

8.4 CONFLICTS BETWEEN APPLICABLE SECTIONS

20 C.F.R. § 702.336 provides that the formal hearing may be expanded to include a new issue **provided** that the parties are afforded a reasonable amount of time within which to prepare for the new issue. When the new issue arises from evidence that has not been considered by the district director, and such evidence is likely to resolve the case without the need for a formal hearing, the judge may remand the case to the district director for his or her evaluation and recommendation pursuant to 20 C.F.R. § 702.316.

This provision is especially important in those cases wherein only temporary benefits are discussed at the informal conference and then, just before the formal hearing, the claimant modifies his claim and attempts to seek permanent benefits. There may be a problem if the case potentially could involve Section 8(f), as Section 8(f) was neither raised before the district director nor discussed at the informal conference. In such case, the ALJ may wish to remand the claim to give the district director the opportunity to consider the applicability of Section 8(f) based on such recently-developed evidence.

Specialized regulations address Section 8(f) in this regard. See 20 C.F.R. 702.321(b)(ii):

Where the issue of permanency is first raised at the informal conference and could not have reasonably been anticipated by the parties prior to the conference, the district director shall adjourn the conference and establish the date by which the fully documented application must be submitted and so notify the employer/carrier. "The date shall be set by the district director after reviewing the circumstances of the case.

8.4.1 **Unscheduled Injuries and Total Disability**

Unscheduled permanent partial disability benefits are computed under Section 8(c)(21) by subtracting post-injury wage-earning capacity from the average weekly wage at the time of injury. Post-injury wage-earning capacity is set by Section 8(h) at the claimant's actual post-injury earnings, if fair and reasonable; if not, the ALJ shall fix a fair and reasonable wage-earning capacity pursuant to the factors listed in Section 8(h) and pertinent cases. See generally Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649 (1979).

8.4.2 **Permanent Partial v. Permanent Total**

It is now well-settled that a worker entitled to permanent partial disability for an injury arising under the schedule provisions of the LHWCA may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. Potomac Elec. Power Co. v. Director, OWCP, 449 U.S. 268, 277 n.17, 14 BRBS 363, 366-67 n.17 (1980) (herein, "PEPCO"); Davenport v. Daytona Marine & Boat Works, 16 BRBS 196, 199 (1984). Unless the worker is **totally disabled**, however, he is limited to the compensation provided by the appropriate schedule provision. Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172 (1984).

Where there is an injury to two separate scheduled body parts, the respective disabilities must be compensated under the schedules, in the absence of a showing of a total disability. The claimant is precluded from (1) establishing a greater loss of wage-earning capacity than that presumed by the LHWCA, or (2) receiving compensation benefits under Section 8(c)(21). Since the claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portions of Sections 8(c)(1)-(20), with the awards running consecutively. PEPCO, 449 U.S. 268. In Brandt v. Avondale Shipyards, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

A schedule injury followed by a subsequent injury is not an independent or intervening event which entitles the claimant to more than the benefits provided by the schedule. Hicks v. Pacific Marine & Supply Co., 14 BRBS 549 (1981). In Hicks, the claimant injured his right knee twice in work-related injuries. As an automobile accident directly resulting from the collapse of his weakened right knee did not constitute an independent and intervening event, the claimant was not limited to the benefits provided by Sections 8(c)(2) and (18). He could be awarded permanent total disability benefits since he could no longer perform his prior job (unless the employer demonstrated the availability of suitable alternate employment). Hicks, 14 BRBS at 556, 559. See also PEPCO, 449 U.S. 268; Jacksonville Shipyards v. Dugger, 587 F.2d 197, 9 BRBS 460 (5th Cir. 1979).

Where the employee's settlement was for a permanent partial disability resulting from a back injury while working for a prior employer and where the employee became permanently and totally disabled as a result of a new back injury while working for another employer, this later employer is not entitled to a credit for the amount received in the settlement (\$20,000.00) with the prior employer. ITO Corp. of Baltimore v. Director, OWCP (Aples), 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989) (employee had sustained a new injury and Section 3(e) applies only to payments made under a state compensation statute or the Jones Act **for the same injury or disability**; moreover, the prior settlement was approved by the deputy commissioner under the LHWCA).

Where the claimant's work accident resulted in injuries to his left arm (total loss of use), his right arm (40 percent loss of use), and his left leg (30 percent loss of use), and where three physicians issued different impairment ratings, the Board affirmed the judge's acceptance of the ratings opined by one physician and the Board rejected the employer's argument that the awards should be amended to conform with the reports of two doctors who arrived at lower percentages. Wright v. Superior Boat Works, 16 BRBS 17, 19 (1983). Moreover, an additional and concurrent award for disfigurement of the hands, pursuant to Section 8(c)(20), does not constitute impermissible double recovery under the LHWCA. Wright, 16 BRBS at 20.

In a matter of first impression, the Board has held that where a claimant suffers two distinct injuries, a scheduled injury and a nonscheduled injury arising from a single accident or multiple accidents, the claimant may be entitled to receive compensation under both the schedule and 8(c)(21), depending upon whether the claimant's condition is the natural consequence of his work-

related ankle injury or constituted a separate and distinct injury. Frye v. Potomac Elec. Power Co., 21 BRBS 194 (1988).

Expanding its holding in Frye, the Board found that there is no danger of double recovery, however, if claimant's shoulder injury [§ 8(c)(21) injury] alone could cause the entire loss in wage-earning capacity since claimant' is entitled to benefits for the full loss in wage-earning capacity due to his shoulder impairment irrespective of the effect of his ankle injury [scheduled injury] on his loss in wage-earning capacity. Green v. I.T.O. Corporation of Baltimore, 32 BRBS 67 (1998), **reversed** at 185 F.3d 239 (4th Cir. 1999). The Board had reasoned that "it was not the combined effects of the disabling shoulder injury and the "equally" partially disabling ankle injury which caused the loss in wage-earning capacity; rather each injury on its own resulted in disability unaffected by the other. Consequently, as the loss in wage-earning capacity due to claimant's ankle injury does not affect the degree of disability due to the shoulder injury alone, claimant would not be receiving a double recovery for the same disability if he were fully compensated under both Section 8(c)(21) and the schedule at Section 8(c)(4)."

However, on appeal, the **Fourth Circuit** noted that "In no case should the rate of compensation for a partial disability, or combination of partial disabilities, exceed that payable to the claimant in the event of total disability. To hold otherwise would be to conclude that the whole may be less than the sum of its parts, and we are fairly certain that –although our authority extends to a myriad of matters—we are without jurisdiction to repeal the laws of mathematics." To support its position, the **Fourth Circuit** analogized to Section 8(c)(17) which deals with loss of digits or phalanges. The **Fourth Circuit's** solution was to pay the claimant for his Section 8(c)(21) injury at the "regular" rate and to allow the scheduled injury benefits to be added only up to the maximum which the claimant could receive weekly had he suffered a permanent total disability. This in effect lengthens the period for which the claimant receives his scheduled disability, although it reduces the weekly payments.

Subsequently, in Padilla v. San Pedro Boat Works, 34 BRBS 49 (2000), the Board approved of the **Fourth Circuit's** reasoning in Green. It reasoned that under Brady-Hamilton Stevedore Co. v. Director, OWCP, 58 F.3d 419, 29 BRBS 101 (CRT) (9th Cir. 1995), an ALJ can make "whatever adjustments" are necessary to prevent overpayment, and since Green is the only authority on calculating concurrent Section 8(c)(21) and schedule awards for permanent partial disability, and as the method established in Green complies with Brady-Hamilton, the ALJ's adjustments to the awards based on Green were reasonable.

***[ED. NOTE:** In Padilla, in order not to exceed the statutory maximum weekly benefit of 66 2/3 percent of the claimant's average weekly wage, the ALJ had ordered the employer to pay the benefits under the schedule at a portion of the claimant's compensation rate until they were paid in full. The employer had argued that an award of benefits under the schedule for a period of more weeks than the schedule indicated was contrary to the LHWCA since the LHWCA requires full payment of benefits over the period of time mandated in the schedule. (Employer had suggested establishing a method whereby the scheduled award is paid first and in full, and payment of the unscheduled*

award commences thereafter.) Interestingly, the **Director**, who previously promoted the employer's position in Green, **declined to express an opinion** in Padilla stating that he was "in the process" of reconsidering his statutory construction in light of the **Fourth Circuit's** decision.]

The Board, in Frye, overruled Conde v. Interocean Stevedoring Inc., 11 BRBS 850 (1980) to the extent it is inconsistent with Frye. In Conde, which was decided prior to Potomac Electric Power Co. v. Director, OWCP, (PEPCO), 449 U.S. 268 (1980), the Board indicated that where there are injuries to scheduled and unscheduled body parts arising out of the same industrial accident, concurrent scheduled and unscheduled awards are not proper. The Conde Board had held that the claimant's compensation should be under 33 U.S.C. § 908(c)(21), noting that compensation for loss of wage-earning capacity encompasses all injuries caused by the same accident. The **United States Supreme Court** subsequently held in PEPCO that where the claimant's disability is covered under the schedule, he may not elect to receive compensation under Section 8(c)(21). The **Court** noted, however, that in rendering its decision, the case before it concerned solely a scheduled injury limited in effect to the scheduled body part. PEPCO, 449 U.S. at 279, 280 n.20.

Where a claimant suffers both a scheduled injury and a non-scheduled injury from the separate work accidents, the claimant is entitled to both a scheduled award and a Section 8(c)(21) non-scheduled award. Turney v. Bethlehem Steel Corp., 17 BRBS 232 (1985) (judge erred in awarding only permanent partial disability benefits under Section 8(c)(21) where claimant sustained knee and back injuries arising from two separate work accidents). In Turney, the Board remanded the case to the judge, noting that PEPCO 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 judge must factor out any loss in wage-earning capacity due to the knee injury. Id. at 234-35. The Board relied upon the fact that two separate work-related accidents were involved to distinguish the case from its holding in Conde.

In order to prevent double recoveries by claimants and hardships to employers, the Board and the **Fifth Circuit** have applied the **credit doctrine**, holding that in cases under the schedule where the claimant has a prior injury which has already been compensated under the LHWCA and a subsequent injury results in increased disability to the scheduled body part, the employer is only liable for the increased liability. Clark v. Todd Shipyards Corp., 20 BRBS 30, 31 (1987), aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP, 848 F.2d 125, 21 BRBS 114 (CRT) (**9th Cir.** 1988); Brown v. Bethlehem Steel Corp., 19 BRBS 200, on recon., 20 BRBS 26 (1987), aff'd in pertinent part sub nom. Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47 (CRT) (**5th Cir.** 1989).

8.4.3 Concurrent Awards of Permanent Disability

The Board has held that "[w]here a claimant sustains an injury which results in an award of permanent partial disability and subsequently suffers a second injury which results in a permanent total disability, he may receive concurrent awards for the two disabilities." However, "[t]he

concurrent awards combined cannot exceed the 66 2/3 percent of the average weekly wage maximum of Section 8(a).” Hansen v. Container Stevedoring Co., 31 BRBS 155 (1997).

Although in some cases it may be appropriate to have two awards run concurrently in order to compensate fully a claimant who has had successive injuries, each resulting in some loss in wage-earning capacity, the second injury must produce a demonstrated loss in wage-earning capacity. Kooley v. Marine Indus. N.W., 22 BRBS 142 (1989) (this case involves a second injury due to an aggravation of the same part of the body as the first injury but the employee received an award of permanent total disability based upon the aggravation doctrine encompassing the employee's entire loss of wage-earning capacity resulting from the combination of the 1980 and 1983 injuries).

Compare Murphy v. Pro-Football, Inc., 24 BRBS 187 (1991), wherein the claimant, a professional football player for the **Washington Redskins**, had sustained injuries to his shoulders, neck, and back between 1977 and July 1985. In Murphy, the judge awarded the claimant permanent partial disability compensation for the 2.4 years representing the curtailment of his football career, based upon a weekly loss of wage-earning capacity of \$3,826.00, and permanent partial disability compensation based upon a four percent prospective loss of wage-earning capacity thereafter in his post-football career. The judge awarded the four percent compensation "although claimant had no present diminution in wage-earning capacity as a result of the injuries" as "he is likely to lose wages in the future."

The Board reversed the four percent *de minimis* award and, as such awards are sanctioned by the **District of Columbia Circuit**, the Board reduced that award to one percent solely "to preserve claimant's right to seek modification in the future pursuant to Section 22 of the Act should he suffer an actual loss in wage-earning capacity." Murphy, 24 BRBS at 192.

In Davenport v. Apex Decorating Co., 18 BRBS 194 (1986), the Board affirmed concurrent permanent partial disability awards. These awards were 28.8 weeks of permanent partial disability compensation for 10 percent disability of the left knee and 14.4 weeks for 5 percent disability of the right hip. After a November 1976 examination, the claimant's condition was stable enough to be rated again; this time, 43.2 weeks for a 15 percent increase in disability to the left knee and 129.6 weeks for a 45 percent increase to the right hip.

[ED. NOTE: If shoulders are not compensable under the schedule, are hips? See Grimes v. Exxon Co., U.S.A., 14 BRBS 573 (1981).]

The claimant had argued that the second set of permanent partial awards should begin after payment of the first set, and payments therefore would not be cut off by the 1978 temporary total award. The Board rejected this contention. A scheduled award commences on the date the partial disability is "permanent," which has been defined as the date of maximum medical improvement. Trask v. Lockheed Shipbuilding & Constr. Co., 17 BRBS 56 (1985).

The Board noted that a physician had found the claimant's condition to be sufficiently stable to rate the claimant's disability in 1971, opining that the claimant had reached maximum medical improvement at that time. "Permanent" does not mean "unchanging." See Watson v. Gulf Stevedore Corp., 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969); Vogle v. Sealand Terminal, 17 BRBS 126, 130 n.9 (1985).

As the Board noted, the claimant's condition proceeded to deteriorate, and the judge found that it was next stabilized on November 19, 1976. The concurrent permanent partial disability awards were cut off on January 10, 1978, however, at which point the judge awarded temporary total benefits for five months and then a continuing award of permanent total benefits.

8.4.4 Multiple Scheduled Injuries/Successive Injuries

Contingent awards and consecutive awards are **not** precluded by the LHWCA. Sablowski v. General Dynamics Corp./Elec. Boat Div., 10 BRBS 1033, 1036 (1979) (the parties' agreement whereby claimant, after his benefits for temporary total end, would be paid an additional lump sum of \$1,900.00, plus medical expenses, for his work-related hearing loss, is not precluded by the LHWCA as Section 8(c)(22) provides for consecutive awards under the schedule and as claimant cannot receive permanent partial disability benefits **while** he is receiving temporary total disability compensation).

The Board has consistently held that **two separate scheduled disabilities** must be compensated under the pertinent schedules in the absence of a showing of a total disability, and has precluded the claimant from establishing a greater loss of wage-earning capacity than that presumed by the LHWCA, or to otherwise receive compensation under Section 8(c)(21), citing PEPCO. Since the claimant suffered injuries to more than one member covered by the schedule, the claimant must be compensated under the applicable portion of Sections 8(c)(1)-(20), based on the unambiguous language of Section 22 of the LHWCA. See, e.g., Brandt v. Avondale Shipyards, 16 BRBS 120 (1984) (the employee had sustained injuries to his right knee and his left index finger in separate work accidents and the Board affirmed awards pursuant to Sections 8(c)(2), (7), (19), and (22)).

In Matson Terminals, Inc. v. Berg, 279 F.3d 694 (9th Cir. 2002) the multi-scheduled injury issue once again was raised in the context of Section 8(f). Here both of a claimant's knees were injured in one accident. The **Ninth Circuit** noted that Section 8(c)(22) indicates that there should be two liability periods and that since the claimant's two knees were discrete injuries under Section 8(f), there should be two 104-week liability periods on the employer. "It is irrelevant that the injuries arose from the same working conditions or that they arose from a single cause or trauma. What is relevant is that the working conditions caused two injuries, each separately compensable under Section 8(f)."

Where one accident causes injury to a larger member and impairs a smaller, connected member, the judge should issue one disability award. Mason v. Baltimore Stevedoring Co., 22 BRBS 413, 416-17 (1989) (Where injury occurred to an arm and impaired the hand, the judge cannot issue separate permanent partial disability awards for claimant's arm and hand and, according to the Board, should award permanent partial disability benefits for the 50 percent loss of use of his arm. Furthermore, an injury to the arm below the elbow is compensated pursuant to Section 8(c)(1). Moreover, Section 8(c)(22), providing awards for each member, did not apply, as claimant's disability resulted from one accident.).

As noted previously, under the schedule where the claimant has a prior injury which has already been compensated, and a subsequent injury results in increased disability to the scheduled body part, the employer is only liable for the increased disability; otherwise, double recovery to the claimant would result. Brown v. Bethlehem Steel, 19 BRBS 200 (1987).

This **credit doctrine** has been applied by the Board as a limit on the **aggravation rule** requiring an employer to compensate its employees for the combination of current injuries and prior injuries. Bracey v. John T. Clark & Son, 12 BRBS 110, 112 (1980).

In Bracey, in 1979 an employee sustained a left leg and left knee injury in the course of his employment. The employer voluntarily paid temporary total disability benefits and, thereafter, permanent partial disability benefits based upon a 20 percent disability of the left leg rating rendered by his physician. The award was based upon the claimant's 1979 average weekly wage. The claimant returned to his regular employment at the end of 1981. Approximately four months later, he reinjured his left knee in the course of his employment and the employer voluntarily paid benefits while he was unable to work. The claimant underwent surgery in 1982 and 1983. The claimant's 1982 injury increased his left leg disability by an additional 10 percent, resulting in an award of 30 percent disability for the 1982 injury. This award was based upon his 1982 average weekly wage. As a result of both injuries, the claimant had experienced a total of 50 percent permanent partial loss of use of his left leg.

The Board, in reviewing the record on appeal, held that the employer is entitled to a credit for the payment of compensation it made for the claimant's 1979 injury. The **Fifth Circuit** has also approved the Board's application of the credit doctrine to prevent excessive recoveries by claimants and hardships to employers. See Strachan Shipping Co. v. Nash, 782 F.2d 513, 18 BRBS 45 (CRT) (**5th Cir.** 1986) (rehearing en banc), aff'g 15 BRBS 386 (1983); Brown v. Bethlehem Steel Corp., 19 BRBS 200, 203 (1987).

In Brown, the Board, citing Nash, held that as a result of the second injury the claimant was entitled to an award for 50 percent loss of use of the leg, pursuant to the aggravation rule. The Board also held that the employer's credit should be based on the **actual** amount of compensation paid, rather than the percentage due, as "crediting the actual amount paid best furthers the purposes of the LHWCA. This method is most consistent with the aggravation rule and the compensation scheme created in applying its principles." Brown, 19 BRBS at 204. The Board affirmed the employer's

liability for 104 weeks of permanent partial benefits, with the Special Fund being responsible for the remaining 40 weeks based upon claimant's 1982 average weekly wage. Brown, 19 BRBS at 205.

The Director timely moved for reconsideration on the grounds that the employer, in being allowed a credit for the prior payment and the benefit of Section 8(f) relief, has been allowed a double-recovery or a windfall. The Director pointed out that the employer thus would be paying only 46.4 weeks of compensation for the second injury, or only slightly more than one-half of its liability therefor.

The Board granted the Director's motion to consider "the novel issue of how to apply both the credit doctrine and Section 8(f) in the same case." The Board rejected the Director's argument, however, because "(a)llowing employer the full benefit of Section 8(f) in the situation presented by this case similarly encourages employers to retain handicapped employees." Moreover, according to the Board, "If the Director's method were [sic] used, Section 8(f) would never apply in cases of successive scheduled injuries, and employers would have no incentive to retain handicapped employees whose existing disabilities predispose them to further injury. Our decision in this case serves the dual purpose of avoiding a double recovery to claimant while rewarding employer for continuing to employ claimant." Brown v. Bethlehem Steel Corp., 20 BRBS 26, 28-29 (1987) (Decision and Order on Reconsideration).

The Director and the employer appealed and the **Fifth Circuit** held that where an injury falling within the provisions of Sections 8(c)(1) to 8(c)(20) materially increases a pre-existing permanent partial disability of an employee and where the compensation due the employee on account of that subsequent injury alone exceeds 104 weeks of compensation, then whenever a credit for previous compensation paid is available to offset the amount due the employee, that credit shall first reduce the total award before there is any allocation of liabilities under Sections 8(f)(1) and 8(f)(2). Accordingly, as the Board's decision to allow employer the benefits of the credit after allocating liabilities pursuant to Section 8(f) was erroneous as a matter of law, it was reversed by the court. Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47 (CRT) (**5th Cir.** 1989).

The **Fifth Circuit** also held that in determining the credit to be allowed against the total award, the amount of the credit shall be the actual dollar amount of payment that was previously made and not an amount based on the percentage of injury for which the claimant was previously compensated. Accordingly, the Board's decision with respect to the amount of credit was affirmed. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47 (CRT). In this case, the **Fifth Circuit** promulgated the so-called "**Special Fund First Rule**" in determining entitlement to the credit for the prior payment.

Work-related accident/injury followed by a non-work-related accident/injury

In Kelaita v. Triple A Machine Shop, 17 BRBS 10, 13 (1984), *aff'd sub nom.* Kelaita v. Director, OWCP, 799 F.2d 1308 (**9th Cir.** 1986), the employee sustained a shoulder injury in

November 1974 while employed as a machinist by Triple A. He then left that company and went to work for General Engineering. The claimant apparently pressed the claim only against the first employer and the judge denied benefits, concluding that the claimant's shoulder was aggravated by his employment at his later employer based on the similarities of work conditions and the physicians' opinions that the claimant's **intermittent flare-ups** of shoulder pain at both employers were **cumulative trauma**. The Board affirmed the denial of benefits because the second employer had apparently been dismissed from the proceeding, a dismissal which was not appealed, and because the Office of Administrative Law Judges had no jurisdiction over the second employer.

In Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991), the Board was faced with the issue as to whether the claimant's disability resulted from a 1985 work accident or a 1987 non-work-related incident while bending over doing yard work. The resolution of this issue was crucial as it affected, inter alia, the average weekly wage and the employer's responsibility. If the current disability is the natural and unavoidable consequence of a work-related injury, then any current disability is related to the first injury and benefits are paid on the basis of the average weekly wage as of the time of the first injury. See, e.g., Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954) (second leg injury at home due to leg instability resulting from the first work-related leg injury); Pakech v. Atlantic & Gulf Stevedores, 12 BRBS 47 (1980) (where claimant's back gave way both at home while rising from a chair and on the job with another employer one year after a work injury, the condition was the result of a natural progression of the work injury).

Occasionally, the Board will frame the employer's burden, in this context, in terms of having to rebut the presumption with substantial countervailing evidence. See, e.g., Merrill, 25 BRBS at 144, wherein the Board held that:

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, supra. Employer is

liable for the entire disability if the 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).

The medical evidence submitted by the parties should enable the judge to determine whether any disability is the natural and unavoidable result of a prior injury or is due to the acceleration, aggravation, or exacerbation of a pre-existing condition, in which case the employee has sustained a new and discrete injury.

The credit doctrine applies only to compensation actually received by an injured worker. Nash v. Strachan Shipping Co., 15 BRBS 386 (1983). In Nash, the employee suffered successive injuries to his leg, a member of the body specifically covered by the LHWCA's schedule provisions. The first injury was a nonemployment-related injury resulting in a 20 percent permanent partial disability to the employee's leg. The second injury occurred while he was employed by Chapparral Stevedoring, a maritime employer under the LHWCA. This injury resulted in an additional 10 percent disability to the leg. Chapparral paid compensation only for this 10 percent disability to the leg resulting from the second injury. The employee then received a third injury while employed by Strachan Shipping, a maritime employer under the LHWCA, an injury that caused an additional 4 percent permanent partial disability to the same member.

This third injury was the focus of the dispute in Nash. At issue was whether Strachan was entitled to a credit for the disability to Nash's leg that he had following the Chaparral injury (30 percent) or the disability for which Chapparral actually paid compensation (10 percent). The Board held that Strachan was entitled to a credit only for the 10 percent disability for which Nash was actually compensated. Nash, 15 BRBS at 390-91.

Upon appeal, a **Fifth Circuit** panel, by a 2-1 vote, reversed the Board's holding that Strachan must pay benefits for the employee's pre-existing disability, despite his receipt of compensation under the LHWCA, for the intervening or second injury which caused 10 percent disability and the court held that Strachan's liability extended only to the 4 percent permanent partial disability that arose from the employee's longshoring work injury with Strachan because the credit doctrine reduced Strachan's liability by thirty (30) percent. Thus, the court held that, under the well-settled aggravation doctrine, the employee's compensation for his second-but-first work-related injury should have also included benefits for his 20 percent pre-existing disability for a total of 30 percent for the first two injuries. Strachan Shipping Co. v. Nash, 751 F.2d 1460, 17 BRBS 29 (CRT) (**5th Cir.** 1985), on reh'g, en banc, 782 F.2d 513 (**5th Cir.** 1986).

Upon en banc review, the **Fifth Circuit** reversed and, in a decision written by Circuit Judge Sam D. Johnson, the dissenting judge in the panel decision, upheld the Board's decision interpreting the credit doctrine to apply only to compensation **actually received** by an injured worker. The court held that the Board's interpretation of the aggravation rule and the credit doctrine was consistent with

the LHWCA and the court's interpretation of the LHWCA which (1) attempted to provide the employee with a single complete recovery; (2) prevented double recoveries; and (3) promoted the policies and rules of construction of the LHWCA. Strachan Shipping Co. v. Nash, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc).

In Hastings v. Earth Satellite Corp., 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), cert. denied, 449 U.S. 905 (1980), the **District of Columbia Circuit** allowed concurrent recovery for permanent partial disability and permanent total disability payments, since the permanent partial award compensated the worker's reduced earning capacity caused by the first injury and the permanent total award was based on the worker's wage at the time of the second injury. In Hastings, the employee suffered a stroke due to job stress. After a period of convalescence, he returned to part-time work and his salary was pro-rated for the amount of time he actually worked. Because the employee was limited in the amount of work he could do, he was permanently and partially disabled. Two years later, he was hospitalized for treatment of right leg phlebitis and pulmonary emboli and he became permanently totally disabled as the treating physician advised him not to return to work.

The claimant's average weekly wages at the time of the second injury, upon which the award of permanent total disability was based under Section 10, already reflected the diminished earning capacity resulting from the previous injury. The award for the permanent partial disability should not have terminated even though he later became permanently totally disabled. Hastings, 14 BRBS at 352 (CRT).

Upon appeal, the **District of Columbia Circuit** allowed concurrent recovery for the permanent partial disability and the permanent total disability payments. According to the court, "Because compensation for his original loss of earning capacity was already addressed in the permanent-partial award, logic and fairness require that the permanent-partial disability award continue concurrently with the permanent-total award. ... Paying the two awards concurrently, however, compensates him fully." Hastings, 14 BRBS at 350 (CRT).

See also Finch v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 196, 200 (1989), wherein, the Board concluded that where a claimant sustains an injury which results in a permanent partial disability award pursuant to 33 U.S.C. § 908(c)(21), and subsequently suffers a second injury which results in a permanent total disability, he may receive concurrent awards for the two disabilities. Hastings v. Earth Satellite Corp., 14 BRBS 345; Morgan v. Marine Corps Exchange, 14 BRBS 784 (1982), aff'd mem. sub nom. Marine Corps Exch. v. Director, OWCP, 718 F.2d 1111 (9th Cir. 1983), cert. denied, 465 U.S. 1012 (1984). The concurrent awards must be calculated, however, so as to avoid the double recovery of benefits.

Although the Board has recognized that double recovery may be prevented by adjusting the claimant's average weekly wage at the time of the second injury to correspond with his residual wage-earning capacity following the first injury, Crum v. General Adjustment Bureau, 16 BRBS 101 (1983), aff'd in part and rev'd and remanded in part on other grounds, 738 F.2d 474, 16 BRBS 115 (CRT) (D.C. Cir. 1984), both the Board and the **District of Columbia Circuit** have also recognized

that the second award should be based on the claimant's average weekly wage "at the time of the second injury" and that an adjustment may be made to the initial award of benefits pursuant to the modification procedures set forth under Section 22 of the LHWCA. See Hastings, 14 BRBS at 354 n.30; Morgan, 14 BRBS at 791. Accord Lopez v. Southern Stevedores, 23 BRBS 295, 299 (1990); Wilson v. Matson Terminals, 21 BRBS 105 (1988).

In Hoey v. Owens-Corning Fiberglas Corp., 23 BRBS 71 (1989), however, the employee had received a lump sum settlement for his permanent total disability due to asbestosis. The Board affirmed the judge's denial of compensation benefits for his subsequent employment-related stomach cancer, as he could not establish any additional loss of wage-earning capacity since the settlement award presupposed a permanent loss of all wage-earning capacity. The Board held that the Claimant was entitled to medical expenses due to his stomach cancer.

8.4.5 Permanent Total v. Permanent Partial Disability

In Bouchard v. General Dynamics Corp., 14 BRBS 839 (1982), petition for review denied, 963 F.2d 541, 25 BRBS 152 (CRT) (2d Cir. 1992), the employee's occupational hearing loss was diagnosed almost seven months after he became permanently and totally disabled as a result of a work-related back injury.

The Board has consistently held that a so-called schedule loss under the LHWCA may not coexist with an award of permanent total disability. Thus, where the claimant's diagnosis, last exposure to the occupational harm, and date of manifestation occur at or after the time that the claimant became permanently totally disabled, the claimant is not entitled to additional benefits for his Section 8(c)(13) occupational hearing loss. Bouchard, 14 BRBS at 842. The fact that claimant filed his permanent partial disability claim before his permanent total disability claim was not relevant where he failed to establish that the date of injury for the hearing loss had occurred prior to the actual onset of his permanent total disability. Mahar v. Todd Shipyards Corp., 13 BRBS 603, 606 (1981).

In cases where the claimant sustains two injuries, one of which is permanently totally disabling and the other which would result in a scheduled permanent partial award, the claimant can receive permanent partial disability benefits only where the claimant is able to show that the permanent partially disabling injury occurred **prior** to the onset of permanent total disability. Where the claimant sustains a prior permanent partial disability compensable under the schedule, the claimant can receive benefits for the period of time, if any, between the permanent partially disabling injury and the onset of the permanent total disability. Tisdale v. Owens-Corning Fiber Glass Co., 13 BRBS 167 (1981), aff'd sub nom. Tisdale v. Director, OWCP, 698 F.2d 1233 (9th Cir. 1982), cert. denied, 462 U.S. 1106 (1983).

In Tisdale, the Board pointed out that an award under the LHWCA's schedule provisions, Sections 8(c)(1)-(20), is applicable only to cases of permanent partial disability. "The mandatory language in Section 8(c), that an employee 'shall be paid,' means that a schedule award shall be paid,

provided the employee is not already receiving the maximum amount of compensation payable under the LHWCA for a disability that is both total and permanent." Tisdale, 13 BRBS at 171.

According to the Board, "Allowing an additional schedule award would run counter to the wage compensation principles of the LHWCA by applying a tort principle." Id. Moreover, the LHWCA does not purport to provide complete compensation for the employee's economic loss, Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268, 273, 14 BRBS 363, 368 (1980), as the maximum compensation to which the employee may be entitled is expressly designated to be less than the employee's actual economic loss. Id. at 273 n.23, 14 BRBS at 368 n.23. Accord Korineck v. General Dynamics Corp. Elec. Boat Div., 835 F.2d 42, 20 BRBS 63 (CRT) (2d Cir. 1987); Byrd v. J.F. Shea Constr. Co., 18 BRBS 48 (1986).

In Scurlock v. Parr-Richmond Terminal Co., 6 BRBS 634 (1977), the Board reversed an award for the claimant's permanent partial loss of use of his right leg from a knee injury, as the award did not account for the possibility that part of that loss may be attributable to an earlier disabling injury to that knee for which the claimant has already received compensation. Thus, the Board remanded the claim to the judge to determine the extent of any disability from such earlier injury and then to recompute the extent of disability from the injury for which the claim was awarded. Scurlock, 6 BRBS at 640-41.

Where the diagnostic tests were negative and where the claimant's treating physician was unable to explain the claimant's continuing complaints of pain on an orthopedic basis, the Board affirmed the judge's conclusions that the claimant had no impairment to his shoulder, that he was only partially disabled, and that his recovery was limited to the schedule provisions of Section 8(c)(1). Rivera v. United Masonry, 24 BRBS 78 (1990), affd., 948 F.2d 774, 25 BRBS 51(CRT) (D.C. Cir. 1991).