BRB No. 04-0338

MICHAEL D. CHEETHAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: 12/20/2004
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland, Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & Detroy, LLC), Portland, Maine, for employer.

Richard A. Seid (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2002-LHC-00127) of Administrative Law Judge Daniel F. Sutton 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 Board held oral argument in this case on September 21, 2004, in Boston, Massachusetts.

Claimant was working as a shipfitter when he injured his back on June 8, 1994, while tack-welding a foundation to the wall of a ship under construction at employer's shipyard. He had back pain the following day and reported to employer's medical department, which referred him to Dr. Franck. Dr. Franck diagnosed a herniated disc at L5-S1 and performed a microdiscectomy on July 25, 1994. Following this surgery, claimant developed an infection which necessitated a second surgery on November 29, 1994. He remained out of work until April 24, 1996, when he returned to work in employer's facility in a full-time, light-duty capacity. He worked at this facility until June 5, 2000, when he was laid off due to lack of work. Claimant filed a claim under the Act in July 2000. Employer voluntarily paid claimant permanent total disability benefits pursuant to the Maine workers' compensation act after the lay-off, but subsequently received information that claimant was working. After an investigation, employer stopped compensation payments effective June 27, 2001, and terminated claimant's employment effective July 10, 2001, for fraudulently failing to report income while he was receiving workers' compensation benefits.

In his decision, the administrative law judge found that claimant cannot return to his former employment, but that employer established suitable alternate employment with a labor market survey identifying a rental sales representative position which pays a minimum of $30,000 per year. The administrative law judge awarded claimant permanent partial disability benefits pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), for his loss in wage-earning capacity. The administrative law judge also found that employer did not use the form specified by 20 C.F.R. §702.285(a) to request earnings information from claimant and that employer requested that earnings information be provided more frequently than twice a year. Thus, the administrative law judge found that the forfeiture provision of Section 8(j) of the Act, 33 U.S.C. §908(j), is not applicable. However, the administrative law judge found that there is sufficient evidence that claimant knowingly and willfully made false statements or representations regarding his work status and earnings after June 5, 2000.[1] The administrative law judge therefore referred a complaint to the Office of the United States Attorney for an investigation pursuant to Section 31(a) of the Act, 33 U.S.C. §931(a).

---

[1] Specifically, the administrative law judge found that claimant testified he knew the purpose of the Maine Employment Status Report and that he had reported that he had no earnings during a period when he had received payment for work. Decision and Order at 9; Tr. at 56, 80-81.

On appeal, employer contends that the administrative law judge erred in finding that its failure to request earnings information on the specified form precludes application of Section 8(j) when the administrative law judge also found that claimant intentionally and willfully misrepresented his earnings. Claimant responds, urging affirmance of the administrative law judge's finding that Section 8(j) is not applicable, noting the district director has not made a finding that claimant misrepresented his earnings. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision as employer did not request earnings information on the form specified "by the Secretary."

As an initial matter, we address an issue raised at oral argument. Claimant's counsel referred the Board to employer's petition for modification pending before the administrative law judge and requested that the Board dismiss the current claim without prejudice pursuant to Section 802.301(c) of the Board's regulations, 20 C.F.R. §802.301(c). OA Tr. at 15. Subsequently, employer filed a letter with the Board stating that its modification petition refers only to the extent of claimant's disability after the date of the administrative law judge's decision, whereas its current appeal addresses the issue of the forfeiture of benefits for a period prior to the issuance of the administrative law judge's decision. Claimant has not responded to this letter.

The issue on appeal relates to the applicability of the Act's forfeiture provision for a finite period of time rather than the general issue of whether claimant has an ongoing loss in wage-earning capacity. As the parties have submitted briefs and participated in oral argument before the Board, and employer does not seek to modify claimant's benefits for the period of time at issue on appeal, in the interest of judicial economy we will address employer's contention that the administrative law judge erred in finding that the forfeiture provision of Section 8(j) is inapplicable. We will remand the case to the administrative law judge for modification proceedings upon completion of the review process.

Section 8(j) 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 [district director] 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.
>
> (3) Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee in any amount and on such schedule as determined by the [district director].

33 U.S.C. §908(j)(emphasis added). Section 8(j) of the Act is intended to operate as an informal tool for monitoring a disabled employee's earnings from employment or self-employment. *See Briskie v. Weeks Marine, Inc.,* 38 BRBS 61 (2004); *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon en banc,* 31 BRBS 109 (1997); *see also* H.R. Rep. No. 98-570(I), at 18 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2734, 2751. Under Section 8(j), an employer paying benefits may request earnings information from claimant, but not more than semiannually. *See Briskie,* 38 BRBS 61; *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998). If the administrative law judge finds that claimant knowingly and willfully omitted or understated his earnings, claimant forfeits his entitlement to compensation for the period of underreporting. 33 U.S.C. §908(j); 20 C.F.R. §802.286; *Floyd v. Penn Terminals, Inc.,* 37 BRBS 141 (2003).[2]

[2] The Board has held that an employer may initiate original forfeiture proceedings before an administrative law judge in those cases in which the compensation claim is also pending before the administrative law judge. *Floyd*, 37 BRBS at 146. In the present case, both the claim for compensation and the forfeiture issues were simultaneously pending before the administrative law judge. Therefore, we reject claimant's contention that Section 8(j) is not applicable because the district director did not first address this issue.

The Secretary has implemented Section 8(j) through the regulations at 20 C.F.R. §702.285 and §702.286. Relevant to the instant case, Section 702.285(a) states:

> An employer, carrier or the Director (for those cases being paid from the Special Fund) may require an employee to whom it is paying compensation to submit a report on earnings from employment or self-employment. This report may not be required any more frequently than semi-annually. *The report shall be made on a form prescribed by the Director and shall include all earnings from employment and self-employment and the periods for which the earnings apply*. The employee must return the complete report on earnings even where he or she has no earnings to report.

20 C.F.R. §702.285(a)(emphasis added). Employer contends that the administrative law judge's requiring employer to request earnings information on a specified form is overly technical. Employer further avers that the Maine form for requesting earnings information is sufficiently similar to the longshore form, specially given that concurrent jurisdiction exist between the two acts. The Director contends that the administrative law judge properly found that employer did not request claimant's earnings information on the proper form, as the Maine form is not interchangeable with Form LS-200.

Section 8(j) of the Act states that, when requested, the claimant must report his earnings on a form specified by the Secretary in the regulations. The regulation at Section 702.285(a) states that the form shall be "prescribed by the Director." 20 C.F.R. §702.285(a). The Director has prescribed Form LS-200. As the Director posits, it follows from the plain language of the Act and regulations that because employer must request an earnings report and claimant must file one on the prescribed form employer's request must include the prescribed form. Indeed, the prescribed form, LS-200, requires that employer fill out information prior to sending the form to claimant.

The LS-200 form reflects that it was issued by the United States Department of Labor in connection with claims for compensation under the Longshore Act. The employee is instructed to complete and sign the form and return it within 30 days of receipt, even if he has no earnings. The instructions also state that the employee may lose compensation benefits if the form is not completed in accordance with the instructions. The form requests the names and addresses of any employers during a specified period, as well as any amounts earned. Additionally, the form requests information regarding any self-employment during this period, and instructs the employee to include all revenue received from self-employment even if the business or enterprise operated at a loss or if the profits were reinvested. The form specifically sets forth the regulatory definition of the term "earnings."[3] Finally, the form summarizes the forfeiture provisions of Section

[3] Section 702.285(b) defines "earnings" as:

8(j) and Section 702.286 of the regulations, and notifies the employee that under Section 31(a)(1) of the Act, 33 U.S.C. §931(a)(1), any claimant who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under the Act shall be guilty of a felony and may be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or both. *See* A BRBS 3-5.

By contrast, the form relied on by employer is titled "Employment Status Report" and reflects that it was issued by the State of Maine Workers' Compensation Board. The form states "this report is due 90 days after the date of injury, and every 90 days thereafter,"[4] and notifies the employee that failure to complete and return the report may result in the discontinuance of his workers' compensation benefits. The form asks the employee only whether he worked or performed any services for pay or other benefit during the period identified, and if "yes," to identify the employer's name and address. The employee is also asked the dates on which the work was performed and what type of work was performed.

We reject employer's contention that the request for earnings information submitted to claimant on the form required under the Maine workers' compensation program is sufficiently analogous to Form LS-200 to justify imposition of Section 8(j). Although the Board has held that an employer may rely on a document that contains all the information required by a form prescribed by the Director, *see, e.g., White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75 (1984)(if a document contains all the information required by Section 14(d), it may be considered equivalent to a notice of controversion), in the present case, the Maine "Employment Status Report" and the LS-200 "Report of Earnings" are dissimilar in material respects. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley],* 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990), *aff'g in pert. part,* 22 BRBS 184 (1989)("answer" to claim not a valid notice of controversion because it did not contain all required information).

As employer correctly contends, both forms require an individual to report work-related earnings for an identified period. However, the forms have distinctly different

---

> 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 revenues received from self-employment even if the business or enterprise operated at a loss or if the profits were reinvested.

20 C.F.R. §702.285(b).

[4] The employer must supply the form to the claimant on a quarterly basis if quarterly reporting is desired.

schedules for filing; the Maine Employment Status Report must be filed every 90 days, while employer may request earnings on Form LS-200 only semiannually. The LS-200 Form requires separate reporting of earnings from employment and self-employment; it requires specific information about each type of earnings, and defines earnings to include revenue received from self-employment even if the business or enterprise operated at a loss or if the profits were reinvested. The Maine form is silent as to the definition of "pay or other benefit." More importantly, the Maine form states that claimant's benefits may be "discontinued," whereas the longshore form states that benefits may be "forfeited."[5] Finally, the longshore form warns of criminal penalties for fraudulent representations concerning earnings, and the Maine form does not contain any similar provisions. Given these significant differences in the two forms, we reject employer's contention that the Maine form is equivalent to the LS-200. The LS-200 form is specific as to the types of earnings claimant must report, and contains a more severe penalty for failure to comply with the reporting requirements. Significantly, the Maine form does not warn claimant that his longshore benefits are at risk for failure to comply with the reporting requirement, the result employer seeks herein.

A failure to respond to or a knowing or willful violation of a valid request for earnings "forfeits [the employee's] right to compensation with respect to any period during which the employee was required to file [an earnings] report." 33 U.S.C. §908(j)(2); 20 C.F.R. §702.286(a). "Generally, forfeitures should be enforced only when within both letter and spirit of the law." *United States v. Marolf*, 173 F.3d 1213, 1217 (9th Cir. 1999)(internal quotation marks omitted), quoting *United States v. One 1936 Model Ford V-8 De Luxe Coach, Motor No. 18-3306511*, 307 U.S. 219, 226 (1939). Under the Act, Section 8(j) provides that claimant's right to compensation may be forfeited and that, if already paid, employer may recover by a deduction from compensation due on a schedule established by the district director. Given this result, we agree with the Director's contention that an employer must follow the established procedures for requiring an earnings report before the Act's forfeiture provisions may be invoked. As employer did not comply with the Act or regulations by requesting the earnings information on the prescribed form, we affirm the administrative law judge's finding that claimant's compensation is not subject to forfeiture pursuant to Section 8(j), notwithstanding the administrative law judge's finding that claimant knowingly and willfully understated his post-injury earnings.[6]

---

[5] Pursuant to Section 8(j), if benefits have not been paid, claimant forfeits his entitlement to them. If benefits have been paid, employer is entitled to a credit against future benefits due, on a schedule determined by the district director. 33 U.S.C. §908(j)(3); 20 C.F.R. §702.286(c).

[6] In his response brief, claimant contends that the administrative law judge erred in finding he intentionally misrepresented his earnings, and therefore in referring the case to

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed. The case is remanded to the administrative law judge for consideration of employer's petition for modification. 33 U.S.C. §922; 20 C.F.R. §802.301(c).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

---

the United States Attorney's Office. This issue is not properly before the Board as it was not raised in a timely filed cross-appeal. *See Briscoe v. American Cynamid Corp.*, 22 BRBS 389 (1989); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87, 1-91 n. 3 (1983).