**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0278

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| ROSS FUROYAMA | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | DATE ISSUED: Feb. 29, 2016 |
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| HORIZON LINES LLC | ) | |
| | ) | |
| and | ) | |
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| SIGNAL MUTUAL INDEMNITY ASSOCIATION | ) | |
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| Employer/Carrier-Petitioner | ) | DECISION and ORDER |

Appeal of the Order Granting Section 22 Modification and the Order Denying Reconsideration of William Dorsey, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Steven M. Birnbaum, San Rafael, California, for claimant.

James P. Aleccia and David L. Doeling (Aleccia & Mitani), Long Beach, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Granting Section 22 Modification and the Order Denying Reconsideration (2012-LHC-01810) of Administrative Law Judge William Dorsey 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 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).

Claimant worked for employer as a container yard operator from October 2007 until September 2008, when he went on long-term disability after a non-work-related car accident.[1] Claimant, who had a history of osteoarthritis in his knees,[2] claimed he experienced bilateral knee pain while performing his job duties with employer, which escalated over the course of his work through the time of his car accident. As a result of his deteriorating bilateral knee condition, Dr. Takai performed surgery on claimant's right knee on January 5, 2011, and left knee on April 23, 2011. Claimant filed a claim under the Act seeking temporary total disability and medical benefits for cumulative trauma injuries he sustained to both knees in the course of his work for employer.

In a Decision and Order dated November 1, 2011, Administrative Law Judge Romero found a causal relationship between claimant's knee conditions and his work for employer, and he awarded claimant medical benefits. 33 U.S.C. §907(a). Judge Romero found, however, that claimant had not intended to stop working because of his knee condition, but had become permanently totally disabled solely due to an event completely unrelated to his work-related knee injuries. Judge Romero thus concluded that claimant is not entitled to temporary total disability benefits for his work-related knee injuries. 33 U.S.C. §908(b).

Claimant filed a timely petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging both a change in his physical condition and a mistake of fact in Judge Romero's decision. In his Order Granting Section 22 Modification, Administrative Law Judge William Dorsey (the administrative law judge)[3] found that claimant established a change in his physical condition, as claimant reached maximum medical

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[1]On August 11, 2008, claimant hit a light pole while driving his car, resulting in a brain injury, i.e., a subdural hematoma, which required surgical intervention. Claimant's knees were not injured in, or in any way adversely affected by, the automobile accident. HT dated February 9, 2011 at 66-67. Claimant returned to work for employer about two weeks later and worked for another two weeks, but then stopped working as he alleged he was permanently, totally disabled due entirely to the injuries sustained in the car accident.

[2]Claimant received scheduled awards of permanent partial disability benefits as a result of a July 10, 1992 work-related right knee injury, and a September 15, 1994 work-related left knee injury. Dr. Takai performed surgical procedures on claimant's right knee on July 29, 1992, and June 6, 2001, and on claimant's left knee on December 17, 1994.

[3]Administrative Law Judge Russell Pulver held a formal hearing on the modification petition on April 15, 2013, but was unable to resolve the matter before his retirement. The case was reassigned to Judge Dorsey.

improvement for his right knee on January 28, 2012, and for his left knee on January 25, 2013. The administrative law judge awarded claimant permanent partial disability benefits for a 37 percent impairment of his right leg and a 50 percent impairment of his left leg pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), subject to employer's entitlement to a credit, pursuant to *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*), for amounts claimant previously received under the schedule for his right and left knee impairments. *See* n. 2, *supra*. With regard to claimant's claim that Judge Romero's award of medical benefits mistakenly covered only the right knee, the administrative law judge clarified "what Judge Romero already ordered," stating that employer must pay for necessary medical care to both of claimant's knees, including the expenses relating to the left knee arthroplasty performed by Dr. Takai on April 23, 2011. Lastly, the administrative law judge denied employer's request for Section 8(f) relief, 33 U.S.C. §908(f). Both parties filed motions for reconsideration. Upon reconsideration, the administrative law judge modified his Order to reflect claimant's entitlement to scheduled permanent partial disability benefits using the maximum weekly compensation rate in effect in September 2008, i.e., $1,160.26. All other arguments pertaining to the parties' motions for reconsideration were rejected.

On appeal, employer challenges the administrative law judge's scheduled award of permanent partial disability benefits. Claimant has not responded to employer's appeal.[4]

Employer contends that the administrative law judge's award of permanent partial disability benefits is contrary to law in view of the fact that claimant was already totally disabled from a non-work-related car accident. Employer contends that case law establishes that where a claimant has already sustained a complete loss of earning capacity, he cannot also receive benefits due to partial disability to another body part.

In the event of an injury to a scheduled member, recovery for a claimant's permanent partial disability is confined to that provided in the schedule in Section 8(c)(1)-(19) of the Act, 33 U.S.C. §908(c)(1)-(19). *Potomac Electric Power Co. [PEPCO] v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). An award of permanent partial disability benefits for a scheduled disability is predicated solely on the

[4]By motion filed February 5, 2016, claimant filed a notice of substitution of counsel and a motion for an enlargement of time in which to file a response brief. Employer opposes the motion for an enlargement of time because the Board stated in its October 20, 2015 order granting an extension that no further extensions would be granted. We recognize that claimant has offered a valid basis for requesting another enlargement of time. Nonetheless, given our resolution of employer's appeal, claimant's motion is denied. 20 C.F.R. §§802.217, 802.219(f).

existence of a permanent anatomical impairment to a member listed in the schedule, and economic loss is not considered in determining an impairment rating under the schedule. *See, e.g., Soliman v. Global Terminal & Container Service, Inc.*, 47 BRBS 1, 2 (2013); *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011); *see also Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998). Nonetheless, longstanding precedent holds that a claimant is not entitled to concurrently receive scheduled permanent partial disability benefits and total disability benefits, whether the total disability is permanent or temporary; the reasoning underlying this precedent is that a claimant cannot be more than totally disabled and, thus, cannot receive compensation greater than that for total disability. *See Korineck v. General Dynamics Corp.*, 835 F.2d 42, 20 BRBS 63(CRT) (2d Cir. 1987); *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956); *Johnson v. Del Monte Tropical Fruit Co.*, 45 BRBS 27 (2011); *Bogden v. Consolidation Coal Co.*, 44 BRBS 43 (2010); *B.S. [Stinson] v. Bath Iron Works Corp.*, 41 BRBS 97 (2007); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985).

Thus, while employer is generally correct in stating that case law establishes that a claimant who has already sustained a complete loss of earning capacity is not entitled to a scheduled award of permanent partial disability benefits, employer fails to recognize that the application of this case law is limited to those circumstances where claimant is totally disabled due to an injury within the Act's coverage. *See, e.g., Macklin v. Huntington Ingalls Inc.*, 46 BRBS 31 (2012). For instance, the case employer cites in support of its position, *Stinson*, 41 BRBS 97, involved the validity of an administrative law judge's concurrent awards of permanent total disability benefits for claimant's work-related back condition and scheduled permanent partial disability benefits for claimant's work-related hearing loss; both injuries arose under the Act. Noting that case precedent establishes that claimant cannot receive a scheduled permanent partial disability award under the Act concurrently with total disability under the Act, either temporary or permanent, for a different injury, the Board vacated the administrative law judge's award of scheduled permanent partial disability benefits, because the administrative law judge's award of concurrent benefits was not in accordance with law.[5] Other cases acknowledging this precedent similarly involved the filing of multiple claims for separate injuries arising under the Act. *Korineck*, 835 F.2d 42, 20 BRBS 63(CRT) (the Second Circuit affirmed the denial of permanent partial disability benefits for a hearing loss because claimant was already permanently totally disabled under the Act due to his back

[5]The Board held that the claimant's entitlement to the scheduled award turned on whether the onset of the scheduled disability preceded or post-dated the onset of the total disability, regardless of which claim was filed first. If the onset of the scheduled award preceded the onset of total disability, the claimant is entitled to scheduled benefits for the period of time before he became totally disabled. *B.S. [Stinson] v. Bath Iron Works Corp.*, 41 BRBS 97, 99 (2007).

injury); *Rupert*, 239 F.2d 273 (the Ninth Circuit held that an award under the schedule may not coincide with an award for permanent total disability under the Act, because permanent total disability presupposes the loss of all wage-earning capacity); *Johnson*, 45 BRBS at 28 (claimant, while receiving total disability benefits for a work-related back injury, sought concurrent award of permanent partial disability benefits for a work-related hearing loss; Board affirmed the denial of permanent partial disability benefits and award of medical benefits for the hearing loss); *Bogden*, 44 BRBS 43 (in a case involving claims for periods of total disability due to a work-related back injury and for a scheduled award for a hearing loss, Board affirmed the finding that the scheduled award for hearing loss lapsed during the period of total disability but was to resume once the back injury was no longer totally disabling); *see also Rathke v. Lockheed Shipbuilding & Constr. Co.*, 16 BRBS 77 (1984).

The facts in this case are akin to those involving the effect of a claimant's voluntary retirement on his entitlement to benefits in a traumatic injury case. In *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001), the claimant suffered a traumatic knee injury at work, returned to suitable light-duty work with his employer, and retired three years later by accepting the employer's early retirement offer. After retirement, claimant's knee condition worsened and required additional surgery. The permanent impairment to claimant's knee increased and his physician stated he was unable to perform any work. The Board affirmed the administrative law judge's finding that the claimant's total loss of wage-earning capacity was not due to his work-related knee injury because he had voluntarily retired at a time when he was able to work.[6] The Board therefore affirmed the administrative law judge's findings that the claimant was entitled to an increased scheduled award under Section 8(c)(2) because such an award is not predicated on a showing of lost wage-earning capacity, but that the claimant was not entitled to total disability benefits. *Hoffman*, 35 BRBS at 149-150; *see also Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989).

As in *Hoffman*, claimant's total loss in wage-earning capacity in this case was not caused by his work-related knee injuries, but was due to the non-work-related car accident. Nonetheless, the worsening of claimant's bilateral knee condition was, as Judge Romero and the administrative law judge found, related to his work for employer. These findings have not been appealed. Because claimant's work-related right and left

[6]In contrast, the Board has held that where a claimant's traumatic work injury precludes his return to his usual work, notwithstanding his acceptance of a retirement offer, the claimant may receive an ongoing award of total disability benefits. *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997).

knee conditions reached maximum medical improvement after Judge Romero's decision, the administrative law judge properly modified Judge Romero's decision and found claimant entitled to awards under the schedule for the permanent impairment to each knee. *See* 33 U.S.C. §908(c)(2); *Young*, 45 BRBS 35. The administrative law judge properly found that claimant's total disability due to the non-work-related car accident has no bearing on claimant's entitlement to scheduled awards under the Act for his work-related knee conditions. *See generally Macklin*, 46 BRBS 31; *Hoffman*, 35 BRBS 148.

In reaching this conclusion, we reject employer's contention that the car accident should be considered an intervening event completely terminating its liability for the scheduled awards. Claimant sustained his knee injuries prior to the totally disabling car accident. Employer remains liable for any disability attributable to the work injury, notwithstanding the intervening accident. *See Macklin*, 46 BRBS 31; *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 F.App'x 126 (5th Cir. 2002). As in *Hoffman*, the fact that claimant's permanent knee impairments due to the work injury became compensable after the event that caused the total loss of earning capacity is of no legal significance because, in this case, employer offered no evidence that claimant sustained any new or additional injury to his knees as a result of the non-work-related car accident. Under these circumstances, the car accident is not a cause of claimant's compensable disability under the Act, and the administrative law judge properly found that employer is fully liable for the permanent impairment due to claimant's work-related knee injuries. Order Granting Section 22 Modification at 4-5; *see Hoffman*, 35 BRBS 148. We therefore affirm the administrative law judge's finding that claimant is entitled to scheduled awards of permanent partial disability benefits. *PEPCO*, 449 U.S. 268, 14 BRBS 363; *Young*, 45 BRBS 35. As employer does not challenge the administrative law judge's findings regarding the permanent impairment ratings attributable to claimant's work-related right and left knee injuries, we affirm the administrative law judge's award of benefits for a 37 percent impairment to claimant's right leg and a 50 percent impairment to his left leg pursuant to Section 8(c)(2) of the Act, subject to employer's *Nash* credit.

Accordingly, the administrative law judge's Order Granting Section 22 Modification and the Order Denying Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge