BRB Nos. 14-0071
and 14-0071A

SAMUEL JACKSON	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	DATE ISSUED: Nov. 25, 2014
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Ira M. Steingold (Steingold & Mendelson), Chesapeake, Virginia, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Micole Allekotte (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order (2013-LHC-00915) of Administrative Law Judge Kenneth A. Krantz 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).

The specific facts involving the work-related incident which gave rise to this claim for compensation for a psychological injury are set forth in detail in the administrative law judge's Decision and Order, and will not be repeated in this decision except as necessary. Briefly, on March 28, 2011, claimant was operating a forklift while in the course of his employment with employer when he accidentally struck and killed a fellow employee. Tr. at 15-19, 45-46; EX 25 at 21-22. Claimant's uncontroverted testimony reflects that he and other employees attempted to extricate the decedent's body from underneath claimant's forklift, and that claimant remained in the immediate vicinity of the accident during the rescue efforts undertaken by emergency medical personnel. Tr. at 19-22; EX 25 at 22-26.

The following day, claimant sought medical attention from Dr. Stiles, his primary care physician, who diagnosed claimant with an unspecified acute reaction to stress, and prescribed Ativan. CX 1 at 14-15. Subsequently, claimant attended three counseling sessions with Gregory Griffin, LSW. Tr. at 24-25; EX 19 at 12-15; *see also* CXs 2 at 99-100; 5. On July 11, 2011, claimant commenced psychotherapeutic treatment with Norbert Newfield, Ph.D., a licensed clinical psychologist, who diagnosed claimant with severe post-traumatic stress disorder (PTSD), with significant anxiety and depression, resulting from the March 28, 2011 work incident. CX 2 at 99-101.

Dr. Thrasher, a psychiatrist who examined claimant on September 14, 2011 on behalf of employer, diagnosed claimant with chronic PTSD and major depression, single episode, severe, which he attributed to claimant's work-related incident. CX 5. Dr. Thrasher opined that the severity of these conditions precluded claimant from performing any employment, but that with aggressive psychiatric treatment and psychotherapy, claimant might be able to return to longshore employment within six to twelve months; in this regard, he recommended a psychiatric consultation to address claimant's need for additional psychotropic medications. *Id.*

Dr. Giorgi-Guarnieri, a psychiatrist in Dr. Newfield's office, initiated treatment of claimant on November 14, 2011, for purposes of managing claimant's psychotropic

medications, while Dr. Newfield continued to see claimant for psychotherapy.[1] Tr. at 26; CXs 2 at 101; 3. At employer's behest, Dr. Thrasher reviewed claimant's updated medical records and, in a February 12, 2012 report, he proposed an alternative psychotropic medication regimen from that implemented by Dr. Giorgi-Guarnieri.[2] EX 16. Thereafter, the Office of Workers' Compensation Programs referred claimant to psychiatrist Dr. Mansheim for an independent medical examination. EX 11. In a December 8, 2012 report based on his interview of claimant, a personality assessment inventory, and his review of claimant's medical records, Dr. Mansheim opined that claimant does not meet the criteria for a diagnosis of PTSD and that there is no psychiatric contraindication to claimant's employment in any job for which he qualifies.[3] *Id.; see also* EXs 12, 13. Employer, who had voluntarily paid claimant temporary total disability benefits for the period from March 29, 2011 to December 11, 2012, terminated its payments on December 17, 2012, based on Dr. Mansheim's opinion that claimant is able to work. EX 1.

In his Decision and Order, the administrative law judge initially rejected employer's contention that claimant is not entitled to compensation under the Act for a psychological injury because he did not meet the requirements of the "zone of danger" test. Decision and Order at 21-23. Next, the administrative law judge found that claimant demonstrated the existence of a psychological injury and that a work accident occurred that could have caused that injury. Thus, he found claimant entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a). *Id*. at 24-25. The administrative law judge further found that the opinion of Dr. Mansheim, that claimant does not have PTSD or a disabling psychiatric condition, rebuts the presumption. *Id*. at 25. After weighing the evidence as a whole, the administrative law judge found that

[1] As of the date of the hearing on June 19, 2013, claimant was seeing Dr. Newfield twice a week and Dr. Giorgi-Guarnieri every fourteen days. Tr. at 26.

[2] The administrative law judge's Decision and Order does not address Dr. Thrasher's subsequent April 23, 2012 report following his re-examination of claimant on March 9, 2012, which is included in the packet of documents identified as CX 5. We note that this report reiterates Dr. Thrasher's previous PTSD and major depression diagnoses and his opinion that claimant is incapable of any employment, and that the report includes his recommendations regarding alternative medications. In a September 4, 2012 letter to the district director, claimant's treating psychiatrist, Dr. Giorgi-Guarnieri, responded to Dr. Thrasher's April 23, 2012 report. CX 3 at 10-11.

[3] Dr. Newfield responded to Dr. Mansheim's December 8, 2012 report in a letter dated January 7, 2013, CX 2 at 59-63, and subsequently provided a lengthy response to Dr. Mansheim's May 13, 2013 deposition in a letter dated June 3, 2013. *Id*. at 1-13.

claimant suffers from PTSD which is causally related to the March 28, 2011 work incident. *Id*. at 25-29. The administrative law judge determined that claimant is unable to return to his usual employment, and that employer did not present any evidence establishing the availability of suitable alternate employment. *Id*. at 29-30. Lastly, the administrative law judge calculated claimant's average weekly wage to be $1,121.59. *Id*. at 30-34. Accordingly, he awarded claimant continuing temporary total disability benefits from March 29, 2011, and medical benefits.[4] *Id*. at 34-35; *see* 33 U.S.C. §§908(b), 907.

On appeal, employer challenges the administrative law judge's determination that the "zone of danger" test does not preclude recovery in this case. Employer further contends that the administrative law judge erred in finding that claimant sustained a work-related psychiatric injury based on the record as a whole. Specifically, employer first argues in this regard that the administrative law judge failed to give proper weight to Dr. Mansheim's status as an independent medical examiner pursuant to Section 7(e), 33 U.S.C. §907(e). Employer makes numerous additional arguments regarding the administrative law judge's determination to credit the opinion of Dr. Newfield, as supported by that of Dr. Thrasher, over the contrary opinion of Dr. Mansheim, and avers that the administrative law judge's decision fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's finding that claimant has a compensable psychological disability. Employer filed briefs in reply to both claimant's and the Director's response briefs. BRB No. 14-0071. In his cross-appeal, claimant assigns error to the administrative law judge's exclusion of claimant's vacation, holiday and container royalty payments from the calculation of claimant's average weekly wage. Employer responds, urging affirmance of the administrative law judge's average weekly wage determination. BRB No. 14-0071A.

We first consider the issues presented by employer's appeal, BRB No. 14-0071, relating to employer's challenge to the administrative law judge's conclusion that claimant sustained a compensable work-related psychological injury. Initially, we reject employer's contention that the "zone of danger" test precludes recovery in this case, and, thus, we affirm the administrative law judge's determination that the lack of an actual physical injury or immediate risk of physical injury to claimant does not bar claimant from recovery for his psychological injury. *See* Decision and Order at 21-23. As stated by the administrative law judge, it is well established that a work-related psychological impairment, with or without an underlying physical harm, may be compensable under the

[4] The parties stipulated that claimant has not yet reached maximum medical improvement. Decision and Order at 2, 34.

Act. *See, e.g., Pedroza v. Benefits Review Board*, 624 F.3d 926, 44 BRBS 67(CRT) (9th Cir. 2010); *American National Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964); *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009). We agree with claimant and the Director that the "zone of danger" test, upon which employer relies, is a tort concept which does not apply to the workers' compensation provisions of the Longshore Act. As noted by the Director, employer cites five federal court decisions in which the "zone of danger" test was applied to limit a plaintiff's recovery for the negligent infliction of emotional distress. *See* Employer Petition for Review at 30-31. Employer's reliance on these cases is misplaced, however, as its argument fails to acknowledge the critical distinction between tort actions, which rely on common law fault and negligence principles, and workers' compensation claims, which are not governed by those principles. Indeed, as the Director argues, employer's primary reliance on the decision of the United States Supreme Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), is belied by the clear distinction drawn by the Court between negligence actions and workers' compensation claims. In *Gottshall*, the plaintiff sued his employer under the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.* (FELA), a statute that permits a railroad worker to recover for an injury resulting from his employer's negligence. The Court was called on to decide whether recovery for negligent infliction of emotional distress was available under FELA, and, if so, to determine the appropriate rule for evaluating liability in such claims. *Id.* at 541. In construing the statute, the Court expressly stated that FELA is not a workers' compensation statute, and emphasized that the basis of an employer's liability under FELA is its negligence, which turns on common law principles. *Id*. at 543-44; *see also id.* at 554 ("We have made clear, however, that FELA is not an insurance statute."). The Court next discussed the three major tests developed in the common law to limit the scope of recovery for negligent infliction of emotional distress, *id*. at 546-48; one of the three tests was the "zone of danger" test, which limits recovery "to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 547-48. Having held that recovery for negligent infliction of emotional distress is available under FELA, *id*. at 549-50, the Court adopted the "zone of danger" test to limit the scope of that recovery in FELA claims. *Id*. at 554. As the Supreme Court's application of the "zone of danger" test in FELA claims was explicitly based on common law negligence principles and the Court expressly distinguished FELA from workers' compensation statutes, its decision in *Gottshall* provides no support for employer's contention that the "zone of danger" test is applicable to the Longshore Act workers' compensation claim in this case.[5]

[5] Like other workers' compensation statutes, the Longshore Act represents a balance between the competing interests of injured workers and their employers in which the certainty of benefits is exchanged for tort immunity. *See Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 636, 15 BRBS 155, 159(CRT) (1983); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 281-82 & n.24,

As asserted by the Director, employer's reliance on the additional four cases cited in its brief is similarly misplaced as each of these cases involved a negligence action as opposed to a workers' compensation claim. By way of background, we note that the Longshore Act provides immunity to an injured worker's employer, its officers and the injured employer's co-workers against tort suits based on the work injury. 33 U.S.C. §§905(a), 933(i); *see Hymel v. McDermott, Inc.*, 37 BRBS 160, 162 (2003), *aff'd mem. sub nom. Bailey v. Hymel*, 104 F.App'x 415 (5th Cir. 2004). Section 5(b) of the Act, 33 U.S.C. §905(b), however, preserves an employee's right to bring a negligence action against the vessel and the vessel owner, as a third party, under certain circumstances. *See Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 165-66 (1981); *Hymel*, 37 BRBS at 162 n.2. Thus, as the Director correctly observes, an injured worker's claim against his employer for disability under the Act is governed by Sections 4 and 5(a), 33 U.S.C. §§904, 905(a), whereas suits brought under Section 5(b), 33 U.S.C. §905(b), are third-party negligence actions bought in district court against the vessel's owner. Employer cites *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208 (5th Cir. 2013), and *Dierker v. Gypsum Transp., Ltd.*, 606 F.Supp. 566 (E.D.La. 1985), in which recovery was denied to the plaintiffs on the basis that they were not in immediate risk of physical harm. Contrary to employer's overbroad reading of the *Barker* and *Dierker* decisions, the holdings in those cases, both of which were negligence actions brought under Section 5(b) of the Act, have no application to workers' compensation claims under the Act. Employer's reliance on *Chaparro v. Carnival Corp.*, 693 F.3d 1333 (11th Cir. 2012), and *Stacy v. Rederiet Otto Danielsen, A.S.*, 609 F. 3d 1033 (9th Cir. 2010), *cert. denied*, 131 S.Ct. 1493 (2011), is similarly misplaced as these cases involve common law tort claims for negligent infliction of emotional distress brought under federal maritime law. Thus, as we reject employer's position that the line of cases applying the "zone of danger" test in tort actions for the negligent infliction of emotional distress should be extended to workers' compensation claims under the Longshore Act, we affirm the administrative law

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14 BRBS 363, 368-69 & n.24 (1980); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, *reh'g denied*, 910 F.2d 1179 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *see also* 33 U.S.C. §904(b) ("compensation shall be payable irrespective of fault as a cause for the injury."). Thus, the Act "imposes liability without fault and precludes the assertion of various common-law defenses…." *Potomac Electric Power Co.*, 449 U.S. at 281, 14 BRBS at 368. Consistent with this precedent, the Board has recognized that fault and negligence concepts that may be applicable in common law tort actions do not apply in claims for disability benefits for work-related injuries under the Act, absent the applicability of Section 3(c), 33 U.S.C. §903(c). *See, e.g., Phillips v. Phillips v. PMB Safety & Regulatory, Inc.*, 44 BRBS 1 (2010); *G.S. [Schwirse] v. Marine Terminals Corp.*, 42 BRBS 100 (2008), *modified in part on recon.*, 43 BRBS 108 (2009).

judge's rejection of employer's contention that the "zone of danger" test precludes an award of disability compensation in this case. Decision and Order at 23.

We next address employer's contention that the administrative law judge erred in finding, based on the record as a whole, that claimant suffers from PTSD as a result of the March 28, 2011 work accident. Where, as here, the administrative law judge finds that the Section 20(a) presumption is invoked and rebutted, all relevant evidence must be weighed to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). We reject employer's contentions of error, and affirm the administrative law judge's determination that claimant established that he suffers from PTSD as a result of the March 28, 2011 work accident.

In this regard, we reject employer's initial contention that the administrative law judge erred in failing to give the opinion of Dr. Mansheim dispositive weight based on his status as an independent medical expert pursuant to Section 7(e), 33 U.S.C. §907(e), of the Act. *See* Decision and Order at 25-26. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has stated that "we have consistently recognized that a physician's statement is not conclusive of the ultimate fact in issue." *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 440 n.3, 37 BRBS 17, 21 n.3(CRT) (4th Cir. 2003) (internal quotations and citation omitted). Moreover, the precise argument advanced by employer in this regard has been rejected by the Board in its decisions in *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585 (1984), and *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). The Board held in *Shell*, and reaffirmed in *Cotton*, that the reports of Section 7(e) independent physicians are not binding on the fact-finder and, thus, should be weighed along with the other medical opinions in the record. *Cotton*, 23 BRBS at 387; *Shell*, 14 BRBS at 588-89. In support of its assignment of error in this case, employer summarily cites to the decision of the administrative law judge in the *Cotton* case, in which the administrative law judge stated that the legislative history indicates that Congress, in enacting Section 7(e), intended that the opinions of independent medical experts be given dispositive weight. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 55, 58 & n.1(ALJ) (1988), *vacated by* 23 BRBS 380 (1990). This interpretation of the Section 7(e) legislative history, however, was expressly rejected by the Board in its decision in *Cotton*. 23 BRBS at 387; *see also Shell*, 14 BRBS at 589. As employer has provided no reason to depart from longstanding Board precedent, we reject, for the reasons set forth in the Board's decisions in *Shell* and *Cotton*, employer's assertion that the administrative law judge was required to accord dispositive weight to Dr. Mansheim's opinion. *Id.*; *see also Ward*, 326 F.3d at 440 n.3, 37 BRBS at 21 n.3 (CRT).

