8.3 PERMANENT PARTIAL DISABILITY

Section 8(c) of the LHWCA provides *inter alia*:

> **Compensation for disability shall be paid to the employee as follows:**
>
> **(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively and shall be paid to the employee as follows:**
>
> **(1) Arm lost, three hundred and twelve weeks' compensation.**
>
> **(2) Leg lost, two hundred and eighty-eight weeks' compensation.**
>
> **(3) Hand lost, two hundred and forty-four weeks' compensation.**
>
> **(4) Foot lost, two hundred and five weeks' compensation.**
>
> **(5) Eye lost, one hundred and sixty weeks' compensation.**
>
> **(6) Thumb lost, seventy-five weeks' compensation.**
>
> **(7) First finger lost, forty-six weeks' compensation.**
>
> **(8) Great toe lost, thirty-eight weeks' compensation.**
>
> **(9) Second finger lost, thirty weeks' compensation.**
>
> **(10) Third finger lost, fifteen weeks' compensation.**
>
> **(11) Toe other than great toe lost, sixteen weeks' compensation.**
>
> **(12) Fourth finger lost, fifteen weeks' compensation.**
>
> **(13) Loss of hearing:**
>
> **(A) Compensation for loss of hearing of one ear, fifty-two weeks.**
>
> **(B) Compensation for loss of hearing of both ears, two hundred weeks.**

(C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

(D) The time for filing a notice of injury, under section 12 of this Act, or a claim for compensation, under section 13 of this Act, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80

per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: Proper and equitable compensation not to exceed $7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

(21) Other cases: In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability.

(22) In any case in which there shall be a loss of, or loss of use of more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subdivision shall apply.

(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 10(d)(2), the compensation shall be 66 2/3 per centum of such

average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 2(10), payable during the continuance of such impairment.

8.3.1 Scheduled Awards -- Some General Concepts

The scheduled permanent partial disability rates established by Sections 8(c)(1)-8(c)(20) of the LHCWA are merely the **minimum** levels of compensation to which the injured employee is **automatically** entitled as a result of his injury and no proof of actual loss of wage-earning capacity is required in order to receive at least the amount specified in the schedule for such injury. See Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (**2d Cir.**), cert. denied, 350 **U.S.** 913 (1955); Greto v. Blakeslee, Arpaia & Chapman, 10 BRBS 1000 (1979).

The Board has held that an ALJ's determination of disability from loss of use of an arm by considering both economic and physical factors, in adjudicating a claim under the Section 8(c) schedule provisions, was improper because determination of disability in adjudication of such claims must be based upon a consideration of physical factors alone. Bachich v. Seatrain Terminals, 9 BRBS 184, 187 (1978).

The judge may, however, properly base his or her findings on medical evaluations plus the claimant's own descriptions of the symptoms and the physical effect of the injury. Amato v. Pittston Stevedoring Corp., 6 BRBS 537 (1977).

Benefits can not be awarded for **pain and suffering**. Young v. Todd Pacific Shipyards Corp., 17 BRBS 201 (1985) (award under the schedule should be based on loss of use of the arm **without amplification** for pain and discomfort). However, in Young, the Board did not hold that pain and its symptoms are never considered when a doctor rates the loss of use of a member nor that pain and its symptoms should be disregarded in their entirety. Pimpinella v. Universal Maritime Service, Inc., 27 BRBS 154 (1993) (neuropathy, tenderness of the elbow and sensory loss and weakness of the fingers are medical factors which establish a loss of use which may be compensable under the schedule). Young held only that a doctor's impairment rating should not be amplified so as to separately compensate the claimant for "pain and suffering" as in a tort context. Pimpinella, 27 BRBS at 159.

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. Potomac Elec. Power Co. v. Director, OWCP, 449 **U.S.** 268, 277 n.17, 14 BRBS 363 (1980) (herein, "PEPCO"); Davenport v. Daytona Marine & Boat Works, 16 BRBS 196, 199 (1984). Unless the worker is totally disabled, however, he is limited to the compensation provided by the appropriate schedule provision. Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172 (1984). With the PEPCO exception of total disability, economic factors are not to be taken into account in

calculating disability benefits for a scheduled injury. Rowe v. Newport News Shipbuilding and Dry Dock Co., 193 F.3d 836 (**4th Cir.** 1999).

Where there is an **injury to two separate scheduled body parts**, the respective disabilities must be compensated under the schedules, in the absence of a showing of a total disability, and the claimant is precluded from (1) establishing a greater loss of wage-earning capacity than that presumed by the LHWCA, or (2) receiving compensation benefits under Section 8(c)(21). Since the claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portions of Sections 8(c)(1)-(20), with the awards running consecutively. PEPCO, 449 **U.S.** 268, 14 BRBS 363.

The **Fourth Circuit** has held that "[i]n no case should the rate of compensation for a partial disability, or combination of partial disabilities, exceed that payable to the claimant in the event of total disability. To hold otherwise would be to conclude that the whole may be less than the sum of its parts, and we are fairly certain that – although our authority extends to a myriad of matters – we are without jurisdiction to repeal the laws of mathematics." I.T.O. Corp. of Baltimore v. Green, 185 F.3d 239, 243 (**4th Cir.** 1999), rev'g, 32 BRBS 67 (1998). The court noted that Section 8(c)(21) of the Act specifically states that benefits for non-scheduled injuries are "payable during the continuance of partial disability." The court construed the words "during the continuance" to mean that a claimant "must be paid compensation for the disability to his shoulder from the beginning of the award period." See id. at 243.

In Brandt v. Avondale Shipyards, 16 BRBS 120 (1984), the Board held that the claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

Although it may seem unfair to pay the claimant two-thirds of his average weekly wage as compensation benefits while his physical, housing, and medical needs were being provided by the State of Connecticut in a penal institution, the Board has spoken in Allen v. Metropolitan Stevedore, 8 BRBS 367, 369 (1978), where it held that a disabled employee does not lose his entitlement to compensation benefits, if during his convalescence he becomes incapacitated by a factor [**incarceration**] other than his disabling injury.

Under Section 8(c)(21) of the LHWCA, the claimant's loss of wage-earning capacity is what is being compensated. Therefore, payments under Section 8(c)(21) should be made to the claimant **even while he is out on strike**. See Schenker v. Washington Post Co., 7 BRBS 34 (1977) (emphasis added).

The claimant's pre-existing flatfoot condition was aggravated by a work-related right ankle injury and the Board affirmed the judge's finding as to the compensability of the entire resultant foot condition, including the effects of surgery performed to correct the problem. Seaman v. Jacksonville Shipyards, 14 BRBS 148.9, 153 (1981).

It is well-settled that "benefits under the LHWCA are not limited to employees who happen to enjoy good health (prior to their work accidents); rather, employers accept with their employees the frailties that predispose them to bodily hurt." J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144, 147-48 (**D.C. Cir.** 1967); Vandenberg v. Leicht Material Handling Co., 11 BRBS 164, 169 (1979).

Although the employment-related injury need not be the **sole** cause of the disability, the employment-related injury must at least be a **contributing** cause. The LHWCA does not cover disability (i.e., incapacity to earn wages) because of a subsequent condition which develops for reasons quite unrelated to employment. Vandenberg, 11 BRBS at 170.

The employer, in rebutting the presumption by substantial evidence, need only introduce evidence controverting the existence of a relationship between the bodily harm and employment working conditions. The employer need not necessarily prove another agency of causation. Brennan v. Bethlehem Steel Corp., 8 BRBS 419 (1978); Carver v. Potomac Elec. Power Co., 8 BRBS 43 (1978).

8.3.2 Balancing or Weighing the Medical Ratings

In a claim for benefits for permanent partial disability of the right leg, a claimant's physician rated such disability as 17 ½ percent and two other physicians found no permanent loss of use of the leg as the claimant had no loss of motion and no ligament instability. The judge awarded five percent disability for the claimant's "slight" permanent injury to his right leg due to the tenderness in the knee. The judge selected that rating because he found "no loss of flexion or rotation and continued ability to perform his work."

The Board affirmed, holding "the Act does not require adherence to any particular guide or formula" and that the "administrative law judge was not bound by the doctor's opinion nor was he bound to apply the Guides or any other particular formula for measuring disability." Mazze v. Frank J. Holleran, Inc., 9 BRBS 1053, 1055 (1978).

Moreover, although the question of whether the loss of use of the member affects his ability to perform his work is **immaterial** to the issue of his entitlement to compensation, i.e., any **economic** loss, the judge can properly consider the claimant's ability to return to work at his regular job in determining whether or not the claimant has sustained any measure of **physical** injury. Mazze, 9 BRBS at 1054-55; Michael v. Sun Shipbuilding & Dry Dock Co., 7 BRBS 5 (1977) (judge properly awarded four percent partial loss of use of the right foot, pursuant to Section 8(c)(4) and (19) where claimant's initial treating physician rated such impairment as two percent and the second physician issued a rating of from three to five percent, according to the AMA Guides).

Where the employee's work injury resulted in a fracture of the left great toe and where two physicians rated such impairment at 15 and 19 ½ percent loss of use of the left foot and the third physician estimated a ten percent loss of use of the left great toe, the Board affirmed the judge's award of ten percent loss of use of the left foot as a whole, based on the totality of the record,

including the seriousness of the injury as "reflected in the substantial amount of time lost from work following the injury for the purpose of convalescence." Iglesias v. Pittston Stevedoring Corp., 6 BRBS 128, 131-32 (1977). See also Ortega v. Bethlehem Steel Corp., 7 BRBS 639 (1978) (in determining the extent of a scheduled injury the judge is not required to adhere to the AMA Guides for Combined Values.)

Where a claimant's work accident resulted in a right hand and wrist injury, he was limited to the benefits provided by Section 8(c)(1), in the absence of establishing that he was totally disabled. Two doctors rated the disability as 10 and 15 percent, respectively. On the other hand, two other physicians found no permanent partial disability. The ALJ found "minimal loss of function as a result of the injury and awarded a scheduled loss of five percent." The Board affirmed, holding that "(i)t is clear that the Administrative Law Judge is not bound by any particular formula when determining the degree of permanent partial disability and that it is within his discretion to assess a degree of disability different from the ratings found by the physicians if that degree is reasonable." Peterson v. Washington Metro. Area Transit Auth., 13 BRBS 891, 897 (1981).

The judge, however, in balancing or weighing the medical ratings, **should be careful** not to exercise "medical judgment concerning the conversion of the percent of impairment to the knees to that of the legs for which there is no support in the record." Griffin v. Gates & Fox Constr. Co., 13 BRBS 384, 387 (1981). In Griffin, the employee's injury to his knees was rated by the physicians in terms of impairment to the knees, but as there were no ratings as to the impairment of the legs, the judge's acceptance of and reduction of one doctor's rating by a conversion factor of 75 percent was not supported by the record. Griffin, 13 BRBS at 386. Compare Jones v. I.T.O. Corp. of Baltimore, 9 BRBS 583, 585 (1979) ("[T]he AMA Guide is a standard reference widely used by physicians in testimony before administrative law judges;" in this case, however, "the Guide had not been placed in evidence.").

8.3.3 Section 8(c)(1) Loss of Use of Arm

Where a claimant's accident resulted in a fracture of the left arm and where he was not able to establish impairment to his shoulder, thereby justifying an award pursuant to Section 8(c)(21), such claimant was only partially disabled and his recovery was limited to the schedule provisions of Section 8(c)(1). See generally Potomac Elec. Power Co. v. Director, OWCP, 449 **U.S.** 268, 277 n.17, 14 BRBS 363, 366-67 n.17 (1980); Rivera v. United Masonry, 24 BRBS 78, 81 (1990); Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94 (1988).

Where a claimant's work accident injured his left wrist and where he sought benefits for loss of use of his left arm, pursuant to Section 8(c)(1), the Board reversed an award for twenty (20) percent permanent partial disability of the left upper extremity, as not permitted by the LHWCA. Sankey v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 886, 887 (1978). After reconsidering the record, the judge awarded benefits for twenty five percent disability of the arm, rejecting the employer's argument that the award should be based upon Section 8(c)(3).

The Board affirmed the ALJ's finding based upon the claimant's testimony regarding his limitations in performing his job and the fact that the traumatic arthritis is likely to be a progressive factor. The Board permitted consideration of this latter evidence as a discussion of the arthritic disease process, and not as a discussion of the economic factors resulting from the arthritic disease process. Sankey v. Sun Shipbuilding & Dry Dock Co., 14 BRBS 272, 273 (1981).

Where a claimant's work accident resulted in "a severe injury to his right elbow" and where the employer showed the availability of suitable alternate work, the claimant was only partially disabled and limited to the benefits provided by Section 8(c)(1). Argonaut Ins. Co. v. Director, OWCP, 646 F.2d 710, 13 BRBS 297 (**1st Cir.** 1981).

Where a claimant's work accident resulted in an injury to the dorsum of his right hand, requiring surgical transplanting of the ulnar nerve, and the claimant was complaining of numbness to the forearm, thumb, and third and fourth fingers of the right hand, the Board affirmed the judge's award of a fifty percent permanent partial disability of the right arm, pursuant to Section 8(c)(1) and (19). Hunigman v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 141 (1978).

A claimant's work accident resulted in injuries to his left shoulder and left knee. Medical diagnosis was a contusion and strain of the left shoulder and knee and a tear in the posterior portion of the medial meniscus. After the hearing the ALJ awarded, *inter alia*, benefits for "ten percent impairment of his shoulder and a twenty percent impairment of his leg." The Board affirmed, "conclud[ing] the record contains substantial evidence to support the judge's finding that the claimant suffered a ten percent disability of his shoulder and a twenty percent disability of his knee. These ratings are set forth by Dr. Holman." The shoulder disability was compensated pursuant to Section 8(c)(1). Scott v. C & C Lumber Co., 9 BRBS 815, 816, 817, 823 (1978).

[ED. NOTE:** Query the precedential value of this case. Shoulder injuries are not payable under the schedule. Grimes v. Exxon Co., U.S.A, 14 BRBS 573 (1981).**]

An employee sustaining a fracture of the left humerus was limited to the benefits provided by Section 8(c)(1) for the left upper extremity and for the particular impairment as rated by the physician. An **injury to the shoulder** is not encompassed by the schedule provisions of the LHWCA and, as the judge rejected the employee's subjective complaints about chronic shoulder pain, as contraindicated by the negative objective tests, the employee was limited to the schedule award.

Moreover, the employer had identified a number of available positions that were within the employee's physical and educational restrictions. Thus, the employee was only partially disabled. Rivera v. United Masonry, 24 BRBS 78, 79 (1990), aff'd, 948 F.2d 774, 25 BRBS 51 (CRT) (**D.C. Cir.** 1991).

The Board has **consistently** held that **an award under the schedule may not coincide with an award for permanent total disability as permanent total disability presupposes the loss of**

all wage-earning capacity. Mahar v. Todd Shipyards Corp., 13 BRBS 603 (1981); Tisdale v. Owens-Corning Fiber Glass Co., 13 BRBS 167 (1981), aff'd mem. sub nom. Tisdale v. Director, OWCP, 698 F.2d 1233 (**9th Cir.** 1982), cert. denied, 462 **U.S.** 1106 (1983).

This position has been **consistently upheld** by the **Courts of Appeal** to avoid double recoveries. See, e.g., Korineck v. General Dynamics Corp., 835 F.2d 42, 20 BRBS 63 (CRT) (**2d Cir.** 1987) (a claim for hearing loss benefits is **subsumed** within an award of permanent total disability benefits for a back injury); Hastings v. Earth Satellite Corp., 628 F.2d 85, 14 BRBS 345 (**D.C. Cir.**), cert. denied, 449 **U.S.** 905 (1980); Jacksonville Shipyards v. Dugger, 587 F.2d 197, 9 BRBS 460 (**5th Cir.** 1979); Fluor Corp. v. Cunnyngham, 403 F.2d 223 (**5th Cir.** 1968), cert. denied, 394 **U.S.** 943 (1969).

[ED. NOTE: *This holding is questionable because a schedule loss presupposes a loss of wage-earning capacity and an employee who is out of work because of a schedule injury and who returns to full-time work, at no loss in salary, can still receive an award pursuant to Sections 8(c)(1)-(20).**]***

Where a claimant's work accident resulted in disability to both his right shoulder and his right arm, the Board rejected the conclusion that the primary site of disability is determinative of the type of compensation to be awarded. Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990). Thus, where the judge awarded permanent partial benefits under Section 8(c)(21) for the shoulder disability, the Board remanded the case for reconsideration of the claimant's entitlement to a schedule award for his right arm injury. Bivens, 23 BRBS at 236-37.

Where a claimant's disability resulted from a shoulder injury, however, the Board affirmed the determination that the disability was compensable under Section 8(c)(21), since the **Section 8(c) schedule is not applicable where the actual injury is to a body part not specifically listed in the schedule, even if it results in disability to a part of the body which is listed**. Andrews v. Jeffboat, Inc., 23 BRBS 169, 173 (1990); Pool Company v. Director, OWCP [White], 206 F.3d 543, (**5th Cir.** 2000), rehearing en banc denied, 232 F.3d 212 (**5th Cir.** 2000) (Claimant seeking compensation for the loss of use of a scheduled member resulting from an injury to an unscheduled body part may recover only under § 8(c)(21)). See also, Barker v. U.S. Dept. of Labor, 138 F.3d 431 (**1st Cir.** 1998) and Long v. Director, OWCP, 767 F2d 1578 (**9th Cir.** 1985).

In Pool, the **Fifth Circuit** examined the New York ancestry of the LHWCA, along with the prior **Ninth** and **First Circuit** cases and concluded that the **purpose and Congressional intent** behind the LHWCA led to the conclusion that if an individual suffers an injury to an unscheduled body part, then the individual must recover under Section 8(c)(21), "no matter that the [claimant's] symptoms extend beyond the injured area. The schedules were set up to ameliorate administrative burdens by providing a simple method of determining the effect on the wage-earning capacity of typical and classified injuries. [See PEPCO at 435.] Streamlinining compensation for arm injuries, which are unlikely to effect other body parts, while leaving open the question of appropriate compensation levels for injuries that may effect multiple body parts, such as an injury to a neck, is

consistent with these goals." Pool Company v. Director, OWCP [White], 206 F.3d 543, (**5th Cir.** 2000), rehearing en banc denied, 232 F.3d 212 (**5th Cir.** 2000)

Importantly, the **Fifth Circuit** noted that holding otherwise would open the door for a claimant to recover under both Section 8(c)(1) [arm] and Section 8(c)(21) [unscheduled injury to shoulder]. Such a potential for double compensation would undercut the simplifying purpose of the schedule. See also, I.T.O. Corp. of Baltimore v. Green, 185 F.3d 239, 243 (**4th Cir.** 1999), rev'g, 32 BRBS 67 (1998).In Green, the **Fourth Circuit** held that "[i]n no case should the rate of compensation for a partial disability, or combination of partial disabilities, exceed that payable to the claimant in the event of total disability. To hold otherwise would be to conclude that the whole may be less than the sum of its parts, and we are fairly certain that – although our authority extends to a myriad of matters – we are without jurisdiction to repeal the laws of mathematics." Green at 243 (**4th Cir.** 1999).

8.3.4 Sections 8(c)(1) and 8(c)(2) Concurrent Awards

Where a claimant's work accident resulted in injuries to his left arm (total loss of use), his right arm (40 percent loss of use) and his left leg (30 percent loss of use) and where three physicians issued different impairment ratings, the Board affirmed the judge's total acceptance of the ratings opined by one physician and the Board rejected the employer's argument that the awards should be amended to conform with the reports of two doctors who arrived at lower percentages. Wright v. Superior Boat Works, 16 BRBS 17, 19 (1983).

Moreover, an additional and concurrent award for disfigurement of the hands, pursuant to Section 8(c)(20), does not constitute impermissible double recovery under the LHWCA. Wright, 16 BRBS at 20.

8.3.5 Section 8(c)(1) Versus Section 8(c)(3)

Where the injury occurred to a larger member (arm) and impaired the smaller connected member (hand), the judge cannot issue separate permanent partial disability awards for a claimant's arm and hand and should award permanent partial disability benefits for the fifty (50) percent loss of use of his arm. Furthermore, the award was for the arm where the injury to the arm occurred below the elbow. Moreover, Section 8(c)(22), providing awards for each member, did not apply as the claimant's disability resulted from one accident. Mason v. Baltimore Stevedoring Co., 22 BRBS 413, 416-17 (1989).

8.3.6 Loss of Use of Leg

A claimant sustained a left knee injury in 1970, underwent a medial meniscectomy and the carrier accepted and paid the doctor's ten percent schedule rating, pursuant to Section 8(c)(2), based upon his 1970 average weekly wage. The claimant returned to work at the shipyard and, nine years later, the doctor diagnosed "post-traumatic arthritis developing as a sequel to his meniscectomy" of

nine years earlier. The doctor opined that the claimant's knee disability had increased to twenty percent.

The claimant, alleging a 1979 occupational disease which was either latent or the result of repetitive trauma incident to his climbing and squatting on the job, filed a claim for his increased disability based upon his 1979 average weekly wage. The carrier agreed that the claimant had sustained one injury, and that injury occurred in 1979. The ALJ and the Board agreed that the claimant's post-traumatic left knee degenerative arthritis was a latent occupational disease and that, as it became manifest in 1979, appropriate benefits for the twenty percent permanent partial disability should be based upon his 1979 average weekly wage. Morales v. General Dynamics Corp., 16 BRBS 293 (1984).

Morales was appealed and the **Second Circuit**, acknowledging situations where the increased risks of a particular employment aggravate a pre-existing physical condition, thereby rendering the resultant disability as an occupational disease, saw no reason "why this rule should not be applied where the pre-existing condition is arthritic in nature." Director, OWCP v. General Dynamics Corp., 769 F.2d 66, 68, 17 BRBS 130, 133 (CRT) (**2d Cir.** 1985), rev'g 16 BRBS 293 (1984).

However, because there was "neither evidence nor findings that osteoarthritis was a hazard peculiar to the nature of Morales' work or that Morales' work activities between 1970 and 1979 aggravated his pre-existing knee condition" and as the only physician opined that the claimant's condition was "post-traumatic arthritis developing as a sequel to his meniscectomy" of 1970, the **Second Circuit** held that benefits for the claimant's increased disability of ten percent should be based upon his 1970 average weekly wage as "Morales' increased arthritic disability (falls) squarely within the statutory definition of accidental injury, i.e., accidental injury ... and such occupational disease or infection ... as naturally or unavoidably results from such accidental injury." General Dynamics Corp., 769 F.2d at 68, 17 BRBS at 133 (CRT). Accord Gencarelle v. General Dynamics Corp., 22 BRBS 170, aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (**2d Cir.** 1989).

Clark had injured his left knee while playing high school football and re-injured the same knee some eleven years later when he fell off a toboggan. He underwent knee surgery after this latter injury. He joined the U.S. Navy, but was discharged in 1978 due to problems with his left knee. He was given a ten percent service-aggravated disability discharge. Two years later, he twisted his left knee while working as a maritime employee for the employer. The medical evidence reflected (1) that the claimant had a seventeen percent impairment of the left knee and a one percent impairment of the left leg at the ankle, and (2) that two-thirds of the claimant's present knee disability is due to problems that existed prior to his work injury and that none of this ankle disability is due to his pre-existing injuries. Clark was awarded benefits for a six and two-thirds percent disability, pursuant to Sections 8(c)(2) and (19) of the LHWCA, representing one-third of the seventeen percent knee disability and one percent for the ankle disability.

The Board reversed, holding that the employer, under the aggravation rule, is responsible for the claimant's entire knee and ankle disabilities as the credit doctrine does not apply because the

claimant's prior schedule injury was not compensated under the LHWCA. Clark v. Todd Shipyards Corp., 20 BRBS 30, 31 (1987), aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP, 848 F.2d 125, 21 BRBS 114 (CRT) (**9th Cir.** 1988) (the credit doctrine does not apply to a veteran's disability benefits). In Clark, the Board held that the claimant is entitled to an award for his entire seventeen percent knee disability and one percent ankle disability, pursuant to Section 8(c)(2). Clark, 20 BRBS at 32.

A noteworthy decision is Frye v. Potomac Electric Power Co., 21 BRBS 194 (1988), wherein the Board held that where the claimant suffers two distinct injuries, a scheduled injury and a nonscheduled injury arising from a single accident or multiple accidents, the claimant may be entitled to receive compensation under both the schedule and Section 8(c)(21), depending upon whether the claimant's condition is the natural consequence of his work-related ankle injury or constitutes a separate and distinct injury. In Frye, the employee sustained injuries to his right ankle and back when he jumped from a falling ladder. Frye, 21 BRBS at 197-98.

In Turney v. Bethlehem Steel Corp., 17 BRBS 232 (1985), the Board concluded that the judge erred in awarding only permanent partial disability benefits under Section 8(c)(21), where the claimant sustained knee and back injuries arising from two separate work accidents. The Board remanded the case to the judge, noting that PEPCO required that the claimant receive a scheduled award for the knee injury and an award under Section 8(c)(21) for the back injury from which the judge must factor out any loss in wage-earning capacity due to the knee injury. Id. at 234-35.

In order to prevent excessive recoveries by claimants and hardships to employers, the Board and the **Fifth Circuit** have applied the **credit doctrine**, holding that in cases under the schedule where a claimant has a prior injury which has already been compensated under the LHWCA, and a subsequent injury results in increased disability to the scheduled body part, the employer is liable only for the increased liability. Clark, 20 BRBS at 31; Brown v. Bethlehem Steel Corp., 19 BRBS 200, on recon., 20 BRBS 26 (1987), aff'd in pertinent part sub nom. Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47 (CRT) (**5th Cir.** 1989).

8.3.7 Section 8(c)(2) vs. Total Disability

Where a claimant injured his right knee twice in work-related injuries and as an automobile accident directly resulting from the collapse of his weakened right knee did not constitute an independent and intervening event, the claimant was not limited to the benefits provided by Sections 8(c)(2) and (18) and he could be awarded permanent total disability benefits unless the employer demonstrated the availability of suitable alternate employment. See Hicks v. Pacific Marine & Supply Co., 14 BRBS 549, 556, 559 (1981). See also Potomac Elec. Power Co. v. Director, OWCP, 449 **U.S.** 268 (1980); Jacksonville Shipyards v. Dugger, 587 F.2d 197, 9 BRBS 460 (**5th Cir.** 1979).

A determination, pursuant to Sections 8(c)(4) and (18), that the loss of use of a foot by an employee is tantamount to physical loss of the foot is improper where the employee who lost his right foot and who injured his left foot at work can walk around a small area without problem, can

stand for four to five hours without discomfort if he maintains therapy, can drive himself to work without special devices and does not suffer considerable pain, except when walking long distances. Such evidence demonstrates that he did not totally lose use of the left foot. Thus, as the employee did not suffer physical loss of both feet, Section 8(c)(18) is inapplicable and the Board reversed an award of permanent total disability benefits, pursuant to Section 8(a), as there is no evidence that he works only by extraordinary effort. Collins v. Todd Shipyards Corp., 9 BRBS 1015 (1979).

8.3.8 Sections 8(c)(2) and 8(c)(19)

Where the employee suffered an accidental work-related injury to his back, he could not receive an award of benefits under Sections 8(c)(2) and 8(c)(19) for the partial loss of use of his leg because the injury to the back was to an unscheduled portion of the body. Moreover, the Board affirmed denial of benefits, pursuant to Sections 8(c)(21) and 8(h), as the employee had not established a loss of wage-earning capacity. Long v. Director, OWCP, 767 F.2d 1578, 17 BRBS 149 (CRT) (**9th Cir.** 1985); Todd Shipyards Corp. v. Allan, 666 F.2d 399, 402 (**9th Cir.** 1981) (injury to neck and shoulder, 25% loss of function in each arm), cert. denied, 459 **U.S.** 1034 (1982); Hole v. Miami Shipyards Corp., 640 F.2d 769, 772-73 (**5th Cir.** 1981) (injury to back resulting in leg pain).

8.3.9 Sections 8(c)(2), 8(c)(19) and 8(c)(22)

An injury to an employee's right hip is properly compensated under Section 8(c)(2) of the LHWCA and the employer is also responsible for the resulting effects to the pre-existing right hip condition, as such pre-existing disability was accelerated and aggravated by the work-related injury. The employee had also sustained left knee disability as a result of that work-related injury. The Board held that a claimant who receives a scheduled award under Sections 8(c)(1)-(20) cannot be compensated for an injury under Section 8(c)(21). Moreover, under Section 8(c)(22), compensation is to be awarded for the loss of use of each member, with the awards to run **consecutively**. Thus, the awards for the right hip disability and the left knee disability must not **overlap** as such awards run **consecutively**. Davenport v. Apex Decorating Co., 13 BRBS 1029, 1033-34 (1981).

8.3.10 Sections 8(c)(3) Loss of Use of Hand

The judge properly awarded a claimant benefits for his five percent thumb impairment, resulting from a fracture of the distal phalanx, pursuant to Section 8(c)(6) and not Section 8(c)(21), without consideration of any loss of earning capacity, since loss of earning capacity is presumed with proof of a loss described in Section 8(c)(6). The judge, accepting the disability rating opined by the surgeon, rejected the claimant's alternative request for a fifteen percent impairment of the left hand as the claimant is ambidextrous and, whenever possible, he used his seniority to transfer to less heavy work. Conteh v. Greyhound Lines, 8 BRBS 874 (1978).

Where an employee sustained a laceration of his left hand at the "fleshy portion between the palm and the thumb" and where "the surgeon not only operated on the thumb but also made an

incision on the underside of the claimant's wrist to recover a tendon "and where the surgeon rated the claimant's disability as 25 percent loss of use of the left hand, the judge properly awarded benefits, pursuant to Section 8(c)(3) and not Section 8(c)(6), as the claimant "testified that he sometimes experiences lumps in the area of the incision, and that his hand is often stiff and sore" and that "the application of pressure produces pain, and that there has been a loss of strength in his grip." Cross v. Lavino Shipping Co., 6 BRBS 579 (1977).

8.3.11 Section 8(c)(4) Loss of Use of Foot

Where a claimant's left ankle injury resulted only in subjective complaints of pain and where the doctor opined that the physical examination was "essentially normal," thereby constituting a zero percent impairment under the American Medical Association guidelines, the claimant is not entitled to a schedule award. The Board also affirmed the ALJ's conclusion that the claimant was capable of returning to his usual employment. Geisler v. Continental Grain Co., 20 BRBS 35, 37 (1987).

In Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986), the Board affirmed an award of permanent total disability benefits from the date of maximum medical improvement to the date on which the employer established the availability of light duty work, at its shipyard, within the employee's medical restrictions, and from that day an award of permanent partial disability benefits, pursuant to Sections 8(c)(4) and (19), for the employee's 10 percent disability of the right foot.

The Board, rejecting the employer's argument "that claimant cannot receive overlapping or concurrent awards for permanent total disability and for permanent partial disability under the schedule," held that the judge "awarded consecutive judgments" and such awards are permitted by the LHWCA. Darden, 18 BRBS at 227.

8.3.12 Section 8(c)(4) vs. Section 8(c)(15) Amputated Arm or Leg

Where a claimant's leg was amputated below the knee, the Board found that the employer's liability was limited to 205 weeks for loss of a foot, pursuant to Sections 8(c)(4) and (15). Section 8(c)(15) indicates the congressional intent to preclude liability for loss of the entire leg where only a below-the-knee amputation has been performed. Accordingly, the Board modified the decision to hold the employer liable for only the first 205 weeks of the claimant's permanent total disability compensation, with the Special Fund to be liable thereafter. Higgins v. Hampshire Gardens Apartments, 19 BRBS 77, 79-80 (1986).

8.3.13 Section 8(c)(5) (Loss of Use of Eye) Vis-A-Vis Section 8(c)(22)

Where the claimant and the employer acknowledge the permanent and total nature of the claimant's disability, the claimant is not entitled to an award for permanent partial disability under either Section 8(c)(5) for permanent loss of vision (25 percent) or Section 8(c)(16) for loss of use of one eye (100 percent), as injuries arising under the schedule which amount to permanent total

disability are subsumed under Section 8(a). See 33 U.S.C. § 908(c)(22); Jacksonville Shipyards v. Dugger, 587 F.2d 197 (**5th Cir.** 1979); Paiement v. Bath Iron Works Corp., 11 BRBS 767 (1980).

An employee was hit in the face by another worker and he filed a claim for benefits, alleging the incident left him with injuries to his eyes, ears, and nose, and caused him to lose nine teeth. The injuries to his eyes and ears are scheduled injuries, compensable by reference to the LHWCA's schedule provisions at Section 8(c)(5) and (13).

The injuries to his teeth and nose are unscheduled. The **Eighth Circuit** affirmed the denial of benefits as the medical evidence demonstrated (1) that any vision and hearing loss problems were not related to the work incident, and (2) that the injuries to his nose and loss of teeth did not affect his wage-earning capacity as he "worked six days a week for years after the incident, missing work only occasionally" and as he candidly admitted that "the accident has not changed his ability to do his job."

The **Eighth Circuit** affirmed the award of $250 for disfigurement, however, pursuant to Section 8(c)(20). The Court also directed that the Board award a $200 attorney fee for the successful prosecution. Arrar v. St. Louis Shipbuilding Co., 837 F.2d 334, 20 BRBS 79 (CRT) (**8th Cir.** 1988). See also 780 F.2d 19, 18 BRBS 37 (CRT) (**8th Cir.** 1985) (denial of benefits was reversed and the claim remanded to the Board for further proceedings).

It is well-settled that any loss of vision must be based upon the claimant's **uncorrected vision**, pursuant to Section 8(c)(5) and (19). The **Ninth Circuit** acknowledged that the Board's use of **uncorrected** vision constituted a liberal construction of the LHWCA but was in accord with the LHWCA's **"compelling language."** McGregor v. National Steel & Shipbuilding Co., 8 BRBS 48, 51 (1978), aff'd sub nom. National Steel & Shipbuilding Co. v. Director, OWCP, 703 F.2d 417, 15 BRBS 146 (CRT) (**9th Cir.** 1983); Gulf Stevedore Corp. v. Hollis, 298 F. Supp. 426, 430-31 (**S.D. Tex.**), aff'd per curiam, 427 F.2d 160, 161 (**5th Cir.** 1969), cert. denied, 400 **U.S.** 831 (1970).

A claimant's **epiphora** (excessive tearing) in his right eye, resulting from a work injury, which caused his vision to blur, is compensable under Sections 8(c)(5) and (19), not Section 8(c)(16), since the claimant has suffered no loss of vision acuity (i.e., the ability of the eye to detect accurately objects, e.g., block letters on a Snellen Chart, at both near and far distance). The Board reversed the denial of benefits "because the claimant had no 'measurable difficulty in performing his duties' as a carpenter and because the claimant could use protective goggles to prevent the tearing," the Board holding that "these findings were error as a matter of law, because neither are relevant to the two questions before the judge, whether the claimant has suffered a loss of visual **efficiency** (i.e., which refers to most of the other visual facets, e.g., light sensitivity) and the extent of that loss, if any." **Epiphora**, thus, is compensable as "the American Medical Association's Guides to the Evaluation of Permanent Impairment recognizes epiphora as an 'ocular disturbance'." Banks v. Moses-Ecco Co., 8 BRBS 117, 121 (1978).

An employee diagnosed as having intra ocular herpes simplex, a virus within the eye which was aggravated by a work-related traumatic injury, is entitled to compensation pursuant to Section 8(c)(5) and (16). Henry v. National Steel & Shipbuilding Co., 8 BRBS 325, 327 (1978).

In Gunter v. Parsons Corp., 4 BRBS 241 (ALJ) (1976), aff'd, 6 BRBS 607 (1977), aff'd, 619 F.2d 38, 12 BRBS 234 (**9th Cir.** 1980), the claimant contended that his work-related use of certain toxic substances precipitated blinding Leber's Optic Atrophy, a rare disease of unknown etiology which attacks the optic nerves. The judge awarded benefits for the claimant's permanent total disability due to his total blindness as the claimant, aided by the Section 20(a) presumption, established a work-related injury as (1) the claimant's evidence rises above the level of "mere fancy," and (2) the employer did not offer substantial evidence that the condition was not precipitated by the toxic substances.

8.3.14 Section 8(c)(6) Loss of Use of Thumb

The ALJ, in Conteh v. Greyhound Lines, 8 BRBS 874 (1978), properly awarded the claimant benefits for his five percent thumb impairment, resulting from a fracture of the distal phalanx, pursuant to Section 8(c)(6) and not Section 8(c)(21), without consideration of any loss of earning capacity, since loss of earning capacity is presumed with proof of a loss described in Section 8(c)(6). The judge, accepting the disability rating opined by the surgeon, rejected the claimant's alternative request for a 15 percent impairment of the left hand as the claimant is ambidextrous and, whenever possible, he used his seniority to transfer to less heavy work.

Where an employee sustained a laceration of his left hand at the "fleshy portion between the palm and the thumb" and where "the surgeon not only operated on the thumb but also made an incision on the underside of the claimant's wrist to recover a tendon" and where the surgeon rated the claimant's disability as twenty-five percent loss of use of the left hand, the judge properly awarded benefits, pursuant to Section 8(c)(3) and not Section 8(c)(6), as the claimant "testified that he sometimes experiences lumps in the area of the incision, and that his hand is often stiff and sore" and that "the application of pressure produces pain, and that there has been a loss of strength in his grip." Cross v. Lavino Shipping Co., 6 BRBS 579, 582-83 (1977).

8.3.15 Section 8(c)(8) Loss of Use of Great Toe

In Vanison v. Greyhound Lines, 17 BRBS 179 (1985), the claimant, a bus cleaner for the employer, had his right great toe crushed by a bus cleaning machine, and it subsequently became necessary to amputate the distal or outermost phalange of this toe. The claimant sought benefits for a 30 percent loss of use of his right foot, pursuant to Section 8(c)(4), but the judge awarded 19 weeks compensation for loss of the distal phalange, pursuant to Sections 8(c)(8) and (14). The Board affirmed this award of benefits, the Board pointing out the interplay of the various sections of the pertinent schedule provisions.

Section 8(c) of the LHWCA sets forth a compensation schedule for permanent partial disability for specified injuries. The schedule provides an award of 205 weeks of compensation for loss of a foot, 8(c)(4), 38 weeks of compensation for the loss of a great toe, 8(c)(8), and a proportionate number of weeks for a proportionate loss or loss of use of any member. See 33 U.S.C. § 908(c)(19). Section 8(c)(14) also specifies compensation payable for the loss of part of a digit:

> **Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.**

33 U.S.C. § 908(c)(14).

In Vanison, the record reflected that although one physician opined that the claimant had a 30 percent permanent residual disability of the right foot, two other physicians opined that his disability was limited to the toe. Thus, the judge properly accepted the opinions of the two physicians and rejected the single opinion as that physician "never explained how he arrived at his 30 percent disability figure."

Thus, the Board affirmed the award of benefits limited to the toe, as the claimant failed to show any disability to the foot. The percentage awarded was also affirmed as the two physicians assessed the claimant's toe disability at 75 percent and 100 percent, respectively, since Section 8(c)(14) specifically provides that compensation for loss of the first phalange of a digit shall be one-half of the compensation for loss of the entire digit.

Moreover, Section 8(c)(17), which provides that "compensation for loss of two or more digits, or one or more phalanges of two or more digits, may be proportioned to the loss of use of the hand or foot occasioned thereby," is not applicable herein since the claimant has lost only one phalange of one digit. Vanison, 17 BRBS 179. Compare Iglesias v. Pittston Stevedoring Corp., 6 BRBS 128, 131 (1977) (the fracture of the claimant's left great toe produced a 10 percent loss of use of the left foot as a whole because of the seriousness of the injury).

In Burson v. T. Smith & Son, Inc., 22 BRBS 124, 127 (1989), the claimant injured his right foot and right great toe in a work-related accident. The employer paid appropriate benefits while he was out of work. The claimant retired several months after his return to work and six weeks thereafter sought medical treatment for his foot pain. The doctor diagnosed the source of pain as a bunion near the right great toe, which pre-existed the injury. To alleviate the foot pain, a bunionectomy was performed.

The Board, in reviewing the record, concluded that there was no medical opinion refuting a causal relationship between the work injury and the bunionectomy and that claimant, aided by the Section 20(a) presumption, had established causation as a matter of law, thereby entitling him to medical benefits for such injury, as the work-related aggravation of a pre-existing bunion constitutes

a work-related injury. The claim was remanded to the judge to determine the extent, if any, of the disability to the right great toe, pursuant to Section 8(c)(8) and (19). Burson, 22 BRBS at 127.

8.3.16 Sections 8(c)(9) and 8(c)(10): Loss of Use of Second and Third Finger

The **Ninth Circuit** found that substantial evidence supported the judge's finding that the claimant was entitled to compensation only for a 50 percent loss of his middle finger, pursuant to Section 8(c)(9), and a 20 percent loss of his ring finger, pursuant to Section 8(c)(10), where the claimant's treating physician rated the middle finger at a 25 percent impairment and the ring finger at a 20 percent impairment.

The court noted approvingly that the ALJ, as the fact-finder, heard the claimant's testimony, asked him questions, and observed the injured fingers. Therefore, as there was not a proven physical loss of 50 percent of each of the two injured fingers, the claimant was not entitled to proportionate loss of use of his hand as Section 8(c)(17) requires proof of physical loss of each of his two injured fingers. Accordingly, the judge's determination was affirmed. King v. Director, OWCP, 904 F.2d 17, 23 BRBS 85 (CRT) (**9th Cir.** 1990).

8.3.17 Section 8(c)(12) Loss of Use of Fourth Finger

In Greto v. Blakeslee, Arpaia & Chapman, 10 BRBS 1000 (1979), the claimant's work accident resulted in the severing of the fourth finger of his right hand and although his finger was surgically saved, the claimant thereafter was diagnosed as suffering from causalgia (i.e., an over-reaction of the nerves), a condition which developed as a result of the crush injury. Although the claimant returned to work, the judge, permitting the parties to introduce evidence as to the claimant's ability to do his work post-injury, determined that the post-injury wages did not reasonably represent his wage-earning capacity and the judge awarded benefits pursuant to the Sections 8(c)(21) and 8(h). Greto, 10 BRBS at 1004.

The Board reversed an award of benefits, pursuant to Section 8(c)(21), however, as the claimant's post-injury wage-earning capacity had not been properly determined, the Board noting that "the record in this case does support an award under Section 8(c)(21)" according to the method used by the judge. Chairman Smith dissented on the grounds that "Claimant suffered a disability to his finger, a scheduled member of the body and should be limited to a schedule award under Sections 8(c)(12) and 19 of the Act." Greto, 10 BRBS at 1006.

[ED. NOTE:** Query the precedential value of this case.**]

8.3.18 Section 8(c)(14) Determining Loss of Phalanges

The **Ninth Circuit** has found that substantial evidence supported an ALJ's finding that a claimant was entitled to compensation only for a 50 percent loss of his middle finger, pursuant to Section 8(c)(9), and a 20 percent loss of his ring finger, pursuant to Section 8(c)(10), where the claimant's treating physician rated the middle finger at a 25 percent impairment and the ring finger at a 20 percent impairment.

The judge heard the claimant's testimony, asked him questions, and observed the injured fingers. Therefore, as there was not a proven physical loss of 50 percent of each of the two injured fingers, the claimant was not entitled to proportionate loss of use of his hand as Section 8(c)(17) requires proof of physical loss of each of his two injured fingers. Accordingly, the judge's determination was affirmed. King v. Director, OWCP, 904 F.2d 17, 23 BRBS 85 (CRT) (**9th Cir.** 1990).

In Vanison v. Greyhound Lines, 17 BRBS 179 (1985), the claimant, a bus cleaner for the employer, had his right great toe crushed by a bus cleaning machine, and it subsequently became necessary to amputate the distal or outermost phalange of his toe. The claimant sought benefits for a 30 percent loss of use of his right foot, pursuant to Section 8(c)(4), but the judge awarded 19 weeks compensation for loss of the distal phalange, pursuant to Sections 8(c)(8) and (14). The Board affirmed this award of benefits, the Board pointing out the interplay of the various sections of the pertinent schedule provisions.

Section 8(c) of the LHWCA sets forth a compensation schedule for permanent partial disability for specified injuries. The schedule provides an award of 205 weeks of compensation for loss of a foot, 8(c)(4), 38 weeks of compensation for the loss of a great toe, 8(c)(8), and a proportionate number of weeks for a proportionate loss or loss of use of any member. See 33 U.S.C. § 908(c)(19).

Section 8(c)(14) also specifies compensation payable for the loss of part of a digit:

> **Phalanges: Compensation for loss of more than one phalange of a digit shall be the same for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.**

33 U.S.C. § 908(c)(14).

Although one physician opined that the claimant had a 30 percent permanent residual disability of his right foot, two other physicians opined that his disability was limited to the toe. Thus, the judge properly accepted the opinions of the two physicians and rejected the single opinion as that physician "never explained how he arrived at his 30 percent disability figure." Thus, the Board affirmed the award of benefits limited to the toe as the claimant failed to show any disability

to the foot. The percentage awarded was also affirmed, as the two physicians assessed the claimant's toe disability at 75 percent and 100 percent, respectively, since Section 8(c)(14) specifically provides that compensation for loss of the first phalange of a digit shall be one-half of the compensation for loss of the entire digit. Moreover, Section 8(c)(17), which provides that "compensation for loss of two or more digits, or one or more phalanges of two or more digits, may be proportioned to the loss of use of the hand or foot occasioned thereby," is not applicable herein since the claimant has lost only one phalange of one digit. Vanison, 17 BRBS at 181. Compare Iglesias v. Pittston Stevedoring Corp., 6 BRBS 128, 131 (1977) (the fracture of claimant's left great toe produced a ten percent loss of use of the left foot as a whole because of the seriousness of the injury).

8.3.19 Section 8(c)(15) Amputated Arm or Leg

Where a claimant's leg was amputated below the knee, the Board found that the employer's liability was limited to 205 weeks for loss of a foot, pursuant to Section 8(c)(4) and (15). Section 8(c)(15) indicates the congressional intent to preclude liability for loss of the entire leg where only a below-the-knee amputation has been performed. Accordingly, the Board modified the decision to hold the employer liable for only the first 205 weeks of the claimant's permanent total disability compensation, with the Special Fund to be liable thereafter. Higgins v. Hampshire Gardens Apartments, 19 BRBS 77, 79-80 (1986).

The date the physician assessed the employee with a disability rating was sufficient to determine the date of permanency. Miranda v. Excavation Constr. Co., 13 BRBS 882 (1981). As the employer demonstrated the availability of suitable alternate employment, the employee is limited to the benefits provided by the schedule. Moreover, where Section 8(c)(15) explicitly equates a below-the- knee amputation with the loss of a foot, benefits were properly awarded, pursuant to Section 8(c)(4), for loss of use of the foot. Jones v. Genco, Inc., 21 BRBS 12, 14 (1988).

Where the employee's injury occurred to a larger body member (arm) **and** impaired the smaller connected member (hand), the Board reversed the award of **separate** permanent partial disability awards for the claimant's arm and hand and modified the decision to award the claimant permanent partial disability benefits for the 50 percent loss of use of his arm. Mason v. Baltimore Stevedoring Co., 22 BRBS 413 (1989).

The Section 8(c) schedule accounts for impairments necessarily caused to smaller members, as a result of injuries to larger connected members, by awarding greater compensation for loss of use of greater members. See 33 U.S.C. § 908(c)(11)-(20). Section 8(c)(22), which deals with loss of use of more than one member, applies only to disability resulting from multiple injuries to members covered by the schedule. Mason, 22 BRBS at 416; Brandt v Avondale Shipyards, 16 BRBS 120 (1984) (where the employee injured his right knee and his left index finger in two separate work accidents).

8.3.20 Section 8(c)(16) Binocular Vision or Per Centum of Vision

The **Ninth Circuit** affirmed the Board's use of **uncorrected vision** to determine the extent of the claimant's disability and an award of benefits pursuant to the schedule provision. National Steel & Shipbuilding Co. v. Director, OWCP, 703 F.2d 417, 15 BRBS 146 (CRT) (**9th Cir.** 1983), aff'g 8 BRBS 48 (1978). The court rejected the employer's argument that benefits should be based upon the claimant's corrected vision and his loss of earnings, as determined under Section 8(c)(21). National Steel, 15 BRBS at 148.

Since the LHWCA makes it clear that injuries arising under the schedule which amount to permanent total disability are subsumed under Section 8(a), the claimant was not entitled to compounded benefits under Sections 8(c)(5) or 8(c)(16). Paiement v. Bath Iron Works Corp., 11 BRBS 767, 769 (1980).

8.3.21 Section 8(c)(17) Two or More Digits

Where a claimant's left ankle injury resulted only in subjective complaints of pain and where the doctor opined that the physical examination was "essentially normal," thereby constituting a zero percent impairment under the American Medical Association guidelines, the claimant was not entitled to a schedule award. The Board also affirmed the judge's conclusion that the claimant was capable of returning to his usual employment. Geisler v. Continental Grain Co., 20 BRBS 35, 37 (1987).

In Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986), the Board affirmed an award of permanent total disability benefits from the date of maximum medical improvement to the date on which the employer established the availability of light duty work, at its shipyard, within the employee's medical restrictions, and from that day an award of permanent partial disability benefits, pursuant to Sections 8(c)(4) and (19), for the employee's 10 percent disability of the right foot.

The Board, rejecting the employer's argument "that claimant cannot receive overlapping or concurrent awards for permanent total disability and for permanent partial disability under the schedule," held that the judge "awarded consecutive judgments" and such awards are permitted by the LHWCA. Darden, 18 BRBS at 227.

8.3.22 Sections 8(c)(18) and 8(c)(15) Total Loss of Use

Where an employee's leg was amputated below the knee, the Board held that the employer's liability was limited to 205 weeks for loss of a foot, pursuant to Sections (c)(4) and (15). Section 8(c)(15) reflects the congressional intention to preclude liability for loss of the entire leg where only a below-the-knee amputation has been performed. Higgins v. Hampshire Gardens Apartments, 19 BRBS 77, 79 (1986).

8.3.23 Sections 8(c)(18) and 8(c)(19) Partial Loss of Use

Scheduled awards may be based not only on total or partial loss of a member, but on total or partial loss of its use. See 33 U.S.C. §§ 908(c)(18) & (19); Travelers Ins. Co. v. Norton, 30 F. Supp. 119 (**E.D. Pa.** 1939); Conteh v. Greyhound Lines, 8 BRBS 874, 875 (1978).

The Board and the circuit courts have consistently held that a schedule award runs for the proportionate number of weeks attributable to the loss of use of the member at the full compensation rate of two-thirds of the average weekly wage. Nash v. Strachan Shipping Co., 15 BRBS 386, 391 (1983), aff'd in relevant part but rev'd on other grounds, 760 F.2d 569, 17 BRBS 29 (CRT) (**5th Cir.** 1985), aff'd on recon. en banc, 782 F.2d 513, 18 BRBS 45 (CRT) (**5th Cir.** 1986).

In Nash, the Board addressed the propriety of the judge's computations of benefits under the schedule and his assessment of compensation pursuant to Section 8(c)(19).

The ALJ, instead of applying the percentage of loss of use of the leg to the number of weeks in the schedule, as required by Sections 8(c)(2) and (19), applied the percentage of loss to the claimant's compensation rate. Thus, instead of finding the claimant entitled to two-thirds of his average weekly wage for 97.92 weeks (34 percent of 288 weeks), the judge charged the employer with payment of 4 percent of the compensation rate for 288 weeks and the Special Fund for the remaining 30 percent of the compensation rate for the next 288 weeks.

The **correct assessment**, pursuant to Section 8(c)(19), is payment at the full compensation rate (two-thirds of the claimant's average weekly wage of $451.54 for a proportional number of weeks). The number of weeks is calculated by applying the percentage of loss to the number of weeks stated in Section 8(c)(2). Using the 24 percent figure, the correct number of weeks is 69.12. Since this amount is less than 104 weeks, the Special Fund is not liable for benefits. Thus, in Nash, the Board modified the award and ordered that the employer pay the claimant compensation at two-thirds of his average weekly wage for 69.12 weeks. Nash, 15 BRBS at 391-92.

8.3.24 Section 8(c)(20) Disfigurement

Section 8(c)(20) provides that an award for disfigurement may be made for serious injury to areas of the body which might hinder a worker in efforts to obtain or maintain employment. Thus, although a serious **disfigurement to the face, head, or neck is automatically compensable**, Schreck v. Newport News Shipbuilding & Dry Dock Co., 10 BRBS 611 (1978), in the case of serious disfigurement to **other exposed parts of the body**, such as "very visible malformations of his arms" and an "obviously wasted" and "clawlike" left arm, the employee **must show that the disfigurement would be likely to handicap the employee in securing or maintaining employment**.

Moreover, a disfigurement award for the hands, pursuant to Section 8(c)(20), may run concurrently with scheduled permanent partial disability awards for both arms, pursuant to Section

8(c)(1). Wright v. Superior Boat Works, 16 BRBS 17, 20 (1983). Furthermore, **an award for facial disfigurement may run concurrently with an award under Section 8(c)(21)**. Fuduli v. Maresca Boat Yard, 7 BRBS 982 (1978). See also Case v. Pillsbury, 148 F.2d 392 (**9th Cir.** 1945) (disfigurement award for eye damage allowed in addition to a scheduled permanent partial award for loss of use of the eye, pursuant to Section 8(c)(5)).

The employee was not entitled to additional compensation for disfigurement under Section 8(c)(20), however, because he **continued** his **employment** with the employer and did not demonstrate that the disfigurement to the hands and arms was likely to handicap him in securing future employment.

Under Section 8(c)(20), any award for disfigurement other than to the head, face, or neck requires a showing that the disfigurement is likely to handicap the employee in securing or maintaining employment. Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 173-74 (1984); Creamer v. I.T.O. Corp. of Baltimore, 9 BRBS 812 (1978).

The Board, citing Moss v. Norfolk Shipbuilding & Dry Dock Corp., 10 BRBS 428 (1979), remanded the claim for a determination as to whether the claimant has suffered a **psychological injury arising out** of his employment. Winston, 16 BRBS at 174.

The Board has **consistently** interpreted this subsection to mean that a disfigurement of the face, head, or neck is compensable when it is determined to be **serious**. Adverse effect on an employee's ability to secure or maintain employment must be shown **only** in the case of serious disfigurement of other normally exposed areas of the body. See, e.g., Woodham v. U.S. Navy Exch., 2 BRBS 185, 188-89 (1975). The Board affirmed the judge's award of $2,500.00 for facial disfigurement, as the judge found the disfigurement to be severe and as the amount was well within the then-statutory limit of $3,500.00. Woodham, 2 BRBS at 189.

In facial disfigurement cases, the judge must find that the scar was **"serious"** in order to find it compensable, and there is no requirement that the scarring be likely to handicap the claimant in securing or maintaining employment. Brysiak v. Sun Shipbuilding & Dry Dock Co., 2 BRBS 197 (1975); Skipper v. Jacksonville Shipyards, 1 BRBS 533 (1975), rev'd on other grounds sub nom. Jacksonville Shipyards v. Perdue, 539 F.2d 533 (**5th Cir.** 1976), vac'd sub nom. Director, OWCP v. Jacksonville Shipyards, 433 **U.S.** 904 (1977).

The ALJ determines, as a factual matter, the seriousness of a particular disfigurement, and the Board has repeatedly stressed the respect due this determination because it is based on personal observation of the claimant. Bean v. Sun Shipbuilding & Dry Dock Co., 7 BRBS 605 (1978); Hamilton v. Sun Shipbuilding & Dry Dock Co., 4 BRBS 56 (1976); Duncan v. Myrtle Beach Air Force Base Exch., 1 BRBS 397 (1975).

As the ALJ recognized, the testimony regarding the claimant's modeling ambitions is unnecessary, because **in facial disfigurement cases there is no requirement of a finding of**

handicap to a claimant's employability, only that the disfigurement be "serious." Schreck v. Newport News Shipbuilding & Dry Dock Co., 10 BRBS 611, 612 (1978).

In disfigurement cases, the ALJ has broad fact-finding discretion. Section 8(c)(20) includes disfigurements with the scheduled permanent partial disabilities, in which lost wage-earning capacity is presumed and need not be specifically proven. Compensation for a disfigurement, however, adds an unusual element to the concept of scheduled disability in that, rather than being limited to compensation for a definite number of weeks or for a percentage of economic loss as in Sections 8(c)(1)-(19) and (21), **compensation for disfigurement is limited by the LHWCA to lump sum amounts between zero and $7,500**.

Since compensation for disfigurement is not based on proportionate loss of use, there is no need to solicit disability ratings from physicians. It is up to the judge's discretion to set within the dollar minimum and maximum the amount of compensation which will be "proper and equitable" for the particular serious disfigurement. Woodham v. U.S. Navy Exch., 2 BRBS 185 (1975). When the judge properly found a disfigurement serious, the Board has affirmed awards of $2,500 to a woman (Woodham) and $400 to a man (Skipper) and the **Ninth Circuit** has affirmed an award of $750 to a man. Case v. Pillsbury, 148 F.2d 392 (**9th Cir.** 1945). See Schreck, 10 BRBS at 613.

8.3.25 Scheduled Injuries -- Calculation

(See Topic 8.3.23, supra).

8.3.26 Section 8(c)(22) Multiple Scheduled Injuries

In Sablowski v. General Dynamics Corp./ Elec. Boat Div., 10 BRBS 1033, 1036 (1979), the Board held that the parties' agreement whereby the claimant, after his benefits for temporary total end, would be paid an additional lump sum of $1,900.00, plus medical expenses, for his work-related hearing loss, is not precluded by the LHWCA, as Section 8(c)(22) provides for consecutive awards under the schedule and since the claimant cannot receive permanent partial disability benefits **while** he is receiving temporary total disability compensation. Thus, as such **contingent award is not precluded** by the LHWCA, the Board remanded the matter to the Deputy Commissioner.

The Board has consistently held that two separate scheduled disabilities must be compensated under the pertinent schedules in the absence of a showing of a total disability, and has precluded a claimant from establishing a greater loss of wage-earning capacity than that presumed by the LHWCA, or to otherwise receive compensation under section 8(c)(21), citing PEPCO.

Since the claimant suffered injuries to more than one member covered by the schedule, the claimant must be compensated under the applicable portion of Sections 8(c)(1)-(20), based on the unambiguous language of Section 22 of the LHWCA. See, e.g., Brandt v. Avondale Shipyards, 16 BRBS 120 (1984). In Brandt, the employee had sustained injuries to his right knee and his left index

finger in separate work accidents and the Board affirmed awards pursuant to Sections 8(c)(2), (7), (19), and (22).

Where the injury occurred to a larger member (arm) and impaired the smaller connected member (hand), the ALJ cannot issue separate permanent partial disability awards for the claimant's arm and hand and, according to the Board, should award permanent partial disability benefits for the 50 percent loss of use of his arm. Furthermore, the award was for the arm where the injury to the arm occurred below the elbow. Moreover, Section 8(c)(22), providing awards for each member, did not apply as the claimant's disability resulted from one accident. Mason v. Baltimore Stevedoring Co., 22 BRBS 413, 416-17 (1989).

In 1979, an employee sustained a left leg and left knee injury in the course of his employment. The employer voluntarily paid temporary total disability benefits and, thereafter, permanent partial disability benefits based upon a 20 percent disability of the left leg rating rendered by his physician. The award was based upon the claimant's 1979 average weekly wage.

The claimant returned to his regular employment at the end of 1981. Approximately four months later, he re-injured his left knee in the course of his employment and the employer voluntarily paid benefits while he was unable to work. The claimant underwent surgery in 1982 and 1983. The claimant's 1982 injury increased his left leg disability by an additional 10 percent, resulting in an award of thirty percent disability for the 1982 injury. This award was based upon his 1982 average weekly wage. As a result of both injuries, the claimant had experienced a total of fifty percent permanent partial loss of use of his left leg.

The Board, in reviewing the record on appeal, held that the employer is entitled to a credit for the payment of compensation it made for the claimant's 1979 injury. It further held that, generally, in cases under the schedule where the claimant has a prior injury which has already been compensated, and a subsequent injury results in increased disability to the scheduled body part, the employer is only liable for the increased disability. Otherwise, double recovery to the claimant would result. Bracey v. John T. Clark & Son, 12 BRBS 110, 112 (1980).

This **"credit doctrine"** has been applied by the Board as a **limit on the aggravation rule** requiring an employer to compensate its employees for the combination of current injuries and prior injuries. The **Fifth Circuit** has also approved the Board's application of the credit doctrine to prevent excessive recoveries by claimants and hardships to employers. See Strachan Shipping Co. v. Nash, 782 F.2d 513, 18 BRBS 45 (CRT) (**5th Cir.** 1986) (rehearing en banc), aff'g 15 BRBS 386 (1983); Brown v. Bethlehem Steel Corp., 19 BRBS 200, 203 (1987); Blanchette v. OWCP, 27 BRBS 58 (CRT) (**2d Cir.** 1993); but see Director, OWCP v. General Dynamics Corp. ("Krotsis"), 900 F.2d 506 (**2d Cir.** 1990), overruled in part on other grounds by Director, OWCP v. General Dynamics Corp. ("Bergeron"), 982 F.2d 790 (**2d Cir.** 1992).

[ED. NOTE: *For a lengthy discussion of Krotsis and Blanchette see Topic 8.13.5, infra, Duplicate Claims and Section 8(f).**]***

In Brown, the Board, citing Nash, held that as a result of the second injury the claimant was entitled to an award for 50 percent loss of use of the leg, pursuant to the aggravation rule. The Board also held that the employer's credit should be based on the actual amount of compensation paid, rather than the percentage due, as

> crediting the actual amount paid best furthers the purposes of the Act. This method is most consistent with the aggravation rule and the compensation scheme created in applying its principles.

Brown, 19 BRBS at 204. The Board affirmed the employer's liability for 104 weeks of permanent partial benefits, with the Special Fund being responsible for the remaining 40 weeks based upon the claimant's 1982 average weekly wage. Brown, 19 BRBS at 205.

The Director timely moved for reconsideration on the grounds that the employer, in being allowed a credit for the prior payment and the benefit of Section 8(f) relief, has been allowed a double-recovery or a windfall. The Director pointed out that the employer thus would be paying only 46.4 weeks of compensation for the second injury, or only slightly more than one-half of its liability therefor.

The Board granted the Director's motion to consider **"the novel issue of how to apply both the credit doctrine and Section 8(f) in the same case."** The Board rejected the Director's argument, however, because "(a)llowing employer the full benefit of Section 8(f) in the situation presented by this case similarly encourages employers to retain handicapped employees."

Moreover, according to the Board:

> If the Director's method were used, Section 8(f) would never apply in cases of successive scheduled injuries, and employers would have **no incentive** to retain handicapped employees whose existing disabilities predispose them to further injury. Our decision in this case serves the dual purpose of avoiding a double recovery to claimant while rewarding employer for continuing to employ claimant.

Brown v. Bethlehem Steel Corp., 20 BRBS 26, 28-29 (1987) (Decision and Order on Reconsideration) (emphasis added).

The Director and the employer appealed and the **Fifth Circuit** held that where an injury falling within the provisions of Sections 8(c)(1) to 8(c)(20) materially increases a pre-existing permanent partial disability of an employee and where the compensation due the employee on account of that subsequent injury alone exceeds 104 weeks of compensation, then whenever a credit for previous compensation paid is available to offset the amount due the employee, that credit shall first reduce the total award before there is any allocation of liabilities under Sections 8(f)(1) and 8(f)(2).

Accordingly, as the Board's decision to allow the employer the benefits of the credit after allocating liabilities pursuant to Section 8(f) was erroneous as a matter of law, it was reversed by the court.

The **Fifth Circuit** also held that in determining the credit to be allowed against the total award, the amount of the credit shall be the actual dollar amount of payment that was previously made and not an amount based on the percentage of injury for which the claimant was previously compensated. Accordingly, the Board's decision with respect to the amount of credit was affirmed. Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47 (CRT) (**5th Cir.** 1989). In this case, the **Fifth Circuit** promulgated the so-called **"Special Fund First Rule"** in determining entitlement to the credit for the prior payment.

In Kelaita v. Triple A Machine Shop, 17 BRBS 10, 13 (1984), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (**9th Cir.** 1986), the employee sustained a shoulder injury in November 1974 while employed as a machinist by Triple A. He then left that firm and went to work for General Engineering. The claimant apparently pressed the claim only against the first employer and the ALJ denied benefits, concluding that claimant's shoulder was aggravated by his employment at his later employer based on the similarities of work conditions and physicians' opinions that the claimant's intermittent flare-ups of shoulder pain at both employers were cumulative trauma.

The Board affirmed the denial of benefits because the second employer had apparently been dismissed from the proceeding, a dismissal which was not appealed, and because the Office of Administrative Law Judges had no jurisdiction over the second employer.

In Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991), the Board was faced with the issue of whether the claimant's disability resulted from a 1985 work accident or a 1987 non-work-related incident while bending over doing yard work. The resolution of this issue was crucial as it affected, *inter alia*, the average weekly wage and the employer's responsibility.

If the current disability is the natural and unavoidable consequence of a work-related injury, then any current disability is related to the first injury and benefits are paid on the basis of the average weekly wage as of the time of the first injury. See, e.g., Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (**9th Cir.** 1954) (second leg injury at home due to leg instability resulting from the first work-related leg injury); Pakech v. Atlantic & Gulf Stevedores, 12 BRBS 47 (1980) (where claimant's back gave way both at home while rising from a chair and on the job with another employer one year after a work injury, the condition was the result of a natural progression of the work injury).

Occasionally, the Board will frame the employer's burden, in this context, in terms of having to rebut the presumption with substantial countervailing evidence. See, e.g., Merrill, 25 BRBS at 144, wherein the Board held that:

> Section 20(a) of the Act, 33 U.S.C.§ 920(a), provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. See, e.g., Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (**2d Cir.** 1989). Once claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. See Del Vecchio v. Bowers, 296 **U.S.** 280 (1935).
>
> If there has been a subsequent non-work-related event, employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that claimant's condition was not caused by the work-related event. See James, supra. 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, 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).

The medical evidence submitted by the parties should enable the judge to determine whether any disability is the natural and unavoidable result of a prior injury or is due to acceleration, aggravation, or exacerbation of a pre-existing condition, in which case the employee has sustained a new and discrete injury.