BRB No. 97-831

DONALD RONNE	)	
	)	
Claimant-Respondent	)	DATE ISSUED:_____
	)	
v.	)	
	)	
PORT OF PORTLAND	)	
	)	
and	)	
	)	
HELMSMAN NORTHWEST	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Pozzi, Wilson, Atchison, L.L.P.), Portland, Oregon, for claimant.

Robert E. Babcock (Babcock & Company), Lake Oswego, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-261, 96-LHC-262) of Administrative Law Judge Alexander Karst 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).

Claimant twice injured his knee during the course of his employment as a longshoreman. On December 5, 1988, he slipped, landing on his knees and elbows, and he was diagnosed with a complex tear of his right medial meniscus. Claimant underwent a partial medial meniscectomy on February 14, 1989, Cl. Exs. 1, 14-15, and he was released

to return to full duty work on August 14, 1989. On September 21, 1989, Dr. Weintraub, claimant's treating orthopedist, assessed a 20 percent permanent impairment of the right leg. Cl. Ex. 15; Emp. Ex. 15. However, on October 29, 1989, claimant re-injured his right knee in a new work accident. Cl. Ex. 15, 19. He ceased working and was diagnosed with a Baker's cyst, and he underwent a second knee surgery (a partial medial meniscectomy and debridement) on January 24, 1990. Cl. Ex. 15. Claimant has not been permitted to return to longshore work since the second injury. Tr. at 207.

Because claimant's knee did not noticeably improve, Dr. Weintraub considered him a candidate for a third knee operation, a tibial osteotomy. Cl. Ex. 15. On March 4, 1992, claimant underwent the surgery. Cl. Ex. 32. By July 23, 1992, claimant began expressing concerns about pain in his lower back and hip. On December 15, 1992, Dr. Weintraub considered claimant's knee medically stationary and assessed a 35 percent impairment to the right leg. Tr. at 201. Claimant's back pain persisted throughout 1993, and in April 1994, Dr. Mason, a neurological surgeon, diagnosed a narrowing of the lumbar canal at L4-5 and probable herniation at L5-S1. Cl. Ex. 48. Dr. Mason concluded that claimant's back problems were a direct result of his knee problems. Cl. Ex. 49.

Claimant and employer stipulated that claimant has been unable to return to his usual work since October 29, 1989, and that claimant's back condition is a sequela of his knee problems. Decision and Order at 1. The administrative law judge awarded claimant benefits for his injuries, and between December 5, 1988, the date of claimant's first knee injury, and April 8, 1994, the date on which final permanency was declared, claimant had periods of temporary total disability and permanent partial disability.[1] Decision and Order at 7. Pertinent to this appeal, the administrative law judge found that claimant established a *prima facie* case of total disability after his second knee injury in October 1989; however, he also found that employer established the availability of suitable alternate employment between November 29, 1990, the date claimant was released to return to sedentary work, and March 4, 1992, the date of the third knee surgery. Decision and Order at 6. He awarded claimant permanent partial disability benefits under the schedule for this period for a 20 percent impairment. The administrative law judge also found that from the time of the third knee surgery claimant has been totally disabled, as he is unable to perform the identified alternate employment. *Id.* The administrative law judge then awarded permanent total disability benefits based on claimant's average weekly wage at the time of his first

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[1]The administrative law judge awarded benefits for the following periods:

> December 6, 1988 - August 13, 1989 -- temporary total disability
> October 30, 1989 - November 29, 1990 -- temporary total disability
> November 30, 1990 - March 3, 1992 -- scheduled permanent partial disability
> March 4, 1992 - April 7, 1994 -- temporary total disability
> April 8, 1994 and continuing -- permanent total disability

Decision and Order at 10.

knee injury, $963.64, as he found that figure accurately represented claimant's average weekly wage at the time of his second knee injury.[2] *Id.* at 8. Additionally, the administrative law judge concluded that because claimant's back injury is not a separate and distinct injury, but is rather a natural progression of the knee injury, and because benefits are to be calculated based on one average weekly wage, there is no need to "factor out" the economic impact of the knee injury from benefits awarded for the back injury. *Id.* at 9. Employer appeals the decision only with regard to the "factoring out" issue, and claimant responds, urging affirmance.

Employer contends claimant is being overcompensated in this case. It argues that claimant's permanent total disability benefits should be based on the wages he could have earned in alternate employment after the knee injury and before the onset of total disability due to his back condition, rather than on those he earned when he was first injured. Employer thus contends that claimant's permanent total disability benefits should be based on his residual wage-earning capacity after the knee injury alone of $170 per week. In this way, employer contends, the economic effect of claimant's scheduled injury will be factored out of claimant's award of permanent total disability. Employer contends this case is controlled by the decisions in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988), *overruled on different grounds, Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988); and *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). Claimant argues that these cases are distinguishable and inapplicable.

The Supreme Court held in *PEPCO* that a permanent partial disability resulting from an injury to a member listed under the schedule requires an award of benefits pursuant to the schedule. It rejected the notion that Section 8(c)(21), 33 U.S.C. §908(c)(21), offered a claimant an alternative measure of compensation. *PEPCO*, 449 U.S. at 268, 14 BRBS at 363; *see also Turney,* 17 BRBS at 234. Following this premise, *Turney* and its progeny have concerned the question of how a claimant is to be compensated for concurrent scheduled and non-scheduled injuries. For example, in *Bass*, the Board held that if a claimant sustains a harm to a body part not specified in the schedule as a result of an injury to a scheduled member, he may receive benefits under Section 8(c)(21) for the consequential injury as well as benefits under the schedule for the initial injury. *Bass*, 28 BRBS at 17-18. Pursuant to *Frye*, if two injuries are then being compensated separately,

[2]The administrative law judge used claimant's average weekly wage at the time of the initial knee injury to calculate benefits for both the second knee injury and for permanent total disability. His reasons for doing so are fully explained in his decision, and his conclusion has not been appealed. *See* Decision and Order at 8.

any loss of wage-earning capacity due to the scheduled injury must be factored out of the Section 8(c)(21) award. *Frye*, 21 BRBS at 194.

Contrary to employer's assertion, *Turney* and its progeny do not apply to the case before us. Although claimant here sustained two injuries to his knees, for which he was compensated under the schedule, and then he sustained a consequential back injury, as did the claimant in *Bass*, claimant here was ultimately found to be totally disabled. This distinguishing factor is significant: at no time was claimant in this case entitled to concurrent awards under the schedule for his knee injury and Section 8(c)(21) for his consequent back condition. *See* n.1, *supra*. Therefore, at no time could claimant have received double compensation, as he did not receive concurrent awards. Rather, claimant was entitled to consecutive awards for permanent partial disability pursuant to the schedule from November 1990 to March 1992, and for permanent total disability as of April 8, 1994. There is no concurrent award conflict in this case. *See Tisdale v. Owens-Corning Fiber Glass Co.*, 13 BRBS 167 (1982), *aff'd mem. sub nom. Tisdale v. Director, OWCP*, 698 F.2d 1233 (9th Cir. 1983), *cert. denied*, 462 U.S. 110 (1983) (an award under the schedule cannot coincide with an award for permanent total disability benefits); *cf. Brady-Hamilton Stevedore Co. v. Director, OWCP,* 58 F.3d 418, 29 BRBS 101 (CRT)(9th Cir. 1995)(concurrent awards for permanent partial disability under Section 8(c)(21), and for permanent total disability cannot exceed statutory maximum for permanent total disability).

Moreover, claimant is not being overcompensated by virtue of the fact that his permanent total disability benefits are based on his average weekly wage at the time of his knee injury rather than on the amount claimant could have earned in alternate employment. The administrative law judge found that claimant's back condition was the natural and unavoidable result of his knee condition, and this finding is supported by substantial evidence of record. Accordingly, the compensable injury is claimant's knee injury, and benefits for the consequential back condition must be calculated based on the average weekly wage at the time of the knee injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *James v. Sol Salins, Inc.*, 13 BRBS 762 (1981); *see* n.2, *supra*. Therefore, we reject employer's argument, and we affirm the administrative law judge's award.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge