BRB No. 98-0314

| | | |
|---|---|---|
| JOHN WESTERMAN | ) | |
| | ) | |
| Claimant | ) | DATE ISSUED: |
| | ) | |
| v. | ) | |
| | ) | |
| OCEAN REPAIR SERVICE | ) | |
| | ) | |
| and | ) | |
| | ) | |
| STATE INSURANCE FUND | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order On Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Richard A. Cooper (Fischer Brothers), New York, New York, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Remand (91-LHC-137) of Administrative Law Judge Stuart A. Levin 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On October 28, 1985, claimant, a ship rigger, sustained an injury to his left knee while working for employer. Employer voluntarily paid claimant compensation for this knee injury. Claimant stopped working on April 9, 1986. On November 1, 1988, claimant filed a claim for an occupational hearing loss. In his Decision and

Order, Administrative Law Judge Robert J. Feldman denied this claim based on his finding that claimant was receiving total disability compensation for his knee injury. Claimant appealed, challenging the administrative law judge's denial of benefits for his hearing loss. Employer responded, urging affirmance.

On appeal, the Board held that the administrative law judge properly denied claimant compensation for his scheduled hearing loss during those periods he was receiving temporary total and permanent total disability benefits for his 1985 knee injury, as an award of total disability cannot run concurrently with a scheduled award. Inasmuch, however, as the record contained evidence, not addressed by the administrative law judge, which reflected that claimant may have been paid for a period of temporary partial disability benefits for his knee injury, the Board vacated the denial of benefits for the hearing loss, and remanded the case. The Board instructed the administrative law judge that if, on remand, he found that claimant did, in fact, receive partial disability benefits for his 1985 knee injury after his date of last exposure to injurious noise, claimant was entitled to an award of benefits for his hearing loss under Section 8(c)(13), 33 U.S.C. §908(c)(13), during these periods, and that such an award should be calculated based on the parties' stipulations.[1] *Westerman v. Ocean Repair Service*, BRB No. 93-0947 (July 30, 1996) (unpublished).

On remand, as Judge Feldman had retired, the case came before Judge Stuart A. Levin. The parties were provided with the opportunity to submit briefing. In its brief, employer argued that claimant was last exposed to noise on April 8, 1986, and that although the hearing loss award would ordinarily commence as of that time, it did not commence until July 6, 1988, because claimant was receiving temporary total disability compensation for his 1985 knee injury up until that time. In addition, employer contended that because claimant had received temporary partial disability compensation for his 1985 knee injury premised on his having a residual wage-earning capacity of $85.17 per week, this figure should serve as the basis for

[1]The record reflects that claimant was receiving temporary partial disability benefits for his knee injury from July 6, 1988, through May 9, 1989, based on the difference between his average weekly wage of $590.65 and his residual earning capacity of $85.17 per week. The parties stipulated that the average weekly wage for the hearing loss award was also $590.65. Tr. at 6.

determining the compensation rate for his scheduled hearing loss award in order to avoid claimant's receiving a double recovery. Accordingly, it was employer's position that claimant was limited to compensation payments based on 66 2/3 percent of this amount or $56.78 per week for 18.76 weeks.

In his Decision and Order on Remand, Judge Levin stated that, while employer's argument was not without merit, the Board's remand instructions were quite specific in that they mandated that if claimant were receiving temporary partial disability benefits for his knee injury after claimant's last injurious exposure to noise, he should receive permanent partial disability compensation for his scheduled occupational hearing loss based on the parties' stipulation. Accordingly, consistent with the Board's instructions, the administrative law judge ordered employer to pay claimant hearing loss benefits based on the parties' stipulation; thus, claimant was entitled to 66 2/3 percent of his average weekly wage of $590.65 or $393.37 per week for 18.76 weeks. Tr. at 6; Decision and Order On Remand at 4-5.

On appeal, employer specifically argues that the administrative law judge erred in awarding claimant compensation under Section 8(c)(13) based on 66 2/3 percent of his $590.65 average weekly wage, as this award results in his receiving combined temporary partial and scheduled permanent partial disability compensation totaling $730.76 per week, an amount which exceeds not only claimant's total disability compensation rate, but also his initial average weekly wage. Moreover, employer argues that, contrary to the assumption made by the administrative law judge at the initial hearing, the parties only stipulated to the degree of claimant's hearing loss and not to the applicable compensation rate. In addition, employer argues that because neither the Board's Decision and Order, nor the parties' stipulations at the August 5, 1991, hearing, explicitly addressed the rate of payment for the scheduled award, the administrative law judge erred in failing to consider this argument on remand. Finally, employer reiterates the argument it made before the administrative law judge that because claimant, who had an average weekly wage of $590.65, was receiving compensation for his 1985 knee injury based on a loss of wage-earning capacity of $505.48 per week, this left an uncompensated capacity of $85.17 to serve as the basis for the scheduled award thereby limiting claimant to scheduled benefits based on two-thirds of that amount or $56.78 per week.

After review of the Decision and Order On Remand in light of employer's arguments and the record evidence, we affirm the administrative law judge's determination that claimant is entitled to receive occupational hearing loss benefits under Section 8(c)(13)(B) based on his stipulated average weekly wage of $590.65, rather than his residual wage-earning capacity during periods of temporary partial disability of $85.17 per week. Where a claimant who sustains an injury which results in an award of permanent partial disability compensation subsequently suffers a second injury which results in a permanent total disability compensation, it is well-established that he may receive concurrent awards for the two disabilities. *See Brady-Hamilton Stevedore Co. v. Director, OWCP* [*Anderson*], 58 F.3d 419, 29

BRBS 101 (CRT)(9th Cir. 1995); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). In such circumstances, however, the concurrent awards of non-scheduled permanent partial disability and permanent total disability compensation are premised on claimant's average weekly wage at the time of each injury and the total of the two awards should fully compensate claimant for his total disability under Section 8(a), 33 U.S.C.§908(a). *See Anderson*, 58 F.3d at 420, 29 BRBS at 102 (CRT).

The case presently before us, however, involves the calculation of concurrent awards where a claimant who is receiving temporary partial disability compensation for one injury under Section 8(e) also sustains an unrelated injury resulting in permanent partial disability to a body part listed in the schedule, 33 U.S.C. §908(c)(1)-(19). In this case, claimant sustained a 9.38 percent hearing loss entitling him to 18.76 weeks of compensation at 66 2/3 percent of his average weekly wage pursuant to Section 8(c)(13). In resolving the issue of the average weekly wage upon which his hearing loss award is based, we note initially that, contrary to employer's assertions on appeal, the parties in the present case did stipulate at the initial hearing that if claimant were entitled to compensation for his hearing loss, he should receive $393.77 per week, based on 66 2/3 percent of his average weekly wage of $590.65, for 18.76 weeks. Tr. at 6. As such stipulations are generally binding on the parties, and the Board specifically instructed the administrative law judge that if compensation were awarded on remand it should be based on the parties' stipulation, the compensation awarded by the administrative law judge must be affirmed on this basis, provided that the stipulation does not evince an incorrect application of law. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992); *Puccetti v. Ceres Gulf*, 24 BRBS 25, 29 (1990).

We note initially that there is no case authority which directly addresses the concurrent partial awards presented here. Nonetheless, the cases addressing the nature of recovery under the schedule lead us to conclude that the parties' stipulation regarding the applicable compensation rate comports with applicable law, and that the administrative law judge's hearing loss award premised on the stipulation was accordingly proper. In this regard, we note that it is well-established that if an injury resulting in permanent partial disability is to a member specifically identified in the schedule set forth in Section 8(c)(1)-(19) of the Act, the injured employee is entitled to receive two-thirds of his average weekly wage at the time of the injury for a specific number of weeks, premised on his physical impairment regardless of whether his earning capacity has actually been affected. *See Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs* [*PEPCO*], 449 U.S. 268, 269-270, 14 BRBS 363 (1980). Moreover, the schedule

establishes a presumptive loss of earning power for specific defined injuries, thus freeing the injured employee from the inconvenience of having to litigate and prove a loss of earning power each time he or she is injured. *See Korineck v. General Dynamics Corp.*, 835 F.2d 42, 20 BRBS 63 (CRT) (2d Cir. 1987). In contrast, in all other cases, the Act only authorizes partial disability compensation based upon proof of a diminution in earning capacity and awards the injured employee compensation based on two-thirds of the difference between his average weekly wage and his post-injury earning capacity. 33 U.S.C. §908(c)(21), (e); *Barker v. U.S. Dept. of Labor*, 138 F.3d 431 (1st Cir. 1998).

Unlike awards of compensation under Section 8(c)(21) or (e) which are contingent on the employee's proving a loss in wage-earning capacity, where the employee sustains an injury falling under the schedule, compensation must be paid in the scheduled amount even though the scheduled injury may have no effect on the employee's capacity to perform a particular job or to maintain a prior level of income. *PEPCO*, 449 U.S. at 282, 14 BRBS at 349. Thus, an employee who returns to his former job at the same wages nonetheless is paid the full scheduled amount. It is evident from this discussion that an award of permanent partial disability compensation under the schedule is a form of liquidated damages; for purposes of administrative efficiency, this award is premised on physical impairment alone and economic factors, including earning capacity, are of no relevance. *See generally Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.2d 915, 32 BRBS 15 (CRT) (4th Cir. 1998); *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989). An injured employee who returns to suitable alternate work and earns his full pre-injury wages following a scheduled injury receives full compensation under the schedule even though his actual earnings in conjunction with his disability payments will clearly exceed his average wage prior to his injury. *See PEPCO*, 449 U.S. at 282, 14 BRBS at 349. Similarly, during his period of temporary partial disability due to his unrelated knee injury, claimant was entitled to the payment of the full scheduled amount. We therefore reject employer's arguments and hold that the administrative law judge properly awarded claimant compensation for his hearing loss based on his pre-injury average weekly wage of $590.65, as stipulated by the parties.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F.  BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge