

BRB No. 92-761

GARY RANDO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STANDARD BOAT COMPANY,	)	
INCORPORATED	)	DATE ISSUED: _____
	)	
and	)	
	)	
STATE INSURANCE FUND	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Interim Decision and Order and the Final Decision and Order Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Richard E. Spillane (Caruso, Spillane, Contrastano & Ulaner, P.C.), New York, New York, for claimant.

Leonard J. Linden (Linden & Gallagher), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Interim Decision and Order and the Final Decision and Order Awarding Benefits (91-LHC-382) of Administrative Law Judge Ralph A. Romano 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his right elbow on July 22, 1988, when he fell while attempting to close a

crane door. Tr. at 4, 22. Employer voluntarily paid claimant temporary total disability benefits from July 23, 1988, through September 13, 1990, and permanent partial disability benefits from September 14, 1990, pursuant to Section 8(c)(1) of the Act, 33 U.S.C. §908(c)(1).<sup>1</sup> Claimant filed a claim for unscheduled permanent partial disability benefits, pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), contending that he has only a minimal earning capacity as a result of the injury. Employer contested the claim, asserting that claimant has a scheduled impairment of 28 percent to the right arm.

At the hearing before the administrative law judge, claimant and employer stipulated that claimant cannot return to his usual work, that claimant's condition reached maximum medical improvement on July 10, 1990, and that employer voluntarily paid temporary total and permanent partial disability benefits as set forth above. Interim Decision and Order at 2; Tr. at 4-6. Therefore, the only disputed issues were whether claimant sustained a scheduled or an unscheduled injury and the degree of his impairment. The administrative law judge found that claimant cannot return to his usual work, that employer presented evidence establishing the availability of suitable alternate employment, and that claimant failed to show due diligence in seeking work. Consequently, he concluded that claimant is permanently partially disabled. Interim Decision and Order at 3-5. The administrative law judge rejected employer's assertion that Section 8(c)(1) applies to this case, as well as claimant's argument that Section 8(c)(21) applies; however, he determined that claimant sustained a scheduled injury, and he awarded permanent partial disability benefits pursuant to Section 8(c)(19), 33 U.S.C. §908(c)(19). Interim Decision and Order at 5. Thereafter, in his Final Decision and Order, the administrative law judge noted the parties' agreement that claimant has a 30 percent loss of use to his right arm, and he awarded permanent partial disability benefits from July 10, 1990, pursuant to Section 8(c)(19). Final Decision and Order at 1.

Claimant appeals the administrative law judge's decisions. Claimant contends administrative law judge erred in not awarding benefits pursuant to Section 8(c)(21), and in determining the onset of permanent partial disability. In its response brief, employer asks the Board to modify the administrative law judge's award to reflect claimant's entitlement to benefits under Section 8(c)(1), and it urges affirmance in all other respects.

Claimant contends administrative law judge erred in awarding benefits pursuant to Section 8(c)(19). In support of his argument, he cites *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980), *rev'g* 606 F.2d 1324, 10 BRBS 1048 (D.C. Cir. 1979), urging the Board to consider the decision rendered by the United States Court of Appeals for the D.C. Circuit as well as the dissenting opinion in the Supreme Court's decision. Further, claimant urges the Board to distinguish the facts of this case on the basis that the claimant in *PEPCO* returned to light duty work for the same employer whereas claimant in this case did not. Claimant's argument is not persuasive. In *PEPCO*, the Supreme Court held that an injury to a scheduled member resulting in permanent partial disability limits a claimant to compensation under the schedule set forth in Section 8(c)(1)-(20) of the Act, 33 U.S.C. §908(c)(1)-(20), and the claimant may not elect to

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<sup>1</sup>Employer determined payments would cease on May 17, 1992. Tr. at 4-5.

receive compensation under Section 8(c)(21), 33 U.S.C. §908(c)(21). The Court noted, however, that such an injury does not bar an award of permanent total disability benefits. *PEPCO*, 449 U.S. at 277 n.17, 14 BRBS at 366-367 n.17. We decline to distinguish *PEPCO* in the manner espoused by claimant, as it is clear that the Supreme Court's decision in *PEPCO* applies to the case at bar. In this case, claimant sustained an injury to his right elbow, and the administrative law judge correctly determined that such an injury is an injury to a scheduled member. Consequently, as claimant is permanently partially disabled, he is entitled to benefits under the schedule and not, as he contends, to continuing benefits under Section 8(c)(21). Thus, the administrative law judge properly rejected claimant's argument. *PEPCO*, 449 U.S. at 282-283, 14 BRBS at 369.

Employer contends the administrative law judge erred in rejecting its assertion that claimant's benefits are appropriately awarded under Section 8(c)(1) and not under Section 8(c)(19). Section 8(c)(19) of the Act provides the formula for determining compensation for the partial loss or partial loss of use of a scheduled member.<sup>2</sup> 33 U.S.C. §908(c)(19). This subsection must be used in conjunction with another subsection of the schedule, depending on the particular member injured, to determine the appropriate compensation for such injury. In this case, claimant sustained an injury to his right elbow; therefore, Section 8(c)(1), which provides the formula for determining compensation for the loss of an arm, applies. 33 U.S.C. §908(c)(1); *see generally Bachich v. Seatrains Terminals of California*, 9 BRBS 184 (1978). Accordingly, we modify the administrative law judge's decision to reflect claimant's entitlement to permanent partial disability benefits for a 30 percent impairment to the arm pursuant to Section 8(c)(1) and (19). 33 U.S.C. §908(c)(1), (19).

Claimant also contends the administrative law judge erred in terminating his temporary total disability benefits on July 10, 1990. Specifically, claimant argues that he is entitled to temporary total disability benefits through November 20, 1991, when the administrative law judge issued his decision, or through May 1991, when he received his high school diploma, or through September 13, 1990, when employer ceased paying temporary total disability benefits.<sup>3</sup> In determining the nature of a disability, a claimant's condition becomes permanent on the date of maximum medical improvement, and in determining the extent of a disability, a claimant's condition becomes partial, if he cannot return to his usual work, on the date on which an employer establishes the availability of suitable alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). Thus, permanent partial disability benefits, whether scheduled or

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<sup>2</sup>Section 8(c)(19) provides:

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

33 U.S.C. §908(c)(19).

<sup>3</sup>Claimant contends that employer conceded claimant's temporary total disability status by paying benefits until September 13, 1990.

unscheduled, cannot commence until both maximum medical improvement and suitable alternate employment have been established. *Id.* Further, under certain circumstances, if a claimant is participating in a rehabilitation program, he may be considered totally disabled for the duration of the program, if employment is precluded during this period. *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122 (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Anderson v. Lockheed Shipbuilding & Construction Co.*, \_\_\_ BRBS \_\_\_, BRB No. 91-1967 (Oct. 27, 1994).

In the instant case, claimant and employer stipulated that claimant cannot return to his usual work and that July 10, 1990, is the date on which claimant's condition reached maximum medical improvement. Employer presented evidence of potential jobs for claimant which were available between May 31 and July 30, 1990, Emp. Exs. 11-16, and, upon the recommendation from the Department of Labor, claimant sought and received his high school diploma in May 1991. The administrative law judge did not determine the date on which employer established the availability of suitable alternate employment, as required by *Palombo*. Therefore, we vacate the administrative law judge's finding that permanent partial disability benefits are to commence on July 10, 1990, and we remand the case for him to reconsider the onset of permanent partial disability in light of the decisions in *Abbott* and *Palombo*.

Accordingly, the administrative law judge's award is modified to reflect claimant's entitlement to permanent partial disability benefits pursuant to Section 8(c)(1), (19). His determination regarding the onset date of permanent partial disability is vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the administrative law judge's decisions are 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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NANCY S. DOLDER  
Administrative Appeals Judge