BRB No. 99-1221A

WERNER BERG	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MATSON TERMINALS, INCORPORATED	)	DATE ISSUED: Aug. 29, 2000
	)	
and	)	
	)	
METRO RISK MANAGEMENT	)	
	)	
Self-Insured Employer/Administrator-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Petition for Reconsideration of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

William N. Brooks, II (Law Offices of James P. Aleccia), Long Beach, California, for self-insured employer/administrator.

Kristin M. Dadey (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers= Compensation Programs, United States Department of Labor.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Petition for Reconsideration (98-LHC-1551) of Administrative Law Judge Daniel L. Stewart rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. '901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. '921(b)(3).

Claimant sustained injuries to both knees on June 22, 1990. Tr. at 32. On July 25, 1990, claimant underwent arthroscopic surgery on his right knee, and on November 2, 1990 he had arthroscopic surgery on his left knee. Emp. Ex. 7 at 33, 36, 69. He continued to have problems with his knees and the pain worsened. Tr. at 33-35. On August 5, 1996, claimant had a total knee replacement of his right knee and an additional procedure on that knee in 1997. Emp. Ex. 7 at 67. At the time of the November 18, 1998, hearing, claimant was a candidate for total knee replacement of the left knee as well. At the hearing, the parties stipulated that claimant sustained injuries to both knees arising out of and in the course of employment with employer culminating on June 14, 1996. Decision and Order Awarding Benefits at 3, Stipulation 3. The parties agreed that claimant sustained a 50 percent impairment to his right lower extremity and a 50 percent impairment to his left lower extremity. *Id.,* Stipulation 8. In his initial Decision and Order, the administrative law judge awarded claimant 144 weeks of scheduled permanent partial disability benefits for his right knee injury and 144 weeks of scheduled permanent partial disability benefits for his left knee injury, based upon a 50 percent impairment of both lower extremities under Section 8(c)(2) of the Act, 33 U.S.C. '908(c)(2). *Id.* at 20-21. The administrative law judge awarded employer relief from continuing liability pursuant to Section 8(f) of the Act based on the preexisting disability to each leg, and ordered employer to pay benefits for only one period of 104 weeks.

The Director, Office of Workers= Compensation Programs (the Director), filed a Motion for Reconsideration on the ground that the administrative law judge erred in holding employer liable for only one period of 104 weeks, since there were two separate scheduled awards involved, arising from two separate injuries, creating two separate liabilities, with Section 8(f) applicable to each. The Director also argued that the administrative law judge failed to make a finding, for purposes of Section 8(f), of the extent of impairment from the second injury alone for each knee injury. In response to the Director=s motion, employer submitted a July 19, 1999, report of Dr. London stating that, as a result of a June 22, 1990, accident, claimant sustained a 16 percent permanent impairment to each lower extremity.[1]

[1]On May 13, 1999, the administrative law judge issued an Order Reopening Record, requiring employer to file supplemental evidence concerning the percentage of the

In his Decision and Order on Petition for Reconsideration, the administrative law judge granted the Director=s Motion for Reconsideration, and held employer liable for 104 weeks of compensation for each scheduled award. Based on Dr. London=s report, the administrative law judge found that as claimant sustained a 50 percent impairment to each lower extremity, 16 percent of which was attributable to the preexisting condition, claimant=s current impairment, resulting from the knee injuries at issue in this case, was 34 percent to each extremity. Inasmuch as employer is liable for the greater of 104 weeks or the amount attributable to the second injury, the administrative law judge ordered employer to pay claimant permanent partial disability benefits in the amount of $782.44 per week for two periods of 104 weeks, one for each knee, or a total of 208 weeks, from December 15, 1997.[2] After 208 weeks, the administrative law judge ordered the Special Fund to pay benefits for the remaining 55.68 weeks.

On appeal, employer contends that the administrative law judge erred on reconsideration in finding employer liable for two separate 104-week periods of permanent partial disability, and in his finding of the extent of claimant=s preexisting impairment for each knee. The Director responds, urging affirmance of the administrative law judge=s decision on reconsideration. Employer replies, reiterating its arguments on appeal.

Employer argues that the administrative law judge erred in holding it liable for two 104-week periods of scheduled permanent partial disability payments, one for the right knee and one for the left knee. Employer argues that the two knees constitute one cumulative bilateral injury, albeit resulting in two disabilities, and that therefore it is liable for only one period of 104 weeks. Section 8(f) shifts the liability to pay compensation for permanent disability or death from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. ''908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest preexisting permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury but "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. '908(f)(1); *Marine Power & Equipment v. Dep=t of Labor [Quan]*, 203 F.3d 664, 33 BRBS

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preexisting impairment to claimant=s lower extremities. The opinion of Dr. London was offered in response to that order.

[2]Thirty-four percent of 288 weeks is 97.92 weeks.

204(CRT) (9th Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). In the case of a scheduled injury, employer is liable for compensation for the greater of the number of weeks in the schedule attributable to the subsequent injury or 104 weeks. 33 U.S.C. ' 908(f)(1); *see, e.g., Padilla v. San Pedro Boat Works*, BRBS , BRB No. 99-862 (May 17, 2000).

Employer argues that, contrary to the Director=s assertion that claimant in this case sustained two separate injuries, one to the left knee and one to the right knee, the Director has erroneously failed to distinguish the term Ainjury@ from Adisability.@ Employer relies on the definition of Ainjury@ as an Aaccidental injury...arising out of and in the course of employment,@ 33 U.S.C. ' 902(2), in support of its argument that claimant sustained only one injury, despite its resulting in two periods of disability. In further support of its position employer cites cases holding that employer is liable for only one 104-week period, pursuant to Section 8(f), for all permanent disabilities arising out of the same injury. *See Murphy v. Pro-Football, Inc.*, 24 BRBS 187 (1991), *aff=d on recon.*, 25 BRBS 114 (1991), *rev=d mem. on other grounds*, No. 91-1601 (D.C. Cir. Dec. 18, 1992); *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142 (1985). The Director counters that claimant suffered two distinct injuries, one to each knee, and that each injury triggers employer=s liability for a separate period of 104 weeks of compensation.

Where a claimant files claims for two types of benefits arising from the same injury, an employer must raise and show entitlement to Section 8(f) relief for each claim separately. *See, e.g., Padilla*, slip op. at 8; *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Huneycutt*, 17 BRBS at 142. If Section 8(f) applies to both awards, employer is liable for only one period of 104 weeks. *Id.* If, on the other hand, claimant sustains two unrelated injuries for which the requirements of Section 8(f) are met, employer is liable for 104 weeks of benefits on each claim. *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131(CRT) (4th Cir. 1990); *Cooper v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 284 (1986).

We agree with the Director that claimant sustained two distinct unrelated injuries in this case resulting in two distinct disabilities. For the reasons that follow, we affirm the administrative law judge=s imposition of liability for a period of 104 weeks on each claim. First, it is clear that each leg is a distinct body part, and that claimant is entitled to a separate award for the disability to each leg, notwithstanding that the injuries arose from the same working conditions.[3] Contrary to employer=s argument, the Director is not confusing

[3]Further support for the proposition that the facts here involve two separate injuries is that in its Proposed Decision and Order Awarding Benefits at 2, after stating that the parties stipulated that claimant has sustained a 50 percent impairment of each lower extremity,

Ainjury@ with Adisability;@ rather, employer is attempting to equate an Ainjury@ with the accident or working conditions causing it. An injury occurs when Asomething unexpectedly goes wrong within the human frame.@ *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968). In this case, claimant sustained physical harm to two distinct body parts and thus two injuries. The structure of the disability awards is consistent with the fact that claimant sustained two injuries. Section 8(c)(2) of the Act, 33 U.S.C. '908(c)(2), the section of the schedule under which claimant=s knee injuries fall, provides compensation for Aleg lost@ in the singular. The language of Section 8(c)(22) of the Act lends further support to such an interpretation. It provides that:

> In any case in which there shall be a loss of, or loss of use of, more than one member or parts of more than one member set forth in paragraphs (1)-(19) of this subsection, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects two or more digits of same hand or foot, paragraph (17) of this subsection shall apply.[4]

33 U.S.C. '908(c)(22). Thus, the schedule provides for an award of compensation for *each* member injured, providing exceptions only for injuries to two or more digits of the same hand or foot. The only other provision for Abilateral@ injuries under Act is for binaural hearing loss. *See* 33 U.S.C. '908(c)(13)(B). Contrary to employer=s contention, there is no

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employer states that the impairment rating for the left lower extremity might change depending upon whether claimant elects to undergo surgery for the left knee. *Id.* at 4 n.2; Tr. at 14-15. Employer=s argument that this is a bilateral knee injury is inconsistent with the fact that the injury in each knee has followed a different course.

[4]Section 8(c)(17) provides that compensation for two or more digits or one or more phalanges of two or more digits of a hand or foot may be proportioned to the loss of use of the hand or foot, but shall not exceed the compensation for loss of a hand or foot. 33 U.S.C. '908(c)(17).

logic to its conclusion that Section 2(2) of the Act bolsters its interpretation that claimant sustained only one injury merely because the same working conditions resulted in disability to each knee. Section 2(2) in no way limits to one the number of injuries or disabilities that may arise from the same accident or conditions of employment. *See generally Padilla*, slip op. at 9.

Moreover, the cases cited by employer are distinguishable from the case at bar, in that the claimants therein were entitled to two awards for disabilities and/or death due to an injury *to the same body part* as a result of the worsening of the initial disability. For example, in *Huneycutt*, 17 BRBS at 142, the claimant was first permanently partially disabled by asbestosis, and then permanently totally disabled by the same disease. *See also Davenport*, 18 BRBS at 194. The Board held that as the elements for Section 8(f) relief were met as to both claims, the employer was liable for only one period of 104 weeks. The basis for this holding is the fact that A[b]oth claims arose from the same injury. . . .@ *Graziano v. General Dynamics Corp.*, 14 BRBS 950 (1982) (holding employer is liable for only one period of 104 weeks on permanent total disability and death claims arising out of the same respiratory disease), *aff=d sub nom. Director, OWCP v. General Dynamics Corp. [Graziano]*, 705 F.2d 562, 15 BRBS 130(CRT) (1st Cir. 1983); *see also Adams v. Newport New Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989) (Section 8(c)(23) and death claim). Similarly, the Board has held that employer is liable for only one period of 104 weeks where the claimant received scheduled permanent partial disability benefits for a foot injury and death benefits due to complications from that injury. *Henry v. George Hyman Constr. Co.*, 21 BRBS 329 (1988). The common factor in these cases is one injury or illness resulting in disability which deteriorates into a greater degree of disability or death.

In contrast, the United States Court of Appeals for the Fourth Circuit and the Board have held that employer=s liability is not similarly limited when the subsequent disability is caused by a new distinct injury. *Howard*, 904 F.2d at 206, 23 BRBS at 131(CRT); *Cooper*, 18 BRBS at 284. In *Cooper*, the claimant=s permanent partial disability award was for asbestosis and his subsequent permanent total disability award resulted from a completely separate back injury, which was unrelated to the prior injury. The Board affirmed the administrative law judge=s imposition of two periods of 104 weeks= liability. *Cooper*, 18 BRBS at 286. The Fourth Circuit adopted the Board=s holdings in *Huneycutt* and *Cooper*, as urged by the Director, holding that a new period of liability is imposed for Aeach new discrete injury.@ *Howard*, 904 F.2d at 210-211, 23 BRBS at 136(CRT). The court stated that Aimplicit [in the Board=s holdings is] that *Cooper* and *Huneycutt* together stand for the proposition that it is the relatedness of the first injury to the subsequent one . . . that determines whether another 104-week liability is triggered.@ *Id.*, 904 F.2d at 208, 23 BRBS at 133(CRT). As the claimant in *Howard* was permanently partially disabled by a back injury, and then suffered permanently totally disabling carpal tunnel syndrome, which was

unrelated to the back injury, employer was held liable for a period of 104 weeks on each claim for Section 8(f) relief.

The facts in the present case clearly establish the applicability of the latter line of cases. Claimant sustained injuries to two discrete body parts, the right leg and the left leg, resulting in a distinct disability to each leg. The two disability awards are not the result of the worsening of the condition of one leg, and thus are not related to one another such that employer is liable for only one period of 104 weeks. *Howard*, 904 F.2d at 211, 23 BRBS at 133(CRT). That the awards are paid consecutively, rather than concurrently, pursuant to Section 8(c)(22), does not change the nature of the awards, but merely reflects that concurrent awards would result in claimant=s receiving more than that permitted by the Act at any one time. *See generally I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 151(CRT) (4th Cir. 1999).

Employer also argues that the application of two separate periods of liability under Section 8(f) in this case provides a disincentive to hire and retain handicapped employees, thereby undermining the policy considerations behind Section 8(f). Addressing the same argument in *Howard*, the Fourth Circuit stated:

> Although [employer=s] incentive argument has superficial appeal, it certainly is not conclusive on the interpretive issue. The record is devoid of any evidence suggesting that multiple-injury liability would in any way increase the incidence of employee firings after a first '8(f) injury. . . . Even if the Director=s interpretation may be thought to threaten the congressional purpose to promote the employment of the handicapped, account must also be taken of the parallel congressional concern with workplace safety that is reflected in the overall statutory scheme. . . . Section 8(f) expressly requires the employer to bear liability to the extent a workplace injury is in no way synergistically affected by the extant handicap . . . .

Howard, 904 F.2d at 210, 23 BRBS at 135(CRT). Employer=s contention, therefore, is without merit. In sum, as there is no support in the statute or in the case law for employer=s argument that claimant sustained only a single injury in this case and that therefore it is only liable for one 104-week period of payments, we affirm the administrative law judge=s imposition of a period of liability on employer for each scheduled award.

Finally, employer argues that the administrative law judge erred in determining the extent of claimant=s disability due to the pre-existing impairments. Employer maintains that, based on Dr. London=s opinion, claimant=s level of impairment for each knee was 50 percent as of February 22, 1996. Employer contends that these ratings constitute the

preexisting disabilities, and that therefore the increase in impairment until claimant=s last day of work on June 14, 1996, is negligible. Employer asserts that since it is liable only for the amount of impairment attributable to the subsequent injury, the minimal impairment does not give rise to a second 104-week period of compensation.

Employer=s interpretation is not plausible. The level of the preexisting impairment vis-a-vis the level of impairment due to the subsequent injury has no bearing on whether employer is liable for a period of benefits on only one claim or on both claims. Moreover, employer=s argument fails as an attempt to lower its liability to less than 104 weeks on each claim. The Act provides that an employer is liable for 104 weeks or the number of weeks of benefits due pursuant to the schedule for the subsequent injury, whichever is greater. 33 U.S.C. '908(f)(1); *Strachan Shipping Co. v. Nash*, 751 F.2d 1460, 17 BRBS 29(CRT) (1985), *modified on other grounds on recon. en banc*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986). An employer is thus liable for the entire amount due as a result of the subsequent work injury and the Special Fund is liable for any remaining amounts which are related to the preexisting disability. *Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989); *Padilla*, slip op. at 11; *Davenport*, 18 BRBS at 197. The administrative law judge here reasonably determined, based on Dr. London=s report, that since as a result of the 1990 accident claimant had a 16 percent impairment to each leg, and the parties stipulated to a 50 percent impairment to each leg up until and including June 14, 1996, claimant sustained a 34 percent impairment to each knee as a result of claimant=s employment up to and including June 14, 1996. This finding is affirmed as it is supported by substantial evidence.

Furthermore, as the Director contends, employer=s argument with regard to this issue is inconsistent with its stipulation that the 50 percent impairment rating for each knee resulted from his employment with employer Aup to and including June 14, 1996.@ Decision and Order at 3, Stipulation 8. The Director correctly states that employer=s position is fatal to any entitlement to relief under Section 8(f), since, if the 50 percent impairment to each knee is the preexisting condition, then there is no subsequent injury. Employer must carry its burden of showing that a second injury occurred before it may be entitled to Section 8(f) relief. *Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989), *aff=d in part and rev=d on other grounds part sub nom. Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *see also Jacksonville Shipyards, Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988). Inasmuch as employer=s argument that claimant=s preexisting condition should be deemed to be the 50 percent assessed by Dr. London as of February 22, 1996, is inconsistent with its stipulation and, moreover, if accepted, would preclude employer=s entitlement to Section 8(f) relief, we hold that it is without merit. Accordingly, we affirm the administrative law judge=s finding that claimant had a 16 percent preexisting impairment to each knee and that he sustained an additional 34 percent impairment as a result of his employment with employer up to and including June 16, 1996, his last day of work. Under Section 8(f)(1), therefore, employer is liable for 104 weeks of compensation for each knee impairment, as this liability is greater

than that due for the subsequent injury. *See* n. 2, *supra*.

Accordingly, the administrative law judge=s Decision and Order on Petition for Reconsideration is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge