EARNESTINE K. HYDE	)	BRB Nos. 05-0618
	)	and 05-0618A
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 04/24/2006
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	
	)	
	)	
EARNESTINE K. HYDE	)	BRB No. 05-0937
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order, the Order Denying Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney's Fees of David A. Duhon, District Director, United States Department of Labor.

Sue Esther Dulin (Dulin & Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order and the Order Denying Motion for Reconsideration (2004-LHC-1342, 1343) of Administrative Law Judge Lee J. Romero, Jr., rendered on claims 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). Employer also appeals the Supplemental Decision and Order Awarding Attorney's Fees of Administrative Law Judge Romero and the Compensation Order Award of Attorney's Fees (Case No. 07-163692) of District Director David A. Duhon. The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

At issue in this case are injuries claimant sustained in the course of her modified welding work at employer's shipyard on May 6, 2002, and December 9, 2003. Previously, she had sustained a work-related injury to her right knee at the shipyard on November 21, 1991, requiring two surgical procedures and an assignment of a ten percent permanent impairment of her right lower extremity with restrictions regarding climbing and squatting.[1] EX 29. Claimant eventually returned to modified welding work at the shipyard and continued in this capacity until February 14, 2002, when, upon

[1] Employer's predecessor, Ingalls Shipbuilding, Incorporated (Ingalls), paid permanent partial disability benefits for this injury pursuant to the schedule.

employer's review, her permanent restrictions were allegedly modified to reflect that she was to avoid only climbing.[2]

Claimant thereafter worked within this restriction until May 6, 2002, when she sustained a work-related cervical injury, which led to surgery performed by Dr. Smith on April 10, 2003. Dr. Smith released claimant to return to work as of September 13, 2003, with permanent restrictions of no overhead activity and no lifting and carrying in excess of 25 pounds. Employer, however, did not call claimant back to work until November 5, 2003, at which time she was placed in a modified welding position. Employer paid temporary total disability benefits for the period that claimant was unable to work, and the parties stipulated that claimant has been paid for all appropriate periods of disability prior to her return to work on November 5, 2003.

While performing her modified work on December 9, 2003, claimant injured both of her knees. She continued to work but sought treatment from Dr. Wiggins. On December 17, 2003, Dr. Wiggins placed claimant at maximum medical improvement with no additional permanent impairment to her knees and released her to return to work with additional restrictions of no climbing, no squatting, and no kneeling.

Claimant attempted to return to work for employer on December 17, 2003, but was informed that it did not have any work available to claimant given her physical limitations. She eventually obtained employment at D.J.'s Shuttle and Tour Service in May 2004, and worked in this capacity until she voluntarily left in October 2004. Claimant filed claims seeking benefits commencing December 17, 2003, for the work-related injuries of May 6, 2002, and December 9, 2003.

The administrative law judge found that claimant could not return to her usual employment, and that employer established suitable alternate employment at its facility for the period between November 5, 2003, and December 17, 2003, and as of its labor market survey dated January 14, 2004. The administrative law judge further found, however, that claimant diligently sought alternate employment from January 14, 2004, without success until she obtained the position with D.J.'s Shuttle and Tour Service on May 10, 2004. Accordingly, the administrative law judge awarded claimant permanent total disability benefits from December 17, 2003, through May 9, 2004. Additionally, he awarded claimant continuing permanent partial disability benefits from May 10, 2004, pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), as well as medical benefits.[3] The

[2] The record establishes that employer purchased the shipyard from Ingalls in 2002. At that time, it reviewed and updated the physical restrictions of all of its injured employees. Tr. at 43.

[3] The administrative law judge awarded permanent partial disability benefits for three distinct periods, from May 10, 2004, through July 11, 2004, from July 12, through September 12, 2004, and continuing from September 13, 2004, based on different post-injury wage-earning capacities.

administrative law judge awarded employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer asserts that the administrative law judge erred in awarding claimant permanent partial disability benefits under Section 8(c)(21) since claimant's present partial disability is related only to her December 9, 2003, knee injuries. Employer further contends that that administrative law judge erred in not "factoring out" from claimant's loss in wage-earning capacity the effects of claimant's knee injury. Employer additionally asserts that, assuming the Board agrees with its contentions on the merits, the fee awards of the administrative law judge and the district director are inappropriate given claimant's degree of success. BRB Nos. 05-0618, 05-0937. Claimant responds, urging rejection of employer's contentions. On cross-appeal, claimant argues that the administrative law judge erred in finding that her work for employer between November 5, 2003, and December 17, 2003, was suitable. Thus, claimant contends that her disabling condition is due at least in part to her cervical injury and that an award under Section 8(c)(21) is proper. BRB No. 05-0618A. Employer responds, urging rejection of this contention.

Where, as in the instant case, claimant suffers two distinct injuries, one to a scheduled member and one to a non-scheduled body part, she may be entitled to receive compensation under both the schedule and Section 8(c)(21).[4] *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988); *see also Green v. I.T.O. Corp. of Baltimore*, 32 BRBS 67 (1998), *modified in part*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999). Under such circumstances, an award of benefits under Section 8(c)(21) should be based on the effects of the non-scheduled injury alone.[5] *Id.; see also Bivens v. Newport News*

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[4] As the administrative law judge found, claimant is not presently entitled to a scheduled award for her knees since she incurred no additional permanent knee impairment as a result of the December 9, 2003, work accident. Decision and Order at 25.

[5] Thus, we reject employer's contention that only the last injury, to claimant's knees, is the compensable injury pursuant to the "aggravation rule." The cases employer cites address the responsible employer in two-injury cases involving the liability of successive employers rather than claimant's entitlement to benefits for multiple injuries with one employer. The administrative law judge properly distinguished these responsible employer cases since the "present matter concerns only one employer," and because claimant herein "injured her neck and subsequently injured both knees in an unrelated work accident," thereby making it that "claimant's knee injuries did not result in an aggravation of or cumulative injury to the earlier neck injury." Decision and Order at 24. The caselaw cited *infra* makes clear that both injuries claimant sustained in this case are potentially separately compensable. *See also New Haven Terminal Corp. v.*

Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990). In contrast, if claimant's permanent partial disability is entirely attributable to the scheduled injury, she is limited to a recovery under the schedule. *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980); *see also Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998).

Claimant contends that the work she performed for employer between November 5, and December 17, 2003, was not suitable, and thus her present disability is due at least in part to the non-scheduled injury to her neck. Employer contends that as claimant's cervical condition was fully accommodated by a suitable job at its facility, the administrative law judge erred in finding that claimant's disability after December 17, 2003, was due to both the cervical and knee conditions rather than to the knee injury alone. We reject employer's contention and affirm the administrative law judge's finding that the unavailability of the job at employer's facility is due to both the knee and cervical condition as it is based on substantial evidence of record.[6]

Employer contends that the administrative law judge erred as a matter of law in finding that employer's failure to offer claimant suitable employment after December 17, 2003, was due to the restrictions from both the cervical and knee injuries and not just the knee injuries alone. Employer contends that as claimant's cervical restrictions were accommodated up to the point of claimant's sustaining the knee injuries claimant's present disability must be due solely to her knee injury. Thus, employer avers that an award of benefits for a loss in wage-earning capacity pursuant to Section 8(c)(21) is precluded by *PEPCO*, 449 U.S. 268, 14 BRBS 363.

The administrative law judge discussed the restrictions claimant had as a result of both injuries, and concluded that "[b]ased on the combination of neck and knee restrictions, Employer could no longer provide suitable modified employment for Claimant." Decision and Order at 28; *see also* Order on Recon. at 2. This finding is

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Lake, 337 F.3d 261, 37 BRBS 73(CRT) (2d Cir. 2003) (The court held that the aggravation rule is not a defense to be used by first or earlier employers as a shield from liability). Moreover, employer's contention regarding the last injury being "the compensable injury" in an aggravation case fails to account for concurrent awards cases. *See, e.g., I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999).

[6] Claimant did not seek benefits for the period between November 5, 2003, and December 17, 2003. Thus, as we reject employer's contention that its inability to provide claimant with a suitable job thereafter was due solely to the knee injury, we need not address claimant's assertion that the job employer provided during this period was not suitable as it would not result in the alteration of the administrative law judge's award of permanent total and partial disability benefits commencing December 17, 2003.

supported by substantial evidence in the form of employer's Return to Work Program form dated December 17, 2003, which states that claimant cannot climb ladders, lift greater than 25 pounds, perform overhead work, or kneel or squat. It further states that, "These restrictions reference neck injury – Dr. Terry Smith and knee injury – Dr. Wiggins." CX 9 at 20. Since employer's form specifically references both injuries, the administrative law judge reasonably concluded that both work injuries led to the unavailability of the job at employer's facility. *See generally Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001). Employer has not raised any issues of fact with regard to the administrative law judge's finding, and given this evidence, the administrative law judge was not required to infer that the December 2003 knee injury alone was the cause of claimant's disability merely because employer previously provided a job for claimant which arguably had accommodated her neck restrictions. *See* n. 6, *supra.* Therefore, we affirm the administrative law judge's finding that claimant's disability after December 17, 2003, is due to both her cervical and knee injuries as he rationally found that the job at employer's facility was unavailable due to the combination of claimant's injuries. Claimant's partial disability, therefore, is not due solely to the knee injury and she is not precluded by *PEPCO*, 449 U.S. 268, 14 BRBS 363, from receiving an award for a loss in wage-earning capacity caused by the cervical injury. *See Green*, 32 BRBS 67.

Employer also contends that the administrative law judge erred by not "factoring out" from claimant's post-injury wage-earning capacity any loss caused by the knee injuries. We agree that remand is required as the administrative law judge did not address this issue.[7] The purpose of the Board's holding in *Frye*, 21 BRBS 194, regarding "factoring out" the effects of a scheduled injury on claimant's loss in wage-earning capacity is to avoid double recovery and requires simply that restrictions due to claimant's knee injury not be considered in addressing claimant's wage-earning capacity. For example, if a claimant has limitations due to her neck injury that preclude some types of jobs and restrictions due to the knee injury that eliminate others, the job limitations due

[7] The administrative law judge's award of total disability benefits from December 17, 2003, through May 9, 2004, is not challenged on appeal and is affirmed.

to the knee injury should not be considered in setting claimant's wage-earning capacity.[8] There is no danger of double recovery, however, if claimant's neck injury alone could cause the entire loss in wage-earning capacity; claimant is entitled to benefits for the full loss in wage-earning capacity due to her neck condition even if her knee injury alone also resulted in restrictions. *Green*, 32 BRBS at 69.

Therefore, as the administrative law judge did not address this issue, we vacate his findings regarding the extent of claimant's loss in wage-earning capacity beginning on May 10, 2004. *See* Decision and Order at 31-33. On remand, the administrative law judge must determine the extent, if any, to which claimant's knee injuries contributed to her loss in wage-earning capacity and factor that amount out of the award under Section 8(c)(21). *Green*, 32 BRBS 67; *see also* 33 U.S.C. §908(h). Moreover, as employer correctly states, the administrative law judge must base the award of benefits for the cervical injury on claimant's average weekly wage at the time of the May 2002 cervical injury, rather than on her average weekly wage at the time of the December 2003 knee injury.[9] *See generally LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 31 BRBS 195(CRT) (5th Cir. 1997).

In view of our disposition of employer's contentions on the merits, we decline to reduce, as employer requests, the fee awards of the administrative law judge and the district director to reflect reduced success, as the awards will not necessarily be reduced on remand. The administrative law judge may reconsider the amount of his award of an attorney's fee in light of his findings on remand, keeping in mind that employer asserted that claimant was not entitled to any further benefits after claimant returned to work in November 2003. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). As employer preserved its right to challenge the district director's fee award by timely appealing the award, and the award is not yet final as the proceedings in this case continue, employer may petition the district director to reduce the fee award upon receipt of a final decision that results in a lower award to claimant.

[8] The restrictions due to all conditions, however, were appropriately considered by the administrative law judge in addressing whether employer established the availability of suitable alternate employment. *See generally Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001).

[9] The administrative law judge stated that the parties stipulated that claimant's average weekly wage in May 2002 was $647.45. Decision and Order at 2, 35; JX 1.

Accordingly, the administrative law judge's findings regarding claimant's loss in wage-earning capacity commencing May 10, 2004, 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, the Order Modifying Decision and Order, and the Order Denying Motion for Reconsideration are affirmed. The fee awards of the administrative law judge and the district director are affirmed on the current record, but may be reconsidered consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge