

CHARLIE CORNER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LOGISTEC OF CONNECTICUT,)	DATE ISSUED: 05/20/2010
INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order Denying Claimant’s Motion for Reconsideration and Granting Employer’s Motion for Reconsideration of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Montstream & May, L.L.P.), Glastonbury, Connecticut, for claimant.

Peter D. Quay (Law Office of Peter D. Quay, LLC), Taftville, Connecticut, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Decision and Order Denying Claimant’s Motion for Reconsideration and Granting Employer’s Motion for Reconsideration (2008-LHC-00168) of Administrative Law Judge Colleen A. Geraghty 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, a terminal worker, suffered an injury to his left shoulder while performing "drop box" duties on July 8, 2005. Claimant underwent surgery on June 13, 2006, and returned to work on August 21, 2006, without medical restrictions. Employer paid claimant temporary total disability benefits during this period. Claimant testified that his condition prevented him from performing "drop box" duties or from working in a refrigerated warehouse, so he worked as a forklift operator until employer's facility closed in April 2008. HT at 33-34. Following the facility's closure, the employees were reassigned to another facility, but claimant's lower seniority there prevented him from obtaining regular work. Claimant's condition reached maximum medical improvement on July 17, 2007, and claimant sought permanent partial disability benefits pursuant to either Section 8(c)(1) or 8(c)(21), 33 U.S.C. §908(c)(1), (21).

In her Decision and Order, the administrative law judge found that as claimant's injury was to his shoulder and not his arm, he is not entitled to benefits under the schedule at Section 8(c)(1). The administrative law judge also found that as claimant did not establish that he suffered any reduction in his earning capacity attributable to his shoulder injury, he is not entitled to benefits pursuant to Section 8(c)(21). Therefore, she denied compensation benefits. The administrative law judge awarded claimant medical benefits and stated that his attorney is entitled to an attorney's fee.

Both parties filed motions for reconsideration. The administrative law judge denied claimant's motion, again finding that claimant's injury was to his shoulder and not to his arm. The administrative law judge also denied claimant's request for a nominal award because the issue was raised for the first time in claimant's motion for reconsideration. The administrative law judge, however, granted employer's motion for reconsideration on the issue of claimant's entitlement to an attorney's fee award. As employer had not contested the claim for medical benefits and had paid all expenses, the administrative law judge found that claimant's counsel is not entitled to any attorney's fee.

On appeal, claimant contends that the administrative law judge erred in finding that he suffered an injury to his shoulder and not to his arm. Claimant also contends that the administrative law judge erred in denying a nominal award. Employer responds, urging affirmance of the administrative law judge's decisions.

Claimant first contends that the administrative law judge erred in finding that he did not suffer an injury to his arm compensable under the schedule. 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 an 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); *Grimes v. Exxon Co., U.S.A.*, 14 BRBS 573 (1981). The shoulder is not listed in the schedule and thus an injury to the shoulder is not compensable under the schedule, even if the injury results in impairment of the arm. *Keenan*, 392 F.3d 1041, 38 BRBS 90(CRT); *White*, 206 F.3d 543, 34 BRBS 19(CRT); *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990).

Claimant relies on Dr. Carolan's surgical notes and 10 percent impairment rating to claimant's upper extremity to support his contention that his injury was to his arm. Although Dr. Carolan's surgical report states that he evaluated claimant's humerus and performed a synovectomy of the hypotrophic changes around the origin of the biceps tendon, *see* EX 5 at 4, Dr. Carolan concluded that all of the damage was in the shoulder blade area. CX 3 at 15. The administrative law judge found, based on the totality of Dr. Carolan's reports, that claimant's injury was only to his shoulder. Dr. Carolan diagnosed a rotator cuff injury and impingement syndrome of the left shoulder with arthritic changes at the acromioclavicular joint. EX 5. Claimant's surgery involved resection of the acromioclavicular joint and resection of spurs and bone on the interior surface of acromion. CX 3 at 6. The administrative law judge also relied on Dr. Carolan's deposition testimony that the impairment rating to claimant's arm is a consequence of the AMA *Guides*, which translates shoulder impairment into impairments of the upper extremity. CX 3 at 9. The administrative law judge found that this rating does not establish that claimant sustained an injury to his arm. The administrative law judge's finding that claimant sustained an injury only to his shoulder is amply supported by substantial evidence and therefore is affirmed. *Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995); *see also Electric Boat Corp. v. Blayman*, 263 F. App'x 152 (2^d Cir. 2008). Therefore, we affirm the denial of benefits under the schedule. *Barker*, 138 F.3d 431, 32 BRBS 171(CRT).

Claimant also contends that the administrative law judge erred in failing to grant a nominal award.¹ The administrative law judge declined to address claimant's entitlement to a nominal award because he raised the issue for the first time in his motion for

¹ Claimant does not appeal the administrative law judge's finding that he did not establish a present loss of wage-earning capacity pursuant to Sections 8(c)(21), (h).

reconsideration. The administrative law judge found that because claimant did not raise the issue prior to or at the formal hearing, or in his post-hearing brief, the issue was waived pursuant to her post-hearing order dated June 30, 2008. This order stated that “issues or arguments not specifically addressed in the brief will be deemed to have been waived.”

We affirm the administrative law judge’s refusal to address claimant’s entitlement to a nominal award. Entitlement to a nominal award arguably is “at issue” in every case in which entitlement to total disability or permanent partial disability based on a loss in wage-earning is raised, as these claims implicitly include a claim for lesser degrees of disability. *Rambo v. Director, OWCP*, 81 F.3d 840, 843, 30 BRBS 27, 30(CRT) (9th Cir. 1996), *aff’d and remanded sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Nonetheless, in this case, the administrative law judge issued a post-hearing order in which the parties were ordered to state each issue and present an argument on that issue, with supporting facts and legal authority. The administrative law judge stated that failure to do this would result in the party’s waiver of that issue. In declining to address on reconsideration claimant’s entitlement to a nominal award, the administrative law judge stated that claimant’s post-hearing brief did not assert entitlement to a nominal award. Indeed, a review of this brief reveals that claimant did not present any factual argument or case citations in support of a nominal award. Moreover, on appeal, claimant has not contended that the administrative law judge erred in finding the issue waived or in enforcing her post-hearing order. As claimant has failed to establish error in the administrative law judge’s decision on reconsideration, we decline to address claimant’s contention that he is entitled to a nominal award. *See generally Scilio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). The administrative law judge’s decision on reconsideration therefore is affirmed.

Accordingly, the administrative law judge's Decision and Order and the Decision and Order Denying Claimant's Motion for Reconsideration and Granting Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge