

**United States Department of Labor
Employees' Compensation Appeals Board**

C.L., Appellant)

and)

DEPARTMENT OF STATE, AMERICAN)
CONSULATE GENERAL, Hong Kong,)
Employer)

**Docket No. 08-130
Issued: March 20, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 16, 2007 appellant filed a timely appeal from the July 13, 2007 merit decision of the Office of Workers' Compensation Programs, which denied his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether, under 5 U.S.C. § 8137, the Office properly adopted and applied the benefit features of the Hong Kong workers' compensation ordinance to deny appellant's claim for a schedule award.

FACTUAL HISTORY

On January 20, 2005 appellant, then a 24-year-old full-time mail clerk, Chinese citizen and a resident of Hong Kong, filed a claim alleging that he developed severe back pain as a result of his federal employment: "I am working for the mailroom as the part of my job request I have to lift heavy weight items and some items are very heavy such like the cataloged or

periodical mailbags weighing over 70 pounds.” He stopped work on January 3, 2005 and used sick leave. Appellant returned to work on January 18, 2005 and continued to miss work intermittently.

Appellant first became aware of his back injury in 2001. On June 16, 2001 he sought medical attention from Dr. William Wing-Hung Yuen, a specialist in orthopedics and traumatology. Dr. Yuen reported that appellant had low back pain with lower limb radiation for six months: “It started after [appellant] sprained his back while lifting heavy bags.” Examination showed decreased spinal movements, a decrease in straight leg raising on the left and motor weakness in the L4-5 distribution. Appellant received a clinical diagnosis of left sciatica from a prolapsed intervertebral disc. A December 6, 2001 magnetic resonance imaging (MRI) scan showed a prolapsed disc at L4-5 with the protrusion extending bilaterally but more on the left side with some impingement of the adjacent nerve root. Dr. Yuen attributed the condition to work and stated that it was very likely appellant would require surgery. He cautioned, however: “Even with successful surgery, [appellant] should not engage in similar work in the future.”

A human resource officer reported that appellant earned \$9.00 an hour on June 16, 2001, the date of injury. Appellant was reassigned to light duty in December 2001. He nonetheless performed lifting duties when he felt his condition permitted.

On December 8, 2004 Dr. Leung Yum Kwong, another specialist in orthopedics and traumatology, reported a history of persistent low back pain and bilateral leg pain and numbness: “It started after an episode of bending [appellant’s] back to lift a heavy load.” He noted that the pain became aggravated after exercises and sleep and worsened with coughing and sneezing. There was an associated numbness of both calves and the left leg was weaker. Dr. Kwong reported that, after a long clinical course with little improvement, appellant’s condition was now static, with on-and-off back pain expected, sometimes radiating down his legs with associated numbness and weakness. He noted that the situation “may get worse after prolonged sitting or walking or frequently bending his back or lifting a load, during the course of [appellant’s] work.”

When appellant filed his January 20, 2005 claim for compensation, his supervisor reported the following: “[Appellant] has been reassigned from performing heavy duties (such as lifting weight up to 70 pounds) to light duties like typing invoices, sorting letter mail, logging registered items and maintaining time and attendance report[s] for the mail room personnel.”

Dr. Kwong examined appellant on June 14, 2005. Appellant walked with a limp and had a stiff back. There was tenderness at his left hip and left sacroiliac joint. Straight leg rising was 60 degrees on the left. Flexion of the spine was fair, with appellant being able to reach 10 centimeters below the knee cap. On May 3, 2005 the Office accepted appellant’s claim for a prolapsed disc at L4-5 and sciatica. On August 3, 2005 it advised that it was accepting a displaced lumbar intervertebral disc and sciatica, left.

The Office explained that appellant might be entitled to compensation in addition to medical benefits:

“If you have lost time from work or if you have a permanent impairment as a result of your injury, you may be eligible for compensation. Under 5 U.S.C. § 8137 overseas employees’ of the United States who are not citizens or residents receive compensation according to the benefit provisions of the workers’ compensation law of their own countries or the provisions of the Federal Employees’ Compensation Act (FECA), whichever is less. If you wish to claim compensation as a result of your injury, the Office will review the relevant law and make a determination as to your entitlement. You are entitled to the procedures of the Act (notice, due process and appeal rights) with respect to any decision that is made on your claim.”

On December 15, 2005 appellant claimed compensation for a schedule award. The Office asked Dr. Kwong to provide an evaluation of permanent impairment of the lower extremity. On May 18, 2006 Dr. Kwong noted that appellant currently had persistent low back pain radiating down his left buttock and leg down to his foot, with numbness and frequent attacks of cramps in his calf muscles. The pain became aggravated after walking for about 20 minutes or sitting for about 15 minutes, “so much so that [appellant] has to get up from the sitting position with the assistance of both hands.” Dr. Kwong reported that appellant could not sleep well, as he had pain while lying down or changing posture. Appellant could not run, squat down or walk fast. He walked with an antalgic gait and avoided putting weight on his left leg or bending his knee. Dr. Kwong diagnosed residual left leg pain and weakness due to nerve root compression.¹ He reported a 16 percent impairment of the whole person.

An Office medical adviser reviewed Dr. Kwong’s clinical findings and determined that appellant had a 27 percent permanent impairment of the left lower extremity due to strength deficits, according to Table 17-8, page 532 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*).

Appellant resigned from the position of mail clerk on May 25, 2007.

In a decision dated July 13, 2007, the Office denied appellant’s claim for a schedule award. It noted that appellant initially suffered a traumatic injury but that the accepted condition developed over time. Because there were elements of both traumatic and occupational injury in the claim, it considered both schedules of the local ordinance. The Office found no listing in the First Schedule for injuries to the back, other than paralysis or for neither conditions of the limbs resulting from injury to the spine nor did it find such a listing in the Second Schedule. Further, it observed that, as appellant had received no assessment by the Ordinary or Special Assessment Board of the Hong Kong Labor Department, it had no basis to determine whether such an

¹ Dr. Kwong later noted that appellant had to rely on a course of anti-inflammatory drugs and pain killers to improve his situation.

assessment would be similar to an evaluation of permanent impairment for the purpose of comparing benefit amounts.² The Office held as follows:

“The Office reviewed all of the facets of Hong Kong law that were analogous or potentially analogous to the schedule award provision of the [Act]. The Employees’ Compensation Ordinance of Hong Kong does not provide for the specific benefit you claimed. In the absence of this provision, your benefit under Hong Kong law is zero. When compared to your rating under the [Act] of 27 [percent], the Hong Kong law is the lesser of the two benefits and we must consider your entitlement to be zero. As a result you are not entitled to a schedule award of compensation under the Act.”

LEGAL PRECEDENT

Section 8137 of the Act provides compensation to an employee or a dependent, who is neither a citizen nor a resident of the United States or Canada. Subsection (a) provides that, when the Office finds that the amount of compensation payable to such an employee or dependent under the Act is substantially disproportionate to compensation for disability or death payable in similar cases under local law, it may provide for payment of compensation on a basis reasonably in accord with prevailing local payments in similar cases, either by “the adoption or adaption of the substantive features, by a schedule or otherwise, of local workmen’s compensation provisions or other local statute, regulation or custom applicable in cases of personal injury or death” or by “establishing special schedules of compensation for injury, death and loss of use of members and functions of the body for specific classes of employees, areas and places.”³

The Office has determined that the compensation provided under the Act is substantially disproportionate to the compensation for disability or death which is payable in similar cases under local law, regulation and custom or otherwise, in areas outside the United States, any territory or Canada.⁴ Further, it has established no special schedule for employees working in the Republic of China.⁵

Section 25.2 of the Office’s regulations provides:

“(a) Pursuant to 5 U.S.C. 8137, the benefit features of local workers’ compensation laws or provisions in the nature of workers’ compensation, in effect in areas outside the United States, any territory or Canada shall, effective as of

² The employer explained: “As locally employed staff is covered by the U.S. Workers’ Compensation Program, we have not officially reported to the Hong Kong Labor Department on [appellant’s] occupational disease. In view of this, neither the Employees’ Compensation Ordinary Assessment Board nor the Employees’ Compensation Special Assessment Board of the Hong Kong Labor Department has performed an evaluation on [appellant’s] impairment/disability.”

³ 5 U.S.C. § 8137(a).

⁴ 20 C.F.R. § 25.1.

⁵ *Id.* at § 25.200-.203; *Fu Ai-Loong Chow (Mo Chow)*, 23 ECAB 229 (1972).

December 7, 1941 and as recognized by the Director, be adopted and apply in the cases of employees of the United States who are neither citizens nor residents of the United States, any territory or Canada, unless a special schedule of compensation for injury or death has been established under this part for the particular locality or for a class of employees in the particular locality.

“(b) The benefit provisions adopted under paragraph (a) of this section are those dealing with money payments for injury and death (including medical benefits), as well as those dealing with services and purposes forming an integral part of the local plan, provided they are of a kind or character similar to services and purposes authorized by the [Act].”

* * *

“(e) Compensation for disability and death of noncitizens outside the United States under this part, whether paid under local law or special schedule, shall in no event exceed that generally payable under the [Act].”⁶

Benefits paid under local law should never exceed those which would be payable under the Act. However, when making a comparison of the Act and benefits under local law, total benefits payable are considered, not just individual portions of the benefits.⁷

ANALYSIS

Pursuant to 5 U.S.C. § 8137 and as mandated by 20 C.F.R. § 25.2, the Office must adopt and apply the substantive features of the Employees’ Compensation Ordinance, Chapter 282 of the Laws of Hong Kong (ECO). As Office procedures state: “Compensation benefits are paid in accordance with the benefit structure of the local workers’ compensation laws.”⁸ The purpose of adopting the local benefit structure is to “provide for payment of compensation on a basis reasonably in accord with prevailing local payments in similar cases.”

Section 9 of ECO provides schedule awards for permanent partial incapacity.⁹ The Office is required to adopt and apply that substantive feature of the Ordinance. Section 9(1)(a) provides that, where permanent partial incapacity results from the injury, the amount of compensation shall be, in the case of an injury specified in the First Schedule, such percentage of the compensation which would have been payable in the case of permanent total incapacity as is specified therein as being the percentage of the loss of earning capacity caused by that injury.

⁶ 20 C.F.R. § 25.2.

⁷ Federal (FECA) Procedure Manual, Part 4 -- Special Case Procedures, *Foreign National Claims*, Chapter 4.801.9(b) (September 1994).

⁸ *Id.* at Chapter 4.801.8(c) (or by special schedule).

⁹ “Partial incapacity,” as defined in section 3(1), means, where the incapacity is of a permanent nature, such incapacity (which may include disfigurement) as reduces an employee’s earning capacity, present or future, in any employment which he was capable of undertaking at that time.

The Office reviewed the First Schedule and could find no listing for injuries to the back (other than “total paralysis”) or for conditions of the limbs resulting from injury to the spine,¹⁰ but that is no bar to an award under section 9. Section 9(1)(b) provides that, where permanent partial incapacity results from the injury, the amount of compensation shall be, in the case of an injury not specified in the First Schedule, such percentage of the compensation which would have been payable in the case of permanent total incapacity as is proportionate to the loss of earning capacity permanently caused by the injury in any employment which the employee was capable of undertaking at that time, provided that “(ii) in the case of injury not specified in the First Schedule, the loss of earning capacity permanently caused by such injury shall be assessed as a percentage having regard so far as possible to the scale of percentages specified in that Schedule and to the note thereto.”

Section 9(1)(a) permits consideration of the employee’s special circumstances -- including the nature of the injury in relation to the nature of his former usual employment and his qualification, previous training and experience -- where the percentage specified or assessed would be substantially less than the percentage loss of earning capacity permanently caused by the injury in the employee’s special circumstances.

Section 9(4) adds that in assessing loss of earning capacity, an Assessment Board or Court “may but shall not be obliged to give weight to any actual earnings of the employee earned after the accident causing the injury.”

An associate professor on the Faculty of Law at the University of Hong Kong described the local benefit scheme in plainer language:

“Assessment of permanent partial incapacity (s 9)

“Compensation under the Ordinance can be made for loss of earnings or earning capacity, for medical expenses and for the cost of any prostheses. Assessment for loss of earning capacity of a permanent nature (including fatal cases) is subject to ceilings, determined on the basis of the age and earnings of the work at the time of the accident.

“Where permanent partial incapacity is suffered by the worker, reference should be made to the First Schedule, to ascertain whether the type of injury suffered is listed there. If so, the amount of compensation, to be paid in a lump sum, is (subject to the special circumstances qualification in section 9(1)(a)) calculated according to that percentage incapacity listed in the First Schedule which is a proportion of the amount such a worker would have received under s 7 if the employee had suffered a permanent total incapacity (s 9(1)(a)).

¹⁰ The First Schedule specifies the following with respect to the lower extremity: loss of leg at hip, 80 percent loss of earning capacity; loss of leg at or above knee, 75 percent; ankylosis of hip joint in optimum position, 25 percent; in worst position, 35 percent; loss of leg below knee, 65 percent; ankylosis of knee joint in optimum position, 25 percent; in worst position, 35 percent; loss of foot, 55 percent; ankylosis of ankle joint in optimum position, 15 percent; in worst position, 25 percent; and losses of toes.

“Where the permanent partial incapacity is not listed in the First Schedule, the situation is similar, except that there is no scheduled percentage incapacity to refer to. Instead, the relevant percentage loss of earning capacity is to be determined having regard so far as possible to the scale of percentages for comparable injuries specified in the First Schedule (s 9(1)(b)(ii)). Further, by s 9(4) the Board assessing the incapacity ‘may but shall not be obliged to give weight to any actual earnings of the employee earned after the accident causing the injury.’”¹¹

Because section 9 does award compensation for permanent partial incapacity resulting from injuries not specified in the First Schedule, the Board finds that the Office erred in denying compensation on the grounds that it could find no listing in the First Schedule for appellant’s injury. The Office did not properly apply the whole of section 9.¹² To determine the award payable under ECO, it must determine the percentage loss of earning capacity, if any, permanently caused by the accepted injury.

Once the Office makes its assessment, it shall, pursuant to section 9 of ECO, apply the percentage to the compensation that would have been payable in the case of permanent total incapacity.¹³ Section 7(1)(a) provides that, where permanent total incapacity results from the injury, the amount of compensation shall be, in the case of an employee under 40 years of age at the time of the accident, a lump sum equal to 96 months earnings.¹⁴

Having thus adopted and applied the benefit features of ECO, the Office, if it finds any entitlement to compensation for permanent partial incapacity, must revisit appellant’s entitlement under the Act for the purpose of comparing the *amount* of compensation payable under each benefit scheme. Section 8107(a) of the Act states: “If there is permanent disability involving the loss or loss of use, of a member or function of the body or involving disfigurement, the employee

¹¹ *Law Lectures for Practitioner 1995* (Hong Kong: HKLJ Ltd, 1995), p 166 (Rick Glofcheski, “Conditions for Compensation under the Employees’ Compensation Ordinance”).

¹² The Office committed a similar error in denying compensation because appellant’s injury was not specified in the Second Schedule, as an employee may still recover an award for permanent partial incapacity resulting from a disease outside the Second Schedule. LABOR DEPARTMENT, HONG KONG, A CONCISE GUIDE TO THE EMPLOYEES’ COMPENSATION ORDINANCE 5 (Feb. 2005 ed.). The Office accepts and the record tends to support, that appellant initially suffered a traumatic injury arising out of and in the course of his employment.

¹³ See generally *Lui Kwong Yan v Shui Hing Decoration Works & Anr.* [1993] 1 HKLR 168. For an injury not specified in the First Schedule, the Court of Appeal considered two possible percentage incapacities: 35 percent, taken from an injury specified in the First Schedule that was considered comparable to the employee’s incapacity, and 56.25 percent, taken from the employee’s pre- and post-accident earnings. The Court took neither approach to be decisive and settled on 50 percent.

¹⁴ In no case, states section 7(2), shall the amount payable under subsection (1) be less than the amount specified in the second column of the Sixth Schedule shown opposite section 7(2) specified in the first column of that schedule, *i.e.*, HK\$344,000 or US\$44,379.41 as of January 2, 2009.

is entitled to basic compensation for the disability, as provided by the schedule in subsection (c) of this section, at the rate of 66 2/3 percent of the employee's monthly pay."¹⁵ Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.¹⁶

The Office medical adviser reviewed Dr. Kwong's May 18, 2006 clinical findings, and rated impairment using strength deficits on manual muscle testing, but the A.M.A., *Guides* states:

"In general, this method is best used for pathology that does not have a primary neurologic basis, *e.g.*, a compartment syndrome or direct muscle trauma. Weakness caused by an identifiable motor deficit of a specific peripheral nerve should be assessed according to [s]ection 17.21, Peripheral Nerve Injuries."¹⁷

Because the Office accepted appellant's claim for a prolapsed disc at L4-5 and sciatica, left and because his orthopedist diagnosed residual left leg pain and weakness due to nerve root compression, the Board finds that the procedure for evaluating impairment due to peripheral nerve injury, set out in section 17.21 of the A.M.A., *Guides* beginning on page 550, is appropriate. The Office medical adviser should identify the nerve injured by appellant's prolapsed disc. Table 17-37, page 552, lists the maximum impairment of the lower extremity due to motor, sensor and dysesthesia deficits of the affected nerve and the medical record should reasonably allow the Office medical adviser to grade the severity of the motor and sensory deficits under Table 16-11, page 484 and Table 16-10, page 482. After calculating appellant's permanent physical impairment, the Office need only apply this percentage to section 8107(c)(2), which provides 288 weeks' compensation for the loss of a leg.¹⁸

On appeal, the Director of the Office argues that appellant is not entitled to monetary benefits under ECO. He makes three basic arguments. The Director submits that the Office properly adopted and applied the benefit features of ECO, but there is no listing in the First Schedule for loss of use of a limb due to a back and no listing in the Second Schedule for an injury to the back or a condition of the limbs resulting from an injury to the spine. The Board has already explained that ECO provides awards for injuries not listed in the appended schedules. The schedules are not exhaustive or exclusive. The injuries listed and the percentages specified therein are meant to serve as a guide to the assessment of incapacity caused by other injuries. This was not a proper basis to deny compensation under ECO.

¹⁵ A disabled employee with one or more dependents is entitled to have his basic compensation for disability augmented at the rate of 8 1/3 percent of his monthly pay if that compensation is payable under section 8107(a). 5 U.S.C. § 8110(b)(1).

¹⁶ 20 C.F.R. § 10.404.

¹⁷ A.M.A., *Guides* 531.

¹⁸ Partial losses are compensated proportionately. 5 U.S.C. § 8107(c)(19).

The Director also argues that appellant has no loss of earning capacity, as the record reflects that he returned to light duty with no loss of earnings until he resigned in May 2007. What the Director is doing, for the first time on appeal, is proffering an assessment of appellant's earning capacity, something the Office did not attempt in its July 13, 2007 decision, denying compensation. It will have an opportunity to make this assessment when the Board remands the case for further action. Its assessment will then be reviewable by this Board, which notes that retained pay, be it in a light-duty, sheltered, odd-lot or makeshift position, is but one factor to consider when determining an employee's capacity to earn wages in the open labor market.

The Director further argues that ECO provides no compensation for permanent impairment: "Although the ECO may provide for wage-loss benefits, even for permanent incapacity benefits, the Director submits that this is not relevant to the present case." The Director notes that, in making the determination of what benefits would be payable under the two compensation systems, a comparison of benefits payable should be made and since the only benefits appellant has claimed and which are potentially payable involve a claim for permanent partial impairment, that is the only relevant comparison.

It is not relevant whether ECO provides compensation for permanent physical impairment. The law requires the Office to adopt and apply the substantive features of ECO for the purpose of providing compensation on a basis reasonably in accord with prevailing local payments in similar cases. So if the local law provides awards for permanent partial incapacity, it must adopt and apply that law. Appellant's entitlement under section 8107 of the Act is an entirely separate matter and is irrelevant to the determination of his entitlement to benefits under section 9 of ECO.

The Director relies on an overly specific characterization of appellant's claim. Appellant did not claim compensation for "permanent physical impairment as such without regard to loss of earning capacity." He simply filed a claim for a schedule award, which was necessary to initiate the process. Appellant can just as easily be said to have claimed compensation for permanent impairment, without the additional disqualifying modifier the Director supplies and section 9 of ECO compensates injured employees for permanent impairment, albeit permanent impairment of earning capacity, as opposed to the somewhat narrower concept of permanent physical impairment, which may or may not affect earning capacity.

To parse the claim, as the Director does on appeal, is to deny, in the language of section 8137, the payment of compensation on a basis reasonably in accord with prevailing local payments in similar cases. The Director introduces a barrier to compensation not found in section 8137. There is nothing in section 8137 of the Act and nothing in the regulations implementing that section that limits the compensation payable under local law to the precise benefits payable under the Act. The only limitation is that "compensation for disability and death" shall in no event exceed that generally payable under the Act."¹⁹

¹⁹ 20 C.F.R. § 25.2. Office procedures, less authoritative, state that the Office must adopt, apart from benefit provisions dealing with money payment, provisions dealing with services and purposes forming an integral part of the local plan,

The Director cites the case of *Lusimba A. Rague*²⁰ which supports the Board's holding in the present matter. The employee, a Kenyan citizen, sustained a skull fracture and left leg nerve injury in the performance of duty. *Lusimba A. Rague* requested a schedule award. Schedule awards in Kenya were payable only for 100 percent loss of a scheduled member and the employee's loss was partial. The Board therefore found that he was not entitled to a schedule award under the special schedule provision of Kenyan law. Compensation was nonetheless payable for permanent loss of wage-earning capacity caused by a nonscheduled injury.²¹ Noting that the employee returned to his date-of-injury position two months after the injury without sustaining a permanent loss of wages, the Board found that the evidence did not substantiate a permanent loss of wage-earning capacity caused by the injury.

This represents the proper application of section 8137 of the Act. The employee's entitlement to compensation under local law is determined on a basis reasonably in accord with the local law, not by importing legal concepts applicable to the schedule awards payable under the Act. The Kenyan benefit scheme described in *Rague* parallels the benefit scheme in Hong Kong.²² The difference is that the Office in the present matter did not assess the permanent loss of earning capacity caused by the nonscheduled injury. As important as what the Board held in *Rague* is what the Board did not hold. The Board did not hold that the employee was entitled to no compensation because Kenyan law provided no schedule award for permanent physical impairment. The Board did not hold that the local provision for wage-loss benefits, even for permanent incapacity benefits, was irrelevant. To the contrary, the Board affirmed the denial of compensation because the employee was not entitled to compensation under the terms of the local law.

The Director's also refers to *A.G.*²³ Wherein the Board, in a nonmerit review, found that the claimant did not establish that the Office had erroneously applied or interpreted a specific point of law when it had earlier denied the employee's claim for a schedule award. The Office noted no provision in Bolivia's Pension Fund Law granting compensation for permanent partial impairment resulting from a work injury, only benefits for work-related disability. The Board affirmed the Office's denial of reconsideration, discussing the difference between disability and a schedule award under the Act and finding no local provision for schedule awards for permanent (physical) impairment. To the extent that *A.G.*, an unpublished decision, cannot be reconciled with the published case of *Lusimba A. Rague* or with section 8137 of the Act, it is hereby overturned.

²⁰ 51 ECAB 161 (1991).

²¹ Kenyan law defined loss of wage-earning capacity as the difference between the monthly earnings which the workman was earning at the time of the accident and the monthly earnings which he is earning or is capable of earning in some suitable employment or business after the accident.

²² Laws of Kenyan, the Act, Chapter 236, §. 8(1): "Where the permanent partial incapacity results from the injury, the amount of compensation shall be -- (a) in the case of an injury specified in the second schedule, such percentage of sixty months' earnings as is specified therein as being the percentage of the loss of earning capacity caused by that injury; and (b) in the case of an injury not specified in the second schedule, such percentage of sixty months earnings as is proportionate to the loss of earning capacity permanently caused by the injury."

²³ Docket No. 07-1209 (issued October 25, 2007).

To clarify, appellant is not making a claim directly under section 8107 of the Act. As a foreign national, he is making his claim through section 8137, which, together with regulations, requires the Office to adopt and apply the benefit structure of the local law. The Board will set aside the Office's July 13, 2007 decision, denying compensation and will remand the case for the Office to do just that, *i.e.*, to adopt and apply the benefit structure of the local law. After such further development of the evidence as may be necessary, it shall issue an appropriate final decision on appellant's claim for compensation.

CONCLUSION

The Board finds that the Office did not properly adopt and apply the benefit features of the Hong Kong workers' compensation ordinance when it denied appellant's claim for a schedule award. Further development of the evidence is warranted -- including an assessment of the percentage loss of earning capacity permanently caused by the employment injury -- to determine appellant's entitlement to compensation under section 8137.

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the National Operations Office (District 25)²⁴ for further action consistent with this opinion.

Issued: March 20, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge, dissenting:

I respectfully record this dissent from the majority opinion as I would affirm the July 13, 2007 decision of the Office.

²⁴ All claims from foreign nationals will be jacketed, adjudicated and paid in the National Operations Office (District 25). Federal (FECA) Procedure Manual, Part 4 -- Special Case Procedures, *Foreign National Claims*, Chapter 4.801.5 (September 1994).

Appellant sustained injury to his low back, accepted by the Office for a displaced disc at L4-5 with sciatica on the left side. He utilized sick leave and was reassigned to light-duty work as of December 2001. Appellant again utilized sick leave in 2005 for intermittent dates of disability.

In response to an inquiry from the employing establishment, on October 25, 2006 the Office advised that appellant would be entitled to continuing medical benefits for his accepted injury even if no longer employed by the Consulate provided he submit medical reports from an attending physician showing that care was for his work-related condition.¹ It noted that, under the Act, a claim could also be made for permanent impairment to a schedule member such as an arm or leg. However, as appellant was a citizen of another country, the Act provided that compensation would be paid according to local law or under the Act, whichever is less. The Office requested that the Consulate forward a copy of applicable local law in order to determine appellant's eligibility for a schedule award.

On December 15, 2005 appellant filed a CA-7 claim for a schedule award. On May 18, 2006 his attending physician advised that appellant had persistent pain with numbness running down his left buttock into his leg. He attributed appellant's symptoms to nerve root compression, rating the extent of impairment as 16 percent to the whole person. Appellant was found to have reached maximum medical improvement as of November 2005. Upon review, an Office medical adviser determined that appellant sustained 27 percent impairment to his left leg due to muscle weakness.

In response to the Office's request for additional information concerning the local workers' compensation laws, the Consulate advised on May 9, 2007 that as appellant was covered under the Act his occupational disease claim had not been reported to the Hong Kong Labor Department. In view of this, neither the Employees' Compensation Ordinary Assessment Board nor the Special Assessment Board had performed any evaluation of his disability. Therefore, appellant had not been issued a Certificate of Assessment. On July 11, 2007 the Consulate advised that the Office that appellant had resigned from his position of mail clerk as of May 25, 2007.

I find that the Office properly applied section 8137 of the Act in determining appellant's eligibility for schedule award compensation. Appellant clearly filed a claim under section 8107 for permanent impairment to his left leg following his accepted back injury.² As he is not a citizen or resident of the United States or Canada, the Office is required to assess appellant's claim for such benefits with reference to the local workers' compensation provisions pertaining to Hong Kong. If it determines that the amount of compensation payable to a noncitizen of the United States working outside the United States is substantially disproportionate to compensation paid in similar cases under local law, the Office may adopt the local worker's

¹ Appellant received reimbursement for medical expenses related to treatment of his accepted back condition.

² The record reflects that appellant utilized sick leave for periods of intermittent disability due to his back condition and never filed a claim for wage-loss benefits prior to his resignation from work on May 25, 2007. This is not an issue in the present appeal as the Office only adjudicated his claim for a schedule award under section 8107.

compensation provisions.³ Pursuant to the implementing federal regulations, it will determine compensation benefits pursuant to local law in situations where the employee is a nonresident, noncitizen of the United States or Canada and who is employed at the time of injury outside the continental United States or Canada and there has been no special schedule established for the particular locality.⁴ As the Office has not established any special schedule for appellant's locality pursuant to section 8137, it properly adjudicated appellant's schedule award claim with reference to the Employees' Compensation Ordinance of Hong Kong.

The Ordinance provides for the payment of compensation based on the loss of wage-earning capacity arising from cases of accident or occupational disease. Chapter 5 of the Ordinance provides that compensation for permanent total/partial incapacity resulting from a work injury varies with the employee's age at the time of the accident or occupational disease. Total permanent disability for work entitles an employee under 40-year-of-age, as was appellant, to a maximum of 96 months of earnings. Where disability is partial, the amount of compensation payable is proportionate to the loss of earning capacity caused by the injury.⁵ Under the Ordinance, an Employees' Compensation Assessment Board is appointed by the Hong Kong Commissioner of Labor to assess the percentage of the loss in earning-capacity caused by injuries. As noted the Consulate, appellant's injury was never reviewed by a local Assessment Board as he was covered under the Act. Further, I note that appellant never presented a claim for wage-loss disability or a loss of wage-earning capacity due to residuals of his accepted back injury. Rather, the record establishes that he continued to work and utilized sick leave to cover intermittent work stoppages until his resignation on May 25, 2007.

The majority relies on Chapter 7 of the Ordinance to direct that the Office further develop the schedule award claim, acting in the place of a Special Assessment Board.⁶ I find this to be a rather pointless exercise.

There are two schedules appended to the Employees' Compensation Ordinance. Under Appendix 1, certain *percentages of loss of earning capacity* are presumed to arise depending on the loss of defined bodily functions or members. (Emphasis added.) For example, loss of a leg at the hip is an 80 percent loss of wage-earning capacity. An immovable joint, such as knee ankylosis in the optimal position, is a 15 percent loss in earning capacity. There is, simply put, no provision under the Ordinance for the payment of compensation for permanent impairment to the back or for leg atrophy or muscle weakness as was found in the present appeal. Again, the

³ 5 U.S.C. § 8137(a).

⁴ 20 C.F.R. § 25.2(a).

⁵ If temporary incapacity lasts more than 24 months, a claimant may not be entitled to further periodic payments and shall be regarded as having suffered total or partial permanent incapacity.

⁶ The Ordinance notes that the Special Assessment Board makes an assessment of "the percentage of loss of earning capacity" with reference to such factors as the nature of injury, the employee's former usual employment, qualifications, previous training and experience. Again, the focus of the Ordinance is on factors which are determinative of a loss in wage-earning capacity and not permanent impairment. *Compare* 5 U.S.C. § 8115 and the statutory factors for determining wage-earning capacity under the Act.

Hong Kong Ordinance defines how certain injuries impact an employee's loss in wage-earning capacity.

Under Appendix 2, pertaining to occupational disease, explicit occupational diseases are listed as to their cause, the nature of the trade or industry in which the employee works and a prescribed period of compensation defined. For example, for a cramp of the hand or forearm due to repetitive movements in trades involving prolong periods of handwriting, typing or other repetitive movements; one year of compensation is allowed. Under this appendix, however, compensation is limited to bursitis or subcutaneous cellulitis arising at or about the knee due to severe or prolong external friction or pressure. There is no other reference to disease of the spine or leg. Although compensation is provided for instances of avian flu, poisoning or exposures to biological or chemical agents; there is no provision for compensation to the back or extending into the leg based on muscle weakness or atrophy due to sciatica.

In short, nothing under the Employees' Compensation Ordinance of Hong Kong provides for an award of permanent impairment extending from the back to a leg. Further, appellant has made no claim that he sustained any permanent loss of wage-earning capacity due to his injury. Rather, his correspondence with the Office has focused on reimbursement for certain medical expenses and, once so advised, his claim for a schedule award.

Moreover, I do not find that there is inconsistency in the Board's case law applying section 8137. In *Fu Ai-Loong Chow*,⁷ the employee was a citizen of the Republic of China and a resident of Taiwan who died in an employment-related motor vehicle accident. A claim for death benefits was brought by his widow and minor children. The Office, pursuant to Taiwan law, granted 37 months of wages as death benefits and 3 months of wages for burial allowance. On appeal, the widow contended that the award was insufficient to meet the surviving family's financial needs. The Board affirmed the determination of the Office, noting that under section 8137 it properly awarded the maximum amount allowable as determined by local law.⁸

In *Yun K. Choe*,⁹ the employee fractured his left leg while in the performance of duty. The Office computed his entitlement to compensation for permanent impairment under the Act and the local Korean Labor Standard Act. It determined that under section 8107 the employee was entitled to an award of \$6,949.95 and, under the Korean schedule, he was entitled to an award of \$6,581.40. Pursuant to section 8137, the lesser amount was awarded. The Board affirmed the Office's application of section 8137 and the implementing federal regulations.¹⁰ This case is distinguishable from the facts in the present appeal as the Hong Kong compensation laws do not provide any award for impairment extending from the back into the leg.

⁷ 23 ECAB 229 (1972).

⁸ *Accord Tomi Tamashiro*, 23 ECAB 96 (1971); *Hisako Fukuhara*, 23 ECAB 92 (1971) (applying Okinawa law to determine the death benefits and burial allowances payable).

⁹ 49 ECAB 331 (1998).

¹⁰ *See also Mu-Hyang Ku*, 39 ECAB 217 (1987) (applying the Korean Labor Standard Act in granting an award of death benefits).

In *Lusimba A. Rague*,¹¹ the employee was a citizen of Kenya, who was involved in a motor vehicle accident sustaining a skull fracture and left leg nerve injury. The Office denied his request for a schedule award for permanent impairment of the leg, finding that there was no provision under local Kenyan law for a partial impairment award. The Board found that the Office properly applied section 8137 in denying a schedule award. Under the Kenyan compensation system, schedule awards were payable only for 100 percent loss of a schedule member. As the medical evidence established that the employee had 23 percent impairment to his left leg, he was not entitled to an award under local law. The Board, in passing, noted that the employee had returned to work and had not sustained any permanent loss in wage-earning capacity due to his injuries. As noted, the Hong Kong statute does not provide for permanent impairment of the back extending into a leg based on sciatica.¹²

The impairment sustained by appellant is not cognizable under the Hong Kong Employees' Compensation Ordinance. I would affirm the July 13, 2007 decision of the Office denying his claim for a schedule award.

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹¹ *Lusimba A. Rague* 51 ECAB 161 (1999).

¹² In *A.G.*, Docket No. 07-1209 (issued October 25, 2007) the Board affirmed an Office decision denying appellant's request for reconsideration of a schedule award. The Board noted that there was no provision for a schedule award under Bolivian workers' compensation law such that the employee did not establish an error of law in the denial of her claim.