

BRB No. 10-0336

JOHN W. THORNTON)
)
 Claimant-Petitioner)
)
 v.)
)
 NORTHROP GRUMMAN SHIPBUILDING,) DATE ISSUED: 12/22/2010
 INCORPORATED)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2009-LHC-00400) of Administrative Law Judge Kenneth A. Krantz 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 injured his right knee at work on August 10, 1993, and employer voluntarily paid claimant compensation for a 15 percent permanent impairment of his right leg. 33 U.S.C. §908(c)(2), (19); EX 3b. Claimant injured his left knee on June 2, 2003, during the course of his employment for employer. After the 2003 injury, employer paid claimant compensation for a 43 percent permanent impairment to his left

leg for 123.84 weeks; the last payment was due on April 4, 2009. 33 U.S.C. §908(c)(2), (19); EX 2b. On September 18, 2007, claimant's right knee impairment rating was increased to 50 percent. CXs 3d, 4b. Employer did not dispute the extent of this increased impairment or its liability for benefits, but it declined to pay claimant additional scheduled compensation for his right leg impairment until it finished paying compensation for the left leg impairment. Therefore, employer commenced paying benefits for claimant's right knee impairment on April 4, 2009. Claimant requested a determination by an administrative law judge regarding the date employer should have begun paying compensation for the increase in the right knee impairment. Claimant contended the award should have commenced on September 18, 2007, when the increased right knee impairment rating was assigned and that he, therefore, is entitled to interest on the award due to employer's refusal to begin paying compensation until April 4, 2009.

In his decision, the administrative law judge found, pursuant to Section 8(c)(22) of the Act, 33 U.S.C. §908(c)(22), and the Board's decision in *Brandt v. Avondale Shipyards, Inc.*, 16 BRBS 120 (1984), that claimant is entitled to a schedule award for the increased permanent impairment of the right knee following the completion of payments under the schedule for the permanent impairment of the left knee on April 4, 2009. The administrative law judge thus awarded claimant compensation for his right knee impairment commencing April 4, 2009. 33 U.S.C. §908(c)(2), (22).

On appeal, claimant challenges the administrative law judge's finding that he was not entitled to compensation for his 50 percent right knee impairment from the date the increase in disability was assigned by his treating physician on September 18, 2007. Employer responds, urging affirmance.

Claimant asserts that the administrative law judge erred by relying on Section 8(c)(22) of the Act and the Board's decision *Brandt*, 16 BRBS 120. Claimant contends that Section 8(c)(22) is not applicable because his knee impairments arose from separate accidents; claimant avers that Section 8(c)(22) applies only when two scheduled awards are payable for injuries occurring in a single accident. Claimant also contends that the Board's affirmance in *Brandt* of the administrative law judge's consecutive scheduled awards based on Section 8(c)(22) of the Act is *dicta*, and thus, inapplicable as precedent in deciding this case, as the issue of consecutive as opposed to concurrent awards was not presented on appeal.

Section 8(c)(22) of the Act states:

In any case in which there shall be a loss of, or loss of use of, more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subdivision shall apply.

33 U.S.C. §908(c)(22). In *Brandt*, the claimant sustained a work-related injury to his right knee on June 6, 1973, and a subsequent work-related injury to his left index finger on December 27, 1973. Thus, like this case, *Brandt* involved separate work-related accidents to scheduled members. The Board affirmed two consecutive permanent partial disability awards under the schedule pursuant to Section 8(c)(22) and the Supreme Court's decision in *Potomac Electric Power Co. v. Director, OWCP (PEPCO)*, 449 U.S. 268, 14 BRBS 363 (1980), and rejected claimant's contention that compensation for claimant's two partial disabilities combined should be awarded pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21).¹ The Board's holding was based on two rationales: (1) there is no basis to limit *PEPCO*'s applicability to single injury cases; and (2) Section 8(c)(22) unambiguously provides that "injuries to more than one member covered by the schedule shall be compensated pursuant to its provisions so long as only permanent partial disability is the result," with the awards to be paid consecutively. *Brandt*, 16 BRBS at 121-122.

We reject claimant's contention that Section 8(c)(22) is not applicable in this case. While *Brandt* did not squarely address the issue raised herein, the decisions reached in *Brandt* and by the administrative law judge in this case are consistent with the principles of statutory construction. It is axiomatic that, when interpreting a statute, the starting point is the language of the statute. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989). Words of a statute are to be given their plain meaning whenever possible. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997). In ascertaining the proper construction of a specific statutory provision, it is also appropriate and helpful to view the disputed language in context; that is, to

¹ In *PEPCO*, the Supreme Court held that where a claimant is permanently partially disabled by an injury falling under the schedule, he is limited to a schedule award and cannot seek a higher recovery under Section 8(c)(21). 449 U.S. at 273-284, 14 BRBS at 365-370.

interpret the specific provision in a way that renders it consistent with the tenor and structure of the whole act or statutory scheme of which it is a part. *See* 2A Norman J. Singer and J.D. Shambie Singer, Sutherland Statutory Construction §46.1 (7th ed. 2010). The language of Section 8(c)(22) pertinent to the issue on appeal is the opening phrase “In any case,” which claimant suggests refers only to scheduled injuries arising from a single accident or claim, and not, as the administrative law judge applied it in this case, to scheduled injuries arising from multiple accidents or claims. We reject claimant’s contention, as the plain meaning of the phrase “in any case” encompasses “any” situation in which the claimant is entitled to multiple scheduled awards, regardless of whether they arise from one accident or claim or from multiple accidents or claims. The statute mandates that such awards “shall” run consecutively. 33 U.S.C. §908(c)(22).

In reaching this conclusion, we note that the phrase “in any case” appears seven other times in the Act, *see* 33 U.S.C. §§907(e), 908(f)(1), 914(h), 918(b), 935, 938, 941(f), and that, in each instance, the word “whenever” may be substituted with the statutory language “in any case” without changing the meaning of the section. As like phrases should be interpreted the same throughout a statute whenever possible, *see Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197(CRT) (9th Cir. 2000), and as words should be given their usual meaning if not defined in the statute, *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998), we hold that the phrase “in any case” as written in Section 8(c)(22) means “whenever” or “under any circumstances.”² Therefore, “whenever” a claimant is entitled to more than one scheduled award, such awards must run consecutively, as in *Brandt*, 16 BRBS at 121-122.

² In 1934, Section 8(c)(22) was amended to its current state: “In any case” where there are two scheduled injuries, the awards for permanent partial disability “shall run consecutively.” *See Luckenbach S.S. Co. v. Norton*, 23 F.Supp. 829 (D. Pa. 1938). Previously, Section 8(c)(22) included the phrase “both resulting from the same injury,” but this was explicitly limited to a “case of temporary total and permanent partial disability.” 33 U.S.C. §908(c)(22) (1927); *see Southern Stevedoring & Contracting Co. v. Sheppard*, 1 F.Supp. 867 (D. Tex. 1932). The amended Section 8(c)(22) clarified the statute to explicitly provide that awards for permanent impairment to more than one body part should run consecutively without regard to the length of any period of temporary total disability. *See* 78 Cong. Rec. 9171 (1934). While neither the original nor the amended Section 8(c)(22) directly addresses a case such as this one, where the claimant sustained more than one injury under the schedule resulting from multiple work accidents, the amended statute explicitly provides that two awards under the schedule shall run consecutively.

Moreover, claimant's contention that his scheduled awards should run concurrently for the period from September 18, 2007, through April 4, 2009, is not in accordance with the precedent set in *I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999). In *Green*, the claimant sustained a scheduled and an unscheduled permanent partial disability arising from the same accident. The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, held that, "in no case should the rate of compensation for a partial disability, or combination of partial disabilities, exceed that payable to the claimant in the event of total disability." *Id.*, 185 F.3d at 243, 33 BRBS at 142(CRT) (emphasis added);³ see also *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).⁴ In this case, concurrent scheduled awards for claimant's left and right knee impairments would exceed the rate payable for total disability, which is two-thirds of \$1,215.48, or \$810.32, for the 2003 left knee injury. JX 1. Thus, consecutive payments of permanent partial disability compensation for claimant's left knee impairment and increased right knee impairment are consistent with *Green*, 185 F.3d 239, 33 BRBS 139(CRT).

Pursuant to the plain language of Section 8(c)(22), that multiple permanent partial disability awards under the schedule shall run consecutively, the holding of the Fourth Circuit in *Green*, and the absence of any compelling reason that "[i]n any case" as provided by Section 8(c)(22) should be narrowly construed as applying only when a claimant has more than one scheduled disability from a single work accident, we reject claimant's contention that Section 8(c)(22) is applicable only to cases where a single accident results

³ Although it may be *dicta*, in *Green* the court specifically states, "Indeed, in cases where a claimant has sustained more than one injury listed in the schedule, the Longshore and Harbor Workers' Compensation Act specifies that the awards are to run consecutively." 185 F.3d at 243, 33 BRBS at 142(CRT).

⁴ Similarly, a claimant may not receive concurrently a schedule award for one injury and a total disability award for another injury, whether they arise in the same or separate accidents, as claimant cannot receive compensation greater than that for total disability. See *Korineck v. General Dynamics Corp., Electric Boat Div.*, 835 F.2d 42, 20 BRBS 63(CRT) (2^d Cir. 1987); *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956); *Bogden v. Consolidation Coal Co.*, 44 BRBS 43 (2010); *B.S. [Stinson] v. Bath Iron Works Co.*, 41 BRBS 97 (2007).

in permanent partial disability to more than one scheduled body part.⁵ Whenever a claimant sustains two or more scheduled permanent partial disabilities, the awards are to run consecutively pursuant to the plain language of Section 8(c)(22). We, therefore, affirm the administrative law judge's finding that claimant is entitled to consecutive, rather than concurrent, awards for his work-related permanent impairments of his right and left knees that arose from two injuries occurring at different times. Thus, we affirm the administrative law judge's award of permanent partial disability benefits for claimant's right knee impairment pursuant to the schedule commencing on April 4, 2009.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁵ In cases where claimant sustains both a scheduled and an unscheduled permanent partial disability arising from either a single accident or multiple accidents, claimant's scheduled and unscheduled awards may run concurrently, subject to the maximum compensation rate. *See, e.g., Green*, 185 F.3d 239, 33 BRBS 139(CRT); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). Such cases, however, are not governed by a specific statutory provision such as Section 8(c)(22).