BRB No. 92-1638

EDWARD P. GREEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
I.T.O. CORPORATION OF BALTIMORE	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and the Decision on Motion for Reconsideration of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Bernard J. Sevel (Sevel & Sevel, P.A.), Baltimore, Maryland, for claimant.

Stan M. Haynes and John D. Kromkowski (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand and the Decision on Motion for Reconsideration (85-LHC-1753) of Administrative Law Judge G. Marvin Bober 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).

This case is before the Board for the second time. To recapitulate, claimant, on May 14, 1983, sustained fractures to his left ankle and left shoulder during the course of his employment as a climber with employer,[1] when he fell approximately 15 feet from a container. Claimant's ankle injury required surgery; claimant's shoulder was restrained by a sling for one month. Employer

[1]As a climber, claimant was responsible primarily for climbing containers and securing them in their place. Tr. at 26.

voluntarily paid claimant temporary total disability compensation from May 15, 1983 through September 1, 1984. 33 U.S.C. §908(b). Claimant's treating physician, Dr. Radwick, stated that claimant reached maximum medical improvement on June 27, 1984. Claimant did not return to his usual employment with employer; rather, at the time of the hearing in 1986, he was employed by Annapolis City Marina in a supervisory position.

In his initial Decision and Order, the administrative law judge found that claimant is incapable of performing his previous employment duties with employer and that his average weekly wage at the time of his injury was $532. The administrative law judge then concluded that although claimant's employment at Annapolis City Marina constituted suitable alternate employment yielding a salary of $15,600 per year, claimant had suffered no loss in wage-earning capacity as a result of his work accident, since additional employment opportunities yielding wages between $16,000 and $35,000 per year were available to him. After finding that claimant sustained a 15 percent permanent partial disability to his left shoulder and a 25 percent permanent partial disability to his left ankle, the administrative law judge awarded claimant permanent partial disability compensation pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), at a weekly rate of $354.67 ($532 x 2/3). Claimant appealed the award, challenging the administrative law judge's calculation of both his average weekly wage and his post-injury wage-earning capacity.

In its Decision and Order, the Board vacated the administrative law judge's determination of claimant's average weekly wage, and remanded the case for the administrative law judge to recalculate claimant's average weekly wage using the actual vacation and holiday pay earned by claimant, as opposed to two comparable longshoremen. The Board further held that the administrative law judge erred by failing to consider whether claimant's actual post-injury earnings reasonably and fairly represented his post-injury wage-earning capacity; additionally, the Board determined that the administrative law judge erred in concluding that claimant suffered no loss in wage-earning capacity. Specifically, the Board noted that the administrative law judge's statement that claimant sustained no loss in wage-earning capacity could not be reconciled with his award of benefits. The Board thus remanded the case for the administrative law judge to consider whether claimant's actual post-injury wages reasonably and fairly represented his post-injury wage-earning capacity and, if they did not, to calculate a dollar figure representing claimant's post-injury wage-earning capacity. Lastly, pursuant to *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988), the Board instructed the administrative law judge on remand to determine whether claimant was entitled to benefits under both Section 8(c)(21) for any loss in wage-earning capacity occasioned by his shoulder injury, and under the schedule for his ankle injury. *Green v. I.T.O. Corporation of Baltimore*, BRB No. 87-2198 (July 25, 1990)(unpublished).

In his Decision and Order on Remand, the administrative law judge initially found that claimant's average weekly wage at the time of injury was $599.19. He then found that a sales representative position paying $18,000 per year, or $305 per week,[2] reasonably and fairly represents claimant's post-injury wage-earning capacity. The administrative law judge thus found that the compensation rate due claimant based on his loss in wage-earning capacity, was two-thirds of the difference between $599 and $305. Next, the administrative law judge noted that in an erratum issued on September 22, 1987, he had in fact awarded claimant permanent partial disability benefits under Section 8(c)(4), 33 U.S.C. §908(c)(4), for his scheduled ankle injury.[3] He thus found that claimant sustained a loss in wage-earning capacity justifying an award of permanent partial disability benefits. The administrative law judge "factored out" claimant's scheduled award by commencing claimant's award under Section 8(c)(21) at the end of the payment period for claimant's scheduled award.

Thereafter, employer submitted a motion for reconsideration, contending that the administrative law judge failed to properly factor out claimant's ankle injury from his award pursuant to Section 8(c)(21), as directed by the Board's holding in *Frye*. The administrative law judge, in a Decision on Motion for Reconsideration, interpreted the holding in *Frye* as a directive to determine whether claimant's unscheduled injury was caused by the scheduled injury or was independently caused by the work accident. After finding that claimant's shoulder injury was not caused by his ankle injury, the administrative law judge reinstated his previous award under Section 8(c)(21).

On appeal, employer contends that administrative law judge failed to properly factor out claimant's ankle injury, for which he received a scheduled award, from his unscheduled award. Employer further argues that the administrative law judge erred in awarding claimant consecutive scheduled and unscheduled awards, as such an award renders an impermissible result under the holding of the United States Supreme Court in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). Claimant responds, urging affirmance of the administrative law judge's decision.[4] Additionally, claimant's counsel has submitted a fee petition for services

[2]The administrative law judge made an adjustment for inflation to arrive at this figure.

[3]Employer paid permanent partial disability compensation for 51.25 weeks based on the administrative law judge's award and does not challenge this award on appeal.

[4]Employer submitted a reply brief, again asserting that the administrative law judge did not properly factor out from the Section 8(c)(21) award any loss in claimant's wage-earning capacity due to his ankle injury, and that there is no evidence to support claimant's assertion that all of his loss in wage-earning capacity is due to the shoulder injury. Thereafter, claimant submitted a response to employer's reply brief, arguing that the administrative law judge, in his Decision and Order on Remand, found that claimant's shoulder injury resulted in his loss in wage-earning capacity. Employer has submitted a motion to strike claimant's response to its reply brief, contending that the regulations provide for no further briefing once a petitioner's reply brief is filed, *see* 20 C.F.R. §§802.211, 802.212, 802.213, and requesting an attorney's fee for time spent on the motion to strike.

performed before the Board, requesting an attorney's fee of $1,476, representing 8.2 hours of legal services rendered at an hourly rate of $180. Employer, in response, has submitted objections to counsel's fee request.

Our consideration of the issues raised by employer on appeal must begin with a discussion of *Potomac Electric* and *Frye*. In *Potomac Electric*, the United States Supreme Court held that where a claimant's disability is covered under the schedule, he may not elect to receive compensation under Section 8(c)(21) of the Act. In rendering its decision, the Court noted that the case before it concerned solely a scheduled injury, limited in effect to the scheduled body part, which resulted in permanent partial disability. *Potomac Electric*, 449 U.S. at 279 n.20, 14 BRBS at 367 n.20.

In *Frye*, claimant sustained injuries on March 10, 1977 to his right ankle and back when he jumped from a falling ladder. Claimant subsequently underwent ankle surgery. Employer voluntarily paid permanent partial disability benefits for a 40 percent loss of use of the right foot. Claimant subsequently sought further compensation under Section 8(c)(21), arguing that, in addition to injuring his ankle, he had sustained a back injury and chronic pain syndrome. The administrative law judge denied the claim for additional compensation under Section 8(c)(21), concluding that claimant's complaints were not due to any residuals of the work-related injury. The administrative law judge, relying on the decision of the United States Supreme Court in *Potomac Electric*, additionally concluded that since the claimant had sustained a scheduled ankle injury, his recovery was limited to that provided for under the schedule.

On appeal, the Board vacated the administrative law judge's findings that the claimant's back condition and chronic pain syndrome were not work-related, and remanded the case for the administrative law judge to reconsider the evidence in light of the Section 20(a) presumption. Moreover, the Board considered the question of whether the claimant is entitled to additional compensation beyond that provided for in the schedule if the claimant's back condition or chronic pain syndrome were determined to be work-related. In this regard, the Board held that where a claimant suffers two distinct injuries arising from a single accident, one compensable under the schedule and one compensable under Section 8(c)(21), he may be entitled to receive compensation under both the schedule and Section 8(c)(21); thus, the Board concluded, if the claimant's back injury sustained in 1977 was the cause of his alleged disability due to his back and chronic pain syndrome, he could recover compensation under Section 8(c)(21) for those conditions independent of his recovery under the schedule for his ankle injury. *Frye*, 21 BRBS at 198. The Board determined, however, that "[s]ince the scheduled injury is being compensated separately, any loss in wage-earning capacity due to the scheduled injury must be factored out of the Section 8(c)(21) award."[5] *Id.*; *see also Turney v. Bethlehem Steel Corp.*, 17 BRBS at 232 (1985) (where claimant

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We hereby deny employer's motion to strike and accept claimant's brief in response to employer's reply brief, as a brief supplemental to its initial response brief, pursuant to 20 C.F.R. §802.215. Employer's request for attorney's fees for time spent on the motion to strike is denied.

[5]The Board further held that where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, a claimant may receive a

sustained knee and back injuries arising from two separate work accidents, the Board remanded the case to the administrative law judge, noting that *Potomac Electric* required that the claimant receive a scheduled award for the knee injury and an award under Section 8(c)(21) for the back injury, from which the administrative law judge must factor out any loss in wage-earning capacity due to the knee injury).

In the instant case, employer contends that the administrative law judge erred in interpreting the Board's decision in *Frye* as requiring only a determination as to whether claimant's unscheduled shoulder injury was caused by the scheduled ankle injury. *See* Decision on Motion for Reconsideration at 3. We agree. The Board's decision in *Frye*, which was based on the holding of the Supreme Court in *Potomac Electric* that where a claimant's disability is covered under the schedule, he may not elect to receive compensation under Section 8(c)(21), clearly states that if a claimant is entitled to both a scheduled award and an unscheduled award, any loss in wage-earning capacity due to the scheduled award must be factored out of the award made pursuant to Section 8(c)(21). Commencing an award for loss of wage-earning capacity based on both the shoulder and the ankle after the scheduled award for the ankle ran out does not compensate claimant in a manner consistent with *Frye* or *Potomac Electric*. Claimant's scheduled ankle injury cannot be compensated under Section 8(c)(21). Rather, claimant should receive benefits for the loss in wage-earning capacity caused only by his shoulder injury to run from the date of permanency concurrently with the scheduled award.

The administrative law judge herein did not make a determination as to whether, or to what extent, claimant's ankle injury contributed to his loss in wage-earning capacity, as he "factored out" the ankle injury only by commencing the Section 8(c)(21) award at the termination of the 51.25 weeks of the scheduled award. The record, however, contains evidence which, if credited by the administrative law judge, would support a finding that claimant's loss in wage-earning capacity was due, at least in part, to his ankle injury. Dr. Radwick, the physician who performed surgery on claimant's ankle in 1983, reported in June 1984 that claimant complained that standing on his feet for 5 hours causes pain in his ankle. Cl. Ex. 4A. Dr. Hunt reported in April 1985 that claimant complained of pain in his left ankle and that he was unable to jump, climb or stoop because of this discomfort.[6] Emp. Ex. 4. At the hearing, held on January 22, 1986, claimant testified that he

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Section 8(c)(21) award; however, in such a case, the claimant is limited to one award for the combined effect of his conditions, as he would have sustained only one compensable injury which has affected other parts of the body. *Frye*, 21 BRBS at 198. The Board subsequently overruled this aspect of *Frye*, holding that where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, a claimant is not limited to one award for the combined effect of his conditions, but may receive a separate award under Section 8(c)(21) for the consequential injury in addition to an award under the schedule for the initial injury. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

[6]In his letter of October 10, 1985, Dr. Hunt rated claimant's impairment to his left foot at 15 percent, but opined that claimant could return to work as a longshoreman. Emp. Ex. 4.

continues to have pain and swelling in his ankle which prevent him from walking great distances and turning in certain directions; he stated that he is cautious about where he steps to avoid twisting his ankle. Tr. at 55-57. He also testified that he does not have full extension in his left shoulder and no longer has the strength to lift weights he was able to in the past. *Id*. at 58. At his deposition taken on January 8, 1991, claimant testified that he quit a job with a landscaping company because mowing lawns was hard on his ankle and shoulder.[7] Claimant Dep. at 12. Dr. Cohen, an orthopedic surgeon who examined claimant in December 1985, testified that he would not certify claimant to return to his former job as a climber because of his shoulder and ankle. He further stated that claimant would have difficulty standing for prolonged periods of time due to his compromised ankle, which showed signs of intraosteocalcification[8] and degenerative arthritis, and that claimant would not be capable of repeated bending and stooping because of his ankle. Cohen Dep. at 29-30, 34.

As the administrative law judge made no finding regarding whether claimant's ankle injury contributed to his loss of wage-earning capacity, we vacate the administrative law judge's award of benefits under Section 8(c)(21), and remand the case for the administrative law judge to reconsider claimant's loss in wage-earning capacity. Pursuant to the Board's decision in *Frye*, claimant may receive a Section 8(c)(21) award for his non-scheduled shoulder injury concurrent with his scheduled award for his ankle injury. In order to avoid a double recovery by claimant, the administrative law judge on remand must determine whether any loss in claimant's wage-earning capacity was caused by his ankle injury; any such loss in wage-earning capacity which the administrative law judge finds to be due to claimant's ankle injury must be factored out of the award under Section 8(c)(21). Claimant's loss in wage-earning capacity must be determined based on the impairment due to his shoulder injury alone.

Lastly, claimant's counsel seeks an attorney's fee award for work performed before the Board. Counsel will be entitled to a fee in this case should he engage in a successful defense of employer's appeal. *See* 20 C.F.R. §802.203(a)-(c); 33 U.S.C. §928(a). Inasmuch as we are remanding this case to the administrative law judge for reconsideration of claimant's award under Section 8(c)(21), claimant's counsel's request for an attorney's fee for work performed before the Board is premature. Accordingly, claimant's request for an attorney's fee is denied at this time. Should the administrative law judge on remand award claimant the same or greater benefits, claimant may refile his fee petition.

Accordingly, the Decision and Order on Remand and the Decision on Motion for Reconsideration of the administrative law judge are vacated, and the case is remanded to the administrative law judge for further proceedings in accordance with this opinion.

SO ORDERED.

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[7]Claimant left his job at the marina in July 1986 because he needed more income. He worked at a variety of jobs in 1986 and 1987, until he was offered a job as a cook at a church rectory in May 1987.

[8]Dr. Cohen defined this term to mean the fusing of two bones which are supposed to be separate. Cohen Dep. at 22-23.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge