BRB No. 97-0512

FRANK S. ROUSE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STRACHAN SHIPPING, COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Motion for Reconsideration of Edith Barnett, Administrative Law Judge, United States Department of Labor.

E. Paul Gibson (Riesen Law Firm, L.L.P.), N. Charleston, South Carolina, for claimant.

Bert G. Utsey, III (Sinkler & Boyd, P.A.), Charleston, South Carolina, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Motion for Reconsideration (95-LHC-0866) of Administrative Law Judge Edith Barnett 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, working as a top man for employer, sustained injuries to his left foot and leg as a result of a fall from a container on April 8, 1993. Claimant was immediately treated by Dr. Lowery who, following his diagnosis of a left calcaneal fracture intra-articular (broken heel), performed surgery. Claimant returned to work on August 2, 1993, and has

been continuously employed from that date. Claimant, however, maintains that he continues to have trouble with his left foot.[1]

On May 24, 1994, claimant was re-examined by Dr. Lowery who ultimately concluded that claimant had reached maximum medical improvement with a three percent impairment. Dr. Thompson, in his report dated August 18, 1994, concurred with Dr. Lowery's assessment that claimant had reached maximum medical improvement with a resultant three percent impairment of his left foot. Claimant was further examined by Dr. Schimenti who initially opined that claimant had a 12 percent impairment of his left foot as a result of his work-related accident. Employer subpoenaed Dr. Schimenti to testify at the hearing; however, she ignored the subpoena and did not attend the hearing. In a letter dated October 24, 1995, five days after the formal hearing, claimant's counsel advised the administrative law judge that he had received a letter from Dr. Schimenti in which she stated that she could no longer support her previous opinion that claimant sustained a 12 percent permanent impairment of his left foot and could no longer explain how she arrived at it.

Asserting that Dr. Schimenti's change in position prejudiced claimant as it left him without a medical expert to provide an opinion regarding claimant's impairment, claimant requested that the record be held open and that he be granted leave to have a post-hearing examination by another physician. In an Order dated November 13, 1995, the administrative law judge granted claimant's request over employer's objection. Consequently, the medical report of Dr. Kasman dated December 18, 1995, and transcript of her deposition, taken January 31, 1996, were ultimately admitted into evidence. Based on her examination, Dr. Kasman assigned claimant a 41 percent impairment of the foot,[2] 29

[1]In particular, claimant testified that it hurts if he walks on a rough area or stands too long, and when the weather is bad. In addition, claimant is precluded from taking any jobs as a top man because it requires climbing, and he avoids taking any jobs as a foot man, because it requires standing for an entire shift.

[2]Specifically, Dr. Kasman assigned claimant a ten percent impairment of the left foot based on the loss of ankle dorsiflexion, seventeen percent impairment of the foot based on the mild varus deformity, and a fourteen percent impairment of the foot based on the mild degenerative changes in the calcaneal cuboid joint.

percent impairment of the leg, or a 12 percent whole person impairment. Additionally, Dr. Kasman recommended that claimant limit himself to sedentary work, and avoid climbing, working at heights, or on slopes or uneven ground.

Relying on the medical opinion of Dr. Kasman, the administrative law judge, concluded that claimant is entitled to permanent partial disability benefits for a 41 percent permanent partial impairment for loss of use of his left foot. 33 U.S.C. §908(c)(4), (19). The administrative law judge additionally ordered employer to pay interest on past due compensation. Employer's subsequent Motion for Reconsideration was summarily denied by the administrative law judge on December 6, 1996.

On appeal, employer challenges the administrative law judge's admittance of Dr. Kasman's opinion and consequent award of benefits and interest. Claimant responds, urging affirmance. Employer has also filed a reply brief reiterating its position on appeal.

Employer initially argues that the administrative law judge erred in allowing claimant to obtain and submit the post-hearing report and testimony of Dr. Kasman. Employer argues that Section 702.338, 20 C.F.R. §702.338, pertains to the admission of evidence which was available at the time of the hearing, and thus, should not be extended to enable a party to remedy the poor performance of a witness at trial through the submission of new evidence created subsequent to the hearing.

Section 702.338 provides that the administrative law judge has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents. 20 C.F.R. §702.338. Additionally, under Section 702.338 the administrative law judge may reopen the record for receipt of relevant and material evidence "at any time, prior to the filing of [a] compensation order." *Id.* Contrary to employer's argument, this regulation thus does not limit the administrative law judge's admission of evidence to that available at the time of hearing. *See Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988) (holding administrative law judge did not err in choosing to continue the proceedings before him by requesting submission of *new* evidence). The administrative law judge possesses considerable discretion concerning the admission of evidence, *see Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988), and her actions regarding the admissibility of evidence are reversible only if they are arbitrary, capricious, or an abuse of discretion. *See Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992); *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, Nos. 91-70642, 92-70444 (9th Cir. June 15, 1993).

In this case, the administrative law judge considered the reason behind claimant's post-hearing request to reopen the record, as well as employer's objections to said request. The administrative law judge explicitly determined that claimant's claim of surprise was justified based upon Dr. Schimenti's sudden change in opinion regarding the extent of claimant's permanent impairment. In addition, to protect employer's rights, the administrative law judge provided employer the opportunity to depose Dr. Kasman. In light of these facts, we hold that the administrative law judge did not abuse her discretion in admitting Dr. Kasman's medical report dated December 18, 1995, CX 7, and subsequent deposition testimony taken January 31, 1996, EX 11, as all relevant evidence was allowed into the record and employer was given the opportunity to respond, insuring that its rights

were protected. *Ramirez*, 25 BRBS at 260; *Olsen*, 25 BRBS at 40; 20 C.F.R. §§702.338, 702.339. Inasmuch as this evidence was admitted prior to the issuance of a compensation order, the administrative law judge's actions complied with Section 702.338.

Employer next argues that the administrative law judge erred in discounting the opinions of Drs. Lowery and Thompson because their qualifications were not in evidence. Employer maintains that in light of the evidence which had been developed at the time of the hearing, it was not necessary for employer to submit the curriculum vitae for Dr. Lowery and Dr. Thompson. Rather, employer avers that the need for this evidence only arose in response to the submission of Dr. Kasman's post-hearing opinion and, as such, the administrative law judge should have allowed employer, at that time, pursuant to Section 702.338, to enter this evidence into the record. In addition, employer asserts that the administrative law judge erred in failing to consider all of Dr. Lowery's treating medical records in evaluating the weight to be accorded his impairment rating. Employer specifically maintains that a simple clerical error prevented the presentation of the entirety of Dr. Lowery's records between April 9, 1993, and May 24, 1994, at the time of the hearing, and that contrary to the administrative law judge's determination, employer should have been permitted, under Section 702.338, to rectify its oversight through the submission of the additional missing records with its motion for reconsideration.

Employer was cognizant of the administrative law judge's Order enabling claimant to have a post-hearing medical examination, and was provided the opportunity to depose Dr. Kasman prior to the issuance of the administrative law judge's Decision and Order. Additionally, as evidenced by employer's participation in Dr. Kasman's deposition, employer was fully aware of Dr. Kasman's credentials/qualifications by at least January 31, 1996. In fact, employer's line of questioning included a discussion of Dr. Kasman's qualifications as an orthopaedic surgeon. EX 11 at 29-31. Employer reasonably had knowledge that the relative qualifications/credentials of the physicians of record would be germane to discerning the appropriate weight accorded to the medical evidence prior to the issuance of the administrative law judge's decision and could have requested that the curriculum vitae of Drs. Lowery and Thompson be submitted into evidence at that time. Instead, employer waited until after the administrative law judge issued her decision and raised this issue for the first time in its motion for reconsideration. *See generally Sam v. Loffland Bros., Co*., 19 BRBS 228 (1987). The administrative law judge did not abuse her discretion in denying employer's motion for reconsideration. Employer's argument that this evidence should have been admitted under Section 702.338 necessarily fails inasmuch as it sought to admit the physician's credentials after issuance of the administrative law judge's Decision and Order and that section does not authorize the

administrative law judge to reopen the record after the compensation order is filed.[3] The compensation order was filed on October 30, 1996 and employer's motion for reconsideration was filed on November 13, 1996.

Similarly, despite its emphasis on the importance of Dr. Lowery's medical opinion and status as treating physician, *see* Employer's Post-Hearing Brief at 1-2, 5-6, and employer's explicit reference to Dr. Lowery's seven follow-up examinations of claimant as part of its exhibit number 7, employer made no effort to confirm the actual presence of this evidence in the record until after the issuance of the administrative law judge's compensation order.[4] As employer failed to exercise due diligence in obtaining the entirety of Dr. Lowery's existing medical records prior to the hearing, the administrative law judge acted within her discretion in refusing to allow employer to "resubmit" this evidence following the issuance of her compensation order. *Id.*

Employer further contends that assuming, *arguendo,* that the medical records of Dr. Kasman were properly received into evidence, substantial evidence does not support the administrative law judge's conclusion that claimant is entitled to permanent partial disability benefits based on a 41 percent impairment rating of the left foot. Employer argues that the administrative law judge did not provide any valid reason for discounting the opinion of claimant's treating physician Dr. Lowery in favor of the opinion of Dr. Kasman which, it alleges, is based only on a cursory examination/evaluation of claimant.

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[3]Section 702.338 provides in relevant part:

> If the administrative law judge believes that there is relevant and material evidence available which has not been presented at the hearing, he may adjourn the hearing or, at any time, *prior to the filing of the compensation order*, reopen the hearing for the receipt of such evidence. (emphasis added).

[4]Employer specifically notes that it first became aware of the omission of some of Dr. Lowery's medical reports while employer was reviewing the record in preparation of its motion for reconsideration.

The administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71, 73 (1996); *see also Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge accepted Dr. Kasman's opinion as to the extent of claimant's impairment because, in contrast to the opinions of Drs. Lowery and Thompson, she found it is well-reasoned and well-documented. The administrative law judge explicitly noted that Dr. Kasman carefully analyzed the relevant objective findings and based her impairment ratings on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). In contrast, the administrative law judge observed that Dr. Lowery gave no reason for assigning a three percent impairment and determined that Dr. Thompson's opinion merely echoed Dr. Lowery's impairment rating without any explanation as to why he deemed it "a fair assessment." EX 9. Moreover, the administrative law judge acknowledged Dr. Kasman's special qualifications "in the type of trauma claimant suffered," Decision and Order at 6, and eligibility for Board certification, and further noted that the record did not contain any qualifications for either Dr. Lowery and/or Dr. Thompson. In the instant case the credibility determinations made by the administrative law judge in resolving the issue as to the extent of claimant's permanent partial disability are rational and within his authority as factfinder. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, as substantial evidence supports her finding, we affirm the administrative law judge's determination that claimant is entitled to benefits for a 41 percent impairment of his left foot.

Employer lastly argues that the administrative law judge erred in awarding interest on the award of benefits since employer's offer to timely pay claimant disability benefits based on Dr. Lowery's three percent impairment rating was refused. Employer contends that it is wholly inequitable to require employer to pay interest on an award which is based upon an impairment rating which did not even exist until after the hearing and that at the very least its obligation for any interest should only accrue from the date at which it became aware of Dr. Kasman's 41 percent impairment rating.

It is well-established that, under the Act, claimants are entitled to interest on over-due payments of compensation and that said interest is mandatory. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). The purpose of interest is not to penalize employers but, rather, to make claimants whole, as employer has had the use of the money until an award issues. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 9 BRBS 1089 (4th Cir. 1979); *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 47 (1989); *Grant v. Portland Stevedoring Co.*, 16 BRBS 265 (1984), *on reconsideration*, 17 BRBS 20 (1985). In addition, the Board has held that the date that employer knows of an injury and therefore incurs an obligation to pay benefits under 33 U.S.C. §914(b) is critical in determining the onset date for the accrual of interest. *Renfroe*, 30 BRBS at 105-106. In light of this, and

given the purpose of an interest award, claimant's refusal of employer's pre-hearing offer to pay benefits based on a three percent impairment rating and/or employer's lack of knowledge of the 41 percent impairment rating ultimately awarded is not relevant to the determination of when interest on unpaid benefits began to accrue. *Id.* Accordingly, we affirm the administrative law judge's conclusion that claimant is entitled to interest accrued on unpaid benefits during the period prior to the issuance of her Decision and Order. *See Santos v. General Dynamics Corp.*, 22 BRBS 226, 228 (1989).

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge