BRB No. 97-0349

EDDIE VALENTINE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MAERSK STEVEDORING COMPANY	)	DATE ISSUED: _____
	)	
Self-Insured Employer-Petitioner	)	
	)	
CONTAINER STEVEDORING COMPANY	)	
	)	
Employer	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
STATE COMPENSATION INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Party-in-Interest	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Phil N. Walker (Laughlin, Falbo, Levy & Moresi, L.L.P.), San Francisco,

California, for Maersk Stevedoring Company.

Frank B. Hugg and Wendy B. Mosely, San Francisco, California, for Container Stevedoring, Incorporated.

Michael Mowery, San Francisco, California, for Marine Terminals Corporation.

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

PER CURIAM:

Maersk Stevedoring Company (employer) appeals the Decision and Order (95-LHC-2136) of Administrative Law Judge Paul A. Mapes 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 the 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).

On February 26, 1993, while working as a tractor driver for employer, claimant suffered a left ankle injury when he stepped into a hole on a dock. When claimant sought treatment that day, he was diagnosed as having an ankle sprain and was advised to stop working until his ankle healed. Although claimant did return to work, his ankle remained painful and swollen for an extended period which caused him to miss work frequently. Thereafter, on August 20, 1993, while driving a tractor for employer, claimant felt a sharp pain in his right knee, after he stepped down hard on a brake and his knee immediately became swollen. That night, he was diagnosed as having bursitis and was told to immobilize his knee and take pain medication. Against the advice of his physician, claimant again returned to work and over the next several weeks worked for six different employers. On November 3, 1993, claimant stopped working, allegedly because he was in a lot of pain. His last employer prior to the time he stopped working was Marine Terminals Corporation and his next-to-last employer was Container Stevedoring Company. After claimant stopped working, he underwent a partial meniscectomy on his right knee on November 11, 1994, and his ankle was treated with braces and a cast. Claimant ultimately retired in March 1995 without having attempted to return to work and sought compensation under the Act for his knee and ankle injuries.

Prior to the hearing before the administrative law judge, claimant and employer agreed that claimant sustained a February 26, 1993, ankle injury and an August 20, 1993, knee injury while working for employer. All parties agreed that claimant was unable to perform his usual work from his last day of work in November 1993 until his knee injury reached maximum medical improvement, which they agreed occurred on February 11, 1995. In addition, claimant conceded that thereafter he was not totally disabled. Accordingly, the issues pending for adjudication before the administrative law judge

included the responsible employer, claimant's average weekly wage, the extent of his permanent physical impairment, the date his left ankle condition reached maximum medical improvement, and employer's eligibility for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

The administrative law judge determined that employer was the employer responsible for the payment of benefits and awarded claimant permanent partial disability compensation under the schedule for a 12 percent loss of use of his lower left extremity commencing June 15, 1993, for 34.56 weeks. 33 U.S.C. §908(c)(2), (19). In addition, he awarded claimant temporary total disability compensation between November 4, 1993, and February 10, 1995, and permanent partial disability compensation under the schedule thereafter for a 40 percent loss of use of his right leg. *See* 33 U.S.C. §908(b), (c)(2), (19). The administrative law judge further determined that as claimant's average weekly wage calculated pursuant to Section 10(c), 33 U.S.C. §910(c), was $1,179 per week, he was entitled to be compensated based on the maximum compensation rate in effect at the time of his injuries, $712.14. *See* 33 U.S.C. §906(b)(1). Finally, the administrative law judge denied employer's petition for Section 8(f) relief.

On appeal, employer argues that the administrative law judge erred in determining that it was liable as the responsible employer and in failing to calculate claimant's average weekly wage under Section 10(c) based on his actual earnings in the 52 weeks prior to the February 23, 1993, work injury. In addition, employer argues that in finding that claimant sustained a 12 percent impairment of the left lower extremity, the administrative law judge improperly substituted his own medical judgement for that of claimant's physicians. Finally, employer challenges the administrative law judge's finding that claimant's left ankle condition reached maximum medical improvement on June 15, 1993, as irrational and lacking any evidentiary basis.[1] Container Stevedoring and Marine Terminals respond, urging affirmance of the administrative law judge's responsible employer determination. Claimant has not responded to employer's appeal.

RESPONSIBLE EMPLOYER

Employer initially argues on appeal that the administrative law judge erred in determining that it is the employer responsible for paying claimant's benefits. Employer specifically contends that in finding that claimant's right knee injury was not aggravated by his employment after August 20, 1993, the administrative law judge did not weigh claimant's testimony that he used his lower extremities constantly in performing his job

[1]We note that employer did not challenge the administrative law judge's determination that it was not entitled to relief pursuant to Section 8(f). Consequently, the administrative law judge's denial of Section 8(f) relief is affirmed.

duties or fully weigh and consider the medical opinions of claimant's treating physician, Dr. Brennan, and Dr. Specht, the doctor who performed claimant's knee surgery. We disagree.

In determining the responsible employer in multiple traumatic injury cases, if the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury and accordingly the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, the subsequent injury aggravates, accelerates, or combines with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is liable. *Foundation Constructors, Inc. v. Director, OWCP,* 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991); *Kelaita v. Director, OWCP,* 799 F.2d 1308 (9th Cir. 1986).

In the present case, after considering the relevant evidence of record, the administrative law judge found that the weight of the evidence did not support a finding that claimant's work activities with Container Stevedoring and Marine Terminals after his August 20, 1993, knee injury resulted in a permanent increase in his impairment. The administrative law judge found that the credible evidence in the record established that claimant sustained a distinct trauma to his knee on August 20, 1993; that neither claimant's testimony nor that of Drs. Stark and Renbaum indicated that the minimal climbing claimant's tractor driver job required was likely to have caused additional damage; and that Dr. Brennan, whose opinion was entitled to considerable weight in light of his status as claimant's treating physician, testified that any aggravation of claimant's knee from his work activities after August 20, 1993, was temporary.[2]

Contrary to employer's assertions, in determining that claimant's work activities subsequent to August 20, 1993, did not aggravate his right knee impairment, the administrative law judge considered claimant's testimony regarding the exertional requirements of his work duties and explicitly credited his testimony that he would only have to climb out of the cab of his tractor a few times a day-- at the beginning of the shift, during coffee breaks and lunch, and at the end of the shift. Tr. at 111-112. The administrative law judge also did not err in failing to specifically discuss portions of Dr. Brennan's testimony which, according to employer, establish that claimant should not have continued working and that the continuation of his regular work activities probably continued to aggravate his right knee. In making this argument, employer mischaracterizes Dr. Brennan's testimony. Although Dr. Brennan instructed claimant that it was inadvisable for him to return to his regular work duties immediately following his injury, he did not

[2]The administrative law judge also found that the work claimant performed after his February 23, 1993, injury with Maresk had not aggravated his ankle impairment. This finding is not challenged on appeal.

conclude that claimant's failure to follow this advice resulted in an aggravation of claimant's condition. Rather, as the administrative law judge properly noted, Dr. Brennan opined that although claimant's work after August 23, 1993, could have temporarily aggravated the symptoms of his knee condition by causing him increased pain, his knee probably would have been in the same condition at the time of his surgery even if he had not worked at all after the August 20, 1993, injury. Tr. at 175, 178, 184-185, 188-190.

Employer's argument that the administrative law judge erred in failing to consider Dr. Specht's medical opinion similarly fails. In attributing claimant's right knee impairment to the August 20, 1993, injury with employer, the administrative law judge explicitly considered Dr. Specht's testimony that claimant's knee injury was a degenerative condition rather than a specific tear. Inasmuch, however, as Dr. Specht was unable to state that claimant's work after August 20, 1993 actually or probably aggravated his knee condition, the administrative law judge acted within his authority in rejecting Dr. Specht's opinion as equivocal. *See* Decision and Order at 7, n. 7. Because the administrative law judge considered all of the relevant evidence in determining that employer is liable as the responsible employer, and his finding is rational, supported by substantial evidence, and in accordance with applicable law, this determination is affirmed.

AVERAGE WEEKLY WAGE

Next, we address employer's contention that the administrative law judge erred in calculating claimant's average weekly wage under Section 10(c) based on his post-injury earnings in 1993 instead of his actual earnings in the 52-week period prior to claimant's February 1993 ankle injury. While recognizing that post-injury earnings may be considered in determining claimant's average weekly wage in appropriate circumstances, employer maintains that the administrative law judge's use of claimant's post-injury wages was improper on the facts presented because it ignores the fact that in 1992, the year prior to claimant's injuries, claimant voluntarily chose not to work. Accordingly, employer asserts that the administrative law judge's finding results in claimant's receiving compensation which is excessive when viewed in light of his actual employment record. Employer maintains that in concluding otherwise the administrative law judge glossed over substantial medical evidence and instead relied on claimant's self-serving testimony.

The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). It is well-established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). *See Bonner v. National Steel & Shipbuilding* Co., 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979). The Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury.

The administrative law judge explicitly considered and rejected employer's position

that claimant had voluntarily chosen not to work in 1992. Moreover, citing *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), the administrative law judge found that even if claimant had in fact voluntarily chosen not to work in 1992, it did not mandate calculation of the average weekly wage based on claimant's actual earnings in the 52 weeks prior to his February and August 1993 work injuries as urged by employer because by the time of his 1993 work-related injuries claimant had demonstrated both the potential and willingness to earn far more. Accordingly, finding that claimant's actual earnings in the 41 weeks that he worked in 1993 best represented his true annual earning capacity, the administrative law judge calculated claimant's average weekly wage for both his February and August 1993 injuries by dividing his $48,349 of actual earnings in 1993 by the 41 weeks he worked, resulting in an average wage of $1,179.24 per week.

Inasmuch as the result reached by the administrative law judge is reasonable, supported by substantial evidence, and is consistent with the goal under Section 10(c) of arriving at a sum which reasonably represents claimant's annual earning capacity at the time of his injury, we affirm his average weekly wage calculation. *See Gatlin*, 935 F.2d at 819, 25 BRBS at 26 (CRT); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987). Initially, we are not persuaded that the administrative law judge's calculation of claimant's average weekly wage based on his post-injury wages will result in claimant's being compensated at a level which is inconsistent with his actual employment record; the $1,179.24 average weekly wage calculated by the administrative law judge does not depart significantly from claimant's average weekly earnings of $1,380.01 in 1991, the last year he worked prior to 1993.[3] In addition, the administrative law judge's finding that claimant was off work due, at least in part, to a 1991 work-related injury from May 1991 until January 1993 is supported by substantial evidence. *See Klubnikin v. Crescent Wharf & Warehouse Co.,* 16 BRBS 182 (1984). We hold that on the facts presented, the administrative law judge rationally found that claimant's actual 1993 earnings reasonably represented his true earning capacity at the time of both injuries. *See generally Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). Accordingly, his average weekly wage finding is affirmed.

DATE OF MAXIMUM MEDICAL IMPROVEMENT OF ANKLE INJURY

Employer next challenges the administrative law judge's finding that claimant's ankle injury reached maximum medical improvement on June 15, 1993, arguing that it is irrational and not supported by substantial evidence. We agree. In the present case, in determining the date of maximum medical improvement of claimant's ankle injury, the administrative law judge properly noted that only Drs. Stark and Renbaum provided relevant testimony. Dr. Stark opined that the ankle injury became permanent and stationary within four to six

[3]Claimant's employment records reflect that he earned $35,880.32 in the 26 weeks he worked in 1991.

weeks of the February 26, 1993, date of injury, Tr. at 273, while Dr. Renbaum was of the opinion that claimant's condition reached maximum medical improvement six months after the date of injury, Tr. at 247. The administrative law judge found that both physicians were well-qualified to render such an opinion and determined that as there did not appear to be any reason for rejecting either opinion, claimant's condition reached the point of maximum medical improvement "about half way between the dates proposed by Drs. Stark and Renbaum, *i.e.*, on June 15, 1993. " Decision and Order at 15.

An employee is considered permanently disabled when he has any residual disability following maximum medical improvement, *see Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds), the date of which is determined solely by medical evidence. *Sketoe v. Dolphin Titan International*, 28 BRBS 212, 221 (1994)(Smith, J., concurring and dissenting on other grounds); *see also Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56, 61 (1985). Although the administrative law judge has broad discretion in making such determinations, any finding he reaches must be supported by the evidence. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Cairns v. Matson Terminals, Inc.,* 21 BRBS 252 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). In the present case, by assessing a permanency date based on the average of the two relevant medical opinions of record, the administrative law judge abdicated his judicial responsibility to weigh the relevant evidence and resolve the disputed factual issue regarding the date claimant's ankle condition reached permanency. *See generally Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986). Because the record is devoid of any medical evidence which reflects that claimant's ankle condition reached maximum medical improvement on June 15, 1993, we vacate the administrative law judge's maximum medical improvement determination and remand for him to reconsider this issue. On remand the administrative law judge should make an assessment of the date of permanency based on either Dr. Stark or Dr. Renbaum's opinion.[4]

EXTENT OF IMPAIRMENT - LEFT ANKLE INJURY

[4]While employer urges that we reverse the administrative law judge and hold as a matter of law that claimant's ankle reached maximum medical improvement on April 9, 1993, consistent with Dr. Stark's opinion, we decline to do so as the Board is not empowered to engage in *de novo* review. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

Finally, employer argues that the administrative law judge's finding that claimant suffered a 12 percent permanent physical impairment of his lower left extremity is irrational, not supported by substantial evidence, and represents an improper interjection of the administrative law judge's own medical judgment. We agree. In finding that claimant sustained a 12 percent impairment, the administrative law judge initially noted that four physicians had rendered relevant opinions: Drs. Renbaum and Bernstein each found that claimant suffered a 7 percent impairment, Dr. Charles found that claimant suffered a 20 percent impairment, and Dr. Stark found an 18 percent impairment. The administrative law judge then determined that while it wasn't clear why Dr. Charles had found a higher level of impairment than Drs. Bernstein and Renbaum, it appeared that Dr. Stark provided a higher figure than these two physicians because neither Dr. Bernstein nor Dr. Renbaum included the effects of pain in their calculation. The administrative law judge then determined that while pain which affects the injured worker's ability to function is properly considered in assessing his disability, Dr. Stark overestimated the degree of claimant's loss due to pain in rating his disability at 18 percent because claimant provided testimony that his ankle injury only gave him problems when he walked fast and did not impede his ability to sit, stand or climb stairs. In view of claimant's testimony and the fact that claimant did not seek any prescription medication between March and August 1993, the administrative law judge found that any loss of use claimant experienced due to pain did not exceed 5 percent. Accordingly, he awarded claimant benefits for a 12 percent loss of use, representing the sum of the 5 percent loss of use due to pain and the 7 percent loss of use due to loss of motion found by Drs. Bernstein and Renbaum.

The administrative law judge is not bound by an particular standard but may consider a variety of medical opinions and observations in addition to claimant's descriptions of symptoms and physical effects of his injury in assessing the extent of claimant's disability under the schedule. *Pimpinella v. Universal Maritime Service*, 27 BRBS 154 (1993). In the present case, however, the administrative law judge's finding of a 12 percent permanent physical impairment is neither rational nor supported by substantial evidence in the record. There is no evidence in the record to support the administrative law judge's finding that the difference between Dr. Stark's 18 percent assessment and the 7 percent impairment found by Drs. Bernstein and Renbaum was due to the fact that the latter two doctors had not accounted for claimant's pain. Moreover, as no evidence was presented as to how Dr. Stark arrived at the percentage of loss due to pain or what percentage of claimant's overall impairment was based on claimant's loss of use due to pain, employer correctly avers that the administrative law judge improperly substituted his own medical judgement for that of Dr. Stark in finding that Dr. Stark had overestimated claimant's loss of use due to pain and that the actual percentage of disability due to pain is 5 percent. *See Donnell v. Bath Iron Works Corp.*, 22 BRBS 133, 140 (1989). The administrative law judge's finding that claimant suffered a 12 percent impairment is therefore vacated, and the case is remanded for the administrative law judge to reconsider the extent of claimant's permanent impairment resulting from his February

1993 work injury and to render a conclusion premised on rational inferences from the relevant evidence.[5] *See generally Pimpinella*, 27 BRBS at 160.

Accordingly, the administrative law judge's findings regarding the date of maximum medical improvement and extent of impairment relating to claimant's ankle injury are vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[5]Employer also suggests that Dr. Renbaum's assessment should be afforded determinative weight because the administrative law judge noted repeatedly that it complied with the American Medical Association *Guides to the Evaluation of Permanent Impairment.* Inasmuch, however, as the Act does not require the use of the AMA *Guides* except in cases involving voluntary retirees and hearing loss, employer's argument is rejected. *Pimpinella*, 27 BRBS at 159, n.4.