

FRANK D. DERZIS )  
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 Claimant-Petitioner )  
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 v. )  
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 NEWPORT NEWS SHIPBUILDING AND ) DATE ISSUED: April 14, 2004  
 DRY DOCK COMPANY )  
 )  
 Self-Insured )  
 Employer-Respondent ) DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston,  
Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, L.L.P.), Norfolk,  
Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick), Newport News,  
Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-LHC-1039) of Administrative Law Judge Richard E. Huddleston denying benefits 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 sustained a work-related left ankle injury on March 1, 1997. The parties stipulated that claimant filed a timely claim for compensation, and that employer voluntarily paid benefits for a five percent permanent impairment of the leg on March 13, 1998. On October 4, 2001 and October 25, 2001, claimant attended medical appointments with Dr. Stiles for his work injury. The parties stipulated that claimant

missed four hours of work each day and that employer paid claimant his regular salary for these missed hours. Claimant sought an award of temporary partial disability benefits for the eight hours he was off work. The parties further stipulated that if claimant is awarded benefits, employer is entitled to a credit for the wages it paid claimant.

The administrative law judge summarily denied benefits because he found that there is no evidence employer intended its payment to claimant of full wages while he attended medical appointments to be the payment of compensation. The administrative law judge did not elaborate on the import of this finding, but cited *Taylor v. Security Storage of Washington*, 19 BRBS 30 (1986), in which the Board held that the filing period under Section 13 of the Act, 33 U.S.C. §913, was not tolled by an employer's paying claimant's full salary when he was hospitalized due to a work-related injury in the absence of evidence that employer intended the payments as "compensation."<sup>1</sup> Claimant appeals, contending the administrative law judge erred in failing to address the issue raised before him, namely claimant's entitlement to temporary partial disability benefits. Employer responds, urging affirmance of the denial of benefits. Employer avers that claimant's condition is permanent, as evidenced by its payment of permanent partial disability benefits, and that the Supreme Court's decision in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980) [*PEPCO*], precludes claimant's receipt of benefits for a loss in wage-earning capacity.

We agree with claimant that the case must be remanded for reconsideration. As the parties stipulated that claimant filed a timely claim for compensation, and as this claim has never been formally adjudicated, it remained open when claimant sought temporary partial disability benefits. *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975). Thus, claimant did not argue that the payment of wages was intended as "compensation" in order to extend the filing period of either Section 13 or Section 22 on the facts of this case.<sup>2</sup> Rather, claimant argued that under the terms of the collective bargaining agreement and in view of the usual practice of employer, whereby employer

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<sup>1</sup> Section 13(a) states, *inter alia*, that "if payment of compensation has been made without an award . . . , a claim may be filed within one year after the date of the last payment." 33 U.S.C. §913(a).

<sup>2</sup> Section 22, 33 U.S.C. §922, applies once a compensation order has been issued, *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975), and modification can be sought at any time within one year of the last payment of compensation.

pays regular wages when a claimant misses work to attend medical appointments for a work-related injury, claimant established a temporary loss of earning capacity.<sup>3</sup>

We therefore vacate the administrative law judge's denial of benefits, and we remand this case for the administrative law judge to address claimant's entitlement to temporary partial disability benefits. Claimant is entitled to temporary partial disability benefits if he establishes he has a loss in wage-earning capacity due to his work injury and that his disability is temporary in nature. *See* 33 U.S.C. §908(e), (h); *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4<sup>th</sup> Cir. 2000). The administrative law judge should address claimant's contention that the parties' stipulations concerning employer's payment of full salary while a claimant attends medical appointments establishes that claimant has a loss in earning capacity due to his injury.<sup>4</sup> Contrary to employer's contention that an award of temporary partial disability is precluded as a matter of law, the Supreme Court's decision in *PEPCO*, 449 U.S. 268, 14 BRBS 363, precludes a claimant with a scheduled injury only from receiving permanent partial disability benefits for a loss of wage-earning capacity pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21). It does not preclude him from receiving temporary partial disability benefits in an appropriate case. *See PEPCO*, 449 U.S. at 272 n.17, 14 BRBS at 366 n.17 ("the § 8(c) schedule applies only in cases of permanent partial disability. . ."); *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd mem.*, 84 Fed.Appx. 333 (4<sup>th</sup> Cir. 2004); *see also Leech v. Service Engineering Co.*, 15 BRBS 18 (1982) (claimant with a permanent partial disability may lapse into temporary total disability). Moreover, there has yet to be a finding that

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<sup>3</sup> The collective bargaining agreement calls for employer to pay regular wages when employer's clinic sends a claimant to an outside medical appointment for a work injury, on the day of the injury. The parties stipulated that it is employer's practice to also pay the claimant's regular wages if he attends an appointment for a work-related injury with an outside authorized medical practitioner on any day.

<sup>4</sup> On the facts of this case, we are perplexed by claimant's seeking temporary partial disability benefits for periods when he was paid his full wages, as such an award of benefits would be less than his wages. 33 U.S.C. §908(e), (h). Moreover, claimant and employer stipulated that employer would receive a credit for the wages paid. We observe that this stipulation is contrary to law if, as the administrative law judge found, the wages were not intended as compensation. Employer is entitled to a credit pursuant to Section 14(j), 33 U.S.C. §914(j), only for advance payments of compensation. *See Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *see also Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990) (a stipulation is not binding if it evinces an incorrect application of law).

claimant's condition has reached permanency, although the injury occurred in 1997. *See generally SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5<sup>th</sup> Cir. 1996). The record contains only a reference to employer's voluntary payment of scheduled permanent partial disability benefits. If claimant is permanently disabled and has a partial loss of wage-earning capacity due to his attending doctors' appointments, he is limited to a recovery under the schedule. *PEPCO*, 449 U.S. 268, 14 BRBS 363; *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4<sup>th</sup> Cir. 1999); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4<sup>th</sup> Cir. 1998). On remand, the administrative law judge will have to make findings regarding the nature of claimant's disability in order to determine if *PEPCO* precludes claimant's obtaining an award of temporary partial disability benefits. If *PEPCO* is not applicable, the administrative law judge additionally must determine if claimant has a loss in wage-earning capacity due to his injury. 33 U.S.C. §908(h).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge