

LEE F. ANTHONY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>Nov. 14, 2000</u>
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Fletcher E. Campbell, Jr.,
Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for
claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for
self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and
NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (96-LHC-1464) of
Administrative Law Judge Fletcher E. Campbell, Jr., awarding benefits 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).

This case is before the Board for the second time. Claimant, while working as a
structural welder for employer, sustained an injury to his right knee on October 18, 1988.
Following a third surgery on his right knee on March 16, 1990, claimant began to notice

sharp pains running through his lower and middle back which increased as he became more active in his post-injury employment as an armed guard with Alpha Omega Security. Dr. Shall opined that claimant's work-related knee injury and the subsequent treatment of that injury possibly contributed to his back problems. Claimant's Exhibit (CX) 1-1. Additionally, Dr. Peach, whom claimant engaged for an evaluation of his back pain, ultimately agreed that claimant's "difficulty with ambulation secondary to his knee problems is the probable cause of his chronic musculoligamentous low back pain." CX 5-2. Claimant thereafter filed a claim for compensation for the back injury.

In his decision, the administrative law judge initially concluded that claimant's back pain is causally related to his on-the-job accident on October 18, 1988. The administrative law judge then found that while claimant suffers from a temporary partial impairment from his back injury, he has failed to show any loss of wage-earning capacity and is not entitled to any additional compensation for his back injury since his restrictions have not limited his employment in any way not already limited by his scheduled knee injury.¹ The administrative law judge, however, determined that claimant is entitled to all reasonable and necessary medical benefits associated with his back injury. Claimant thereafter appealed the administrative law judge's denial of benefits.

In its decision, the Board initially affirmed the administrative law judge's findings that claimant reached maximum medical improvement with regard to his right knee injury as of August 6, 1990, and that claimant has not as yet reached maximum medical improvement with regard to his back condition. *Anthony v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 98-0726 (Feb. 22, 1999)(unpub.). The Board however vacated the administrative law judge's finding that claimant is not entitled to benefits for his back condition and remanded for a determination as to whether claimant sustained a loss in wage-earning capacity due to the back injury. *Id.* The Board explicitly noted that concurrent awards of

¹The administrative law judge found that claimant reached maximum medical improvement and therefore is entitled to permanent partial disability benefits for his knee condition pursuant to the schedule based upon the 20 percent disability to claimant's right lower extremity. He thus noted that since claimant has been compensated for his initial knee injury under the schedule, 33 U.S.C. §908(c)(2), any loss of wage-earning capacity due to this scheduled injury must be factored out before an award for his unscheduled back injury may be ordered. *See* Decision and Order at 9.

compensation under both Section 8(e), 33 U.S.C. §908(e), and the schedule at Section 8(c)(2), 33 U.S.C. §908(c)(2), may be appropriate if claimant's back injury alone caused any loss in his wage-earning capacity, irrespective of whether the knee injury caused the same disability. *Id.*

On remand, the administrative law judge found that claimant's back injury did not contribute to his loss in wage-earning capacity as the restrictions associated with his knee and back injuries are virtually the same, and thus the back injury alone did not further impact his ability to find suitable alternate employment. Accordingly, the claim for compensation based on claimant's back injury was denied.

On appeal, claimant asserts that the administrative law judge erred in finding that claimant did not establish that his back injury adversely impacted his wage-earning capacity. Employer responds, urging affirmance.

On remand, after determining that claimant's back condition alone would preclude him from resuming his former employment, the administrative law judge noted that claimant's work restrictions for his back and knee conditions are virtually identical.² He thus concluded that claimant's back injury did not lead to more onerous work restrictions that would affect his ability to find suitable alternate employment. In this regard, the administrative law judge's analysis is flawed as he failed again to separately consider any loss in wage-earning capacity due to the back injury. *Anthony*, slip at 6, n. 4; *Green v. I.T.O. Corp. of Baltimore*, 32 BRBS 67, 69 (1998), *modified on other grounds*, 185 F.3d 239, 33 BRBS 139 (CRT)(4th Cir. 1999); *Frye v. Potomac Electric Power Co.*, 21 BRBS 194, 197 (1988). This analysis required that he ignore the restrictions imposed by the knee injury, which were compensated by the schedule award, and focus on the restrictions due to the back injury. The fact that the restrictions impose similar limitations does not end the analysis, as claimant is not limited to the schedule award. He is entitled to a separate determination under Section 8(e) to compensate his back condition.

²The administrative law judge found that the permanent work restrictions resulting from claimant's right knee injury are: (1) no lifting over 20 pounds; (2) no squatting, crawling, or kneeling on right knee; (3) no repeated stooping; (4) occasional kneeling on left knee only; and (5) no prolonged walking or standing. He found that the permanent work restrictions resulting from claimant's back injury are: (1) lifting limited to no more than 25 pounds frequently and no more than 13 pounds continuously and (2) no bending.

In its first decision, the Board vacated the administrative law judge's finding that claimant's back condition did not result in any loss in wage-earning capacity and remanded the case for the administrative law judge to reconsider claimant's entitlement to disability benefits pursuant to *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). In this regard, the Board has held that where a claimant suffers two distinct injuries arising from a single accident, one compensable under the schedule and one compensable under Section 8(c)(21), (e), 33 U.S.C. §908(c)(21), (e), he may be entitled to receive compensation under both the schedule and Section 8(c)(21), (e), concurrently. *Green*, 32 BRBS at 67; *Bass*, 28 BRBS at 11; *Frye*, 21 BRBS at 198. In particular, the Board held that "if the restrictions due to his back injury preclude his return to his former employment and impede his ability to perform alternate work, then claimant is entitled to partial disability benefits for any loss in wage-earning capacity due to his restricted ability to perform other jobs." *Anthony*, slip op. at 5. The Board therefore remanded "for the administrative law judge to determine the extent of claimant's loss in wage-earning capacity due to his back." *Id.* Moreover, the Board added that "if claimant's back injury alone would cause the entire loss in wage-earning capacity, claimant is entitled to benefits for the full loss in wage-earning capacity due to his back condition even if his right knee injury alone also resulted in restrictions." *Anthony*, slip op. at 6, n. 4.

In the instant case, the administrative law judge's finding that the restrictions from the right knee injury and back injury are virtually the same establishes, in and of itself, that claimant's back injury alone limited his ability to work. The administrative law judge therefore should have determined the extent of claimant's loss in wage-earning capacity due to his back injury, if any, without any consideration of the restrictions imposed by claimant's right knee injury, as the back injury, by itself, caused claimant to have restrictions limiting his employability and thus to suffer a potential loss in wage-earning capacity compensable under Section 8(e). *Green*, 32 BRBS at 69. It was not the combined effects of the disabling right knee injury and the partially disabling back injury which caused the loss in wage-earning capacity; rather, each injury on its own resulted in restrictions unaffected by the other. *Id.* The scheduled award for the knee in no way compensates claimant for the restrictions imposed due to his back. We must, therefore, vacate the administrative law judge's finding that claimant is not entitled to benefits as a result of his work-related back injury and remand for a specific determination as to the extent of claimant's loss in wage-earning capacity, if any, based upon his back injury.

Section 8(e) of the Act provides for an award for temporary partial disability benefits based on the difference between claimant's pre-injury average weekly wage and post-injury wage-earning capacity. 33 U.S.C. §908(e). Wage-earning capacity is determined under Section 8(h), which provides that claimant's wage-earning capacity shall be his actual post-

injury earnings³ if these earnings fairly and reasonably represent his wage-earning capacity. If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must consider relevant factors and calculate a dollar amount which reasonably represents claimant's wage-earning capacity. The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985); *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998). Moreover, if, on remand, the administrative law judge determines that claimant has no present loss in wage-earning capacity he may then consider claimant's entitlement to a nominal award for a period not exceeding five years as the Board affirmed the administrative law judge's finding that claimant's back injury is at present temporary in nature, 33 U.S.C. §908(e). *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999).

Accordingly, the administrative law judge's denial of disability compensation for claimant's back injury is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH

Administrative Appeals Judge

REGINA C. McGRANERY

Administrative Appeals Judge

MALCOLM D. NELSON, Acting

³The record shows that claimant worked in suitable alternate employment as an armed security guard at Alpha Omega Security from August 30, 1991, until August 14, 1997, and that sometime thereafter he obtained a job with Gilliam Welding.

Administrative Appeals Judge