BRB No. 96-1302

THOMAS C. FANNON	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	
	)	
	)	
Self-insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Gerald F. Gay (Arnold, Bacot, Gay & Darby, P.A.), Baltimore, Maryland, and Roger L. Smith, Glen Burnie, Maryland, for claimant.

Andrew M. Battista, Towson, Maryland, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2673, 95-LHC-2674) of Administrative Law Judge Jeffrey Tureck 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).

The instant case involves claims for injuries resulting from two separate work-related accidents occurring on March 5, 1991, and October 8, 1992. On March 5, 1991, claimant, working as a lasher, was hit on the right forearm and shoulder by a lashing bar that had fallen from 16-18 feet above. Claimant was initially treated at Eastern Industrial Medical Center, where he was diagnosed with a strain to the right shoulder and forearm, given medication and released.[1] Claimant then sought treatment from Dr. Howard who, on June

[1]A contusion to the right forearm was also noted. In addition, an x-ray of claimant's right

7, 1991, released claimant to return to work on June 24, 1991, despite noting some remaining pain and discomfort. Claimant, thereafter, returned to work as a lasher, and was directed by Dr. Howard on July 15, 1991, to do as little overhead work as possible. Additionally, claimant noted that he was unable to do any heavy lifting. Despite these limitations, claimant testified that he is able to work by trading certain job duties with other members of his container gang.

Claimant next sustained an injury to the middle finger of his right hand after it became caught between two containers that he had been attempting to tie together aboard a ship, on October 8, 1992. Claimant was initially diagnosed and treated for a "comminuted fracture of the tuft of the third distal phalanx" of his right hand. Dr. Innis kept claimant off work until January 28, 1993, when he returned claimant to work at “full duty capacity.” Claimant began working again in his position as a lasher as of that date.

In his Decision and Order, the administrative law judge initially determined that as a result of the March 5, 1991, accident claimant sustained an injury to his right shoulder. The administrative law judge, however, determined that claimant did not establish a loss in his wage-earning capacity pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), and accordingly, denied benefits for claimant’s shoulder injury arising out of the March 5, 1991, accident. With regard to the accident on October 8, 1992, the administrative law judge determined that claimant is entitled to compensation under Section 8(c)(10), 33 U.S.C. §908(c)(10), for a twenty-five percent loss of the use of his right middle finger.[2]

On appeal, claimant first argues that the evidence of record clearly establishes that claimant's accident on March 5, 1991, resulted in injuries to his right shoulder, upper arm,

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shoulder was interpreted as negative.

[2]We note that inasmuch as the Act specifically delineates, for compensation purposes, the digits of the hand into the thumb, Section 8(c)(6), 33 U.S.C. §908(c)(6), and four fingers, Section 8(c)(7), (9), (10), (12), 33 U.S.C. §908(c)(7), (9), (10), (12), the middle finger is deemed to be the second finger and thus, injuries to said digit are compensable pursuant to Section 8(c)(9) of the Act. Accordingly, in the instant case, the administrative law judge referred to the incorrect section of the Act in awarding claimant benefits for an injury to his middle finger under Section 8(c)(10).

forearm and hand, thus warranting entitlement to a scheduled award for loss of the use of his right arm under Section 8(c)(1), 33 U.S.C. §908(c)(1), of the Act. Claimant also alternatively argues that, in contrast to the administrative law judge's finding, he has established a loss of wage-earning capacity as a result of his March 5, 1991, injury such that he is entitled to compensation under Section 8(c)(21) of the Act. Lastly, claimant argues that the administrative law judge erred in awarding compensation for an impairment to his right middle finger, under Section 8(c)(10), rather than on the basis of a loss of use of his right hand under Section 8(c)(3), 33 U.S.C. §908(c)(3), as a result of his work-related accident on October 8, 1992. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. In considering the relevant medical evidence with regard to claimant's injury of March 5, 1991, the administrative law judge found that from the time claimant returned to work in June 1991, until the October 8, 1992 injury, the only complaints of pain and records of treatment relate to claimant's right shoulder, and not his arm. The administrative law judge explicitly found that claimant's treating physician, Dr. Howard, repeatedly recorded complaints of shoulder pain and made no reference to pain in claimant's arm until January 29, 1993, after the injury to claimant's finger. The administrative law judge also determined that Dr. Henein, Dr. Hochuli, and claimant's physical therapist, Mr. Schlegel, similarly noted only an injury to claimant's shoulder in the course of their examinations and treatment, and thus, made no specific mention of any additional injury to claimant's right arm. In light of this, we affirm the administrative law judge's determination that claimant suffered a shoulder injury as a result of his work-related accident on March 5, 1991, as that finding is supported by the relevant evidence of record. *See Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990). Moreover, having found that claimant's impairment results from a shoulder injury, the administrative law judge properly determined that any permanent partial disability is compensable under Section 8(c)(21) of the Act. *See Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990); *Andrews*, 23 BRBS at 169.

After considering the evidence pursuant to Section 8(c)(21), the administrative law judge determined that claimant did not meet his burden of establishing that his wage-earning capacity has suffered as a result of the shoulder injury which he incurred on March 5, 1991. In rendering this finding, the administrative law judge initially determined that the steady increase in the number of hours that claimant worked and wages he received while working in his pre-injury employment following his March 5, 1991, accident,[3] are

[3] The administrative law judge specifically noted that claimant's work hours steadily increased from 648 for the year ending September 30, 1990, to 752 for the year ending September 30, 1991, to 948 for the year ending September 30, 1992. In addition, the administrative law judge noted that consistent with the increase in hours worked, claimant's average weekly wage also increased by almost a third following the 1991 injury, from

inconsistent with a finding that claimant has incurred a loss of wage-earning capacity.[4] The administrative law judge then found claimant's allegation that his inability to take on jobs as a climber on days when his container gang was not working resulted in a loss in his wage-earning capacity is unsubstantiated since claimant has not provided any evidence to show that such jobs would have been available to him between July 1991 and October 1992. Moreover, the administrative law judge determined that claimant's evidence, which compared the post-injury hours worked by claimant with three co-workers, was neither relevant nor probative to the issue of whether claimant has a loss of wage-earning capacity, since that evidence covers the years 1993-1995, which is after the second accident, and because the three workers to whom claimant is being compared all have more seniority.[5] Inasmuch as the administrative law judge found that claimant is doing his usual work as a lasher adequately, regularly, full-time and without undue help, we affirm the administrative law judge's finding that claimant's actual post-injury wages fairly represent his wage-earning capacity, and he has therefore lost none and as such, is not entitled to permanent partial disability benefits as a result of the shoulder injury stemming from the work-related accident on March 5, 1991. *Burkhardt*, 23 BRBS at 273; *see generally Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984).

Lastly, we consider claimant's contention that the October 8, 1992, accident resulted in an injury to claimant's right hand, such that the administrative law judge should have awarded benefits pursuant to Section 8(c)(3). In cases where claimant injured a smaller member which resulted in impairment to a larger member, the Board has permitted claimant to receive an award for loss of use of the greater member, if the evidence supports such a loss. *See Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989);

$310.48 as of March 5, 1991 to $411.36 on October 8, 1992.

[4]The administrative law judge, however, properly cautioned that the increased hours and wages do not absolutely preclude a finding that claimant has incurred a loss of wage-earning capacity. *See, e.g., Container Stevedoring Co. V. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).

[5]In fact, as the administrative law judge also noted, one of the three workers is a crane operator, a skill which claimant does not possess, and another does not take climbing jobs, thus making any comparison irrelevant in the instant case.

Young v. Todd Pacific Shipyards Corp., 17 BRBS 201 (1985). In the instant case, Dr. Heinen rates claimant's impairment as a twenty-five percent permanent partial impairment of his right middle finger under the AMA *Guidelines* and notes that "this is equal to five percent permanent partial impairment of the hand." Claimant's Exhibit 5. Inasmuch as the administrative law judge rationally concluded, based on the entirety of the medical evidence, that only claimant's right middle finger was injured as a result of the October 8, 1992, accident and since Dr. Henein's assessment of claimant's impairment is, first and foremost, in terms of the injury to the finger, we reject claimant's contention that he is entitled to an award of benefits under Section 8(c)(3), as substantial evidence supports the administrative law judge's determination that claimant has sustained a twenty-five percent impairment of his right middle finger. *See generally King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85 (CRT)(9th Cir. 1990); *Vanison v. Greyhound Lines, Inc*. 17 BRBS 179 (1985); *see also Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). However, we must modify the administrative law judge's award to reflect claimant's entitlement to benefits for his injury to the second finger of his right hand under Section 8(c)(9) of the Act. *See* n. 2, *supra*. Accordingly, claimant is entitled to compensation for twenty-five percent of thirty-five weeks. 33 U.S.C. §908(c)(9).

Accordingly, the administrative law judge's award of compensation for claimant's injury to his right middle finger is modified such that benefits shall be awarded pursuant to Section 8(c)(9) of the Act. In all other regards, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge