BRB No. 97-479

RANDY WHITE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
POOL OFFSHORE COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Edward S. Johnson (Johnson, Johnson, Barrios & Yacoubian), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer/carrier appeals the Decision and Order (95-LHC-1849) of Administrative Law Judge Lee J. Romero, Jr. 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq*. 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 re-injured his left shoulder while he was assisting in lifting a "lift-nubbing" in

his capacity as a floorhand for employer on an offshore oil rig on April 13, 1993; the prior injury occurred at work on November 8, 1992. Employer voluntarily paid claimant temporary total disability benefits from April 14, 1993, through May 11, 1994, and permanent partial disability benefits based upon a 10 percent permanent partial disability of the left arm. Claimant subsequently filed a claim for benefits seeking reinstatement of his compensation benefits since, he alleged, his left shoulder injury was not a scheduled injury. The administrative law judge awarded claimant temporary total disability benefits from April 14, 1993, to May 3, 1994, permanent total disability benefits from May 4, 1994, to September 12, 1994,[1] permanent partial disability benefits from September 13, 1994, and continuing, an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), and interest. The administrative law judge also awarded employer relief from continuing compensation liability under Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge's award of permanent partial disability benefits for claimant's left shoulder injury was made pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), and was based on a determination that claimant's post-injury wage-earning capacity is $5 per hour.

On appeal, employer challenges the administrative law judge's award of permanent partial disability benefits for claimant's left shoulder injury pursuant to Section 8(c)(21) and his determination that claimant's post-injury wage-earning capacity is $5 per hour. Claimant did not file a response brief.

Employer initially challenges the administrative law judge's award of permanent partial disability benefits to claimant for his left shoulder injury under Section 8(c)(21). Employer requests that the Board reconsider its holdings in *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990), and *Grimes v. Exxon Co., U.S.A.*, 14 BRBS 573 (1981). Employer also contends that in light of the Supreme Court's holding in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994), that the "true doubt" rule violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), claimant has the burden of persuasion to show that the shoulder injury results in a disability not covered by the schedule at Section 8(c)(1)-(20).

[1]Although the parties stipulated that claimant was temporarily totally disabled from April 14, 1993, to September 13, 1994, the administrative law judge found that he could not award temporary total disability benefits for this entire period as claimant reached maximum medical improvement on May 4, 1994. Decision and Order at 6 n. 4. Therefore, the administrative law judge's award of temporary total disability benefits ceased on May 3, 1994, and his award of permanent total disability benefits began on May 4, 1994.

In *Andrews* and *Grimes*, the Board followed the Supreme Court's decision in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), and held that the Section 8(c) schedule is not applicable where the actual injury is to a part of the body not specifically listed in the schedule, even if the injury results in a disability to a part of the body which is listed. *Andrews*, 23 BRBS at 169; *Grimes*, 14 BRBS at 573. A shoulder injury is not expressly included within those members covered by the schedule in Sections 8(c)(1)-(20) of the Act, 33 U.S.C. §908(c)(1)-(20), but the loss of the use of the arm is covered by Sections 8(c)(1) and (19) of the Act, 33 U.S.C. §908(c)(1), (c)(19). *Grimes*, 14 BRBS at 573. In the instant case, the administrative law judge properly applied the holding in *Andrews* and *Grimes* to conclude that claimant suffered a shoulder injury based on the opinions of Drs. Cashio, Juneau, Rich, and Taylor, as well as the records from the Alexandria Orthopedic Clinic. Decision and Order at 11-12; Jt. Exs. 3-6, 26, 27.

Specifically, the 1992 medical reports reveal a separation of the joint where the clavicle meets the acromion and that claimant re-injured this site in 1993. *Id.* Anatomically, this area is not a part of the arm, *see Dorland's Illustrated Medical Dictionary* at 31 and Plate XLI (25th ed. 1974), and the limitations imposed by a shoulder injury may well differ from limitations imposed by an elbow injury. We thus decline employer's invitation to overturn longstanding precedent, as Congress has chosen to compensate disabilities differently based on the site of the injury. *See Potomac Electric Power Co.,* 449 U.S. at 268, 14 BRBS at 363. In fact, the Board rejected a similar argument in *Andrews* and noted that compensation under the schedule is the exclusive remedy for disability due to injuries to body parts enumerated within the schedule and that the schedule does not apply where claimant does not suffer an injury to a scheduled member. *Andrews*, 23 BRBS at 173 n. 4; *see also Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990); *Grimes*, 14 BRBS at 573.

Lastly, we reject employer's contention that the Supreme Court's decision in *Greenwich Collieries* mandates a different result. As the proponent of an award under the schedule, it is employer who bears the burden of establishing an injury to a member delineated in the schedule. Claimant has met his burden of establishing his entitlement to an award for permanent partial disability based on a loss in wage-earning capacity. Consequently, we affirm the administrative law judge's award of permanent partial disability benefits under Section 8(c)(21) for claimant's left shoulder injury.

Employer also challenges the administrative law judge's determination that claimant's post-injury wage-earning capacity is $5 per hour. Employer contends that the administrative law judge erred in not accepting the parties' stipulation that claimant's wage-earning capacity is $5.21 per hour. Alternatively, employer argues, even if the administrative law judge rationally rejected the parties' stipulation, he erred in his calculation of the average of the starting salaries for the positions identified in employer's labor market survey.

Stipulations are binding upon the parties when they are received into evidence. 29 C.F.R. §18.51. An administrative law judge is not obligated to accept all stipulations

entered into by the parties, but if he rejects them, he must provide the parties with prior notice that he will not accept them, his rationale for doing so, and an opportunity to submit evidence in support of their positions. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 152 n. 1 (1988). In the instant case, the administrative law judge noted the parties' stipulation that claimant has a post-injury wage-earning capacity of $5.21 per hour after accepting the parties' stipulations and joint exhibits into evidence. Decision and Order at 2, 6 at #28. Nevertheless, he subsequently calculated claimant's post-injury wage-earning capacity as $5 per hour based on the average of the starting salaries for the positions identified in employer's labor market survey. Decision and Order at 12-13; Jt. Ex. 7. Because the administrative law judge made this determination based on the evidence and not on the parties' stipulation without providing the parties prior notice that he was rejecting their stipulation as to this issue and his reasons for doing so, we vacate the administrative law judge's determination that claimant's post-injury wage-earning capacity is $5 per hour. The case is remanded to the administrative law judge to determine whether to accept or reject the parties' stipulation that claimant has a post-injury wage-earning capacity of $5.21 per hour, and the reasons for his decision. *See Dodd*, 22 BRBS at 245; *Grimes*, 14 BRBS at 573. If the stipulation is rejected, the administrative law judge must reconsider his calculation of claimant's post-injury wage-earning capacity as he averaged the starting salaries for the positions found in employer's labor market survey after incorrectly noting that the starting wage for the delivery person job is $6 per hour when in fact the labor market survey states it starts at $5 per hour. *See* Decision and Order at 12; Jt. Ex. 7.

Accordingly, the administrative law judge's finding that claimant's post-injury wage-earning capacity is $5 per hour is vacated, and the case is remanded for reconsideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge