BRB No. 08-0778

W.D.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	DATE ISSUED: 04/29/2009
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Amended Decision and Order Upon Employer's Motion for Reconsideration of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Myles R Eisenstein, Baltimore, Maryland, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Amended Decision and Order Upon Employer's Motion for Reconsideration (2007-LHC-00901) of Administrative Law Judge Janice K. Bullard 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). The Board must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a fractured right elbow on March 23, 2006, when he tripped on a chain while working for employer as a longshoreman. Claimant sought treatment for his injury, and subsequently returned to work for employer on May 15, 2006. Employer voluntarily paid claimant temporary total disability benefits for the period of March 24,

2006 through May 14, 2006, and permanent partial disability benefits for a five percent impairment to claimant's right arm. 33 U.S.C. §908(b), (c)(1). Claimant subsequently filed a claim for benefits under the Act, averring, *inter alia*, that he had sustained a greater impairment to his right arm than that acknowledged by employer.

Relevant to this issue, the administrative law judge initially declined to accept the parties' stipulation that claimant's condition reached maximum medical improvement on May 15, 2006, finding instead that claimant reached maximum medical improvement on November 6, 2006. The administrative law judge then found that claimant sustained a four percent impairment to his right arm as a result of his March 23, 2006, work-injury, and she consequently awarded claimant permanent partial disability benefits pursuant to that finding.

On appeal, claimant asserts that the administrative law judge erred in failing to inform the parties of her intention to reject their stipulation regarding the date claimant reached maximum medical improvement. Claimant also avers that the administrative law judge erred in determining the extent of claimant's disability. Employer responds, urging affirmance.

Claimant first contends that the administrative law judge erred in failing to inform the parties that their stipulation regarding the date claimant's condition reached maximum medical improvement would not be accepted. We agree. In her decision, the administrative law judge found that while the parties stipulated that claimant reached maximum medical improvement on May 15, 2006, the evidence does not fully support their stipulation; consequently, the administrative law judge declined to accept it. *See* Decision and Order at 2 n.2. After subsequently considering the medical evidence, the administrative law judge determined that claimant's medical condition became permanent as of November 6, 2006. *Id.* at 12 – 13.

The Board has consistently held that an administrative law judge may not reject stipulations without giving the parties prior notice that she will not automatically accept the stipulations and an opportunity to present evidence in support of the stipulations. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Beltran v. California Shipbuilding & Dry Dock Co.*, 17 BRBS 225 (1985); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984). In the instant case, the parties submitted a signed stipulation form to the administrative law judge stating that claimant reached maximum medical improvement on May 15, 2006, and that the only issues that remained to be resolved were the degree of disability to claimant's right arm and claimant's average weekly wage. *See* Tr. at 5; ALJX 1. In its post-hearing brief, employer reiterated that the only disputed issues presented for adjudication involved

claimant's average weekly wage and the rating of his arm impairment. *See* Employer's post-hearing br. at 2.

Inasmuch as the record contains a clear and unambiguous statement signed by both parties agreeing to the date claimant's work-related condition reached maximum medical improvement, the administrative law judge erred in not providing the parties notice that the stipulation would not be accepted and an opportunity to submit relevant evidence.[1] We therefore vacate the administrative law judge's determination that claimant reached maximum medical improvement as of November 6, 2006, and remand the case for the administrative law judge to allow the parties the opportunity to present additional evidence in support of their positions regarding this issue. *See Dodd*, 22 BRBS 245.

Claimant next challenges the administrative law judge's determination that he is entitled to permanent partial disability compensation based on a four percent impairment to his right arm. 33 U.S.C. §908(c)(1). Specifically, claimant asserts that, as a consequence of her decision to reject the parties' stipulation regarding the date claimant's condition reached maximum medical improvement, the administrative law judge erred in her evaluation of the medical evidence addressing the extent of claimant's arm impairment. We agree with claimant that the administrative law judge's determination of the extent of claimant's arm impairment cannot be affirmed.

Where, as here, claimant has sustained an injury to a member specified in the schedule contained in Sections 8(c)(1) – (20), 33 U.S.C. §908(c)(1) – (20), and he is not totally disabled, claimant's permanent partial disability must be compensated under the schedule. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). An award under the schedule is based solely on the degree of physical impairment. *See Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). With regard to the calculation of claimant's permanent impairment, 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

[1] The issue of a claimant's disability under the terms of the Act is generally addressed in terms of its nature, that is whether the disability is permanent or temporary, and its extent, that is whether the disability is total or permanent. Consequently, we reject employer's assertion that any error committed by the administrative law judge in failing to inform the parties that their stipulation regarding the date claimant's condition reached permanency is harmless since, as discussed *infra*, the administrative law judge relied upon her findings on this issue when addressing the issue of the extent of claimant's right arm impairment.

description of his symptoms and the physical effects of his injury. *See, e.g., Cotton v. Army & Navy Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Mar. Serv., Inc.*, 27 BRBS 154 (1993). In her decision, the administrative law judge, after declining to accept the parties' stipulation regarding the date claimant's condition reached maximum medical improvement, stated that this date must be determined since it affects claimant's impairment rating. *See* Decision and Order at 12. The administrative law judge declined to accord Dr. Franchetti's September 25, 2006, evaluation and assessment of claimant's condition substantial weight, stating that as claimant had not reached maximum medical improvement at the time of Dr. Franchetti's evaluation, that physician's impairment rating is not the most reliable indicator of claimant's permanent impairment.[2] *Id.* at 14. The administrative law judge then credited the opinion of Dr. Fisher, who opined on November 6, 2006, that claimant had sustained a four percent permanent partial disability to his right arm. *See* EXs 11, 22.

In adjudicating a claim, it is well established that an administrative law judge is entitled to weigh the medical evidence and is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In her decision, however, although the record contains Dr. Franchetti's post-examination report letter which documents the basis for his opinions regarding claimant's condition, the administrative law judge specifically declined to credit Dr. Franchetti's evaluation and assessment of claimant's work-related condition solely based upon her finding that this physician's opinion was rendered prior to the date claimant's condition became permanent.[3] *See* CX 1. As we have vacated the administrative law judge's finding regarding the date on which claimant's condition reached maximum medical improvement, the administrative law judge's use of that date in evaluating the medical evidence regarding the degree of claimant's upper right extremity impairment requires that we vacate her determination regarding the extent of claimant's condition.

Moreover, as we have noted, the nature and extent of claimant's disability are separate issues to be resolved. While the extent of permanent disability is generally determined after maximum medical improvement, in this case, Dr. Franchetti's

[2] On September 25, 2006, Dr. Franchetti opined that claimant's radial head fracture of his right elbow had healed, and that claimant had reached maximum medical improvement with a twenty-eight percent impairment to his right upper extremity. CX 1.

[3] In addressing Dr. Franchetti's opinion regarding claimant's impairment, which took into consideration claimant's ongoing pain, the administrative law judge properly noted that pain and its symptoms may be considered when a doctor rates the loss of use of a member. *See Pimpinella v. Universal Mar. Serv., Inc.*, 27 BRBS 154 (1993). In diagnosing claimant's condition, Dr. Franchetti took these factors into consideration.

September 25, 2006 and Dr. Fisher's November 6, 2006, examinations are relatively contemporaneous. Both doctors believed claimant had healed, examined him and reviewed his x-rays in reaching their different impairment ratings. Given this evidence, the administrative law judge must evaluate the reasons and bases for all of the medical opinions and determine which most persuasively establishes the degree of claimant's permanent impairment.

Accordingly, the administrative law judge's findings that claimant's right arm condition reached maximum medical improvement on November 6, 2006, and that claimant has sustained a four percent impairment to his right upper extremity are vacated, and the case is remanded for further proceedings consistent with this opinion. In all other respects, the Decision and Order and the Amended Decision and Order Upon Employer's Motion for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge