BRB Nos. 94-0629
and 94-0629A

FERNANDO MARTINEZ	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order Granting Attorney's Fee of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Richard W. Galiher, Jr. (Galiher, Clarke & Galiher), Rockville, Maryland, for claimant.

William H. Schladt (Ward, Klein & Miller, Chartered), Gaithersburg, Maryland, for the self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order-Awarding Benefits and employer appeals the Supplemental Decision and Order Granting Attorney's Fee (92-DCW-15) of Administrative Law Judge Edward Terhune Miller 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 Longshore Act), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973)(the D.C. 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 amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion or contrary to law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On May 1, 1981, claimant, a bus driver for employer, sustained a work-related right shoulder injury when he slipped while getting off a bus at employer's bus depot in the District of Columbia.

Claimant was unable to return to his former job after his injury. He accordingly underwent computer training and sought another job with employer. In addition, he sought jobs with other employers. When these endeavors proved unsuccessful, claimant returned to work for employer as a bus driver in 1985. Employer voluntarily paid claimant compensation benefits.

Shortly after his return to work, claimant again experienced problems with his right shoulder on December 10, 1985, while driving a bus without power steering. Employer voluntarily paid temporary total disability benefits for this injury. When claimant returned to work after this disability, he was assigned a bus route in Montgomery County, Maryland.[1] Claimant again experienced right shoulder problems while driving on October 20, 1988, and as a result missed work during four periods in 1988, on the last occasion for almost ten months. On each occasion, claimant experienced a popping sensation in his shoulder and pain while turning the steering wheel. Claimant was awarded compensation for these periods of temporary total disability compensation by the Maryland Workers' Compensation Commission. On June 6, 1991, the Maryland Workers' Compensation Commission awarded claimant permanent partial disability benefits of 20 percent for his right shoulder, based on the October 20, 1988, "re-injury."[2] In light of the award of permanent disability compensation, the Maryland Commission denied claimant additional temporary total disability compensation for his right shoulder injury after June 6, 1991. Claimant sought temporary total disability compensation under the D.C. Act for periods of work he missed after June 6, 1991, including periods subsequent to the hearing, in which he was forced to use sick leave[3] and permanent partial disability compensation for a 15 percent loss in his wage-earning capacity.

In his Decision and Order, the administrative law judge found that claimant sustained a work-related injury to his right shoulder on May 1, 1981, and that all the subsequent periods of temporary total disability he sustained thereafter are the result of recurrences of that injury. Accordingly, he awarded claimant the temporary total disability compensation claimed based on the stipulated average weekly wage of $416.28. The administrative law judge, however, denied claimant's permanent partial disability claim, concluding that the record before him did not provide any rational basis for assessing claimant's alleged loss of wage-earning capacity. Claimant appeals the administrative law judge denial of permanent partial disability benefits, arguing that the

[1]On January 27, 1986, claimant injured his left shoulder and suffered two recurrences of this injury in 1987 for which he lost time and was compensated under the Maryland Workers' Compensation Act. This injury is not a part of the present claim.

[2]The Maryland Workers' Compensation Commission's Award of Compensation stated that five percent was being awarded for the accidental injury sustained October 20, 1988, while fifteen percent is due to a preexisting condition.

[3]Claimant requested temporary total disability benefits for the following periods: March 15, 1992 to March 17, 1992; April 2, 1992 to April 6, 1992; June 13, 1992 to June 17, 1992; August 6, 1992 to August 11, 1992; December 18, 1992 to December 23, 1992; and January 4, 1993 to January 5, 1993.

administrative law judge erred in not finding a loss of wage-earning capacity and thus not awarding permanent partial disability benefits, or in the alternative, a *de minimis* award. Employer cross-appeals, arguing that the administrative law judge erred in finding that the 1988 accident was a compensable recurrence of the 1981 work-related injury which claimant sustained in Washington D.C., and not an intervening non-compensable injury already compensated under Maryland law.

CAUSATION

We direct our attention initially to employer's arguments on cross-appeal because they are potentially dispositive. Employer argues that inasmuch as claimant's May 1, 1981, right shoulder injury, which occurred in the District of Columbia, was subsequently aggravated on October 20, 1988, while claimant was working in Maryland, the periods of temporary total disability being claimed in 1992 are not compensable under the D.C Act.[4] Employer asserts that because claimant sought and was awarded temporary total and permanent partial disability compensation for the October 20, 1988, work injury by the Maryland workers' compensation program, he should have also claimed compensation for these periods under Maryland law. Employer further asserts that although claimant sought compensation for identical periods of temporary total disability under Maryland law and the 1928 Act, and the state action is still pending, claimant cannot claim that his temporary total disability relates to both the 1981 and the 1988 claims. Employer asserts that inasmuch as the 1988 injury in Maryland was the cause of the temporary total disability claimed in 1992, the administrative law judge lacked jurisdiction to determine what benefits should be paid to claimant. Employer asserts that, in any event, the medical evidence of record does not support claimant's position that he was disabled during these periods of time as a result of the 1981 injury, because claimant received no treatment from 1985, when he returned to driving a bus, until 1988, and claimant himself claimed that his periods of temporary total disability thereafter were the result of his 1988 injury.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See, e.g., Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935). If there has been a subsequent non-work-related event, employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that claimant's condition was not caused by the work-related event. *See James*, 22 BRBS at 273. Employer is liable for the entire disability if the

[4]The 1928 D.C. Act applies in this case because the injury alleged to have caused the disability was sustained prior to July 1982. *See, e.g., Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

second injury is the natural or unavoidable result of the first injury. Where the second injury is the result of an intervening cause, employer is relieved of liability for that portion of disability attributable to the second injury. *See, e.g., Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987), *aff'd mem.*, 901 F.2d 1112 (5th Cir. 1990).

After review of the administrative law judge's Decision and Order in light of the record evidence and employer's arguments on appeal, we affirm his award of temporary total disability benefits inasmuch as his finding that claimant's temporary total disability was due to work-related recurrences of the May 1, 1981, right shoulder injury is rational, supported by substantial evidence, and in accordance with applicable law. *See O'Keeffe*, 380 U.S. at 359; Decision and Order at 10. Contrary to employer's assertions, the fact that the Maryland Compensation Commission found the October 20, 1988, recurrence was a re-injury and awarded claimant compensation is not determinative of whether the temporary total disability compensation being claimed is compensable under the D.C. Act. In the absence of evidence that claimant has the same burden of proof under both statutes and where, as here, the Commission's finding is stated in a summary fashion such that its basis is unclear, the ruling is not entitled to collateral estoppel effect; thus it does not bar a subsequent determination of causation under the legal standard applicable under the D.C. Act. *Smith v. ITT Continental Baking Co.*, 20 BRBS 142 (1987).[5]

In the present case, as it is undisputed that claimant suffered a back injury while working in the District of Columbia in 1981 and that he suffers ongoing shoulder problems, the administrative law judge properly determined that claimant was entitled to the benefit of the Section 20(a) presumption. *See generally Gencarelle*, *supra*, 22 BRBS 170. After considering the record evidence, the administrative law judge credited the medical opinion of Dr. Johnson, claimant's treating physician. Inasmuch as Dr. Johnson's opinion that claimant has had the same condition since 1981 and that the October 1988 right shoulder injury was a "recurrence" of the 1981 injury, Cl. Ex. 1 (letter dated April 22, 1991); Depo. at 15, provides substantial evidence to support the administrative law judge's determination that the periods of temporary total disability compensation being claimed are the natural and unavoidable result of the May 1981, work injury, any error which the administrative law judge may have made in analyzing rebuttal of the Section 20(a) presumption is not determinative. *See Peterson v. Columbia Marine Lines*, 21 BRBS 299, 303 (1988). Inasmuch as the administrative law judge rationally concluded that the temporary total disability compensation being claimed is for a recurrence of claimant's May 1981 work injury which occurred in the District, where employer's principle place of business is located, we reject employer's argument that these

[5]The underlying premise of employer's arguments is incorrect because the fact that claimant received compensation from the Maryland Compensation Commission would not preclude claimant from receiving a successive compensation award in the District of Columbia. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980). We note that, in any event, in a January 18, 1993, letter to the administrative law judge, claimant's counsel indicated that claimant has postponed any hearing to finalize the Maryland award until the administrative law judge's decision is rendered in order to avoid the problem of duplicate awards for temporary total disability for the same periods of time.

benefits are not compensable under the D.C. Act and affirm the award of temporary total disability benefits made by the administrative law judge. *See Wright v. Connelly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS at 140, 145 (1991). *See generally Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980).

WAGE-EARNING CAPACITY

On appeal, claimant challenges the administrative law judge's denial of permanent partial disability compensation, asserting that he has established a loss of his wage-earning capacity by virtue of his past record and prognosis for future recurrences of his right shoulder problem as well as his need to drive a bus equipped with power steering.[6] In the alternative, claimant argues that the administrative law judge erred in failing to consider his entitlement to a *de minimis* award.

Under Section 8(c)(21), 33 U.S.C. §908(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *See Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The burden of proof is on the party seeking to prove that actual post-injury wages are not representative of claimant's wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992).

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[6]Claimant contends his injury affects his future earnings capacity in several specific respects. Claimant testified that after an episode of his shoulder popping, he takes Darvocet M-100, which is strong pain medication, and as a result, he is unable to work following these episodes. Claimant argues that because he does not get paid for sick leave until the third day he is out, he loses two days' wages each time he has a recurrence of the right shoulder problems. Moreover, he raises the concern that he would soon use up whatever sick leave he has left. Claimant also argues that pursuant to the applicable union contract, if a person has over eight instances of sick leave per year, regardless of the cause, employer could fire him.

In the present case, the administrative law judge summarily denied the claim for permanent partial disability compensation, finding that the record before him did not provide any rational basis for assessing claimant's alleged reduction in wage-earning capacity and that a finding of percentage of permanent partial disability would require impermissible speculation on his part. In so concluding, the administrative law judge reasoned that claimant has not presented sufficient evidence to establish a reduction in wage-earning capacity as a result of having to use sick leave related to periods of temporary total disability, noting that claimant's wage statements for 1991-1993 indicate that claimant's aggravations do not occur with any predictable regularity and that the amount of work missed after each recurrence varies greatly.

After review of the administrative law judge's Decision and Order in light of the record evidence, we are unable to affirm his denial of permanent partial disability compensation. Contrary to his determination, there does appear to be evidence in the record which the administrative law judge neglected to explicitly consider from which a wage-earning capacity assessment could rationally be made without undue speculation. For example, Dr. Johnson, claimant's treating physician, deposed that in 1985 he had misgivings about claimant's return to work as a bus driver and predicted that claimant would periodically experience problems with his shoulder in the future which would preclude him from driving, consistent with his history in the years since his May 1981 work injury. Based on claimant's recurrent history of discomfort associated with crepitus since 1981, Dr. Johnson had given claimant a permanent impairment rating of 5 percent and recommended that claimant drive a bus with power steering to limit the frequency of these recurrences. The record also suggests that the security of claimant's bus driving job may be in jeopardy; on several occasions employer has tried to disqualify claimant from driving a bus. Moreover, in a report dated May 2, 1991, Edwin Quick, employer's rehabilitation specialist, prepared a report in which he predicted that in all probability, "in the near future," claimant would be unable to continue as a bus operator. Cl. Ex. 4.

In addition, the administrative law judge determined that he could not assess claimant's loss in wage-earning capacity based on his having to use sick leave because claimant's wage statements for 1991-1993 indicate that claimant's aggravations do not occur with any predictable regularity, and the amount of work missed after each recurrence varies greatly. However, the record before the administrative law judge contained information regarding the periods of work claimant missed over an 11 eleven year period, which is a sufficient basis for a reasonable assessment of claimant's wage-earning capacity. As the administrative law judge did not consider and weigh this evidence, we vacate his denial of permanent partial disability compensation and remand for him to reconsider this issue in light of all of the relevant evidence of record consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

If on remand the administrative law judge ultimately concludes that claimant has no present measurable loss in wage-earning capacity under Section 8(c)(21), he should then consider the possibility of a *de minimis* award, a theory which was raised below but not addressed by the administrative law judge. Such awards are appropriate where a claimant has not established a present loss in wage-earning capacity but there is a significant possibility of future economic harm as a result of the injury to protect claimant's right to modification pursuant to Section 22 of the Act, 33 U.S.C. §922. *See, e.g., Randall,* 725 F.2d at 791, 16 BRBS at 56 (CRT); *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981).

ATTORNEY'S FEE

Employer also appeals the administrative law judge's Supplemental Decision and Order Granting Attorney's Fee. Claimant's counsel requested a fee of $7,133.75, representing 36.7 hours at $175 per hour, plus $711.25 in costs. Noting that employer had not filed objections, the administrative law judge disallowed $62 for faxing expenses as office overhead, $507.50 for 2.9 hours of services performed before the district director, and $300 for services performed by a legal assistant, and awarded claimant's counsel a fee of $6,264.25.

Employer's assertion that an award of an attorney's fee is premature, because the case is on appeal and claimant's ultimate success therefore remains to be determined, is rejected. It is well established that to further the goal of administrative efficiency, an administrative law judge may render an attorney's fee determination when he issues his decision; such an award, however, does not become effective, and thus is not enforceable, until all appeals are exhausted. *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987); *Bruce v. Atlantic Marine, Inc.*, 12 BRBS 65, *aff'd*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981). Employer also argues that the administrative law judge failed to consider its objections to claimant's request for attorney's fees. Employer's objections were not considered because they were erroneously filed with the Board, rather than with the administrative law judge. Inasmuch as due process requires that employer be given the opportunity to respond to claimant's fee request and the case is being remanded, in any event, for reconsideration of the issue of permanent partial disability, we vacate the administrative law judge's award of attorney's fees. *See Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982); *see generally Krause v.*

Bethlehem Steel Corp., 29 BRBS 65 (1992). On remand, the administrative law judge should reconsider the attorney's fee award in light of employer's objections[7] and claimant's ultimate success on his claim for permanent partial disability compensation.[8]

Accordingly, the administrative law judge's denial of permanent partial disability compensation is vacated, as is his Supplemental Decision and Order Granting Attorney's Fee, and the case is remanded for further consideration of these issues consistent with this opinion. In all other respects, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[7]In its objections, employer argues, among other things, that the fee requested is excessive, in view of the fact that as a result of his claim claimant only received benefits for a few periods of temporary total disability and no permanent award.

[8]We note that in its brief filed with the Board, employer contends that claimant's counsel has charged for time spent on the Maryland workers' compensation claim. In considering claimant's fee award on remand the administrative law judge should note that generally, an attorney is entitled to a fee under the Longshore Act for time spent in preparing a state workers' compensation claim only if counsel shows that the same services and/or their products were necessary to the prosecution of the federal claim. *See Roach v. New York Protective Covering*, 16 BRBS 114 (1984); *Eaddy v. R.C. Herd & Co.*, 13 BRBS 455 (1980). A similar rationale would apply to services performed in the Maryland claim which are also claimed in D.C.