BRB No. 92-1516

DAVID J. WARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CASCADE GENERAL, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Martin L. Alvey (William H. Skalak & Associates), Portland, Oregon, for claimant.

Carrol J. Smith, SAIF Corporation, Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (89-LHC-794) of Administrative Law Judge Paul A. Mapes 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 was injured on November 4, 1987, during the course of his work for employer as a machinist, when his neck became caught as he was trying to exit a sea chest on a supertanker through a small hole. The next day, claimant began hurting all over, and he experienced pain in his hands. Claimant was diagnosed as having a cervical strain and carpal tunnel syndrome. The parties stipulated in an agreement reached on July 12, 1989, that claimant's carpal tunnel syndrome was a consequence of the November 4, 1987, injury and that employer would authorize surgery for this

condition and would pay claimant temporary total disability benefits until the date of maximum medical improvement. The agreement, which did not address claimant's entitlement to permanent partial disability compensation, also provided that the carpal tunnel syndrome would not be regarded as an occupational disease. While claimant worked for employer, he had also performed floor installation work for other employers. Following his accident, claimant continued to perform such work sporadically. He also worked as a hod carrier for Omega Exterior Systems until he was laid off for lack of work.

Dr. Sirounian performed a left carpal tunnel release on August 1, 1989, and a right carpal tunnel release on October 10, 1989. Emp. Exs. 54, 63. Thereafter, claimant participated in a year-long vocational rehabilitation program which consisted of his taking business-related college courses in the evenings and on-the-job training as a sales manager for Floorcovering Distributors, a mostly sedentary position he held for approximately 13 months. Emp. Exs. 80-81. Claimant then switched to a similar position with another company, but apparently asked to be laid off after being told he would be paid on a straight commission, rather than a combination of salary and commission. Tr. at 37. Claimant, who was not working at the time of the hearing, sought both scheduled and unscheduled permanent partial disability compensation under the Act as well as penalties and an attorney's fee. In the alternative, claimant argued that he was entitled to a *de minimis* award.

The administrative law judge determined that claimant was not entitled to compensation under Section 8(c)(3) and (19) of the schedule, 33 U.S.C. §908(c)(3),(19), for the 24 percent loss of grip strength in each wrist he claimed because the credible medical evidence indicates that claimant sustained direct injury to his back and shoulder which only indirectly resulted in impairment to his hands. The administrative law judge also denied claimant benefits for the combined effect of his neck, shoulder, and hand injuries under Section 8(c)(21), 33 U.S.C. §908(c)(21), finding that claimant's actual post-injury wages, which equaled or exceeded his pre-injury wages after accounting for inflation, reasonably represented his post-injury wage-earning capacity. Finally, the administrative law judge denied claimant a *de minimis* award.

On appeal, claimant contends that the administrative law judge erred in denying him benefits under the schedule and Section 8(c)(21), asserting that he is entitled to both. In the alternative, claimant contends that he is entitled to a *de minimis* award. Claimant also argues that his attorney is entitled to an attorney's fee payable by employer. Employer responds, urging that the administrative law judge's denial of benefits be affirmed. Claimant replies, reiterating the arguments he made in his petition for review.

Claimant first contends that the administrative law judge erred in failing to award him compensation for the injury he sustained to his hands under Section 8(c)(3) of the schedule. Claimant argues that *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), mandates that he receive a schedule award under Section 8(c)(3) for a 24 percent impairment of each wrist as a result of his bilateral carpal tunnel release surgeries, inasmuch as the effect of the work injury was to cause a loss of use of these members.

It is well established that the Section 8(c) schedule is not applicable where the actual situs of the injury is to a part of the body not specifically listed in the schedule, even if the injury results in disability to a part of the body which is listed. *See, e.g., Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). In concluding that claimant's hand impairment was not the direct result of the work accident in the present case, the administrative law judge acted within his discretion in discrediting the medical report of Dr. Bell, which states that claimant may have hyperextended his wrist during the November 1987 accident, based on his belief that Dr. Bell did not possess an accurate understanding of the accident. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 913 (1979). Inasmuch as Dr. Bell reported that although he suspected by history that claimant's carpal tunnel syndrome was related to his injury, he could not "get very good details of how that occurred when [claimant] fell," the administrative law judge's finding in this regard was not unreasonable. Emp. Ex. 16. Moreover, in finding that claimant did not directly injure his hands, the administrative law judge also noted that in reporting the accident to other physicians and in his testimony during the hearing, claimant did not assert that he hyperextended his wrist or otherwise directly injured his right hand or wrist, but focused on the injuries to his neck and shoulder.

The administrative law judge also reasoned that the numbness in claimant's right hand could be attributed to the injuries to his neck and shoulder, and that claimant's hand symptoms may have been related to his work laying tiles for another employer. Contrary to claimant's contention, *Potomac Electric*, wherein the United States Supreme Court held that the schedule is the exclusive remedy for injuries to body parts enumerated under the schedule, does not mandate an award of scheduled benefits, where, as here, claimant sustained no direct injury to a schedule member. Claimant's argument assumes that the location of the disability, rather than the situs of the injury, controls his right to compensation under the schedule; this theory has previously been considered and rejected by the Board. *See Andrews v. Jeffboat, Inc.*, 23 BRBS 169, 173 n.4 (1990); *Grimes v. Exxon Company, U.S.A.*, 14 BRBS 573, 576 (1981). Claimant's reliance on *Turney v. Bethlehem Steel*, 17 BRBS 232 (1985), is misplaced. In that case, unlike the present one, claimant sustained a scheduled injury of the knee and injuries to his back in two separate accidents. Inasmuch as the administrative law judge's finding that claimant did not sustain direct injury to his hand in the subject work accident is rational and supported by substantial evidence, we affirm his determination that claimant's hand impairment is not compensable under the schedule on the facts presented in this case. Claimant's compensation remedy lies under Section 8(c)(21) of the Act. *See Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1981).

Claimant also contends that the administrative law judge erred in finding that he sustained no

loss of wage-earning capacity and accordingly in denying him compensation for a 15 percent unscheduled permanent partial disability under Section 8(c)(21). Claimant argues that given that he has undergone two carpal tunnel surgeries, has lost a significant amount of grip strength in his hands, cannot return to his former work in the shipyard or as a tile and hard surface installer, has a 15 percent impairment in his neck and cervical region, and was unemployed at the time of the hearing, the administrative law judge erred in finding that his actual post-injury wages fairly and reasonably represented his post-injury wage-earning capacity.

Under Section 8(c)(21) of the Act, an award for permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that the claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. Only if such earnings do not represent the claimant's wage-earning capacity should the administrative law judge calculate a dollar amount which reasonably represents the claimant's wage-earning capacity. *See* 33 U.S.C. §908(h). The objective of the inquiry concerning the claimant's wage-earning capacity is to determine the post-injury wage that would be paid under normal employment conditions to the claimant as injured. *See Long*, 767 F.2d at 1578, 17 BRBS at 149 (CRT). Some of the factors to be considered in determining whether the claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include the claimant's physical condition, age, education, and industrial history, the beneficence of a sympathetic employer, the claimant's earning power on the open market, and any other reasonable variables that could form a factual basis for the determination. *See Darcell v. FMC Corp., Marine & Rail Equipment Division*, 14 BRBS 294 (1981); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). If the claimant's post-injury work is found to be continuous and stable, his post-injury earnings are more likely to be found to reasonably and fairly represent his wage-earning capacity. *See generally Darcell*, *supra*; *Devillier, supra*. Relevant questions in this regard include whether the post-injury work is suitable, whether the claimant is physically capable of it, and whether the claimant has the seniority to stay in the job. *See Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). If it is found that the claimant's current employment meets the aforementioned standards, the claimant is not economically disabled even though he may continue to suffer some physical impairment as a result of his injury. *See generally Darcell*, 14 BRBS at 298; *Bethard*, 12 BRBS at 695. The fact that claimant earns higher wages post-injury will not preclude an award of compensation, however, if the claimant has, nevertheless, had a loss in his wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991).

In denying claimant compensation under Section 8(c)(21), the administrative law judge found that claimant's actual post-injury earnings, which equaled or exceeded his pre-injury earnings, reasonably represented his post-injury wage-earning capacity. In so concluding, the administrative law judge specifically rejected claimant's argument that his unemployment at the time of the hearing was indicative of the fact that his post-injury earnings did not fairly represent his wage-earning capacity. The administrative law judge reasoned that although claimant was not employed at the time of the hearing, this could not be attributed to an injury-related inability to perform his post-

injury job, but rather to the fact that he had requested to be laid off when his employer decided to pay him on a commission instead of a fixed salary basis. The administrative law judge found no record evidence that claimant could not perform this job and noted that he had previously performed an essentially identical job for another company for 13 months. The party seeking to establish that claimant's actual post-injury earnings are not representative of his post-injury wage-earning capacity bears the burden of proof on this issue. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992). Inasmuch as the administrative law judge, after considering the record evidence in light of factors relevant to Section 8(h), reasonably concluded that claimant failed to meet this burden in this case, we affirm his determination that claimant failed to establish a present loss of wage-earning capacity. *See Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 293 (1990).[1]

In the alternative, claimant argues that he should at least be granted a *de minimis* award. In denying claimant a *de minimis award* in this case, the administrative law judge determined that because the United States Court of Appeals of the Ninth Circuit, from which this case arises, had not yet ruled on the issue, he was bound by the Board's position that such awards are inappropriate. The Board has previously noted its disagreement with the concept of *de minimis* awards. *See Porras v. Todd Shipyards Corp.*, 17 BRBS 222 (1985), *aff'd on other grounds sub nom. Todd Shipyards Corp. v. Director, OWCP*, 792 F.2d 1489, 19 BRBS 3 (CRT)(9th Cir. 1986).[2] Although the United States Court of Appeals for the Ninth Circuit has not yet addressed this issue, all of the United States Courts of Appeals to do so have upheld the validity of such awards where a claimant has established a significant possibility of future economic harm. *See LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984); *Hole v. Miami Shipyards Corp*, 640 F.2d 760, 13 BRBS 237 (5th Cir. 1981). In view of these decisions, the Board has in recent years addressed whether *de minimis* awards accord with this standard and are supported by substantial evidence. *See, e.g., Mavar v. Matson Terminals, Inc.*, 21 BRBS 336 (1988).

In this case, claimant asserts that Dr. Heatherington's opinion mandates a *de minimis* award, as it meets the criteria set out by the courts. Dr. Heatherington, in a November 12, 1991, letter states

[1]We reject claimant's argument that under *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985), he is entitled to an unscheduled award. In *Long*, the United States Court of Appeals for the Ninth Circuit affirmed the administrative law judge's finding that where claimant suffered a ten percent leg impairment as a consequence of a back injury, he could only receive benefits under Section 8(c)(21), but determined that as his higher post-injury wages fairly represented his wage-earning capacity, claimant was not entitled to benefits, consistent with the analysis which the administrative law judge employed in this case.

[2]In *Porras*, the issue raised concerned the availability of relief under Section 8(f) of the Act, 33 U.S.C. §908(f), where claimant received a *de minimis* award. The court noted the Board's disagreement with the concept, but did not address the issue as it was not raised.

that based on his examination of claimant in November 1989, and a review of his condition in a September 22, 1990 letter, it is very probable that claimant will be "a very likely sufferer of economic injury in the future as a result of the injuries that he suffered on November 4, 1987." Cl. Ex. 9. According to Dr. Heatherington, it is likely that claimant will develop arthritic changes in the site of the cervical spine injuries which would result in future dysfunction and restrictions in the area, leading to severe restrictions of motion. Claimant maintains that an x-ray performed on August 7, 1991, showing mild disk space narrowing C5-6, small posterior osteophyte C5, and gentle scoliotic curve, demonstrates claimant's predicted deteriorating condition. Cl. Ex. 4. The administrative law judge did not consider this evidence because he felt constrained by our prior case precedent. In view of the unanimous opinions of four Courts of Appeals that *de minimis* awards should be considered, we hold that the administrative law judge should address the evidence and make a finding as to whether claimant established a significant possibility of future economic harm. If so, he may enter a *de minimis* award. We therefore vacate the administrative law judge's denial of a *de minimis* award and remand this case for reconsideration of this issue.

Claimant's final argument is that inasmuch as he is entitled to disability compensation, his counsel is entitled to an attorney's fee payable by employer for work performed before the administrative law judge. Because the administrative law judge did not award any benefits, he did not address the issue of an attorney's fee. Inasmuch as we have affirmed the administrative law judge's denial of claimant's claim for disability compensation under both the schedule and Section 8(c)(21), claimant's counsel is obviously not entitled to a fee on this basis. If on remand, however, the administrative law judge ultimately finds claimant entitled to a *de minimis* award, his attorney will be entitled to a reasonable fee commensurate with the degree of claimant's success. *See George Hyman Construction Co. v. Brooks*, 963 F.2d 1352, 25 BRBS 161 (CRT) (D.C. Cir. 1992).

Accordingly, the administrative law judge's denial of a *de minimis* award is vacated, and the case is remanded for further proceedings consistent with this opinion. In all other respects, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge