

BRB No. 04-0507

KENNETH BOND)
)
 Claimant-Petitioner)
)
 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: FEB 14, 2005
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene Parker Brown (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker, & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-2082) of Administrative Law Judge Richard E. Huddleston 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 administrative law judge's findings of fact and conclusions of law if they 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, a shipfitter, sustained a pelvic fracture at work on August 10, 2001, when a 2,000 pound steel plate pinned him across his waist. Subsequently, claimant had surgery on his pelvis, groin, and legs. Claimant sustained nerve and vascular damage to his legs as a result of the pelvic injury, and sought a scheduled award for his legs after he was rated as having a 7 and 51 percent permanent partial impairment to his left and right lower extremities, respectively. Employer voluntarily paid claimant temporary total disability benefits from August 11, 2001, to March 26, 2002; June 24, 2002; July 24, 2002; and September 3, 2002, to October 2, 2002.

The administrative law judge denied claimant's claim for a scheduled award for his leg impairments relying on a line of cases, cited by employer, holding that the situs of injury controls the issue of whether an injury falls under the schedule. See *Pool Co. v. Director, OWCP*, 206 F.3d 543, 34 BRBS 19(CRT) (5th Cir.), *reh'g denied*, 232 F.3d 212 (5th Cir. 2000)(table); *Barker v. United States Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *Ward v. Cascade Gen., Inc.*, 31 BRBS 65 (1995); *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990); *Grimes v. Exxon Co., U.S.A.*, 14 BRBS 573 (1981); see also *Knight v. Ferguson*, 198 A.D. 756, 190 N.Y.S. 659 (N.Y. App. Div. 1921). The administrative law judge held that, as it is the situs of the injury which controls the type of partial award to which a claimant is entitled, and as it is undisputed that claimant's work injury was to his pelvis and not his legs, claimant is not entitled to scheduled awards for his leg impairments. In light of the severity of the impairment to claimant's legs, however, the administrative law judge also awarded claimant a *de minimis* award to protect his right to future compensation should he suffer a loss in his post-injury wage-earning capacity.¹

On appeal, claimant contends that he is entitled to a scheduled award for the impairment to his legs, citing *Bass v. Broadway Maint.*, 28 BRBS 11 (1994). Claimant concedes that the situs of his work injury was to his pelvis but asserts nonetheless that he is entitled to scheduled awards for his leg impairments, in addition to an unscheduled award for his pelvic injuries, because he underwent surgery on his legs the day after his work injury which resulted in the assignment of impairment ratings to both legs. Employer responds urging affirmance of the administrative law judge's decision.

Upon consideration of the administrative law judge's decision, the parties' briefs, and the evidence of record, we affirm the administrative law judge's denial of a scheduled award for claimant's leg impairments as it is in accordance with law. The Board held in *Grimes*, 14 BRBS 573, that the schedule is not applicable where the actual injury is to an unscheduled

¹ Neither party challenges the administrative law judge's *de minimis* award.

body part, even if the injury results in disability to a scheduled body part.² Thus, the Board affirmed the administrative law judge's award under Section 8(c)(21), 33 U.S.C. §908(c)(21), for claimant's left shoulder injury even though surgery was later performed which resulted in a disability to claimant's left arm, a scheduled member. *Id.*; see also *Ward*, 31 BRBS 65; *Andrews*, 23 BRBS 169. Similarly, the United States Courts of Appeals for the First, Fifth, and Ninth Circuits have held that where an impairment to a scheduled member results from an injury to an unscheduled body part, claimant's recovery for permanent partial disability is limited to that for a loss in wage-earning capacity under Section 8(c)(21).³ See *Pool Co.*, 206 F.3d 543, 34 BRBS 19(CRT); *Barker*, 138 F.3d 431, 32 BRBS 171(CRT); *Long*, 767 F.2d 1578, 17 BRBS 149(CRT). The Ninth Circuit recently reaffirmed its holding in *Long Keenan v. Director for the Benefits Review Board*, 392 F.3d 1041 (9th Cir. 2004).⁴

Claimant's reliance on *Bass*, 28 BRBS 11, is misplaced. In *Bass*, claimant sought and obtained a Section 8(c)(21) award after being awarded benefits for a scheduled injury; thus, the facts in *Bass* are the converse of the facts in the instant case where claimant seeks a scheduled award due to an injury to an unscheduled body part. See *Barker*, 138 F.3d at 436 n. 4, 32 BRBS at 174(CRT) n. 4 (distinguishing *Bass* on this same basis). In light of the

² Dr. Dervay stated that claimant's leg injuries are the direct sequelae of, and developed after, his pelvic work injury. Emp. Ex. 16. Claimant testified by deposition that the steel plate pinned him across his waistline and not his legs. Cl. Ex. 7 at 5.

³ The administrative law judge stated that claimant apparently has no loss in wage-earning capacity as he sought only a scheduled award.

⁴ The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has not published a case on this issue. However, in an unpublished decision, *Buckner v. U.S. Marine Corps Morale Club System*, 873 F.2d 1437 (table), 1989 WL 37408 (4th Cir. Apr. 5, 1989), the court indicated its willingness to follow *Long*, 767 F.2d 1578, 17 BRBS 149(CRT), in a fact pattern similar to that in the instant case. The claimant in *Buckner* injured his back at work, but following back surgery sustained left arm and right leg impairments. The Fourth Circuit affirmed the Board's holding that since claimant's actual injury was to his back, he was required to establish a loss in his post-injury wage-earning capacity in order to receive benefits, even though he also alleged impairments to his left arm and right leg, scheduled injuries. The Fourth Circuit cited with approval the Ninth Circuit's holding in *Long* that when the actual injury is to an unscheduled body part, benefits must be awarded pursuant to 33 U.S.C. §908(c)(21) even if consequent impairments include loss of use of scheduled limbs. Although Rule 36(c) of the rules of the Fourth Circuit, 4th Cir. R. 36(c), disfavors the citation of unpublished cases, our citation of *Buckner* is consistent with this rule because *Buckner* supports the administrative law judge's denial of scheduled benefits in this case where there is no relevant Fourth Circuit published precedent.

well-established precedent of the Board and the Courts of Appeals, we hold that the administrative law judge properly denied scheduled benefits for claimant's leg impairments, as it is undisputed that the situs of the work injury was to his pelvis and not his legs.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge