limiting his climbing stairs, crawling and twisting. EX 4. Until he began working for employer in December 2003, claimant testified he sought work through the union hiring hall, but was seldom hired due to the notation on the hiring board that he was working under restrictions. HT at 20. Claimant testified that he returned to Dr. Cohn seeking a lifting of his restrictions. According to claimant, Dr. Cohn stated that claimant could try to return to unrestricted work, but Dr. Cohn did not issue him a fit-for-full-duty slip. HT at 22, 33. After his third injury, claimant believed his knee was in workable condition based on the lack of symptoms and his requiring only one doctor's visit in the period between February 2001 and the date of this injury. HT at 16. Moreover, claimant testified that he worked "smart" to protect his knees and relied on Dr. Cohn's opinion that he could attempt to return to full-duty work. *Id.* at 16, 19, 22, 33. Claimant's work for employer as a chassis inspector required that he lift up to 60 pounds and that he kneel, squat and climb frequently. EX 5.

We reject employer's contention that the administrative law judge erred. A strict standard of proof is required in addressing whether there was a "willful intent to injure oneself," as Section 4(b), 33 U.S.C. §904(b), states that "[c]ompensation shall be payable irrespective of fault as a cause for the injury." *See General Accident, Fire & Life Assur. Corp. v. Crowell*, 76 F.2d 341 (5th Cir. 1935). Thus, ill-advised or negligent conduct by a claimant does not affect the compensability of a work injury itself and such conduct is insufficient to rebut the presumption that claimant did not intend to injure himself. *Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998) (Smith, J., concurring & dissenting); *see also Glen Falls Indemnity Co. v. Henderson*, 212 F.2d 617 (5th Cir. 1954).

In *Glen Falls Indemnity*, 212 F.2d 617, the decedent had been advised by his physician that, given his cardiac condition, strenuous work could cause death, yet he had returned to work. The employee died at work due to a heart attack. The Fifth Circuit affirmed the award of death benefits, stating that the employee did not intend to injure or kill himself, but had sustained an accidental injury regardless of how inadvisable his returning to work might have been. *Id.* at 618. In *Jackson*, 32 BRBS 71, the claimant failed to advise employer of his work restrictions, including no driving, resulting from a seizure disorder, and he worked in employment contraindicated by those restrictions. Claimant was injured in a driving accident. The Board cited *Glen Falls Indemnity* and

held that a claimant's disregard of medical advice does not establish a willful intent to injure oneself.

The administrative law judge fully discussed the applicable law and properly found that employer did not rebut the Section 20(d) presumption.[2] Decision and Order at 6-8. These cases establish that a claimant's disregard of medical advice or the misrepresentation to an employer of a prior condition does not rebut the Section 20(d) presumption, absent evidence that the employee deliberately intended to incur an injury at work. Thus, in the absence of substantial evidence of claimant's specific intent to injure himself, Section 3(c) does not bar the claim. We therefore affirm the administrative law judge's finding that the claim is not barred by Section 3(c) and the award of disability compensation as it is rational, supported by substantial evidence and in accordance with law. *See Jackson* 32 BRBS 71.

We next address the parties' appeals of the administrative law judge's calculation of claimant's average weekly wage and compensation rate. Claimant argues that the administrative law judge erred in concluding that his average weekly wage was $69.80, calculated under Section 10(c), 33 U.S.C. §910(c). Employer argues that the administrative law judge erred in awarding claimant benefits at the rate of $257.70. 33 U.S.C. §906(b)(2).

Claimant contends that the administrative law judge improperly calculated his average weekly wage. He contends that although Section 10(c) should be applied to calculate his average weekly wage, the administrative law judge improperly divided the wages he earned between December 15, 2003, and May 25, 2004, by 52 weeks to arrive an average weekly wage of $69.80. In his decision, the administrative law judge determined claimant's average weekly wage under Section 10(c) because the records showed sporadic employment during the year preceding the subject accident. From

[2] The administrative law judge also cited the unpublished decision of the United States Court of Appeals for the Fourth Circuit in *Carolina Stevedoring Co. v. Davis*, 191 F.3d 447 (table), 1999 WL 713897 (4th Cir. 1999), as further support for his decision. *See* 4th Cir. R. 36. This case arises within the jurisdiction of the Fourth Circuit. In *Davis*, the employee failed to take medication that could have prevented seizures. He also misrepresented to employer the length of time since he had had his last seizure; employer thus allowed him to return to full-duty work. The employee was killed in an accident at work. The court stated that the employee may have disregarded his own safety by failing to take his medication, but such falls short of a willful intent to injury or kill oneself. There was no evidence that a seizure caused the accident. Moreover, the court stated that precedent addressing intervening causes was inapplicable because there was no "subsequent injury" involved.

December 15, 2003, until May 25, 2004, a period of approximately 23 weeks, claimant worked a total of 27 days or 3.86 weeks, earning $3,629.50.[3] The administrative law judge divided the total earnings by 52 weeks to find that claimant's average weekly wage at the time of injury was $69.80. The administrative law judge stated that a 52-week divisor is mandated by Section 10(d), 33 U.S.C. §910(d), and that claimant's inability to obtain more work was due to a prior injury for which he was receiving compensation. The administrative law judge found that under such circumstances a divisor of fewer than 52 weeks would result in employer's liability for an injury for which claimant was otherwise compensated. Decision and Order at 10.

A claimant's average weekly wage at the time of injury is determined by utilizing one of three methods set forth in Section 10 of the Act. 33 U.S.C. §910(a)-(c). Section 10(c) provides a general method for determining annual earning capacity where neither Section 10(a) nor (b) can fairly or reasonably be applied to calculate claimant's average weekly wage at the time of the injury.[4] *See Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998). Claimant argues that the administrative law judge should have found his average weekly wage to be $940.28 by dividing his total earnings of $3,629.50 by 3.86, the number of weeks he actually worked. Alternatively, claimant contends that the administrative law judge should have divided his earnings of $3,629.50 by the number of weeks in the period in which the wages were earned, *i.e.*, 23.14, for an average weekly wage of $156.85.

We agree with claimant that the administrative law judge erred in determining his average weekly wage. The first reason given by the administrative law judge for his method of calculation is that a divisor of 52 weeks is mandated by Section 10(d)(1).[5] The administrative law judge divided by 52 claimant's actual earnings from the 52 weeks prior to the injury. This calculation is not mandated by either Section 10(c) or 10(d)(1). Rather, the object of Section 10(c) is to arrive at a sum that reasonably represents

[3] Claimant worked 17 days from December 15, 2003, until January 9, 2004, 1 day on March 1, 2004, and 9 days from May 17, 2004, until May 25, 2004.

[4] No party argues that either Section 10(a) or (b) is applicable in this case.

[5] Section 10(d)(1) states:

> The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

33 U.S.C. §910(d)(1).

claimant's annual earning capacity at the time of the injury.[6] *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). This sum is then divided by 52. Thus, the administrative law judge can extrapolate from the amount earned in a period of less than 52 weeks a figure which represents claimant's earning capacity over an entire 52-week period, and this figure is then subject to the Section 10(d)(1) divisor. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000) (administrative law judge divided 48 weeks' earnings by 48; same result as if he had added earnings for another 4 weeks and divided by 52); *see also Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990).

A claimant's annual earning capacity, pursuant to Section 10(c), has been held to encompass the claimant's "ability, willingness, and opportunity to work," or "the amount of earnings the claimant would have the potential to earn absent injury." *See, e.g., Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095 (9th Cir. 2006); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). The administrative law judge should account for such factors as the amount of work available due to claimant's recovery from a prior injury. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980). In this regard, the administrative law judge's second basis for his calculation of claimant's average weekly wage is flawed. The administrative law judge, citing *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984), stated that because claimant received benefits for his prior knee injury, it would be unfair to hold the employer responsible for claimant's inability to obtain work due to the restrictions resulting from that injury. Thus, he found that claimant's actual earnings represented his annual earning capacity. Claimant, however, did not receive any compensation benefits in the year prior to the subject injury. Moreover, in *Klubnikin*, the Board held that an administrative law judge should account for wages a claimant would have earned but for an unrelated injury, but that any permanent reduction in earning capacity resulting from that injury is not the responsibility of the employer. *See also Staftex Staffing v. Director, OWCP [Loredo]*,

---

[6] Section 10(c) states:

> If either [Section 10(a) or 10(b)] can not reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c).

237 F.3d 404, 34 BRBS 44(CRT) (5th Cir. 2000); *Strand v. Hansen Seaway Service, Ltd.*, 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980). In this case, the administrative law judge found only that claimant remained under restrictions from the 2001 injury, but not that claimant has any permanent reduction in his earning capacity resulting from that injury.

Therefore, we vacate the administrative law judge's average weekly wage calculation and remand this case to the administrative law judge for further findings. The administrative law judge first must determine claimant's annual earning capacity at the time of injury as required in the statute, consistent with case precedent. *See Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT). The administrative law judge must consider claimant's "ability, willingness and opportunity to work" in making this determination. *See, e.g., Healy Tibbitts*, 444 F.3d 1095. The sum representing claimant's annual earning capacity is then divided by 52, pursuant to Section 10(d), to arrive at claimant's average weekly wage. *Brien*, 23 BRBS 207.

We also agree with employer that the administrative law judge erred in stating that the minimum compensation to which claimant is entitled is $257.70. Section 6(b)(2) of the Act states:

> Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

33 U.S.C. §906(b)(2). The national average weekly wage in effect at the time of claimant's injury in May 2004 was $515.39, and thus the minimum compensation rate under the first phrase of Section 6(b)(2) is $257.70. Volume A BRBS 3-166. Claimant's computed average weekly wage, however, was $69.80. This sum is less than $257.70 (half of the national average weekly wage). Thus, under the administrative law judge's present award and the second phrase of Section 6(b)(2), claimant is limited to his actual average weekly wage as his compensation rate. On remand, the administrative law judge must calculate claimant's compensation rate consistent with Section 6(b)(2).

Accordingly, the administrative law judge's calculation of claimant's average weekly wage and the minimum compensation rate are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge