BRB No. 04-0941

JOE E. RILEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED/ INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: 09/02/2005
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order Granting Employer's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Robert E. O'Dell, Pascagoula, Mississippi, for claimant.

Richard P. Salloum (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and Order Granting Employer's Motion for Reconsideration (2004-LHC-28) of Administrative Law Judge C. Richard Avery 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 burner at the shipyard, broke his left ankle after falling at work on October

16, 1997. Thereafter, claimant underwent surgery and was hospitalized from October 16 through 30, 1997. Claimant returned to work in a light-duty job at employer's facility from December 3, 1997, through February 12, 1998. A second operation on claimant's left ankle was performed on February 12, 1998, and he was hospitalized until February 17, 1998. Claimant returned to work in a light-duty job at employer's facility from June 1 through September 16, 1998. A functional capacities evaluation was performed on September 10, 1998, and based on it, Dr. Wiggins, claimant's treating orthopedic surgeon, imposed permanent light-duty work restrictions on September 15, 1998. Cl. Ex. 1 at 17. Employer voluntarily paid claimant temporary total disability benefits from October 17 through December 2, 1997, and January 7 through May 31, 1998, and a 50 percent scheduled award for permanent partial disability benefits to the left foot.

Claimant suffers from a pre-existing back problem which was aggravated by his 1997 ankle injury. Specifically, claimant's left leg is shorter than his right leg and the administrative law judge found that claimant's pre-existing degenerative disc disease has been aggravated by the limp resulting from his left ankle injury. Claimant sought an award for a loss of wage-earning capacity for his back injury. The administrative law judge awarded claimant temporary total disability benefits from October 17, 1997, until September 16, 1998, except those days claimant was actually employed by employer at his average weekly wage or at a greater rate of pay, a 50 percent scheduled award for claimant's left foot impairment, and an ongoing award of permanent partial disability benefits based on a loss of wage-earning capacity of $308 per week due to claimant's work-related back injury. 33 U.S.C. §908(c)(21), (h).

On appeal, employer challenges the administrative law judge's award of benefits for a loss of wage-earning capacity due to claimant's back injury. Claimant responds in support of the award to which employer replies.

Employer argues that the administrative law judge erred in awarding benefits for a loss of wage-earning capacity for claimant's back injury since the additional restrictions imposed for the back condition did not exceed those for the foot injury. 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) of the Act, 33 U.S.C. §908(c)(21), for the consequential injury, in addition to an award under the schedule for the initial injury. *Bass v. Broadway Maintenance*, 28 BRBS 11, 17-18 (1994). Contrary to employer's contention, it is not necessary that the non-scheduled condition cause *additional* restrictions beyond those which would be due to the scheduled injury. Rather, the non-scheduled condition standing alone need cause only a loss in wage-earning capacity in order for claimant to be entitled to an award for that loss, in addition to the scheduled award for the

ankle injury. *Id.* at 18; *see also Green v. I.T.O. Corp. of Baltimore*, 32 BRBS 67 (1998), *modified in part*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999); *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988). There is no danger of double recovery when the back injury alone could cause a loss in wage-earning capacity. *Green,* 32 BRBS at 70.

Substantial evidence supports the administrative law judge award of benefits for a loss of wage-earning capacity due to the back condition. The administrative law judge relied primarily on the opinions of Drs. Wiggins and McCloskey. As employer contends, Dr. Wiggins initially concluded on June 7, 1999, that claimant's back injury was not industrial and thus, not included within claimant's work restrictions. However, he later clarified his opinion in his deposition by stating that claimant was limited to light-duty jobs taking into account both his work-related back and left foot problems.[1] Cl. Exs. 1 at 13; 6 at 13-14, 19; Emp. Ex. 43 at 12-13, 18. The administrative law judge rationally relied on this latter opinion. *Perini Corp. v. Heyde,* 306 F.Supp. 1321 (D.R.I. 1969). Dr. McCloskey, claimant's consulting neurological surgeon, assigned claimant a five percent permanent partial impairment rating for his back injury and stated that claimant was limited to light work because of this condition.[2] Cl. Ex. 4 at 2; Emp. Ex. 49 at 8. As the opinions of Drs. Wiggins and McCloskey limit claimant to light work because of his work-related back condition, the administrative law judge properly found that claimant is entitled to an award for a loss in wage-earning capacity as the back injury alone could cause the loss, irrespective of whether the foot injury results in the same restrictions. *Green,* 32 BRBS at 70; *see Bass,* 28 BRBS at 17-18. We, therefore, affirm the administrative law judge's award of permanent partial disability benefits for claimant's back injury as it is rational, supported by substantial evidence, and in accordance with law. *Id.*

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order Granting Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

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[1] Claimant's restrictions include the direction to lift no more than 20 pounds occasionally and 10 pounds frequently. He has limitations on stair climbing, standing and walking, and he must avoid squatting and ladder climbing. Emp. Ex. 17. Dr. Wiggins approved six light-duty jobs identified by employer's vocational expert, Mr. Walker. Emp. Ex. 14 at 4-9. The jobs included positions as lock assembler, customer service representative, telephone operator, security guard, shuttle bus driver, and dispatcher.

[2] In addition, the administrative law judge noted Dr. Crotwell's opinion. Decision and Order at 10. Dr. Crotwell was consulted for both claimant's left foot and back injuries. He agreed with Dr. Wiggins that claimant was limited to light-duty work and was capable of performing the jobs identified by Mr. Walker. Cl. Ex. 3 at 3; Emp. Ex. 37 at 2.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge