BRB No. 98-1351

THOMAS PODGURSKI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAHER TERMINALS, INCORPORATED	)	DATE ISSUED: July 12, 1999
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Further Compensation of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Thomas R. Uliase (Uliase & Uliase), Haddon Heights, New Jersey, for claimant.

William M. Broderick and Richard P. Stanton, Jr., New York, New York, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Further Compensation (97-LHC-02271) of Administrative Law Judge Ainsworth H. Brown 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 heavy equipment mechanic, sustained a work-related injury to his right

shoulder and neck on December 13, 1996, while lifting a chain. Employer voluntarily paid claimant disability benefits through March 30, 1997, at a weekly rate of $753.69, and medical benefits in the amount of $4,164.18. At the formal hearing, the parties stipulated that claimant's average weekly wage at the time of his injury was $1,347.35, and that claimant was thus entitled to compensation at the maximum rate allowed under the Act, $801.06. *See* Transcript at 5-6.

In his Decision and Order, the administrative law judge found that claimant suffered no work-related disability subsequent to March 30, 1997, the date on which he reached maximum medical improvement. Accordingly, the administrative law judge denied claimant's request for additional disability benefits.

On appeal, claimant challenges the administrative law judge's finding that he is not entitled to disability compensation subsequent to March 30, 1997; additionally, claimant asserts that the administrative law judge erred in failing to address his assertion that employer should be held liable for assessments pursuant to Section 14(e) and (f) of the Act, 33 U.S.C. §914(e), (f), in not awarding interest, and in neglecting to set forth claimant's proper compensation rate as stipulated by the parties. Employer responds, urging affirmance of the administrative law judge's denial of disability benefits.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985). In the instant case, the administrative law judge, in determining that claimant did not sustain a compensable impairment subsequent to March 30, 1997, relied upon the opinion of Dr. Greifinger, who opined that claimant could resume his regular work as a heavy machinery mechanic, over the contrary opinion of Dr. Cook, who opined that claimant could not resume his usual employment duties since claimant would be required to climb ladders.[1]

[1]Dr. Greifinger examined claimant on January 7, January 31, February 24, and March 28, 1997, and noted that on the last occasion, he found claimant had a good range of motion in his right shoulder and that claimant's subjective complaints of pain were inconsistent with

We hold that the administrative law judge committed no error in crediting the opinion of Dr. Greifinger, rather than the opinion of Dr. Cook, in concluding that claimant sustained no compensable impairment subsequent to March 30, 1997. In declining to rely upon the testimony of Dr. Cook, the administrative law judge specifically found that the physician acknowledged that claimant exhibited no objective indications of physical impairment and that most of claimant's limitations appear to be due to subjective shoulder pain; in this regard, Dr. Cook recommended that claimant be evaluated by one of his partners who specializes in shoulder surgery. The administrative law judge found that claimant's failure to secure such an assessment of his condition casts some doubt on the significance of claimant's complaints. In contrast, the administrative law judge specifically credited Dr. Grefinger's conclusion regarding the extent of claimant's disability. Dr. Greifinger, who examined claimant on January 7, January 31, February 24, and March 28, 1997, reported normal physical findings regarding claimant's range of motion and opined that claimant was capable of returning to his regular employment duties with employer. In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, and he 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). Thus, as the administrative law judge fully weighed the evidence, as is within his authority as a factfinder, and as the credited opinion of Dr. Greifinger constitutes substantial evidence to support his conclusion, we affirm the administrative law judge's determination that claimant sustained no impairment subsequent to March 30, 1997. *See O'Keeffe*, 380 U.S. at 359.

Claimant next asserts that the administrative law judge erred in failing to find him entitled to weekly disability benefits at the maximum compensation rate of $801.06 based on the parties' stipulation that his average weekly wage at the time of injury was $1,347.35, and in failing to assess interest on the amount due. We agree. Claimant and employer stipulated at the formal hearing, and employer acknowledges in its response brief, that claimant's

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the doctor's objective findings. Dr. Cook is primarily a spinal specialist, but does basic shoulder surgery. He opined that claimant had a work-related mild impingement of the rotator cuff that precluded claimant's return to his previous work because it required climbing ladders. Dr. Cook testified on deposition that he based his opinion on the objective evidence of pre-existing arthritis and the subjective complaints of pain.

average weekly wage entitled him to disability benefits from December 14, 1996 through March 30, 1997, at an increased rate of $801.06 per week. *See* Transcript at 5-6; Employer's brief at 1. Accordingly, we modify the administrative law judge's decision to reflect claimant's entitlement to disability compensation from December 14, 1996 through March 30, 1997, at a weekly rate of $801.06. Moreover, as an award of interest is mandatory under the Act, *see Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992), we additionally modify the administrative law judge's decision to reflect claimant's entitlement to interest, payable by employer, on those benefits owed to claimant by employer. *See generally Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988).

Lastly, claimant contends that he is entitled to assessments pursuant to Sections 14(e) and (f) of the Act, 33 U.S.C. §914(e), (f).[2] Section 14(e) provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional ten percent of such installment, unless it files a timely notice of controversion pursuant to Section 14(d) of the Act, 33 U.S.C. §914(d), or the failure to pay is excused by the district director. *See Maes v. Berrett & Hilp*, 27 BRBS 128 (1993). An employer's good faith in voluntarily paying compensation at a rate that it believes to be proper is not relevant to Section 14(e). *See Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). Moreover, an assessment under Section 14(e) of the Act is mandatory. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

In the instant case, the administrative law judge did not address this issue, which was raised in claimant's brief before him; specifically, claimant asserted below that employer failed to pay benefits at the proper compensation rate and did not file a notice of controversion. It is uncontroverted that employer made voluntary payments of benefits to claimant at a rate lower than that to which claimant was ultimately entitled; it is unclear, however, at what point in time a controversy arose over the payment of additional compensation to claimant. In addition, we note that employer, on April 4,1997, filed a notice of suspension of payment which may be equivalent to a notice of controversion and preclude an assessment pursuant to Section 14(e) after that date. *See Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (1993). Thus, as the administrative law judge did not address this issue, we must remand the case for the administrative law judge, as factfinder, to

[2] As no compensation award was entered by the administrative law judge, Section 14(f) is inapplicable to the instant case. *See* 33 U.S.C. §914(f).

determine whether employer is liable for a Section 14(e) penalty.[3] *See generally Bingham*, 20 BRBS at 198.

[3]Interest is not to be imposed, however, on Section 14(e) assessments. *See Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987).

Accordingly, the administrative law judge's Decision and Order is modified to reflect claimant's entitlement to compensation from December 14, 1996 through March 30, 1997, at the weekly rate of $801.06, and interest; in all other respects, the administrative law judge's Decision and Order is affirmed. The case is remanded for the administrative law judge to consider employer's liability for an assessment pursuant to Section 14(e) of the Act.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge