

BRB No. 00-0811

WARREN COKE)
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 Claimant-Respondent)
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 v.)
)
 J. RAY McDERMOTT,) DATE ISSUED:
 INCORPORATED)
)
 and)
)
 CRAWFORD & COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order of James W. Kerr, Jr, Administrative Law Judge, United States Department of Labor.

Julius P. Hebert, Jr. (Hebert & Marceaux), Houma, Louisiana, for claimant.

J. Louis Gibbens (Gibbens & Stevens), New Iberia, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (1999-LHC-02461) of Administrative Law Judge James W. Kerr, Jr., 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a rigger for employer and, on October 18, 1990, and December

11, 1990, sustained injuries to his shoulder during the course of his employment. In a Decision and Order dated December 29, 1994, Administrative Law Judge Edward Terhune Miller awarded claimant temporary total disability benefits from December 11, 1990, through May 10, 1991, temporary partial disability benefits from May 11, 1991, through November 19, 1991, and permanent partial disability benefits from November 20, 1991 and continuing. 33 U.S.C. §908(b), (c)(21), (e). Pursuant to employer's subsequent request, claimant filed a LS-200 Form on April 5, 1995, reporting his earnings for the years 1992, 1993, and 1994. Claimant thereafter relocated and subsequent attempts to mail the form to him were unsuccessful. On March 20, 1998, the district director issued an Order suspending employer's compensation payments to claimant due to claimant's failure to submit a contemporaneous LS-200 Form. *See* 33 U.S.C. §908(j); 20 C.F.R. §§702.285, 702.286. On April 20, 1998, claimant submitted a second LS-200 Form.

In his Decision and Order, Administrative Law Judge Kerr (the administrative law judge) found that the Director, Office of Workers' Compensation Programs, and employer's requests for information regarding claimant's post-injury earnings were mailed to incorrect addresses and that, once the requested form was mailed to the appropriate address and claimant was informed of his responsibility to complete the form, claimant completed and returned it in a timely manner. Thus, the administrative law judge held that claimant did not knowingly fail to complete and return the LS-200 Form documenting his earnings and that, therefore, forfeiture of claimant's compensation benefits was inappropriate. Accordingly, the administrative law judge reinstated claimant's benefits retroactively.

On appeal, employer challenges the administrative law judge's decision to reinstate claimant's benefits. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Pursuant to Section 8(j) of the Act, 33 U.S.C. §908(j), an employer may request that a claimant report his post-injury earnings. Once the request is made, the claimant must complete and return the designated form within 30 days of receipt whether or not he has any post-injury earnings. The claimant's benefits are subject to forfeiture if claimant fails to respond or responds falsely to the request for information. *See* 33 U.S.C. §908(j); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994) (decision on recon.); 20 C.F.R. §§702.285, 702.286. Specifically, Section 8(j)(1), (2) of the Act provides:

(1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.

(2) An employee who--

(A) fails to report the employee's earnings under paragraph (1) when requested, or

(B) knowingly and willfully omits or understates any part of such earnings,
and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.

33 U.S.C. §908(j) (1), (2). Section 702.285(a) of the regulations states in pertinent part:

(a) An employer, carrier, or the Director . . . may require an employee to whom it is paying compensation to submit a report on earnings from employment or self-employment.

20 C.F.R. §702.285(a). Further, Section 702.286(b) of the regulations provides:

(b) Any employer or carrier who believes that a violation . . . of this section has occurred may file a charge with the district director. The allegation shall be accompanied by evidence which includes a copy of the report, with proof of service requesting the information from the employee and clearly stating the dates for which the employee was required to report income.

20 C.F.R. §702.286(b).

In this case, employer contends that the administrative law judge erred in finding that forfeiture was not appropriate pursuant to Section 8(j) of the Act; specifically, employer avers that it affirmatively established that both claimant and his attorney received repeated requests asking for the completion and submission of LS-200 Forms subsequent to the award of benefits to claimant and that claimant failed to comply with those requests. In support of its position that claimant received its requests for documentation of his post-injury earnings, employer states that it sent the aforementioned notices to valid addresses and that claimant continued to receive his compensation checks when they were sent to those addresses. Thus, employer avers that it cannot be considered reasonable for the administrative law judge to conclude that claimant did not receive its requests for documentation of his post-injury earnings. Alternatively, employer avers that the administrative law judge

erred in holding that it must prove that claimant knowingly and willfully failed to report his earnings when requested to do so. For the reasons that follow, we reject employer's contentions of error, and we affirm the administrative law judge's decision.

In his decision, the administrative law judge specifically addressed and rejected each contention set forth by employer. The administrative law judge initially found that the plain language of Section 8(j) of the Act, as well as that section's implementing regulations, requires claimant to report his earnings only upon the receipt of a request from employer to complete a LS-200 Form. See 33 U.S.C. §908(j); 20 C.F.R. §§702.285, 702.286; *Moore*, 28 BRBS at 182. Next, the administrative law judge found that the correspondences relied upon by employer in support of its assertion that it requested claimant's compliance with Section 8(j) were in fact mailed to incorrect addresses, and that although claimant received his compensation checks which were also sent to an incorrect address, there was no evidence that employer's correspondence was forwarded to claimant's correct residence or that claimant received those pieces of correspondence. Lastly, the administrative law judge noted that when, ultimately, the LS-200 Form was mailed to claimant's correct address, claimant timely completed and returned the form to employer. Given this evidence of record, the administrative law judge held that claimant herein did not knowingly fail to complete and return the misaddressed LS-200 forms, as those forms were never received by him; therefore, the administrative law judge concluded that forfeiture of compensation pursuant to Section 8(j) is inappropriate and he reinstated claimant's benefits.

After review of the record, we affirm the administrative law judge's findings because they are rational, supported by the record, and in accordance with law. See *O'Keefe*, 380 U.S. 359. Although claimant's testimony regarding his transient movements following the initial administrative law judge's decision is somewhat confusing, it is apparent from the hearing transcript that claimant had at a minimum five residences after that award. See H. Tr. at 20-32, 37. Moreover, as accurately found by the administrative law judge, the evidence relied upon by employer indicates that various pieces of correspondence were either returned by the post office or were sent to an incorrect address. See Clt. Exs. 5, 7-9. Our review of the record supports the administrative law judge's conclusion that employer offered no evidence that claimant actually received the LS-200 Form correspondences which had been mailed to his prior addresses.¹ Given this evidence of record, we hold that

¹In its brief, employer rhetorically asks "What more can an employer do?" to establish that claimant received its request for post-injury earnings information. See Employer's brief at 12. The answer to employer's query is contained in Section 702.286(b) of the Act's implementing regulations, which provides that employer's allegation of a violation "shall be accompanied by evidence which includes a copy of the report, *with proof of service requesting the information from the employee . . .*" See 20 C.F.R. §702.286(b) (emphasis

the administrative law judge rationally concluded that claimant did not receive a request from employer for documentation of his post-injury earnings until sometime in 1998, at which time claimant timely completed and returned the LS-200 Form on April 20, 1998.² See 33 U.S.C. §908(j)(2)(A); see *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.2d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). Accordingly, we affirm the administrative law judge's determination that claimant's disability benefits are not subject to forfeiture under Section 8(j) of the Act.³

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

added). Employer could have solved its dilemma by mailing its request with a return receipt.

²As the language of both the Act and its implementing regulations provides that post-injury earnings information must be requested from the employee, employer's assertion that its burden is satisfied by service upon claimant's counsel of a LS-200 Form must fail.

³Contrary to employer's assertion, the administrative law judge committed no reversible error when he held that claimant did not "knowingly fail to complete and return the LS-200s." See Decision and Order at 9. Although the administrative law judge used language contained in Section 8(j)(2)(B), the totality of his opinion establishes that he found forfeiture to be inappropriate based upon claimant's failure to receive a request for completion of a LS-200 Form from employer. See 33 U.S.C. §908(j)(2)(A).

REGINA C. McGRANERY
Administrative Appeals Judge