BRB No. 92-2684

MICHAEL A. SANSONE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BETHLEHEM STEEL CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

C. James Sfekas, Baltimore, Maryland, for claimant.

Michael W. Prokopik (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (90-LHC-0785) of Administrative Law Judge Robert S. Amery awarding benefits 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 shipfitter, suffered a work-related injury to his right knee on April 12, 1988. Employer voluntarily paid claimant temporary total disability compensation for various periods from April 13, 1988 to January 3, 1990, when claimant returned to work for employer. 33 U.S.C. §908(b). Thereafter, claimant sought permanent partial disability compensation pursuant to Section 8(c)(2), (19), 33 U.S.C. §908(c)(2), (19). Prior to the 1988 work injury which is the subject of this claim, claimant and employer entered into a settlement agreement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), which was approved by the district director on September 13, 1983; by the terms of this agreement, claimant agreed to accept a lump sum of $13,000 in settlement of five claims for injuries arising under the Act. *See* Emp. Ex. 3. Claimant testified, and employer concedes, that three of the five claims settled were for injuries to claimant's right knee. *See* Hearing

Tr. at 36; Emp. brief at 22.

In his Decision and Order, the administrative law judge awarded claimant permanent partial disability compensation pursuant to Section 8(c)(2), (19), for a 58 percent loss of use of claimant's right leg. The administrative law judge arrived at this impairment rating by crediting Dr. Lippman's opinion that claimant has an 83 percent permanent impairment to his right knee, and then subtracting from that rating 25 percent which the administrative law judge found was attributable to claimant's prior injuries and surgeries to his right knee. *See* Decision and Order at 6.

On appeal, employer contends that the administrative law judge erred in determining the extent of claimant's disability. Specifically, employer argues that it was irrational for the administrative law judge to credit Dr. Lippman's opinion over the opinions of Drs. Kan and Wenzlaff solely on the basis that Dr. Lippman used the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988) (AMA *Guides),*[1] where Dr. Lippman did not properly apply the AMA *Guides* in calculating claimant's impairment rating. Employer further assigns error to the administrative law judge's application of the credit doctrine with respect to claimant's prior receipt of $13,000 in settlement of his five claims for work-related injuries, including three injuries to his right knee. Claimant responds, urging affirmance.

We agree with employer that the administrative law judge erred in basing his decision to credit Dr. Lippman's impairment rating solely on Dr. Lippman's use of the AMA *Guides* where Dr. Lippman did not use the Combined Values Chart, as prescribed by the AMA *Guides*.[2] Both the second and third editions of the AMA *Guides* provide that the combining of any impairment value in the table for Impairment Ratings of the Lower Extremity for Other Disorders of the Knee, *see* Table 38, 2d ed. 1971; Table 40, 3d ed. 1988, with the impairment value in the table for loss of motion, *see* Table 37, 2d ed. 1971; Table 39, 3d ed. 1988, is to be done using the Combined Values Chart. In the instant case, Dr. Lippman testified on deposition that he did not use the Combined Values Chart in reaching claimant's impairment rating. *See* Cl. Ex. 1 at 30. Rather, Dr. Lippman added claimant's percentage losses for flexion, meniscectomy, anterior cruciate ligament, atrophy, loss of strength and weakness to arrive at an 83 percent loss of use of claimant's right leg.

The Act does not require impairment ratings based on medical opinions using the criteria of

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[1]Employer objects to Dr. Lippman's use of the second edition of the AMA *Guides*, published in 1971, instead of the third edition, published in 1988. *See* Emp. brief at 15. In response, claimant correctly notes that employer does not allege that Dr. Lippman's results would be different had he used the third edition, *see* Cl. brief at 6, and our review of the two editions of the AMA *Guides* fails to disclose any differences that would affect Dr. Lippman's impairment rating.

[2]Employer additionally contends that Dr. Lippman's failure to use a goniometer to measure claimant's range of motion is inconsistent with the requirements of the AMA *Guides*. The AMA *Guides* description of the methodology for measuring range of motion provides for the use of a goniometer; thus, the administrative law judge may consider this issue on remand. Our review of the record, however, reveals no affirmative evidence that a goniometer was used by either Dr. Kan or Dr. Wenzlaff.

the AMA *Guides* except in cases involving compensation for hearing loss and voluntary retirees. *See* 33 U.S.C. §§908(c)(13), 902(10); *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154, 159 n.4 (1993). Thus, it is well-established that an administrative law judge is not bound by any particular standard or formula in determining the impairment sustained by claimant, rather, the administrative law judge 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 a claimant's disability under the schedule. *Pimpinella*, 27 BRBS at 159-60; *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053 (1978); *Bachich v. Seatrain Terminals of California, Inc.*, 9 BRBS 184 (1978).

In the instant case, however, the *sole* criterion for the administrative law judge's decision to accord determinative weight to Dr. Lippman's impairment rating was that physician's use of the AMA *Guides*. In view of Dr. Lippman's lack of adherence to the standards for measuring the extent of claimant's impairment as set forth in the AMA *Guides*, the doctor's use of the AMA *Guides* cannot be viewed as a reasonable basis for solely crediting his opinion over others of record.[3] *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). We therefore vacate the administrative law judge's decision to credit Dr. Lippman's 83 percent impairment rating and we remand the case for the administrative law judge to reweigh all the evidence, including the opinion of Dr. Lippman, relevant to determining the extent of claimant's permanent partial disability and to provide a reasoned analysis of his evaluation of the evidence.[4]

[3]Claimant does not dispute that proper use of the Combined Values Chart would yield a lower percentage of impairment than that reached by Dr. Lippman by simply adding the figures for the relevant impairment values. *See* Cl. Response Brief at 6-7; Employer Reply Brief at 2-3.

[4]We note that the parties disagree as to the permissibility of Dr. Lippman's assessment of an additional 15 percent impairment for atrophy, loss of strength and weakness. This issue may be addressed by the administrative law judge on remand in his reconsideration of the totality of evidence relevant to the extent of claimant's impairment. In this respect, we note the Board's holding in *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154, 159 (1993), that medical factors such as neuropathy, sensory loss and weakness establish a loss of use which may be compensable under the schedule.

Lastly, we hold that the administrative law judge erred when, in calculating the credit due employer as a result of his settlement of prior claims under the Act, he subtracted from claimant's present impairment 25 percent, representing the loss of use of claimant's right leg resulting from claimant's prior knee injuries and surgeries. It is well-established that the credit doctrine applies where a claimant receives multiple awards for successive injuries to the same part of the body; although the employer at the time of the last injury is liable for the combined effects of that injury and pre-existing injuries under the aggravation rule, the credit doctrine allows employer to credit the prior compensation *actually received* by the claimant for his first injury against its subsequent liability. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986) (*en banc*). In determining the credit to be allowed against the total award of compensation, the amount of the credit is the actual *dollar amount* of the compensation previously paid to the claimant, and not an amount based on the percentage of injury for which the claimant was previously compensated. *See Director, OWCP v. Bethlehem Steel Corp. (Brown)*, 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989). We therefore vacate the administrative law judge's calculation of a credit based upon claimant's prior impairment; on remand, the administrative law judge must reconsider the issue of the amount of the credit to which employer is entitled, consistent with the opinions in *Brown* and *Nash*.[5]

Accordingly, the Decision and Order of the administrative law judge awarding benefits is vacated, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[5]The administrative law judge, in his discretion, may reopen the hearing record if necessary to the determination of the dollar value of the credit to which employer is entitled.