Employer argues, in the alternative, that even if Dr. Mansheim's opinion is not entitled to dispositive weight, the administrative law judge was required to give greater weight to his opinion, based on his status as a Section 7(e) examiner, than to the other medical opinions in the record. We disagree. It is true that Section 7(e) medical examinations are intended to provide a reliable, independent evaluation of a claimant's medical condition. *See Cotton*, 23 BRBS at 387; *Shell*, 14 BRBS at 589. This does not mandate, however, that an administrative law judge is obligated to give greater weight to the opinions of Section 7(e) independent physicians. Any implication that an administrative law judge is required to accord greater weight to the opinion of a Section 7(e) medical examiner would be inconsistent with the Fourth Circuit's admonition that in considering the medical opinions of record, an administrative law judge must examine the logic of a physician's conclusions and the evidence upon which those conclusions are based, and evaluate the physician's opinion in light of the other evidence in the record.[6] *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.* [*Carmines*], 138 F.3d 134, 140 & n.5, 32 BRBS 48, 52 & n.5(CRT) (4th Cir. 1998); *see also Ward*, 326 F.3d at 441-42 & n.4, 37 BRBS at 22 & n.4(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 433, 37 BRBS 29, 33(CRT) (4th Cir. 2003). In this case, the administrative law judge appropriately examined the logic of Dr. Mansheim's conclusions and evaluated the evidence upon which they were based, and he found the physician's opinion to have a questionable basis. *See, e.g., Winn*, 326 F.3d at 433, 37 BRBS at 33(CRT). Thus, the administrative law judge committed no reversible error in declining to hold that Dr. Mansheim's status as a Section 7(e) medical examiner entitles his opinion to greater weight than the contrary medical opinions of record. *See* Decision and Order at 25-30.

In weighing the evidence as a whole, the administrative law judge found that the opinions of claimant's treating psychologist, Dr. Newfield, and of employer's own psychiatric expert, Dr. Thrasher, that claimant suffers from PTSD resulting from the March 28, 2011 work accident and is incapable of employment, outweigh the contrary

[6] In an analogous context, the United States Supreme Court has proscribed a judicially-imposed rule requiring that special deference be given to the opinions of treating physicians in cases arising under the Employee Retirement Security Act, 29 U.S.C. §1001 *et seq*. (ERISA). *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003). In discussing *Nord*, the Board has stated that the Supreme Court's decision does not prohibit a fact-finder from giving special weight to the opinions of treating physicians; rather, the Court held that, in ERISA cases, a court may not impose a rule requiring such deference. *See Monta v. Navy Service Exch.*, 39 BRBS 104, 107 n.2 (2005). Under the same reasoning, while it is permissible for an administrative law judge to give greater weight to the opinion of a Section 7(e) independent medical expert, there is no rule requiring that the administrative law judge do so.

opinion of Dr. Mansheim that claimant does not meet the criteria for a diagnosis of PTSD and can return to his usual employment.[7] Decision and Order at 25-30. Employer's arguments on appeal, in effect, seek a reweighing of the evidence, which the Board is not empowered to do. Rather, the Board must accept the rational inferences and factual findings of the administrative law judge which are supported by substantial evidence. *See, e.g., Ward*, 326 F.3d at 438, 37 BRBS at 19-20(CRT); *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 380-81, 34 BRBS 71, 72(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001). Contrary to employer's arguments regarding the administrative law judge's consideration of Dr. Mansheim's opinion, the administrative law judge appropriately evaluated the doctor's opinion and rationally accorded it less weight based on the limited nature of the doctor's contact with claimant and the administrative law judge's concerns regarding one of the premises for the doctor's view that claimant does not have PTSD, and, less significantly, on the doctor's reliance on a standardized personality assessment inventory administered to claimant.[8] Decision and

[7] In challenging this determination, employer avers that the administrative law judge's Decision and Order fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor on all the material issues of fact, law or discretion presented on the record." *See, e.g., See v. Washington Metropolitan Transit Authority*, 36 F.3d 375, 384, 28 BRBS 96, 106(CRT) (4th Cir. 1994). The administrative law judge provided a detailed summary of the medical evidence of record, Decision and Order at 8-19, and he fully considered and weighed that evidence. *Id*. at 25-30. Moreover, the administrative law judge sufficiently explained the rationale underlying his conclusions and specified the evidence upon which he relied. We therefore reject employer's contention that the administrative law judge's decision does not meet the requirements of the APA. *See, e.g., Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

[8] It was reasonable for the administrative law judge to accord less weight to the opinion of Dr. Mansheim than to that of Dr. Newfield based, in part, on the fact that Dr. Mansheim saw claimant only once for a one-hour interview whereas Dr. Newfield had the benefit of observing claimant's psychological status on a once or twice per week basis over an extended period of time. Decision and Order at 27-28; *see infra* at n.6; *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35, 39 & n.5 (2011). Moreover, the administrative law judge properly examined the logic of Dr. Mansheim's opinion that claimant does not meet the criteria for a PTSD diagnosis, and rationally found that the doctor did not adequately support his opinion. Decision and Order at 28; *see Carmines*, 138 F.3d at 140 & n.5, 32 BRBS at 52 & n.5(CRT). Specifically, Dr. Mansheim testified on deposition that the work incident does not qualify as a traumatic event under the PTSD diagnostic criteria. EX 13 at 27. Dr. Mansheim reasoned in this regard that if

Order at 26-30. The administrative law judge properly accorded greater weight to the opinion of Dr. Newfield, which he found to be supported by Dr. Thrasher's opinion and by claimant's credible complaints.[9] *Id*. at 27-29. In this regard, he found that both Drs. Newfield and Thrasher provided well-reasoned and well-documented reports explaining their respective opinions that claimant suffers from PTSD which renders him incapable of returning to work. *Id.* at 28-30; *see* S.*K. [Kamal] v. ITT Industries, Inc*., 43 BRBS 78 (2009), *aff'd in part and rev'd in part mem.*, No. 4:09-MC-348, 2011 WL 798464 (S.D. Tex. Mar. 1, 2011). Therefore, as it is supported by substantial evidence, the administrative law judge's conclusion that claimant sustained a compensable work-related psychological injury is affirmed. As employer has not presented an argument challenging the administrative law judge's findings regarding the extent of claimant's work-related disability, and those finding are supported by substantial evidence, the administrative law judge's determination that claimant is entitled to temporary total disability benefits is affirmed.

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every person who was "presented with that sort of image were diagnosed with post-traumatic stress disorder, more than half the population would meet the criteria for the diagnosis." *Id*. The administrative law judge reasonably exercised his discretion as trier-of-fact to question the logic of Dr. Mansheim's rationale, and correctly observed that the doctor offered no evidence to support his assumption that more than half the population has witnessed an image as traumatic as that experienced by claimant. Decision and Order at 28. The administrative law judge also accorded slightly less weight to Dr. Mansheim's opinion based on the doctor's reliance on the computer-graded results of the standardized personality assessment inventory, which was administered to claimant at the recommendation of a psychologist in Dr. Mansheim's practice but was not interpreted by that psychologist. *Id.* at 28-29; *see* EXs 11 at 9; 12;13 at 23-24, 36, 53-58. Employer has not shown that the administrative law judge abused his discretion in determining that Dr. Mansheim's reliance on this test, which Dr. Mansheim himself acknowledged "hasn't really been interpreted," EX 13 at 36, detracts "slightly" from the weight of the doctor's opinion. Decision and Order at 28.

[9] Contrary to employer's assertion that the administrative law judge failed to address claimant's credibility, the administrative law judge specifically found that claimant's complaints were credible and that claimant gave consistent accounts of both the work-related accident and his psychological symptoms. Decision and Order at 29. As the administrative law judge's credibility determination is rational and supported by substantial evidence, it is affirmed. *See, e.g., Faulk*, 228 F.3d at 386, 34 BRBS at 76-77(CRT).

Lastly, we consider claimant's cross-appeal, BRB No. 14-0071A, challenging the administrative law judge's exclusion of claimant's vacation, holiday and container royalty payments from the calculation of his average weekly wage.[10] We reject claimant's contention of error and affirm the administrative law judge's average weekly wage calculation. In determining claimant's average weekly wage, the administrative law judge relied on the decision of the United States Court of Appeals for the Fourth Circuit in *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1999), and, accordingly, found that claimant's vacation, holiday and container royalty payments cannot be included in his average weekly wage in this case. Decision and Order at 32-33. As this case arises within the jurisdiction of the Fourth Circuit, that court's holding in *Wright* is dispositive of the issue raised by claimant on appeal. In *Wright*, the Fourth Circuit held that vacation, holiday and container royalty payments are considered "wages" under Section 2(13) of the Act, 33 U.S.C. §902(13), only when they are earned with the requisite number of hours of actual work. *Wright*, 155 F.3d at 325-26, 33 BRBS at 26-27(CRT). The court stated that vacation, holiday and container royalty payments received on the basis of disability credit are not paid for "services" and therefore are not "wages." *Id.*, 155 F.3d at 326, 33 BRBS at 27(CRT). These funds, therefore, cannot be included in the calculation of a claimant's average weekly wage during the contract year for which the funds are paid. *Id.*, 155 F.3d at 326-330 & n.20, 33 BRBS at 27-30 & n.20(CRT).

In this case, claimant's vacation, holiday and container royalty payments were based on the union contract year, from October 1 through September 30, and were paid at the beginning of each December. *See* Tr. at 42, 95; CX 4. It is undisputed that at the time of his March 28, 2011 injury, claimant did not have the requisite number of actual hours of work necessary to entitle him to vacation, holiday and container royalty payments for either the contract year ending on September 30, 2010 or the contract year

[10] Claimant does not dispute that Section 10(c) of the Act, 33 U.S.C. §910(c), which was used by the administrative law judge to determine claimant's average weekly wage, *see* Decision and Order at 31-32, is the applicable statutory provision. Moreover, claimant agrees that the administrative law judge correctly approximated the amount of claimant's actual wages during the 52-week period preceding his March 28, 2011 work injury to derive a figure of $1,121.59. *Id*. at 34; *see* Cl. Pet. for Rev. and Brief at 3. The only issue raised by claimant's cross-appeal is the administrative law judge's rejection of claimant's position that his vacation, holiday and container royalty payments should have been added to the $1,121.59 average weekly wage found by the administrative law judge. Specifically, claimant avers that $638.90, representing the value of his average weekly vacation, holiday and container payments, should have been added to the $1,121.59, representing his average weekly earned wages, for a total average weekly wage of $1,760.49. *Id.*

ending on September 30, 2011. Rather, he received these payments in both contract years based upon a combination of actual hours worked and workers' compensation disability credit hours.[11] *See* Tr. at 42-58; CX 4. Thus, the administrative law judge properly followed the mandate of the Fourth Circuit in *Wright* to find that the vacation, holiday and container royalty payments received by claimant for the contract years ending on September 30, 2010 and on September 30, 2011 are not "wages," and thus cannot be included in claimant's average weekly wage, *Wright*, 155 F.3d at 326-330, 33 BRBS at 27-30(CRT). Therefore, as the administrative law judge's calculation of claimant's average weekly wage is supported by substantial evidence and is in accordance with law, it is affirmed. *Id.*

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[11] Claimant received disability credit hours for benefits paid under the Act for a previous January 5, 2010 back injury, which enabled him to qualify for the vacation, holiday and container royalty payments he received in December 2010. *See* Tr. at 40-42, 53-58; CX 4 at 2. The voluntary payments of compensation made by employer for claimant's March 28, 2011 work injury entitled claimant to disability credit hours, which enabled him to receive vacation, holiday and container royalty payments in December 2011. *See* Tr. at 47-54; CX 4 at 16.