

OTIS L. COOPER )  
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 Claimant-Respondent )  
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 v. )  
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 POOL OFFSHORE COMPANY ) DATE ISSUED: 07/20/2010  
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 and )  
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 SIGNAL MUTUAL INDEMNITY )  
 ASSOCIATION, LIMITED )  
 )  
 Employer/Carrier- )  
 Petitioners ) DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

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

Douglas P. Matthews and Andres J. Quackenbos (King, Krebs & Jurgens, P.L.L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM

Employer appeals the Decision and Order and the Order Denying Motion for Reconsideration (2008-LHC-00031) of Administrative Law Judge Lee J. Romero, Jr., 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 sustained a work-related injury to his right knee on August 28, 1992. The prior history of this case is set out in *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5<sup>th</sup> Cir. 2001). Claimant had numerous knee surgeries and came under the care of Dr. Conn in February 2006. On January 29, 2007, Dr. Conn performed a total right knee replacement. In October 2006, claimant first reported to Dr. Conn that his left knee was locking, catching, and giving way. Since that time claimant has consistently complained of pain and instability of his left knee and Dr. Conn has recommended an MRI to diagnose the condition. Employer paid claimant temporary total disability benefits from January 29 to July 8, 2007. Claimant sought medical benefits for the treatment of his left knee condition and temporary partial disability benefits for the period from July 9, 2007 to February 11, 2008, the date he reached maximum medical improvement after his right knee surgery.<sup>1</sup>

As claimant's initial claim was previously adjudicated, the administrative law judge first addressed whether claimant met the requirement for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. The administrative law judge found that claimant presented evidence of a change in his physical and economic condition. The administrative law judge also found that claimant established that his left knee condition is a natural or unavoidable consequence of his work-related right knee injury and thus is compensable. The administrative law judge therefore held employer liable for medical treatment for claimant's left knee pain. In determining the extent of claimant's disability following his January 2007 right knee replacement, the administrative law judge found that claimant returned to work on July 9, 2007, but did not reach maximum medical improvement until February 11, 2008. He also found that claimant's earnings as a security guard fairly represent his post-injury wage-earning capacity. Adjusted for inflation, the administrative law judge found that claimant's post-injury wage-earning capacity is \$4.25 per hour. Thus, the administrative law judge awarded claimant temporary partial disability benefits. The administrative law judge denied employer's motion for reconsideration.

On appeal, employer contends that the administrative law judge erred in finding that claimant's left knee condition is a natural or unavoidable result of his work-related right knee injury. In addition, employer contends that the administrative law judge erred in his calculation of claimant's wage-earning capacity and that claimant's actual post-

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<sup>1</sup> On August 10, 1994, claimant began working as a security guard for Capital Security Services, and is currently employed as a security guard with Howard Industries, where he has worked since September 1995. Employer previously paid periods of temporary total disability benefits and scheduled permanent partial disability benefits for a 50 percent right knee impairment. Emp. Ex. 1.

injury wages should not have been adjusted for inflation. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer contends that the administrative law judge erred in finding that claimant's left knee condition is a natural or unavoidable consequence of his work-related right knee injury. The administrative law judge noted that the parties agreed that the decision of the United States Court of Appeals for the Fifth Circuit in *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5<sup>th</sup> Cir. 2008), is applicable in this case. In *Amerada Hess*, the Fifth Circuit held that the Section 20(a), 33 U.S.C. §920(a), presumption does not apply to second or subsequent injuries for which no claim was filed, and thus that the claimant has the burden of proving by substantial evidence that the second or subsequent injury is a "natural or unavoidable" consequence of the original compensable injury.<sup>2</sup> The administrative law judge therefore weighed the evidence as a whole and found that claimant met his burden of proving that his left knee condition is related to the work-related right knee injury and surgery. The administrative law judge credited Dr. Conn's opinion that claimant's left knee pain, swelling and

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<sup>2</sup> In *Amerada Hess*, the claimant suffered a work-related back injury for which he underwent surgery and had a series of steroid injections. At the hearing, the claimant testified that after the steroid treatments he began having heart problems and had had four heart attacks. He did not provide any medical documentation to support this allegation. The administrative law judge applied the Section 20(a) presumption to claimant's heart condition, found that employer did not rebut it, and thus the heart condition compensable. The employer did not contest the administrative law judge's finding that the claimant suffered from a heart condition, but rather contested the administrative law judge's finding that claimant was entitled to the Section 20(a) presumption that this condition was related to his work-related back injury. The United States Court of Appeals for the Fifth Circuit agreed, holding that the Section 20(a) presumption applies only to the claim made. As claimant did not make a claim for a heart condition related to the back injury, but only for back and groin injuries, the administrative law judge erred in applying the Section 20(a) presumption to claimant's heart condition. *Amerada Hess*, 543 F.3d at 761, 42 BRBS at 49(CRT) (citing *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613, 14 BRBS 631, 632 (1982)) ("the presumption by its terms cannot apply to a claim that has never been made"). This case is distinguishable from *Amerada Hess* in that claimant made a claim via Section 22 for the sequelae of the work-related right knee condition and submitted medical evidence in support of his claim that his left knee pain is related to the work injury. See *Emp. Ex. 2*. See generally *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Nonetheless, as application of the Section 20(a) presumption would not alter the result in this case, we need not further consider this issue.

instability is due to claimant's post-operative change in gait. The administrative law judge thus found employer liable for medical benefits for claimant's left knee pain.

Contrary to employer's contention of error, the administrative law judge's finding that claimant's left knee condition is related to the work injury is supported by substantial evidence. In reviewing the evidence as a whole, the administrative law judge accorded greater weight to the opinion of Dr. Conn, claimant's treating physician. The administrative law judge acknowledged that Dr. Barrett, claimant's former treating physician, opined that claimant's left knee condition is not related to the right knee injury, but found the opinion of the physician who had treated claimant for the two years prior to the hearing to be more persuasive. Dr. Barrett examined claimant in 2008 at employer's request, but otherwise had not treated claimant since 2000. Emp. Exs. 4, 5. Dr. Conn opined that claimant's continued pain and difficulty with his left knee is causally related to the work-related injury to his right knee and the subsequent surgeries. Cl. Ex. 2. Specifically, Dr. Conn explained that claimant's left knee was affected by the change in gait and other post-operative issues. Cl. Ex. 1 at 35. Dr. Conn also documented increasing difficulties with claimant's left knee "locking, catching, and giving way" in every examination commencing in October 2006. Cl. Ex. 2. The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5<sup>th</sup> Cir. 1991). In this case, the administrative law judge's reliance on the treating physician's opinion is rational, and therefore, we affirm the administrative law judge's finding that claimant's left knee condition is the natural result of his work-related right knee injury as it is supported by substantial evidence. Thus, we affirm the award of medical benefits necessary for the treatment of claimant's left knee condition. *See generally Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5<sup>th</sup> Cir. 1981); 33 U.S.C §907.

Employer also contends that the administrative law judge erred in the determination of claimant's residual wage-earning capacity for the award of temporary partial disability benefits. Pursuant to Section 8(e), 33 U.S.C §908(e), an award for temporary partial disability is two-thirds of the difference between claimant's average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5<sup>th</sup> Cir. 1992). The administrative law judge found that claimant's post-injury wages as a security guard accurately reflect his wage-earning capacity as the physical requirements are within his restrictions and he has successfully performed the job for over 15 years. Contrary to employer's contention, the administrative law judge also properly found that claimant's current wages must be adjusted downward to

determine the wage the job paid at the time of claimant's injury in order to account for inflation. *See, e.g., Sestich v. Long Beach Container Terminal*, 289 F.3d 1161, 36 BRBS 15(CRT) (9<sup>th</sup> Cir. 2002). He found that the position currently held by claimant, that of a directly hired security guard, did not exist in 1992, when claimant's injury occurred. The administrative law judge also found that the parties agreed that a contract security guard working at employer's facility would have earned the minimum wage in 1992, which was \$4.25 per hour. Thus, the administrative law judge awarded claimant temporary partial disability benefits from July 9, 2007 to February 11, 2008, based on this hourly wage-earning capacity.<sup>3</sup> *See* Decision and Order at 20; Cl. Ex. 6.

As employer correctly contends, the parties did not stipulate that claimant's current employer paid security guards the minimum wage in 1992. Rather, the parties agreed that, in 1992, Howard Industries, claimant's current employer, hired security guards from agencies. The parties agreed that these agencies paid guards the minimum wage, which was \$4.25 per hour. Emp. Ex. 8. In May 1995, Howard Industries began directly hiring employees as security guards and paid them the hourly rate of \$8.25 at that time. *Id.* This is a distinction without a difference, however. The inflation adjustment required by the Act allows for a comparison on an equal footing of the wages paid by the job claimant held at the time of injury, used to calculate his average weekly wage, and, if applicable, the job claimant holds post-injury. *See Sestich*, 289 F.3d 1161, 36 BRBS 15(CRT); *White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70(CRT) (1<sup>st</sup> Cir. 1987). If claimant is not working or if his wage-earning capacity is not set with reference to actual post-injury wages, his inflation-adjusted wage-earning capacity can be set with reference to other suitable jobs identified by employer. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5<sup>th</sup> Cir. 1998); *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). In this case, the suitable post-injury job held by claimant existed in 1992 only as a contract position. The administrative law judge rationally found that the wages paid to such contract employees demonstrate the wage claimant would have earned as a security guard at employer's facility in 1992. *See LaFaille v. Benefits Review Board*, 884 F.2d 54, 61, 22 BRBS 108, 120(CRT) (2<sup>d</sup> Cir. 1989) (pursuant to Section 8(h), inflation adjustment addressed in context of fixing reasonable wage-earning capacity in the interest of justice). Employer has failed to demonstrate on appeal any error in the administrative law judge's reliance on the 1992 wages of this contract security guard position to adjust claimant's post-injury wage-earning capacity for inflation. Therefore, the administrative law judge's finding is affirmed, as it is rational, supported by

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<sup>3</sup> The administrative law judge actually awarded claimant the lump sum of \$2,000.37, in temporary partial disability benefits, based on claimant's calculation that the difference between his average weekly wage of \$420.18 and his post-injury wage-earning capacity over seven months equaled this sum. Cl. Ex. 6.

substantial evidence and in accordance with law. *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998). Consequently, we affirm the award of temporary partial disability benefits.

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

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