BRB Nos. 89-1360
and 89-1360A

DAVID BASS

Claimant-Petitioner
Cross-Respondent

v.

BROADWAY MAINTENANCE

and

LUMBERMENS MUTUAL CASUALTY
COMPANY

Employer/Carrier-
Respondents
Cross-Petitioners

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT
OF LABOR

Respondent

DATE ISSUED:

DECISION and ORDER

Appeals of the Decision and Order Granting Benefits, Decision and Order Upon Reconsideration, and Decision and Order Denying Motion for Reconsideration in Part and Granting in Part, Supplemental Decision and Order Awarding Attorney's Fees of Victor J. Chao, Administrative Law Judge, United States Department of Labor.

Robert B. Adams (Ashcraft & Gerel), Alexandria, Virginia, for claimant.

Kevin J. O'Connell (Hamilton and Hamilton), Washington, D.C., for employer/carrier.

Laura Stomski (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Upon Reconsideration, and employer appeals the Decision and Order Granting Benefits and the Decision and Order Denying Motion for Reconsideration in Part and Granting in Part, Supplemental Decision and Order Awarding Attorney's Fees (86-DCW-198) of Administrative Law Judge Victor J. Chao 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), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973). 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).

On October 6, 1977, claimant, an electrician, injured his knees during the course of his employment with employer when he fell down a flight of stairs. Claimant subsequently sought treatment after suffering persistent pain in his knees, and an arthrogram administered in March 1978 revealed torn cartilage in his left knee, which required surgery. On January 27, 1981, the parties entered into various stipulations, whereby they agreed, *inter alia*, that as a result of claimant's work-related injury claimant suffered a 30 percent permanent partial disability to his left knee and a 20 percent permanent partial disability to his right leg, that claimant's average weekly wage was $489.95, and that, after crediting the amounts employer paid in temporary partial disability benefits, claimant was to receive $40,644.56 for the permanent partial disability which he had sustained to both legs.[1]

After undergoing rehabilitation, claimant returned to work in January 1979 for another employer as an estimator. In 1981, claimant began working for Hager Electric. In 1982, claimant's duties expanded to include work both as an estimator and as a project manager, which required more walking and standing. Thereafter, claimant testified that his knee condition began to worsen and he developed back problems. In a medical report dated August 31, 1981, Dr. Bruno diagnosed degenerative disc disease.

Claimant, who left Hager Electric in 1984 to work for another electrical company, has been self-employed as an electrical contractor since July 1985. Claimant filed a claim for benefits under the Act for a loss of wage-earning capacity for the years 1982 through 1984, alleging that his back condition developed as a result of his 1977 work injury to his knees. In the alternative, claimant sought compensation for a two and one-half percent increase in his disability rating for his knees.

In his Decision and Order Granting Benefits, the administrative law judge found that

[1]The parties agreed that the settlement "does not prejudice the claimant's right to receive in the future any additional benefits for temporary or permanent disability to which he can show he is at that time entitled." Cl. Ex. 5.

claimant's back condition, which he determined was permanent, is the natural and unavoidable result of his original 1977 work-related injury to his knees. Next, after factoring in the effects of inflation, the administrative law judge found that claimant suffered a loss in wage-earning capacity of $270.41 per week. The administrative law judge thus found that claimant was entitled to permanent partial disability benefits at the rate of $180.28 per week for three years, pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). Lastly, the administrative law judge found that employer was entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f), based on back injuries claimant sustained as a result of an automobile accident in 1973.

Thereafter, employer filed a motion for reconsideration. In his Decision and Order Upon Reconsideration, the administrative law judge, relying on the Board's decision in *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988), concluded that claimant is limited to one award for the combined effect of his scheduled knee injury and his unscheduled back condition. Thus, since claimant's 1981 settlement under the schedule exceeded his awarded compensation under Section 8(c)(21) for his back condition, the administrative law judge found that claimant is entitled to no further benefits under the Act.

Claimant then filed a motion for reconsideration, to which employer responded. In another supplemental Decision and Order, the administrative law judge rejected claimant's assertion that he is entitled to an increased disability rating for his knees. Specifically, the administrative law judge concluded that since he had previously found that claimant was entitled to a non-scheduled award under Section 8(c)(21), the Board's decision in *Frye* precluded an increase in claimant's disability rating. Lastly, the administrative law judge rejected employer's argument that it was entitled to reimbursement from the Special Fund for its payments made to claimant based upon claimant's leg disabilities pursuant to the 1981 settlement.

On appeal, claimant contends that the administrative law judge misinterpreted the Board's holding in *Frye*; specifically, claimant asserts that if he is limited to one award rather than two successive awards, he should be allowed to elect to receive either his scheduled loss entitlement or entitlement pursuant to Section 8(c)(21). In its cross-appeal, employer contends that the administrative law judge erred in finding that claimant's back condition was the natural and unavoidable result of his 1977 work-related knee injury, that claimant suffered a loss in wage-earning capacity due to his back injury, and that the administrative law judge erred in denying it reimbursement from the Special Fund for payments made to claimant in excess of 104 weeks of Section 8(c)(21) compensation awarded to claimant.

The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, urging affirmance of the administrative law judge's finding that claimant's back condition was the natural and unavoidable result of his earlier work-related knee injury. The Director additionally asserts that *Frye* was incorrectly decided by the Board, arguing that claimant should be entitled to compensation for both his scheduled knee injury and his unscheduled back injury since, contrary to the Board's decision in *Frye*, compensation for consequential injuries is not in lieu of compensation for primary injuries, but in addition to it. The Director also maintains that the administrative law judge properly denied employer reimbursement from the Special Fund inasmuch as employer is not entitled to Section 8(f) relief for payments it made under the schedule.

As a threshold issue, we first address employer's argument that the administrative law judge erred in finding that claimant's back injury was the natural and unavoidable result of claimant's 1977 work injury. Employer contends that claimant's back condition constitutes a new injury caused by his increased employment duties while employed with Hager Electric. We disagree.

In establishing that an injury arises out of his employment, a claimant is aided by the presumption under Section 20(a) of the Act, 33 U.S.C. §920(a), which applies to the issue of whether an injury is causally related to his employment activities. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). An employment injury need not be the sole cause of a disability; rather, if the employment aggravates, accelerates, or combines with an underlying condition, the entire resultant condition is compensable. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). Upon invocation of the presumption, the burden shifts to the employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

If there has been a subsequent non work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that claimant's condition was caused by the subsequent non work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second accident. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). 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, however, employer is relieved of liability for that portion of disability attributable to the second injury. *See*, *e.g.*, *Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987), *aff'd mem.*, No. 89-4803 (5th Cir. April 19, 1990).

In the instant case, we hold that that Section 20(a) presumption applies as a matter of law, inasmuch as it is undisputed that claimant suffered knee injuries while working for employer in 1977, and that claimant subsequently sought treatment for recurring back pain. *See Merrill v. Todd*

Pacific Shipyards Corp., 25 BRBS 140 (1991). Although the administrative law judge did not analyze the evidence in terms of the Section 20(a) presumption with regard to claimant's back condition, any error in this regard is harmless as the administrative law judge's finding that claimant's back condition is the natural and unavoidable result of the 1977 work-related knee injuries is supported by substantial evidence. Specifically, claimant's two treating physicians, Drs. Bruno and Dennis, opined that claimant's back symptoms were aggravated by the gait disturbance precipitated by claimant's 1977 knee injury. Cl. Exs. 2, 3; Emp. Exs. 4, 5. Employer, in contrast, cites no evidence severing the potential causal connection between claimant's knee and back conditions. Thus, as employer has failed to set forth specific and comprehensive evidence in support of its allegation that claimant's back condition is not related to his 1977 work-related knee injury, we affirm the administrative law judge's finding that claimant's back condition is the natural and unavoidable result of his 1977 work-related knee injury. *See Merrill*, 25 BRBS at 140; *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988).

We now address claimant's contention that he is entitled to benefits under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), for his back condition, in addition to the benefits he received for his work-related knee condition under the schedule, 33 U.S.C. §908(c)(2). Specifically, claimant challenges the administrative law judge's conclusion that, pursuant to the Board's decision in *Frye*, claimant is not entitled to additional benefits under Section 8(c)(21) for his back condition.

In *Frye*, claimant sustained injuries on March 10, 1977 to his right ankle and back when he jumped from a falling ladder. Employer voluntarily paid permanent partial disability benefits for a 40 percent loss of use of the right foot pursuant to Section 8(c)(4) of the Act, 33 U.S.C. §908(c)(4). Claimant subsequently sought further compensation under Section 8(c)(21), arguing that, in addition to injuring his ankle, he sustained an unscheduled back injury, causing emotional pain as well as chronic pain syndrome. The administrative law judge denied the claim for additional compensation under Section 8(c)(21), concluding that claimant's complaints were not due to any residuals of the work-related injury. The administrative law judge, relying on the decision of the United States Supreme Court in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980),[2] additionally concluded that since the claimant had sustained a scheduled ankle injury, his recovery was limited to that provided under the schedule.

[2]In *Potomac Electric*, the Court held that where the claimant's disability is covered under the schedule, he may not elect to receive compensation under Section 8(c)(21).

On appeal, the Board vacated the administrative law judge's findings that the claimant's back condition and chronic pain syndrome were not work-related, and remanded the case for the administrative law judge to reconsider the evidence in light of the Section 20(a) presumption. Moreover, the Board considered the question of whether the claimant is entitled to additional compensation beyond that provided in the schedule if the claimant's back condition or chronic pain syndrome were determined to be work-related. In this regard, the Board held that where a claimant suffers two distinct injuries arising from a single accident, one compensable under the schedule and one compensable under Section 8(c)(21), he may be entitled to receive compensation under both the schedule and Section 8(c)(21); thus, the Board concluded, if the claimant's back injury sustained in 1977 was the cause of his alleged disability due to his back condition and chronic pain syndrome, he could recover compensation under Section 8(c)(21) for those conditions independent of his recovery under the schedule for his ankle injury. *Frye*, 21 BRBS at 198. The Board further held that where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, a claimant may receive a Section 8(c)(21) award; however, in such a case, the claimant is limited to one award for the combined effect of his conditions, as he would have sustained only one compensable injury which has affected other parts of the body. *Id.*, *citing Thompson*, 21 BRBS at 94.[3] Thus, the Board stated that if, on remand, the administrative law judge determined that claimant's back condition and chronic pain syndrome were the sequelae of his ankle injury, he would be entitled to a Section 8(c)(21) award for all conditions.

In the instant case, the Director urges the Board to overrule its decision in *Frye* to the extent that it holds claimant is entitled to only an award under Section 8(c)(21) where harm to a part of the body not covered by the schedule is the natural sequela of a schedule injury. The Director asserts that compensation for consequential injuries should be in addition to compensation for primary injuries, not in lieu of them; to do otherwise, the Director contends, creates an inequitable result. After further review and consideration, we agree with the Director that the distinction drawn by the Board in *Frye* between multiple injuries which occur simultaneously and multiple injuries which are consequential to the initial injury is not warranted. As the Director points out, *Frye* creates inequitable results for similarly situated claimants, in that claimants with disabilities due to multiple body parts may be compensated differently even though they suffer the same work-related conditions with the same loss in earning capacity.

In the instant case, for example, the administrative law judge's decision to apply the Board's rationale in *Frye* resulted in claimant's not receiving compensation for his back injury solely because it was the natural and unavoidable result of his work-related knee injury and he had already been compensated for that knee injury under the schedule. If, however, claimant's back condition had

[3] In *Thompson*, another case in which the claimant's back injury arose out of a work-related ankle injury, the Board first addressed the question of timely notice under Section 12 of the Act, 33 U.S.C. §912. The Board held that the claimant was not required to give separate notice of his back condition as it arose out of the ankle injury, not from a separate accident, *i.e.*, the claimant sustained one compensable injury. The Board then affirmed the administrative law judge's award under Section 8(c)(21) for both the ankle and back injuries. *Thompson*, 21 BRBS at 96.

simultaneously arisen from the same incident in October 1977 that caused his knee injury, claimant would potentially be entitled to an award under Section 8(c)(21), in addition to his entitlement to an award under the schedule. Upon further review and consideration, we can see no acceptable reason for upholding the distinction drawn in *Frye*, as it is contrary to the Supreme Court's requirement that the Act be liberally construed in order to effectuate its remedial purposes. *See Potomac Electric*, 449 U.S. at 268, 14 BRBS at 363. Thus, we hold that where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, a claimant is not limited to one award for the combined effect of his conditions, but may receive a separate award under Section 8(c)(21) for the consequential injury, in addition to an award under the schedule for the initial injury. To the extent that *Frye* is inconsistent with the holding in this case, it is overruled. Accordingly, we hereby vacate the administrative law judge's denial of benefits under Section 8(c)(21) for claimant's back condition, and remand the case for reconsideration of this issue consistent with our decision herein.

Pursuant to our decision to remand the instant case for reconsideration of whether claimant is entitled to benefits under Section 8(c)(21), we now address employer's additional argument on appeal that the administrative law judge erred in finding that claimant suffered a loss in wage-earning capacity during the years 1982 through 1984 due to his back injury. Pursuant to Section 8(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *See Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

In the instant case, the administrative law judge, after finding that claimant's post-injury wages reflected his wage-earning capacity, determined that claimant suffered a loss of wage-earning capacity of $219.54 per week during the years 1982 through 1984. *See* Decision and Order Granting Benefits at 6-7. On appeal, employer asserts that this wage loss resulted from claimant's change in employment due to his knee condition and prior to the onset of back pain. Thus, employer asserts that claimant's loss in wage-earning capacity is not due to his back condition. In making his findings in his initial decision, the administrative law judge did not state whether claimant's loss in wage-earning capacity for the years 1982 through 1984 resulted from his back injury; on remand, the administrative law judge must consider this issue.

Next, the Director, agreeing with claimant's contention before the administrative law judge, contends that claimant should be entitled to increased disability benefits for his knee condition.[4] The

[4]We note that while the stipulation the parties entered into in 1981 was approved by the district director, it contains no finding by the district director that the compensation awarded is in the best interest of claimant, and does not provide for the complete discharge of employer's liability. Cl. Ex. 5. The stipulation, thus, is not a Section 8(i) settlement, and the award can be subject to a Section 22

administrative law judge concluded that, pursuant to *Frye*, claimant was precluded from receiving an increased schedule award based on a higher disability rating to his knees, since *Frye* held claimant should be compensated only under Section 8(c)(21). Inasmuch as we have overruled our prior holding in *Frye*, and the record contains evidence which if credited would support a finding that claimant's knee condition has deteriorated,[5] we vacate the administrative law judge's finding that claimant is not entitled to additional compensation based upon an increased disability rating for his knee condition. On remand, the administrative law judge must reconsider this issue in light of our decision to overrule *Frye*.

Lastly, we reject employer's argument that since the administrative law judge originally found that claimant was entitled to an award under Section 8(c)(21), he should have directed the Special Fund to reimburse employer for all sums it paid in excess of 104 weeks pursuant to the 1981 settlement. The administrative law judge initially found that employer was entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f)(1988), for his back injury,[6] as claimant's pre-existing back condition contributed to his current back disability. He then found that since the 1981 settlement did not involve Section 8(f) or the Special Fund, employer was not entitled to be reimbursed by the Special Fund for payments it made pursuant to the 1981 settlement in excess of 104 weeks. As the administrative law judge found, it is clear that the payments made under the 1981 settlement were for claimant's knee injury alone, and there was no evidence of any pre-existing permanent partial disability which contributed to claimant's knee condition. Thus, these payments have no relevance to employer's entitlement to Section 8(f) relief for claimant's back condition. The administrative law judge's determination on this issue is affirmed.

Accordingly, the administrative law judge's findings that claimant is not entitled to benefits under Section 8(c)(21) for his back condition and that claimant is not entitled to additional compensation under the schedule as a result of a deterioration of his knee condition are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Granting Benefits, Decision and Order Upon

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modification. *See*, *e.g.*, *Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989); *Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988); *see* 20 C.F.R. §702.315. The stipulation is also not a formal compensation order issued by the district director; therefore, the one year statute of limitations contained in Section 22 would not apply. *See Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); 33 U.S.C. §922.

[5]In his August 25, 1984 report, Dr. Bruno opined that claimant's knees had degenerated an additional two and one-half percent. Cl. Ex. 2.

[6]Section 8(f) of the Act provides that the Special Fund will assume responsibility for permanent disability payments after 104 weeks in a case where the claimant had a manifest pre-existing permanent partial disability, the disability is not due solely to the work-related injury, and is materially and substantially greater than that which would have resulted from the subsequent injury alone. *See* 33 U.S.C. §908(f)(1988); *see also Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982); *Armstrong v. General Dynamics Corp.*, 22 BRBS 276 (1989).

Reconsideration, and Decision and Order Denying Motion for Reconsideration in Part and Granting in Part, Supplemental Decision and Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge