

MARGARET CLEGG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND	)	DATE ISSUED:
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge,  
United States Department of Labor.

Gregory E. Camden (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Gerard E.W. Voyer (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-248) of Administrative Law Judge Richard K. Malamphy denying 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 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. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured her left big toe on August 29, 1991, when the 200 pound wheelbarrow she was pushing turned over and landed on her left foot. Surgery was performed twice, and claimant contends that the swelling and pain covers the entire foot and sometimes the ankle. Claimant returned to work as a driver for employer on March 11, 1994, with restrictions consisting of no prolonged standing or walking. Dr. Tischler found claimant reached maximum medical improvement on March 30, 1994, and claimant worked until she was laid off in a reduction in force on March 31, 1994. Claimant was called back to work on August 1, 1994. Employer paid claimant permanent partial disability benefits for 19 weeks for a 50 percent impairment to the left big toe pursuant to Section 8(c)(8), 33 U.S.C. §908(c)(8), effective March 31, 1994, taking credit for

overpayments of temporary partial disability compensation.

In his Decision and Order, the administrative law judge denied claimant temporary partial disability benefits from March 31, 1994 through May 30, 1994 and from August 1, 1994 to the present and continuing, denied claimant temporary total disability benefits from May 31, 1994 through July 31, 1994, and also denied a permanent impairment rating in excess of 50 percent under Section 8(c)(8). The administrative law judge also found that employer was entitled to a credit for excess compensation previously paid.

On appeal, claimant contends she is entitled to permanent partial disability benefits for a 100 percent impairment to her great toe. Claimant also contends she is entitled to additional temporary disability benefits, maintaining that the administrative law judge erred in finding that she reached maximum medical improvement. Claimant also contends she is entitled to total disability benefits from May 31, 1994 to July 31, 1994, when she was in layoff status. Employer responds, urging affirmance of the denial of further benefits.

Claimant first contends that she is entitled to permanent partial disability benefits for a 100 percent impairment to her great toe, based on Dr. Tischler's opinion and on the pain, discomfort and difficulty in walking she has experienced. Dr. Tischler found that claimant lost one-half of the distal phalange of the left great toe, that ambulation was impaired, and that claimant is unable to stand for long periods of time. Dr. Tischler stated that "this patient has definitely lost half of the distal phalanx of the most important digit in the foot. I would probably say that the rating should be loss of the great toe - whereas 38 weeks of compensation is indicated." Cl. Ex. 3-1; Emp. Ex. 24. Citing Sections 8(c)(8) and (c)(14),<sup>1</sup> the administrative law judge found that a 50 percent rating was appropriate, in effect considering the loss of half a phalange to equal the loss of a whole phalange under Section 8(c)(14). He thus awarded 19 weeks of compensation.<sup>2</sup> The administrative law judge stated he considered Dr. Tischler's opinion but denied a greater rating because claimant did not lose her entire toe. *See* Decision and Order at 7. We note that although Dr. Tischler did not find a 100 percent impairment, he in essence found that claimant should be compensated for a full loss of a toe. Thus, the fact that claimant did not lose her entire toe is not necessarily determinative of the extent of her impairment.

Further, claimant's contention that the administrative law judge erred by failing to consider her pain and discomfort has merit.<sup>3</sup> The administrative law judge ruled out benefits for "pain and

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<sup>1</sup>Section 8(c)(14) states:

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.

<sup>2</sup>Section 8(c)(8) provides for compensation for 38 weeks for the loss of a great toe.

<sup>3</sup>Claimant testified that after the second surgery she had pain and swelling of her entire foot and ankle, and that the restrictions of no prolonged standing, walking, and wearing steel-toed shoes prevented her from performing her usual jobs. Tr. at 17-20.

suffering" pursuant to the Board's decision in *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985). In *Young*, the Board held that awards for permanent partial disability under the schedule shall not include compensation for pain and discomfort. However, in *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993), the Board held that *Young* does not mean that compensation for pain and discomfort should never be considered when rating the loss of the use of a member, but rather, should not be used separately to compensate "pain and suffering" in a tort context. Further, 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 her injury when assessing the extent of claimant's disability under the schedule. See generally *Bachich v. Seatrains Terminals of California*, 9 BRBS 184 (1978). We, therefore, vacate the administrative law judge's finding of a 50 percent impairment rating of the great toe, and remand the case to the administrative law judge to reconsider the extent of claimant's impairment in light of Dr. Tischler's opinion and claimant's descriptions of pain and discomfort.

Claimant next contends that the administrative law judge erred in finding that she reached maximum medical improvement as Dr. Tischler's additional restriction (no wearing of steel-toed shoes) and his indication that future surgery was a possibility signify that claimant has not reached maximum medical improvement. However, as the administrative law judge notes, Dr. Tischler specifically stated that claimant reached maximum medical improvement on March 30, 1994. The Board has held that a physician's opinion that surgery may ultimately be required, while also giving a percentage disability rating, allows a finding that maximum medical improvement has been reached because the disability will be indefinite and lengthy. *Morales v. General Dynamic Corp.*, 16 BRBS 293 (1984), *aff'd in part, part sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 17 BRBS 130 (CRT) (2d Cir. 1985). We therefore affirm the administrative law judge's finding that maximum medical improvement was reached on March 30, 1994. *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989).

Claimant also contends that the administrative law judge erred in denying benefits for additional temporary partial disability and for total disability as suitable alternate employment was not established when claimant was laid off from May 31, 1994 through July 1, 1994. The administrative law judge found that suitable alternate employment was established as claimant was working within her regular job classification, the layoff of May 31, 1994 through July 1, 1994, was due to economic conditions, and it was not contended that claimant was unable to work during this time period. We note that the administrative law judge's inference that claimant was able to perform her usual work is not supported by the record. Usual employment is the employee's regular duties at the time that she was injured. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). Claimant was working in a firewatch position at the time of the injury. Dr. Tischler's restrictions of no prolonged standing or walking prevented claimant from performing her usual fire watch on board ships or work in the tool room, and employer gave claimant an alternate position as a driver, within the same job classification, storeroom clerk third class, as before her injury. *See, e.g., Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). However, we affirm the administrative law judge's implicit finding that the driver position constitutes suitable alternate employment as claimant testified she can perform this job without difficulty. Tr. at 20. Thus, as maximum medical improvement and suitable alternate employment have been established, further benefits for temporary partial disability are precluded, as claimant's injury is to a scheduled member. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

Similarly, we reject claimant's contention that she is entitled to total disability benefits during the period of layoff from May 31 to July 31, 1994. A permanent partial disability award under the schedule does not compensate the injured employee for a loss in wage-earning capacity. *See Potomac Electric Power Co.*, 449 U.S. at 269, 14 BRBS at 364; *Henry v. George Hyman Construction Co.*, 724 F.2d 65, 17 BRBS 79 (CRT) (D.C. Cir. 1984). Thus, once entitlement to a schedule award is established, economic factors are no longer a relevant consideration, *see generally Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989), and the fact that suitable alternate employment was temporarily unavailable to claimant cannot be the basis for an award of total disability. We therefore affirm the administrative law judge's findings that claimant is not entitled to temporary partial disability from August 8, 1994 to the present and continuing, and that claimant is not entitled to temporary total disability from May 31, 1994 through July, 31, 1994.

Lastly, claimant's contention that employer improperly took a credit for overpayments of temporary total and partial disability benefits towards the permanent partial disability benefits that were awarded lacks merit. Section 14(j), 33 U.S.C. §914(j), allows employer a credit for its prior payments of compensation against any compensation subsequently found due. *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir.), *cert. denied*, 112 S.Ct. 3056 (1992). We therefore affirm the administrative law judge's award of a credit to employer.

Accordingly, the administrative law judge's limiting claimant's scheduled award for permanent partial disability under Section 8(c)(8) and (14) to 19 weeks of payments is vacated, and the case is remanded for further consideration of this issue consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge