BRB No. 99-1253

RICHARD LAKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW HAVEN TERMINAL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Decision and Order on Motion for Reconsideration of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Montstream & May), Glastonbury, Connecticut, for claimant.

Kristie L. DiResta (Law Offices of Robert M. Brennan), New Haven, Connecticut, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits and Decision and Order on Motion for Reconsideration (98-LHC-2649) of Administrative Law Judge David W. Di Nardi 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 if they 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).

Claimant injured his back on February 17, 1993, during the course of his employment with employer (New Haven) as a checker/laborer. Claimant returned to work for New Haven on February 1, 1994, as a field checker and light-duty laborer. Claimant re-injured his back and sustained a psychological injury on November 25, 1997, as a result of a physical altercation with his supervisor during the course of his employment with Logistec of Connecticut, Inc. (Logistec).[1] He has not returned to work. After the formal hearing but prior to issuance of the administrative law judge's initial decision, claimant and Logistec settled his claim for compensation for the November 25, 1997, work injury (98-LHC-2219), pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i).[2] Claimant sought continuing benefits from New Haven for permanent partial disability caused by the February 17, 1993, work injury.

In his Decision and Order, the administrative law judge found claimant entitled to compensation from New Haven for temporary total disability, 33 U.S.C. §908(b), from April 12 to August 26, 1993, and for permanent total disability, 33 U.S.C. §908(a), from August 27, 1993, to January 31, 1994, based upon the stipulated average weekly wage of $782.82. Claimant also was awarded compensation for permanent partial disability commencing February 1, 1994, for two-thirds of the difference between his stipulated average weekly wage of $782.82 and the administrative law judge's finding that claimant had a post-injury wage-earning capacity of $489.79. 33 U.S.C. §908(c)(21), (h). The administrative law judge, however, terminated New Haven's compensation liability on November 25, 1997. The administrative law judge found that claimant's current disability is solely due to back and psychological injuries sustained during the course of his employment with Logistec, which injuries the administrative law judge additionally found "broke the chain of causality" between claimant's February 17, 1993, injury with New Haven and his present disabling condition. Decision and Order at 51. The administrative law judge reasoned that, whereas claimant was able to return to work for New Haven as a field checker and light-duty laborer after the February 1993 injury, claimant is now totally disabled by back and psychological injuries sustained on November 25, 1997, during the course of his employment with Logistec. The administrative law judge therefore concluded that claimant is not entitled to

[1]On July 12, 1996, Logistec of Connecticut, Inc., assumed control of the employer's operations at the New Haven and Bridgeport docks. Decision and Order at 5.

[2]The administrative law judge approved this settlement agreement in a separate order.

any additional benefits under the Act after November 24, 1997, except those specifically enumerated in the approved settlement agreement with Logistec.

Claimant moved for reconsideration of the administrative law judge's decision terminating his award on the date of his second work-related injury with Logistec. In his Decision and Order on Motion for Reconsideration, the administrative law judge found that claimant's inability to work is solely due to psychological stress resulting from claimant's physical altercation with his supervisor at Logistec; therefore, he found that New Haven's compensation liability for claimant's permanent partial back disability ended on November 25, 1997, and he denied claimant's motion.

On appeal, claimant contends that the administrative law judge erred by terminating his compensation award for permanent partial disability caused by the February 17, 1993, injury with New Haven on the date of his subsequent work injury with Logistec. New Haven responds, urging affirmance.

We agree with claimant that the administrative law judge erred by terminating his compensation award for permanent partial disability attributable to his February 17, 1993, work injury with New Haven. In *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980), the United States Court of Appeals for the District of Columbia Circuit approved a scheme allowing a claimant to receive concurrent permanent partial and permanent total disability awards under Sections 8(c)(21) and 8(a) where claimant sustained consecutive injuries. In *Hastings*, claimant received a permanent partial disability award based on his earnings prior to a 1971 work-related stroke, after which he returned to work part-time at reduced wages. When claimant thereafter suffered a second work injury, resulting in permanent total disability, the court agreed with the Board that this award should be based on his reduced earnings prior to the second injury. *Hastings*, 628 F.2d at 91-92, 14 BRBS at 350-351; *see also Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995); *I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989). In this manner, claimant's concurrent awards fully compensate his loss in wage-earning capacity. *See Hanson v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

In the instant case, the parties stipulated that claimant had an average weekly wage of $782.82 prior to his February 17, 1993, work injury, and the administrative law judge found that claimant had an average weekly wage of $489.79 upon his return to work for New Haven on February 1, 1994. Accordingly, the administrative law judge awarded claimant compensation pursuant to Section 8(c)(21) for the permanent loss of wage-earning capacity of $293.03 caused by the February 1993 work injury with New Haven. The approved settlement with Logistec for the subsequent injury on November 25, 1997, is properly based on claimant's average weekly wage at the date of the second injury. *See generally Lopez v.*

Southern Stevedores, 23 BRBS 295 (1990). Pursuant to *Hastings* and its progeny, claimant remains entitled to a continuing award of compensation for permanent partial disability resulting from the permanent reduction in wage-earning capacity caused by his February 17, 1993, work injury with New Haven.

We hold that the administrative law judge erred in terminating New Haven's compensation liability. In so doing, the administrative law judge misapplied case law pertaining to "intervening cause." The cases cited by the administrative law judge in support of his terminating New Haven's compensation liability address the situation where disability arises from a subsequent non-work-related event following an initial work injury. In such cases, where the subsequent event is an intervening cause of the disability, claimant may not recover for disability due to the intervening cause. Thus, where an injury outside of work occurs after a work-related injury, the relevant inquiry is whether the second injury resulted naturally or unavoidably from the work injury; the claimant's actions must show a degree of due care in regard to his injury and the claimant must take reasonable precautions to guard against re-injury. A claimant may not recover if the remote consequences of his work injury are the direct result of his intentional post-injury misconduct, and are only the indirect, unforeseeable result of the work-related injury. *See Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998)(Smith, J., concurring in pert. part). The instant case, however, does not involve a second non-work-related accident or event occurring subsequent to the work injury; the second injury at issue here occurred at work for another employer on November 25, 1997. Furthermore, the cases cited do not stand for the proposition that claimant's entitlement to benefits for the initial work injury itself necessarily terminates upon the occurrence of the subsequent accident. Rather, the employer remains liable for the disability attributable to the work injury, and is relieved of liability only for the disability attributable to the intervening cause. *See Leach v. Thompson's Dairy*, *Inc.*, 13 BRBS 231 (1981). Thus, the intervening cause cases do not support termination of the permanent partial disability award for the initial injury here.

Moreover, the administrative law judge erred in considering whether the subsequent work injury was due to someone's "fault," and concluding that because claimant was at fault in causing the confrontation with his supervisor, the existing permanent partial award must terminate on the date of this incident. Decision and Order at 51. The Act specifically excludes the consideration of fault in assessing the cause of the injury, as Section 4(b), 33 U.S.C. §904(b), states that "[c]ompensation shall be payable irrespective of fault as a cause for the injury." The courts and Board have explicitly rejected the suggestion that the duty of care required of a claimant to guard against a subsequent injury applies to a work-related injury. *See Cyr*, 211 F.2d at 456; *Jackson*, 32 BRBS at 73; *see also Voris v. Texas Employers*

Ins. Ass'n, 190 F.2d 929 (5th Cir. 1951); *but see* 33 U.S.C. §903(c) . In any event, "fault" in the second injury is not relevant to disability due to a prior unrelated injury, as there is no provision in the Act providing for such a forfeiture. The administrative law judge's termination of claimant's permanent partial disability award on this basis therefore is contrary to law.

Finally, the administrative law judge's finding that claimant's current back and psychological disability is solely attributable to the second injury is factually inaccurate. While there is no evidence that claimant had a psychological disability prior to the November 25, 1997, work injury, there also is no evidence of record that claimant's back impairment had resolved prior to the second injury or was permanently exacerbated by it. That claimant's total disability is the result of the second injury does not affect the continuation of the pre-existing permanent partial disability award. Accordingly, as claimant had a demonstrated loss in wage-earning capacity prior to the second injury, there is no basis in the case law or evidentiary record for the administrative law judge to terminate claimant's permanent partial disability award as of the date of the second injury. We therefore reverse this finding, and modify the administrative law judge's decision to reflect claimant's entitlement to ongoing permanent partial disability benefits, payable by New Haven, pursuant to Section 8(c)(21) of the Act, at the rate of two-thirds of the difference between claimant's average weekly wage of $782.82 and his post-injury wage-earning capacity of $489.79.

Accordingly, the administrative law judge's termination of claimant's permanent partial disability award is reversed, and his decision is modified as stated herein. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting Administrative Appeals Judge