

JOHN PIMPINELLA)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:_____
)	
UNIVERSAL MARITIME SERVICE)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION AND ORDER

Appeal of the Decision and Order Awarding Benefits and Decision and Order on Reconsideration of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Celestino Tesoriero (Grainger & Tesoriero), New York, New York, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and Decision and Order on Reconsideration (89-LHCA-2374) of Administrative Law Judge Robert D. Kaplan rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a terminal laborer for some 40 years, injured his left elbow, wrist and hand on October 7, 1987, when he was struck in the left arm by a steel cable. After being seen by numerous physicians including Drs. S. Patel, Parisi, Schultze, Rosenblum, Larkins, M. Patel, and Fishman, claimant was released to return to work on June 1, 1988 by employer's physician, Dr. Sylvan Stillman. Claimant returned to work for employer on July 5, 1988 and continued to work until December 29, 1989, when he was allegedly forced to quit due to pain resulting from the injury.

Employer voluntarily paid claimant temporary total disability compensation from October 7, 1987 until June 2, 1988, the date Dr. Stillman indicated that claimant could return to work. Claimant sought additional temporary total disability compensation from June 2, 1988 until July 5, 1988, and

permanent partial disability compensation for loss of use of the left arm pursuant to Section 8(c)(1), 33 U.S.C. §908(c)(1), thereafter. Hearings were held on January 3 and 5, 1990. In a post-hearing brief mailed on May 7, 1990, claimant for the first time asserted a claim for permanent total disability compensation commencing December 29, 1989, the date he stopped working for employer.

In his Decision and Order, the administrative law judge denied claimant additional temporary total disability compensation. The administrative law judge also denied claimant permanent total disability compensation, finding that this issue had not been timely raised. The administrative law judge, however, determined that claimant was entitled to receive permanent partial disability compensation under Section 8(c)(12), 33 U.S.C. §908(c)(12), for a 24 percent loss of use of claimant's fourth finger of his left hand, based on an average weekly wage of \$857.27. The administrative law judge noted that although claimant exhibited permanent residuals of the "fifth" finger, the Act did not provide benefits for such loss.

On September 5, 1990, the administrative law judge issued a Decision and Order on Reconsideration in which he denied claimant's request that he reconsider his denial of temporary total and permanent total disability compensation. Recognizing the validity of claimant's assertion that Section 8(c) provides for compensation of the thumb as an unnumbered finger and that the remaining fingers are numbered 1-4, however, the administrative law judge, applying the American Medical Association *Guides to the Evaluation of Permanent Impairment (3d ed. 1988)*(AMA *Guides*), determined that claimant sustained a 33 percent combined loss of use of the third and fourth fingers, entitling him to 8.25 weeks of compensation under Section 8(c)(10), 33 U.S.C. §908(c)(10), and 4.95 weeks of compensation under Section 8(c)(12), 33 U.S.C. §908(c)(12), or a total of 13.2 weeks of compensation.¹ The administrative law judge also awarded claimant past and future medical expenses, and interest.

Claimant appeals, challenging the denial of temporary total disability compensation. He further asserts that the administrative law judge abused his discretion in refusing to entertain his claim for permanent total disability compensation. Claimant also challenges the scheduled award, arguing that the administrative law judge erroneously disregarded, misinterpreted and discounted relevant medical reports in determining the extent of his permanent partial disability. Employer responds, urging affirmance.

We reject claimant's assertion that the administrative law judge erred in denying temporary total disability compensation from June 2, 1988 until July 5, 1988, based on Dr. Stillman's June 1, 1988 opinion that claimant could return to work as of that date. Claimant argues on appeal that the

¹The administrative law judge also considered claimant's assertion that he should be compensated for proportionate loss of use of the left hand under Section 8(c)(3), 33 U.S.C. §908(c)(3), rather than the loss of the fingers. The administrative law judge, however, declined to award claimant compensation on this basis, because he determined that claimant would receive less compensation under subsection (c)(3) than he would under subsections (c)(10) and (12).

administrative law judge erred in relying on this opinion to deny him temporary total disability compensation after having rejected Dr. Stillman's opinion that claimant's disability was not causally related to the October 7, 1987 injury in finding causation established. We disagree. Initially, we note that the administrative law judge did not explicitly reject Dr. Stillman's opinion regarding causation; he found that claimant's injury was work-related and noted that Dr. Stillman had expressed otherwise. Secondly, we note that even if he had done so, causation and disability are two separate issues, and the administrative law judge may accept or reject all or any part of any witness' testimony according to his judgment. See *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), cert. denied, 372 U.S. 954 (1963). See also *Thompson v. Northwest Enviro Service, Inc.*, 26 BRBS 53 (1992).

In denying claimant additional temporary total disability compensation, the administrative law judge noted that Dr. Stillman's opinion that claimant was able to return to work as of June 1, 1988, was corroborated by the fact that when claimant did return to work on July 5, 1988, he was able to work successfully for 18 months. The administrative law judge also recognized that Dr. Patel had testified that working prevented muscular atrophy in claimant's left hand. Finally, the administrative law judge noted that the record was devoid of any evidence indicating that claimant's condition changed between June 2, 1988 and July 5, 1988. The administrative law judge's denial of temporary total disability compensation after June 1, 1988 is rational and supported by substantial evidence in the record. As claimant has failed to raise any reversible error made by the administrative law judge in weighing the conflicting evidence and making credibility determinations, we affirm this determination. See *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Claimant's assertion that the administrative law judge erred in refusing to consider his post-hearing claim for permanent total disability compensation similarly must fail. In his initial Decision and Order, the administrative law judge refused to consider claimant's permanent total disability claim, finding that this issue had not been timely raised and that to allow it would result in a denial of employer's due process rights. The administrative law judge further determined that claimant's counsel failed to establish a "scintilla of a reason" why failure to timely raise the issue should be waived. In so concluding, the administrative law judge rejected claimant's counsel's assertion that the claim had not been raised earlier because he was unaware of the extent of claimant's injuries until the medical evidence was presented at the hearing and Dr. Patel presented an explanation which was confirmed by Dr. Zuckerman. The administrative law judge, in addition, determined that claimant's counsel should not have been "surprised" by Dr. Patel's hearing testimony as it appeared to be consistent with her medical records and indicated that he found it "difficult to believe that an attorney with as much experience as Claimant's could be surprised by the testimony of its own expert witness." Decision and Order at 9. The administrative law judge further noted that claimant was the proponent of Dr. Zuckerman's testimony and that two days after Dr. Patel testified, claimant's attorney, with full knowledge of Dr. Patel's testimony, stated on the record that the issue was "scheduled loss and extent thereon." *Id.*

On appeal, claimant maintains that because all of the evidence relevant to permanent total disability was, in fact, submitted at the hearing, the administrative law judge erred in finding that this issue was not timely raised prior to the closing of the record. Claimant contends that employer's due process rights could have been protected by providing employer with the opportunity to submit additional evidence. Finally, claimant asserts that the administrative law judge's refusal to entertain the permanent total disability claim violates Section 702.336(a) of the regulations, 20 C.F.R. §702.336(a), which allows the administrative law judge to expand the hearing to include new issues which arise during the course of the hearing, noting that Section 702.336(b), 20 C.F.R. §702.336(b), actually provides for consideration of new issues raised up until the issuance of the compensation order.

We conclude that the administrative law judge did not abuse his discretion in refusing to entertain claimant's post-hearing request for permanent total disability compensation based on claimant's failure to exercise diligence in developing this issue, which should have been anticipated prior to the hearing. *See Smith v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 22 BRBS 46, 50, (1989); *see also Duran v. Interport Maintenance Corp.*, 27 BRBS 8, 12 (1993). Accordingly, claimant's allegation of error is rejected. Moreover, since claimant's permanent total disability claim after December 30, 1989 rests on the theory that he was forced to stop working because he was unable to perform his post-injury work, a premise specifically rejected by the administrative law judge in denying the temporary total disability claim, any error which the administrative law judge may have made in this regard, would, in any event, be harmless.²

The final issue we must address involves claimant's assertion that the administrative law judge erred in assessing the extent of his scheduled disability. Initially, we find no merit in claimant's argument that the administrative law judge erred in discrediting the opinions of Drs. Margolies, Human and Tobias that claimant suffered from a 30 percent schedule loss of use in the left arm. Contrary to claimant's assertions, it was not unreasonable for the administrative law judge to view these ratings, which were based, in part, on a finding of loss of motion of the elbow, as negated by the testimony of claimant's treating physician, that when she last examined claimant on January 2, 1990, he did not exhibit restriction of motion.³ *See generally Thompson*, 26 BRBS at 37.

²Although claimant cites the "true doubt rule" in support of this assertion, the United States Court of Appeals for the Third Circuit, from which this case arises, has rejected application of the true doubt rule in longshore cases. *See Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277, 27 BRBS 1 (CRT) (3d Cir. 1993). Moreover, the "true doubt rule" is, in any event, inapplicable as the administrative law judge did not find the evidence to be in equipoise.

³Claimant's assertion that it was irrational for the administrative law judge to totally discount the reports and opinions of Drs. Margolies, Human and Tobias on the basis that they were chronologically after Dr. Patel's reports, is inconsistent with the record. The administrative law judge reasonably relied on Dr. Patel's January 1990 opinion as the basis for rejecting the earlier December 1, 1988 opinion of Dr. Margolies and the earlier August 8, 1989 opinions of Drs. Human and Tobias.

We agree with claimant, however, that the administrative law judge erred in rejecting Dr. Patel's 30 percent impairment rating of the left arm based on *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201, 204 (1985). In *Young*, the administrative law judge relied on the opinion of a physician that claimant suffered a 56 percent loss of use of the upper extremity with an additional 10 to 15 percent loss due to pain and suffering to conclude that claimant suffered a 70 percent permanent partial disability of the arm pursuant to Section 8(c)(1) of the Act, 33 U.S.C. §908(c)(1). Employer appealed the award, arguing that the administrative law judge erred in awarding benefits for pain and suffering. The Board, agreeing with the employer, vacated the award and remanded for the administrative law judge to enter an award under the schedule based on loss of use of the arm without amplification for pain and discomfort.

Contrary to the administrative law judge's determination in the present case, however, the Board, in vacating the administrative law judge's finding of a 70 percent impairment in *Young*, 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; the decision held only that a doctor's impairment rating should not be amplified so as to separately compensate claimant for "pain and suffering" as in a tort context. In the present case, unlike *Young*, Dr. Patel's 30 percent impairment rating did not involve an augmentation of claimant's disability to reflect "pain and suffering." Rather, this rating was based on neuropathy and tenderness of the elbow and sensory loss and weakness of the fingers. These medical factors establish a loss of use which may be compensable under the schedule.⁴ Because the present case is distinguishable from *Young*, we hold that the administrative law judge erred in rejecting Dr. Patel's disability assessment on that basis. Under prior Board case law, the administrative law judge is not bound by any particular standard or formula but may consider a variety of medical opinions and observations in addition to claimant's description of symptoms and physical effects of his injury in assessing the extent of claimant's disability. *Bachich v. Seatrains Terminals of California, Inc.*, 9 BRBS 184 (1978); *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 184 (1978). Accordingly, we vacate the administrative law judge's finding that claimant sustained a 33 percent combined impairment of the third and fourth fingers and remand this case for reconsideration of the extent of claimant's permanent physical impairment in light of Dr. Patel's 30 percent impairment rating of the arm and any other relevant evidence of record.

Accordingly, the administrative law judge's finding that claimant sustained a 33 percent combined impairment of the third and fourth fingers is vacated, and the case is remanded for reconsideration of the extent of claimant's scheduled permanent partial disability consistent with this opinion. In all other respects, the Decision and Order Awarding Benefits and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

⁴The Act does not require impairment ratings based on medical opinions using the criteria of the *AMA Guides* except in cases involving compensation for hearing loss and voluntary retirees. *See* 33 U.S.C. §§908(c)(13), 902(10).

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge