BRB No. 13-0405

TONY ADAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TETRA TECHNOLOGIES, INCORPORATED	)	
	)	
	)	DATE ISSUED: Mar. 25, 2014
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster, Metairie, Louisiana, for claimant.

Christopher L. Zaunbrecher and J. Daniel Siefker (Briney Foret Corry), Lafayette, Louisiana, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2012-LHC-01135) of Administrative Law Judge Patrick M. Rosenow 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*., as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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 was struck in the upper left arm by a crane ball and cable while working for employer as a rigger on the Gulf of Mexico on April 29, 2011. He was airlifted to Terrebonne General Hospital, where Dr. Haydel performed an antegrade intermedullary nailing (I/M nail) to stabilize claimant's left humerus fracture. Dr. Sikes thereafter monitored claimant's surgical recovery and ultimately released claimant from treatment with light-duty work restrictions and a 10 percent permanent impairment of the left upper extremity. During the course of treatment, Dr. Sikes diagnosed claimant with left shoulder joint pain and impingement, which the physician opined was, more likely than not, due to the initial work injury, the surgical repair involving the I/M nail, or a combination of both.

Employer voluntarily paid claimant temporary total disability benefits from April 30 until November 11, 2011, when it believed claimant had reached maximum medical improvement and was capable of performing suitable alternate employment. Employer, thereafter, voluntarily paid claimant permanent partial disability benefits pursuant to Section 8(c)(1) of the Act, 33 U.S.C. §908(c)(1), based on a 10 percent impairment to claimant's left upper extremity. A controversy, however, arose as claimant alleged he continued to suffer from a work-related left shoulder injury which entitled him to an ongoing award of permanent partial disability benefits pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). Alternatively, claimant alleged entitlement to permanent total disability benefits as there had not been any showing as to the availability of suitable alternate employment.

In his decision, the administrative law judge found that claimant sustained work-related injuries to his left arm and left shoulder, that claimant is incapable of returning to his usual employment, and that employer established the availability of suitable alternate employment as of January 18, 2012. Accordingly, the administrative law judge found claimant entitled to temporary total disability benefits from April 30 to November 7, 2011,[1] permanent total disability benefits from November 8, 2011 until January 17, 2012, and unscheduled permanent partial disability benefits under Section 8(c)(21) thereafter, based on his calculations of claimant's average weekly wage, pursuant to 33 U.S.C. §910(c), as $837.76, and post-injury wage-earning capacity, adjusted for inflation, as $349.34 per week.

On appeal, employer challenges the administrative law judge's findings that claimant sustained a work-related left shoulder injury for which he is entitled to an ongoing non-scheduled award of permanent partial disability benefits under Section 8(c)(21), as well as his calculation of claimant's average weekly wage pursuant to

[1]The parties stipulated that claimant's injuries reached maximum medical improvement on November 7, 2011. JX 1.

Section 10(c). Claimant responds, urging affirmance of the administrative law judge's decision.

Employer contends the administrative law judge erred in finding that claimant sustained a work-related injury to his left shoulder, and thus in concluding that claimant is entitled to an ongoing award of permanent partial disability benefits under Section 8(c)(21) of the Act.[2] Employer avers that claimant's injury to his left arm, resulting in a functional impairment to his left shoulder, should be compensated as a scheduled injury of the left arm, rather than as an unscheduled injury to the left shoulder.

Employer is liable for the natural or unavoidable results of the work injury.[3] 33 U.S.C. §902(2). In this vein, a claimant may receive disability benefits for any increased disability due to medical treatment for the work injury. *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986). Employer correctly contends the situs of the injury, and not the location of the impairment, is determinative of whether an employee is entitled to an award under the schedule. In this regard, the schedule is not applicable where the actual site of the injury is to a part of the body not specifically listed in the schedule, even if the injury results in impairment to a scheduled part of the body. *Keenan v. Director for Benefits Review Board*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004); *Pool Co. v. Director, OWCP [White]*, 206 F.3d 543, 34 BRBS 19(CRT) (5th Cir. 2000); *Barker v. U.S. Dept. of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). However, if a claimant

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[2]Employer also contends that "claimant did not file a timely notice or claim regarding an alleged secondary injury to the shoulder." Emp. Brief at 19. Employer's one sentence "argument," however, is inadequately briefed and lacking support and, thus, shall not be addressed. *Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988) (party failed to discuss relevant law and evidence).

[3]Under Section 2(2) of the Act, the term "injury" means

> accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. §902(2).

sustains a direct injury to his shoulder, or if an injury to the arm results in an injury to the shoulder, claimant is entitled to an award under Section 8(c)(21), if he has a loss in wage-earning capacity due to the non-scheduled injury.[4] *Bass v. Broadway Maintenance*, 28 BRBS 11, 17-18 (1994); *Burkhardt v. Bethelem Steel Corp.*, 23 BRBS 273 (1990); *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); *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988).

The administrative law judge found that Dr. Sikes's opinion establishes that in order to treat the specific work injury, i.e., the broken humerus, the surgeon cut and passed a nail through claimant's rotator cuff, a structure that Dr. Sikes stated is clearly a part of the shoulder. Dr. Sikes, a Board-certified orthopedic surgeon specializing in fracture care, joint replacement and sports medicine, served as claimant's treating physician and is the only physician of record to address claimant's shoulder complaints. Dr. Sikes opined that claimant's complaints of shoulder pain and limited range of motion of the shoulder were a "normal, expected and customary" outcome of the I/M nail procedure. CX 2, Dep. at 12. Subsequently, Dr. Sikes diagnosed claimant with left shoulder joint pain and impingement, which he attributed to the work accident itself, the surgical procedure, or a combination of the two. The physician added that the traumatic injury, surgery and shoulder pain are "all intimately tied together" as "you cannot break the center of the strong humerus bone like that without a lot of stretching of the soft tissues, soft tissues that cross this ball and socket joint, be it the rotator cuff, the deltoid, the biceps tendon, [and] other ligaments that are not named herein." *Id*. at 30. Responding to questioning by employer's counsel, Dr. Sikes stated that the "humerus is half of the shoulder joint" as the "ball" of the ball and socket shoulder joint is the "top of the humerus."[5] *Id*. at 34. Moreover, in describing the process by which the I/M nail is inserted, Dr. Sikes stated, as the administrative law judge observed, that you cut through the rotator cuff and deltoid which "are the muscles that drive the shoulder." *Id.* at 49. Thus, Dr. Sikes's testimony, on which the administrative law judge relied, establishes that claimant sustained a work-related left shoulder injury. Consequently, as substantial evidence supports the administrative law judge's finding that claimant sustained a work-

[4]If the arm injury results in permanent impairment, claimant would also be entitled to a scheduled award under Section 8(c)(1). *Bass v. Broadway Maintenance*, 28 BRBS 11, 17-18 (1994).

[5]Employer, trying to distinguish between arm and shoulder pain, asked Dr. Sikes to explain why claimant's initial complaints of injury pain made no mention of injury to a shoulder, to which Dr. Sikes replied, "[i]t says a left humerus fracture. The humerus, that's the shoulder." CX 2, Dep. at 34.

related left shoulder injury either directly from the accident or from the surgery, it is affirmed.[6]

Moreover, the record establishes that claimant's light-duty restrictions, his inability to return to his usual work, and thus, his loss in wage-earning capacity, are attributable to the work-related injury to his left shoulder, rather than to the arm itself. In this regard, the functional capacity evaluation, as well as Dr. Sikes's assessment of it, relates the entire left upper extremity impairment to the diminished range of motion of claimant's left shoulder, and not the broken humerus.[7] EXs 13, 14. Thus, claimant's disability is compensable under Section 8(c)(21). *See generally Keenan*, 392 F.3d 1041, 38 BRBS 90(CRT); *White*, 206 F.3d 543, 34 BRBS 19(CRT); *Burkhardt*, 23 BRBS 273. Employer does not contest the calculation of claimant's residual wage-earning capacity resulting from the injury. 33 U.S.C. §908(h). We, therefore, affirm the administrative law judge's conclusion that claimant is entitled to compensation pursuant to Section 8(c)(21) of the Act.[8] *See Bass*, 28 BRBS 11.

Employer also challenges the administrative law judge's finding that claimant's average weekly wage is $837.76. Employer contends that the administrative law judge erred in using Section 10(c) of the Act, 33 U.S.C. §910(c), and should have applied

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[6]Thus, we reject employer's contention that claimant did not meet his burden of establishing either a direct or consequential injury under Section 2(2) of the Act, 33 U.S.C. §902(2).

[7]Robert Bishop, an occupational therapist, stated that claimant's "elbow, wrist and hand range of motion is within normal limits" but that claimant has a "decreased left shoulder range of motion," which demonstrates: diminished left shoulder flexion equating to "a three percent upper extremity impairment;" diminished left shoulder extension equating to "a one percent impairment;" diminished left shoulder abduction equating to "a three percent upper extremity impairment;" diminished left shoulder adduction equating to "a one percent impairment;" and diminished left shoulder external rotation equating to "a two percent impairment." EX 13. Dr. Sikes reviewed Mr. Bishop's report, finding that it "is appropriate for the injuries sustained by this patient," and adding that "this should offer some conclusive closure to the status and function of his left arm after this extremity injury." EX 14.

[8]In this case, however, claimant is not entitled to a concurrent scheduled award because there is no permanent impairment to claimant's left arm; rather, the permanent impairment in this case is due to claimant's left shoulder injury. The administrative law judge properly found employer entitled to a credit for all previously paid compensation, including the amount paid under the schedule.

Section 10(a), 33 U.S.C. §910(a),[9] as claimant was employed for substantially the whole of the year preceding his accident. Employer thus argues that claimant's earnings of $38,152.08 during that period, divided by 52 weeks, yields an average weekly wage of $733.69.[10]

The administrative law judge properly found Section 10(a) inapplicable in this case, as the record shows that claimant's normal work schedule involved 14 days on and either 7 or 14 days off, such that he could not be classified as either a five-day or six-day worker as required for application of that provision. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Taylor v. Smith and Kelly Co.*, 14 BRBS 489 (1981). Proceeding under Section 10(c), the administrative law judge rejected the calculations put forth by the parties as he found that neither approach accurately reflected claimant's wage-earning capacity at the time of injury. The administrative law judge instead undertook an approach which he believed best represented claimant's wage-earning capacity at the time of his injury.

Section 8(c)(21), 33 U.S.C. §908(c)(21), is designed to compensate injured employees for the amount of wage-earning capacity lost as a result of the injury. 33 U.S.C. §908(h). The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's earning capacity at the time of the injury,[11] and the administrative

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[9]Section 10(a) provides:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a).

[10]Even though employer advocates for a Section 10(a) calculation, it puts forth a Section 10(c) calculation.

[11]No party contends Section 10(b) is applicable. Section 10(c) states:

> If either of the foregoing methods [subsections (a) and (b)] of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees

law judge is given broad discretion in making the calculation under this section. *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). A Section 10(c) computation should reflect a pay raise received shortly before the injury. *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981).

The administrative law judge found that claimant's hourly wage increased from $12 to $14 on April 1, 2011. He thus found of the annual earnings preceding the injury on April 29, 2011, $5,684.60 reflected earnings at the higher $14 per hour pay rate, while the remaining $32,467.48 was based on the $12 per hour rate. The administrative law judge adjusted the $32,467.48 figure to account for the hourly pay raise, which resulted in earnings of $37,878.72, which, when added to claimant's actual post-raise earnings of $5,684.60, resulted in an adjusted annualized wage of $43,563.32. Dividing that figure by 52, rather than by 42 in order to account for claimant's scheduled periods of unemployment, the administrative law judge concluded that the resulting $837.76 is "a fair estimate of [claimant's] weekly earning capacity at the time of his injury," which he concluded is "a fair calculation of the average weekly wage." Decision and Order at 19; 33 U.S.C. §910(d). The administrative law judge's calculation reflects consideration of the entirety of claimant's earnings in the year immediately preceding his work injury, factoring in the annual effect of claimant's pay raise; the administrative law judge rationally concluded that use of all of claimant's earnings with employer during the year prior to injury at the higher hourly rate best represents the wage-earning capacity lost due to the injury. *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). As this calculation is reasonable and supported by substantial evidence, we affirm the administrative law judge's finding that claimant's average weekly wage is $837.76. *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT).

> of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge