BRB Nos. 11-0749,
11-0749A and 11-0749B

JOHN A. RONNE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
KINDER MORGAN BULK TERMINALS, INCORPORATED	)	DATE ISSUED: 03/04/2013
	)	
and	)	
	)	
ACE/ESIS	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners A	)	
	)	
ROGERS TERMINAL & SHIPPING, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner B	)	
	)	
JONES STEVEDORING COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	ORDER on
Party-in-Interest	)	RECONSIDERATION

Rogers Terminal & Shipping (Rogers) and Kinder Morgan Bulk Terminals (Kinder) have timely filed motions for reconsideration of the Board's Decision and Order in *Ronne v. Kinder Morgan Bulk Terminals, Inc.*, BRB Nos. 11-0749/A/B (July 26, 2012) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. No response briefs were filed.

The facts are well known to the parties and we will not repeat them here except as necessary. Pertinent to the motions for reconsideration, the administrative law judge used claimant's wages from the 174 days he worked during the year preceding his first knee surgery on August 11, 2004, to determine claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), as $2,267. The administrative law judge found that this average weekly wage also represents claimant's average weekly wage/wage-earning capacity for claimant's successive injuries when adjusted by the yearly percentage increase in the national average weekly wage. *Id*. at 50.

In its decision, the Board remanded the case for the administrative law judge to determine, *inter alia*, claimant's average weekly wages at the time of his May 2006 knee injury with Rogers, the October 2006 back injury with Kinder, and the December 2007 knee and hip injuries with Kinder; and the dollar amount of the credit due Rogers and Kinder for the percentage of scheduled impairment paid by the prior employer(s) for claimant's work-related knee impairment pursuant to *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc).

In their motions for reconsideration, Rogers and Kinder contend that the Board did not address Rogers' contention that claimant had a wage-earning capacity (and therefore an average weekly wage) of zero prior to commencing employment with Rogers in May 2006 because of his non-work-related vertebrobasilar insufficiency (VBI). Thus, they contend that claimant did not lose any additional wage-earning capacity because of his subsequent work injuries. Kinder additionally contends that, to the extent the Board addressed this contention with respect to claimant's employment with it in December 2007, the analysis is incorrect. Rogers contends, alternatively, that if claimant had any wage-earning capacity/average weekly wage prior to May 2006, the administrative law judge should consider to what extent VBI caused any subsequent loss of wage-earning capacity, as that is not compensable.

In remanding the case, the Board noted Kinder's contention that because claimant had already voluntarily retired due to totally disabling non-work-related VBI, there was no need for the administrative law judge to address claimant's alleged permanent total disability as of December 20, 2007. *Ronne*, slip op. at 5 n.2. The Board rejected this contention because there is no evidence claimant had stopped working in December 2007 due to VBI. Rather, the Board stated that the record shows that claimant had stated his intention to Dr. Gibbs on December 5, 2007, to continue working, he reported no VBI episodes during the previous four to five months, and, based on the absence of episodes and fewer symptoms, Dr. Gibbs stated in December 2007 that the VBI was "clinically better." CX 117 at 403-404, 413. Therefore, the Board concluded there is not substantial

evidence that claimant had "voluntarily" retired due to non-work-related VBI. *Ronne*, slip op. at 5 n.2. Accordingly, as this contention was fully addressed and no error has been identified, we deny the motion for reconsideration on this issue.

The Board also rejected the contention that claimant was totally disabled by VBI prior to the time he returned to work after he underwent right knee surgery for his May 30, 2004, work injury with Jones, based on the footnote stating that claimant was not totally disabled by VBI when he stopped working on December 19, 2007. *Ronne*, slip op. at 10 n.5, *citing* n.2. We agree with Kinder and Rogers that the analysis did not directly address claimant's work status from 2004 to 2006. However, their contention that claimant's VBI caused him to lose all wage-earning capacity prior to his May 2006 knee injury with Rogers is without merit.

The record establishes claimant was taken off work by Dr. Gibbs in January 2005 based on his risk of sustaining a stroke due to his VBI. CX 115 at 364. Claimant worked for Kinder on the day prior to this examination by Dr. Gibbs. Claimant returned to work over a year later on February 3, 2006, with the restriction that he not lift his head "for any period of time." CX 1 at 18. On October 25, 2006, claimant told Dr. Gibbs of two episodes of dizziness not associated with neck movements, and he requested to be taken off work. Claimant did not work from October 25, 2006 through October 18, 2007. Thereafter, claimant returned to his longshore work until December 19, 2007.

Disability under the Act is an economic concept based on a medical foundation. *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978); *Owens v. Traynor*, 274 F.Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Thus, extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975). Accordingly, that Dr. Gibbs advised claimant in January 2005 to stop working due to VBI, and that claimant did so for a while, is not determinative of his average weekly wage/wage-earning capacity as claimant nonetheless returned to work in longshore employment in February 2006 after Dr. Gibbs had advised claimant to retire. *See generally Jennings v. Sea-Land Service, Inc.*, 23 BRBS 312 (1990), *vacating in part on recon* 23 BRBS 12 (1989) (extent of impairment not determinative of loss of wage-earning capacity). Claimant continued working until he re-injured his right knee and underwent a second knee surgery in May 2006. Claimant again returned to work after this injury; thus, contrary to the employers' contention, claimant did not have a wage-earning capacity/average weekly wage of zero. As the Board stated in its decision, it was not rational for the administrative law judge to use claimant's adjusted 2004 average weekly wage to calculate claimant's average weekly wage for the successive injuries. Thus, the Board instructed the administrative law judge to recalculate claimant's average weekly wage at the time of each successive injury, consistent with law. *Ronne*, slip op. at 11-12. We note, however, that claimant's VBI may affect his average weekly wage. "[W]hen considering claimant's annual earning capacity, [the administrative law judge should] take into account any permanent reduction in earnings caused by the injury

suffered [due to the prior VBI]. The Board has held that where a non-work-related injury precedes a work-related injury, it is unfair to hold the employer responsible for any reduced earning capacity resulting from the non-work-related injury. Claimant is only entitled to be compensated for any post-injury loss in what he would have earned but for the work-related injury." *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182, 186 (1984), *citing Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981). On remand, the administrative law judge should consider the effect, if any, of claimant's VBI on his wage-earning capacity/average weekly wage after the initial work injury with Jones.

Rogers also contends on reconsideration that the Board erred in failing to state that its liability for the scheduled permanent partial disability award for claimant's knee impairment is suspended during all periods of overlapping total disability.[1] In its decision, the Board addressed Rogers' assertion that its liability for scheduled permanent partial disability for claimant's knee impairment should be reduced if claimant is awarded permanent total disability compensation as of December 19, 2007. *Ronne*, slip op. at 13 n.9. The Board stated that as the administrative law judge found Rogers liable for 43.2 weeks of permanent partial disability compensation commencing October 6, 2006, this award would expire prior to the commencement of any permanent total disability award on December 20, 2007. Accordingly, the Board rejected the contention.

It is well-established that a claimant may not receive concurrently a scheduled permanent partial disability award for one injury and a total disability award (either permanent or temporary) for another injury, as claimant cannot receive compensation greater than that for total disability. *See Johnson v. Del Monte Tropical Fruit Co.*, 45 BRBS 27, 28 (2011); *Thornton v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 111, 113 n.4 (2010). In this case, the administrative law judge found claimant entitled to 43.2 weeks of compensation for a 25 percent knee impairment commencing on October 6, 2006, and a temporary total disability award from October 25, 2006 to June 19, 2007, for a back injury. We agree with Rogers that claimant is not entitled to the permanent partial disability award for the knee impairment during the period he was receiving temporary total disability benefits for the back injury or for any permanent total disability benefits awarded as of December 2007. *See Johnson*, 45 BRBS at 28. In this respect, we also agree with Rogers that its actual liability is for 72 weeks of scheduled permanent partial disability because the administrative law judge incorrectly applied the credit doctrine.

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[1]Rogers raises for the first time on reconsideration its entitlement to have the scheduled permanent partial disability award suspended during the temporary total disability award. Since Rogers generally raised the applicability of claimant's entitlement to concurrent awards in its initial appeal, we will address its specific contention on reconsideration. *See generally Ravalli v. Pasha Maritime Services*, 36 BRBS 91, *denying recon. in* 36 BRBS 47 (2002).

See Ronne, slip. op. at 13. Thus, on remand, the administrative law judge's award should reflect application of the law on concurrent awards.

Accordingly, Kinder's motion for reconsideration is denied. Rogers' motion for reconsideration of the wage-earning capacity/average weekly wage issue is denied. Rogers' motion is granted with respect to the issue of concurrent awards, as stated herein.[2] 20 C.F.R. §802.409.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[2]As a majority of the Board's permanent members has denied reconsideration of the average weekly wage issue and granted reconsideration on the concurrent awards issue, the requests by Kinder and Rogers for reconsideration en banc are denied. 20 C.F.R. §§801.301(c), 802.407(d).