

EDWARD H. FISHER, Claimant-Petitioner v. STRACHAN SHIPPING COMPANY
and TEXAS EMPLOYERS INSURANCE ASSOCIATION, Employer/Carrier-
Respondents

BRB No. 78-321

8 BRBS 578

Benefits Review Board

July 20, 1978

Before: SMITH, Chairman, and MILLER, Member.

Counsel

Stephen M. Vaughan (Mandell & Wright), Houston, Texas, for the claimant. {(BRB)
579}

Editorial information: History

Appeal from the Decision and Order of J. F. Greene, Administrative Law Judge, United
States Department of Labor.

Editorial information: **Syllabus**

Digest Section: 1911 A decision that a Longshoremen's Act claimant incurred 33
percent permanent disability of a finger is not erroneous for the fact that it is based on a
physician's disability rating which does not indicate a specific formula for determining
disability. p. 580

Opinion

MILLER, Member:

This is an appeal by the claimant from a Decision and Order (77-LHCA-76) of
Administrative Law Judge J. F. Greene pursuant to the provisions of the Longshoremen's
and Harbor Workers' Compensation Act, as amended, [33 U.S.C. § 901](#) et seq.
(hereinafter, the Act).

Claimant was injured on June 14, 1975 when, during the course of his employment, his
hand became caught between steel drums that he was loading onto a ship. The soft tissue
tip of his right index finger required amputation. No bony structure within the finger was
involved.

Employer paid temporary total disability compensation for several weeks following the
accident. It declined to pay permanent partial disability pursuant to the schedule, §
8(c)(7) of the Act, [33 U.S.C. § 908\(c\)\(7\)](#), for loss of use of the first finger.

On March 9, 1977, a formal hearing was held before the administrative law judge. On
February 19, 1978, the administrative law judge issued her Decision and Order in which
she found claimant had sustained a thirty-three percent permanent partial disability of the
right first finger. In arriving at this figure, the administrative law judge adopted the

findings of Dr. Michael Epstein, the orthopedic surgeon to whom claimant was referred by the Deputy Commissioner. Claimant was awarded compensation pursuant to Sections 8(c)(7) and 8(c)(19) of the Act. [33 U.S.C. § 908\(c\)\(19\)](#).

Claimant appeals alleging that the award of thirty-three percent permanent partial disability is erroneous as: (1) based upon a medical report that does not indicate how the thirty-three percent figure was derived; (2) does not follow the American Medical Association Guides to the Evaluation of Permanent Impairment (hereinafter the Guides); and (3) does not include the thirteen percent uniformly awarded in the Eighth Compensation District for loss of the soft tissue tip of a finger. Specifically, claimant alleges that the thirty-three percent disability rating is too low. He argues that, under the Guides, his degree of disability is thirty-seven percent. Adding the thirteen percent disability rating awarded by the Eighth District Deputy Commissioner in such a case as this, he is entitled to a compensation award of fifty percent permanent partial disability to the first finger.

In reviewing a determination of a claimant's disability, the Board's scope is limited. Where the findings and conclusions of the administrative law judge are supported by substantial evidence, are not irrational and are in accordance with law, they must be affirmed. [33 U.S.C. § 921\(b\)\(3\)](#); O'Keeffe v. Smith Associates, 380 U.S. 359 (1965).

This is so regardless of whether the facts permit the drawing of different inferences or even that this Board would have arrived at a different conclusion on identical facts. Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469 (1942) Atlantic & Gulf Stevedore, Inc. v. Director, 542 F.2d 609 (3d Cir. 1976).

Moreover, the fact-finder's evaluation of the credibility of witnesses, including medical witnesses, must be respected by this Board. John W. McGrath Corp. v. Hughes, 289 F.2d 403 (2d Cir. 1961). In reviewing the findings of the administrative law judge, the Board may not reweigh the evidence but must review the record to determine whether evidence exists to support the findings. South Chicago Coal & Dock Co. v. Bassett, 104 F.2d 522 (7th Cir. 1939).

In the present case, claimant alleges that the thirty-three percent disability rating established by Dr. Epstein is arbitrary and erroneous as failing to state how the figure was derived. As such, the administrative law judge was in error to have adopted Dr. Epstein's rating.

The fact that Dr. Epstein failed to indicate a specific formula he used to measure claimant's degree of disability is not fatal, provided that his determination is reasonable. Dr. Epstein is a specialist in hand surgery. He is the independent medical examiner to whom claimant was referred by the deputy commissioner. His rating is based upon a thorough, personal examination of claimant. In light of this, we feel the administrative law judge's adoption of Dr. Epstein's recommendation is in accordance with law.

This position is substantiated further by the other medical reports and testimony admitted into evidence. Claimant and employer jointly submitted the medical reports of three different surgeons, in addition to Dr. Epstein, who either treated or examined claimant. Each surgeon placed the degree of impairment to the right finger at a lesser percentage than did Dr. Epstein. Claimant's treating surgeon, Dr. John McKenna, placed claimant's disability at fifteen percent. Dr. Leroy W. Hanson, an examining orthopedic surgeon, rated claimant's disability at twenty-five percent. A third examining orthopedic surgeon, Dr. Wylie J. Jinkins, Jr., rated claimant's disability at thirteen percent. Dr. Jinkins was the

only surgeon who indicated that he based his rating on a specific formula. He indicated that he followed the Guides.

It is apparent that, in the face of conflicting medical testimony as to the degree of the claimant's disability, the administrative law judge chose to credit the doctor whose position was most favorable to claimant. This is clearly within his authority. John W. McGrath Corp. v. Hughes, *supra*. This Board will not disturb the administrative law judge's finding regarding claimant's permanent partial disability. It is both supported by substantial evidence and rational in light of the facts.

Claimant further urges this Board to require evaluation of claimant's disability in accordance with the Guides. While this Board has expressed a desire that the Director of the Office of Workers' Compensation Programs promulgate regulations establishing a uniform disability evaluation guide for hearing loss and disfigurement, in the absence of such regulations, the Act does not require adherence to any particular guide or formula. Ortega v. Bethlehem Steel Corp., [7 BRBS 639](#), BRB No. 77-245 (Jan. 24, 1978); Shelton v. Washington Post Co., 6 BRBS 54, BRB No. 76-358 (Dec. 15, 1977); and Robinson v. Bethlehem Steel Corp., [3 BRBS 495](#), BRB No. 75-241 (May 14, 1976). Accordingly, we reject the argument that claimant's disability should be measured by the Guides. {(BRB) 581 }

As his final assignment of error, claimant alleges that the administrative law judge should have included a thirteen percent disability rating that the Eighth District Deputy Commissioner uniformly applies in cases where there is soft tissue loss to a claimant's finger. For the reasoning stated above, the administrative law judge is not bound to adhere to any particular formula in determining a claimant's disability. No error of law was committed by her failure to follow the deputy commissioner's practice. Accordingly, the Decision and Order of the administrative law judge is affirmed.

SALVATORE MAZZE, Claimant-Petitioner v. FRANK J. HOLLERAN, INC. and
STATE INSURANCE FUND, Employer/Carrier-Respondents

BRB No. 78-158

9 BRBS 1053

Benefits Review Board

September 11, 1978

Before: SMITH, Chairman, MILLER and KALARIS, Members.

Counsel

Angelo C. Gucciardo (Israel, Adler, Ronca & Gucciardo), New York, New York, for the claimant.

Joseph F. Manes, Croton-on-Hudson, New York, for the employer/carrier.

Editorial information: History

Appeal from the Decision and Order of Vernon C. Field, Administrative Law Judge, United States Department of Labor.

Editorial information: **Syllabus**

Digest Section: 1406 A Longshoremen's Act claimant's ability to perform his work may be considered in evaluating his degree of physical impairment from a loss classified under the Section 8(c) schedule, although the question of whether the loss affects his ability to perform his work is immaterial to the issue of his entitlement to compensation pursuant to that section. Thus, in determining that a claimant suffered only a five percent loss of use of the right leg, an administrative law judge properly considered the fact that claimant remained able to perform his work.

Opinion

MILLER, Member:

This is an appeal by the claimant from a Decision and Order (77-LHCA-1041) of Administrative Law Judge Vernon C. Field pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, [33 U.S.C. § 901 et seq.](#) (hereinafter, the Act).

On August 14, 1975, claimant, during the scope of his employment, sustained injuries to his left chest, right ribs and right leg when he fell from the hatch of a ship. Employer voluntarily paid compensation for temporary total disability from August 15, 1975, to January 11, 1976. Claimant filed a claim for benefits for permanent partial disability to his right leg as a result of the accident. Employer denied liability for this claim asserting that claimant suffered no permanent disability from the accident.

The administrative law judge found claimant had sustained a five percent loss of use of his right leg and awarded benefits pursuant to the schedule for loss of use of the leg, [33](#)

[U.S.C. §§ 908\(c\)\(2\)](#), [908\(c\)\(19\)](#). Claimant appeals the Decision and Order on two separate grounds. He first alleges that the administrative law judge should have found claimant sustained either a 17 1/2 percent or a 15 percent loss of use of the right leg. Claimant also argues that the administrative law judge erred in not finding that he had sustained a left inguinal hernia as a result of the accident as the parties had stipulated between themselves. [1](#).

In reviewing a determination of a claimant's disability, the Board's scope is limited. Where the findings and conclusions of the administrative law judge are supported by substantial evidence, are not irrational and are in accordance with law, they must be affirmed by the Board. [33 U.S.C. § 921\(b\)\(3\)](#); [O'Keeffe v. Smith Associates](#), 380 U.S. 359 (1965). This is so regardless of whether the facts permit the drawing of different inferences or even that this Board would have arrived at a different conclusion on identical facts. [Cardillo v. Liberty Mutual Insurance Co.](#), 330 U.S. 469 (1942); [Atlantic & Gulf Stevedore, Inc. v. Director](#), 542 F.2d 609 (3d Cir. 1976). Moreover, the fact-finder's evaluation of the credibility of witnesses, including medical witnesses, must be respected by this Board. [John W. McGrath Corp. v. Hughes](#), 289 F.2d 403 (2d Cir. 1961). In reviewing the findings of the administrative law judge, the Board may not reweigh the evidence but must review the record to determine whether evidence exists to support the findings. [South Chicago Coal & Dock Co. v. Bassett](#), 104 F.2d 522 (7th Cir. 1939).

In the present case, there is conflicting medical testimony on the extent of claimant's permanent disability to the right leg. Dr. George N. Haziris, in his report of July 9, 1976, placed claimant's permanent disability at 17 1/2 percent. Dr. Arthur L. Matles found no permanent loss of use of the right leg. Dr. Robert Zaretsky, an examining orthopedic surgeon, found no permanent disability under the AMA [Guides](#) since claimant had no loss of motion and no ligament instability. Dr. Zaretsky added that, if claimant had a torn cartilage, there would be a fifteen percent loss of use of his leg. There is no indication in the record that claimant had a torn cartilage.

As is his prerogative, the administrative law judge chose not to credit the opinion of Dr. Haziris since the doctor failed to state with particularity the findings upon which he based his rating. The administrative law judge's failure to find a fifteen percent loss of use is proper since that figure was based on the express condition that claimant's right knee cartilage be torn. Since there was no evidence that the cartilage was torn, the fifteen percent rating did not apply. {(BRB) 1055}

The administrative law judge also chose not to credit the opinions of Drs. Matles and Zaretsky that claimant suffered no permanent disability to his right leg. Dr. Zaretsky's opinion was based on the AMA [Guides](#). Because the Act does not require adherence to any particular guide or formula, the administrative law judge was not bound by the doctor's opinion nor was he bound to apply the [Guides](#) or any other particular formula for measuring disability. [Ortega v. Bethlehem Steel Corp.](#), [7 BRBS 639](#), BRB No. 77-245 (Jan. 24, 1978); [Shelton v. Washington Post Co.](#), 6 BRBS 54, BRB No. 76-358 (Dec. 15, 1977); [Robinson v. Bethlehem Steel Corp.](#), [3 BRBS 495](#), BRB No. 75-241 (May 14, 1976).

Instead of adhering to the opinion of one particular physician, the administrative law judge found claimant had a "slight" permanent injury to his leg due to the tenderness in the knee. He determined claimant's permanent disability to be a five percent loss of use of

the right leg because of "no loss of flexion or rotation and continued ability to perform his work."

We find this percentage of disability to be rational and supported by evidence in the record. Drs. Matles and Zaretsky found no loss of flexion or rotation. Both Drs. Haziris and Zaretsky noted tenderness in claimant's right knee during their examinations conducted approximately one year after the accident. The fact that the administrative law judge chose a "compromise" percentage of disability is not fatal. Courts have upheld findings of the degree of a claimant's disability that fell within the range of disability testified to by various physicians. See, e.g., Williams v. Donovan, 234 F. Supp. 135 (E.D. La. 1964), aff'd, 367 F.2d 825 (5th Cir. 1966). Findings that are contrary to the weight of medical evidence have also been upheld. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962).

Claimant is correct to note that the fact that he could perform his work is immaterial to a determination of whether he has suffered a scheduled loss under Section 8(c) of the Act. Ruiz v. Universal Maritime Service Corp., [8 BRBS 451](#), BRB No. 78-135 (May 30, 1978). In Ruiz, the administrative law judge placed great weight on whether the claimant had suffered any economic loss to determine whether there was a permanent disability. This clearly was wrong under Section 8(c). However, the administrative law judge in the instant case is using claimant's ability to work not as a measure of economic loss, but as a measure of physical injury. It is used to support his finding that claimant suffers from only "slight" permanent impairment. There was no incorrect legal standard applied in this case.

Claimant also argues that the administrative law judge should have found his inguinal hernia to be causally related to the August 1975 accident, as was stipulated to by the parties. While this is primarily a factual issue that can be stipulated by the parties, the fact that the administrative law judge failed to incorporate it into his Decision and Order is inconsequential to the result of this case. It does not appear from the record that claimant suffered any economic loss as a result of the hernia to sustain an award under Section 8(c)(21), [33 U.S.C. § 908\(c\)\(21\)](#), for loss of wage-earning capacity. Accordingly, the Decision and Order of the administrative law judge is affirmed.

Footnotes for 9 BRBS 1053

[1.](#)

Claimant, without saying why, discusses the Act's Section 20(a) presumption, [33 U.S.C. § 920\(a\)](#), in his brief. If this is to suggest that it is applicable in the present case, claimant is in error. Questions concerning the nature and extent of disability are issues to be litigated without the benefit of the presumption. See Hunigman v. Sun Shipbuilding & Dry Dock Co., [8 BRBS 141](#), BRB No. 76-266 (Mar. 31, 1978).

[Group:"9 BRBS 1056 "]

In the Matter of Joseph Grispingo, Claimant v. General Dynamics Corporation, Self-Insured Employer

OALJ No. 94-LHC-1744

OWCP No. 1-125235

29 BRBS 777(ALJ)

Office of Administrative Law Judges

John W. McCormack Post Office and Courthouse

Boston, Massachusetts 02109

Dated: November 9, 1995

Before: Clement J. Kichuk, Administrative Law Judge

Counsel

APPEARANCES:

Scott N. Roberts, Esq.

For the Claimant

Peter D. Quay, Esq.

For the Employer

Editorial information: SYLLABUS

DIGEST SECTION: 702[1][b][i] When crane shackle fell on crane inspector's right foot and, after fractures healed, claimant developed arthritis in that foot, and when treating doctor found zero-percent permanent impairment under one edition of the *AMA Guides* and some permanent impairment under a different edition of the *Guides*, ALJ held he could disregard the *Guides* ; ALJ found scheduled permanent impairment of the right foot of 4 percent, for residual arthritic condition resulting from claimant's industrial injury.

Opinion

Opinion by Kichuk, J.

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for compensation arising under the Longshore and Harbor Workers' Compensation Act (the "Act"), as amended, [33 U.S.C. § 901](#), *et seq.*, filed by Joseph Grispingo ("Claimant") against the self-insured employer, General Dynamics Corporation ("Employer"). [1.](#)

In accordance with § 919(d) of the Act, the District Director of the Office of Workers' Compensation Programs referred this matter to the Office of Administrative Law Judges for formal resolution by letter dated April 4, 1994. The undersigned issued a Notice of Hearing on May 16, 1994. Pursuant thereto, the undersigned conducted a hearing in New London, Connecticut on August 30, 1994, at which time all parties were given the opportunity to present evidence and oral arguments.

At the hearing, the parties stipulated to the following: (1) the Act applies; (2) there was an injury in the course and scope of employment on September 22, 1992; (3) there was an

employee/employer relationship; (4) the parties timely complied with all notice, claim, and controversion provisions of the Act; (5) the informal conference was held on March 16, 1994; (6) the average weekly wages of Claimant are \$798.47; and (7) temporary total disability benefits were paid from September 23, 1992 through November 30, 1992. (TR 31). Claimant's exhibits one through three and Employer's exhibits one through seven were admitted into evidence. In addition, the record was left open for the parties to submit post-hearing briefs in support of their positions. By letter dated October 25, 1994, counsel for Employer informed this Office that the parties had received the transcript of this proceeding and would file briefs on November 17, 1994. On November 21, 1994, this Office received Claimant's Brief. To date, Employer has not filed its post-hearing brief and the record has been closed.

ISSUE

The only issue which remains in dispute is whether Claimant has a compensable permanent partial impairment to his right foot.

STATEMENT OF THE CASE

Claimant was born on July 21, 1958. (TR 17). Employer initially hired Claimant as a rigger on September 9, 1981. After performing well in an apprentice program, Employer promoted Claimant into Department 507, the crane inspecting department. (TR 18). As they tested the cranes, Claimant explained that they did a lot of climbing and standing. (TR 18). The cranes were located throughout Employer's facility. (TR 19). In September, 1992, Claimant suffered an injury at work when a crane shackle fell onto his foot. (TR 20). Claimant testified that he reported the injury immediately and went directly to the yard hospital. (TR 21). Dr. Willetts, who treated Claimant for a prior non-work-related injury to the other foot, also treated Claimant for this injury. Claimant stated that the top part of his foot was broken in three places. (TR 22). Dr. Willetts waited for the swelling in the foot to go down before he set Claimant in a cast to his knee. (TR 22). Employer made payments of compensation without an award from September 23, 1992 to November 30, 1992, during which time Claimant was out of work. (RX 4). Upon removal of the cast, Claimant returned to the crane inspection department, but was assigned to different duties. (TR 23). At the time of the injury, Claimant testified that he was working in an "orphan section" of the department issuing equipment. After the injury, Claimant was back out on the cranes, climbing ladders in order to perform the inspections. (TR 23). Claimant explained that the department was short-handed and that he had experience in testing the cranes. (TR 29). The constant bending of the foot as he climbed the ladders {(ALJ) 779} caused Claimant to experience discomfort in his right foot. (TR 23). Claimant testified that he reported this discomfort to Dr. Willetts, who advised him to use an orthopedic pad to lift the instep. (TR 24). According to Claimant, he only needed the pad for his work shoes because he generally wore sneakers which have an arch support at other times. (TR 24). At the time of the hearing, Claimant testified that he was working his regular duties without any reduced pay. (TR 30). Claimant stated that he still experienced the discomfort which he described as a pins and needle sensation. At the end of an eight hour work day, Claimant testified that his foot was sore. (TR 25- 26). Claimant indicated that he experienced the discomfort every day after climbing the rungs of the ladders. Prior to

the foot injury, Claimant stated that his foot did not bother him. (TR 26). Claimant filed his Claim for Compensation on November 9, 1993. (CX 1 at 3).

Medical Evidence

The record contains the office notes of Dr. Philo F. Willetts. The initial visit report dated September 22, 1992, included Claimant's description of the shackle falling on his right foot earlier that day. (CX 2 at 1). Upon examination, Dr. Willetts reported that there was moderate swelling over the dorsum of the foot and tenderness over the tarsal-metatarsal junction. X-rays revealed a definite fracture of the base of the second metatarsal and injury to the Lisfranc's joint. Dr. Willetts opined that Claimant suffered a fracture to the right second and possibly third and fourth metatarsals with a sprain of the Lisfranc's joint. Due to the swelling, Dr. Willetts placed Claimant in a fiberglass splint, rather than a cast. Dr. Willetts prescribed Percocet for the pain and advised Claimant to elevate his foot. After several days, Dr. Willetts reported that he would re-examine Claimant and perhaps set him in a nonweight bearing cast. Dr. Willetts noted that the injury to the Lisfranc's joint could result in arthritis in that area. (CX 2 at 1). Upon return to Dr. Willetts on September 25, 1992, Dr. Willetts noted a decrease in swelling and set Claimant in a well-padded, non-weight bearing short leg cast with good distal neurovascular. (CX 2 at 2). Claimant continued to treat with Dr. Willetts. On November 2, 1992, Dr. Willetts removed Claimant's cast and noted that there was considerable stiffness and discomfort over the Lisfranc's joint and metatarsals. (CX 2 at 2). Dr. Willetts indicated that there was no visible swelling and that neurovascular was intact. Due to the stiffness and soreness, Dr. Willetts restricted Claimant to physical therapy. Dr. Willetts restricted Claimant from prolonged standing, walking beyond two hours, boats, and climbing. Moreover, Claimant was to use crutches for two weeks. (CX 2 at 2). Office notes dated November 16, 1992, indicated that there was no swelling in the foot but Claimant reported significant discomfort. (CX 2 at 3). Dr. Willetts encouraged Claimant to return to work but restricted him from climbing vertical ladders, squatting, kneeling, lifting over 10 pounds, and pushing over 25 pounds. By follow-up report dated November 30, 1992, Dr. Willetts indicated that Claimant could return to normal duty and discontinue physical therapy. Dr. Willetts also warned Claimant of expected aches and pains. (CX 2 at 3). On January 13, 1993, Dr. Willetts reported that Claimant had returned to work where he spent a lot of time on his feet. (CX 2 at 3). Claimant informed Dr. Willetts of pain over the Lisfranc's joint and under the ball of his foot. Due to this foot pain, Claimant opted not to play basketball. X-rays revealed solid healing and very good alignment. Dr. Willetts informed Claimant that injuries at the Lisfranc's joint had a 50% incidence of post traumatic arthritis, and recommended that he wear an arch support. Dr. Willetts expected gradual improvement without aggressive diagnostic or surgical modalities. (CX 2 at 4). During his December 15, 1993 office visit, Claimant continued to complain of pain even with the orthotic in his work boots. According to Claimant, his right small toe was painful as well as the mid foot and metatarsal regions. The x-rays showed very good alignment of the bones, but there was minimal step-off at the PIP joint of the right small toe. In addition, there was a minimal increase sclerosis at the base of the second and third metatarsals but no clear evidence of fracture. (CX 2 at 5). At this time, Dr. Willetts informed Claimant that he had a 3% permanent partial disability impairment of the right lower extremity under the Third Edition of the *AMA Guides*, but had no disability rating

under the current Fourth Edition. Dr. Willetts reported that Claimant had a strong foot and ankle in good position with good range of motion and normal ambulation. (CX 2 at 5).

Claimant also submitted the deposition of Dr. Willetts taken on August 11, 1994. Dr. Willetts, Board-certified with the American Board of Orthopedic Surgery, testified that he first treated Claimant in January, 1991. (CX 3 at 5). At that time, Claimant had suffered a fracture in his left foot as a result of a non-work-related accident. Dr. Willetts saw Claimant on September 22, 1992, due to complaints of right foot pain. Dr. Willetts testified about his treatment of Claimant. Despite the possible development of arthritis following an injury to the Lisfranc's joint, Dr. Willetts stated that he never recommended fusion operations or any aggressive treatments. (CX 3 at 10,11). Dr. Willetts opined that x-rays were the way in which to identify the existence of the arthritis. X-rays taken fifteen months after Claimant's injury showed minimal increased sclerosis at the base of the second and third metatarsals. Dr. Willetts noted that there was no real spurring of the bone or destruction of the joint. (CX 3 at 11). Claimant's complaints of pain over the mid-foot and metatarsal regions were consistent with his type of injury. (CX 3 at 12). Dr. Willetts explained that he did not set Claimant in a walking cast because he believed that the condition was potentially unstable and could be dislodged. (CX 3 at 13). During the January, 1993 visit, he informed Dr. Willetts that he had adapted his walk in order to avoid putting weight on the Lisfranc's joint as well as under the ball of his right foot. (CX 3 at 14). Dr. Willetts recommended that Claimant try orthotic arch support because this added support often helps individuals who experience pain as a result of an injury to the key part of their arch. (CX 3 at 15). Describing Claimant's office visit on December 15, 1993, Dr. Willetts stated that Claimant dramatically expressed discomfort upon movement of his right ankle. (CX 3 at 16). Dr. Willetts testified that the ankle and foot appeared normal with no swelling, discoloration, or muscle atrophy. Upon further examination of the foot, Claimant did not report of tenderness over the Lisfranc's joint and metatarsal. Moreover, Dr. Willetts noted that Claimant did not walk with a limp. As a result of his right foot fracture, Dr. Willetts confirmed that Claimant had minimal alterations that were permanent. (CX 3 at 18-19). Although Claimant was more dramatic about his pain, Claimant's residual symptoms were similar to other cases seen by Dr. Willetts.

Testifying about Claimant's 3% disability rating, Dr. Willetts explained that he compared the measurements of Claimant's range of motion with the tables that govern the rating of the lower extremities found in the Third Edition of the *AMA Guides*. (CX 3 at 20). Upon using the same technique with the Fourth Edition tables, Claimant did not have an impairment rating. Regarding the two editions of the *Guides*, Dr. Willetts testified that the Fourth Edition was an attempt by the physicians to convey impairment ratings more accurately than conveyed in the previous edition. However, Dr. Willetts stated that all physicians agree that the *Guides* are imperfect. Dr. Willetts opined that the Fourth Edition was published in June, 1993. (CX 3 at 21). Dr. Willetts provided a possible explanation for Claimant's different ratings by using a back analogy. According to Dr. Willetts, testing the range of motion for many asymptomatic middle aged people would result in an impairment rating under the Third Edition. In the Fourth Edition, the experts were trying to improve on data which recognized what was really abnormal versus that which many experience. (CX 3 at 22). Although the *Guides* allow a physician to rate

future arthritic changes for some body parts, Dr. Willetts opined that there was no specific chart to factor in future arthritic problems for Claimant's injured joint. Nevertheless, Dr. Willetts opined that it was unlikely that Claimant would develop a severe case of arthritis in the Lisfranc's joint if this had not yet occurred. (CX 3 at 23). On cross-examination, Dr. Willetts testified that a 3% impairment of the lower extremity was the equivalent to a 4% disability rating of the foot under the Third Edition of the *AMA Guides*. (CX 3 at 24). Counsel for Employer questioned Dr. Willetts on the language in the Fourth Edition indicating that the AMA discouraged the use of prior editions because the information was not based on the most up-to-date material. Dr. Willetts testified that he would use the most recent edition when determining impairment ratings for his patients, even if the injury occurred several years ago. (CX 3 at 26). Regarding impairments which occurred several years ago, Dr. Willetts would use the Fourth Edition ratings. According to Dr. Willetts, it was the accepted practice of the general orthopedic community to use the most recent edition of the *Guides*. {(ALJ) 781 }

FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is well-settled that the factfinder is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and to accept or reject the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459 , 467 (1968), *reh'g denied*, 391 U.S. 929 (1969); *Atlantic Marine, Inc. and Hartford Indemnity Co. v. Bruce*, 661 F.2d 898 , 900 (5th Cir. 1981); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Courts have consistently held that the Act must be construed liberally in favor of the claimant. *Voris v. Eikel*, U.S. 328 (1953); *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). However, the Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct 2251 (1994), *aff'g* 990 F.2d 730 (3d Cir. 1993).

Nature and Extent of Disability

The parties contest whether Claimant has a compensable permanent partial disability. Initially, Dr. Willetts had provided Claimant with a disability rating for the lower extremity. Employer argued that the disability was to the right foot, as opposed to the whole lower extremity. Accordingly, Employer requested that Dr. Willetts provide a corresponding disability rating to the right foot using the AMA guidelines. Counsel on behalf of Claimant agreed that the injury was to Claimant's right foot, and not to the whole leg. Accordingly, I find that the court must determine whether Claimant suffered a permanent partial disability to his right foot pursuant to § 8(c)(4) of the Act. A disability is deemed permanent if the condition has reached the point of maximum medical improvement, a determination based on the medical evidence. *Trask v. Lockheed Shipbuilding and Construction Co.*, [17 BRBS 56](#), 60 (1985). In matters where there is no date of maximum medical improvement, a disability will nonetheless be deemed permanent if the condition has existed for a prolonged period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 , 654 (5th Cir. 1968), *cert denied*, 394 U.S. 976 (1969). The court does not rely on economic

considerations such as the date an employee stopped working or returned to work, but instead examines the medical opinions and reports in order to establish the point of maximum medical improvement. *Ballestros v. Williamette W. Corp.*, [20 BRBS 184](#), 186 (1988). A claimant's disability has not reached maximum medical improvement when the physicians anticipate further improvement. *Dixon v. John J. McMullen & Assoc.*, [19 BRBS 243](#), [245](#) (1986). Nevertheless, a remote possibility of some future improvement does not preclude a finding that a claimant's condition is permanent. *Watson*, 400 F.2d at 654. Furthermore, a medical opinion that the chance of improvement is remote is sufficient evidence to find that a condition has reached permanency. *Walsh v. Vappi Constr. Co.*, [13 BRBS 442](#), [445](#) (1981).

During a visit on January 13, 1993, Dr. Willetts advised Claimant of the incidence of post-traumatic arthritis at the Lisfranc's joint, and indicated that Claimant's reported pain was compatible with this condition. Dr. Willetts informed Claimant that he expected gradual improvement, and recommended the use of an orthotic. (CX 2 at 4). On December 15, 1993, approximately fifteen months after Claimant's injury, Claimant still complained of pain in his right foot. Although the x-rays showed very good alignment of the bones, Dr. Willetts noted that Claimant had minimal arthritic changes at the base of the second and third metatarsals. In addition, there was minimal step-off at the PIP joint of the right small toe. (CX 2 at 5). Dr. Willetts provided Claimant with information on a possible disability rating. At this time, Dr. Willetts did not indicate that he expected more improvement. By deposition, Dr. Willetts testified that the slight alterations, noted during Claimant's December, 15, 1993 office visit, were permanent. (CX 3 at 18-19).

Accordingly, I find that Claimant reached maximum medical improvement on December 15, 1993.

Generally, a claimant with a physical disability is not entitled to compensation without any economic loss. *Sproull v. Stevedoring Servs. of America*, [25 BRBS 100](#), 110 (1991). However, an injury which falls under a scheduled disability under § 8(c)(1)-(20), does not require a showing of loss of wage earning capacity. The Board has held that the administrative law judge should only consider physical factors when determining the disability for a scheduled injury. *Bachich v. Seatrain Terminals*, [9 BRBS 184](#), [187](#) (1978). The mere fact that a claimant is able to perform his work duties is immaterial to his entitlement of compensation for a scheduled injury. *Mazze v. Frank J. Holleran, Inc.*, [9 BRBS 1053](#), [1055](#). (1978). Moreover, the administrative law judge may base his findings on the medical evaluations and on a claimant's description of his symptoms and the effects of his injury. *Amato v. Pittston Stevedoring Corp.*, 6 BRBS (1977). The Act does not require adherence to any particular formula for determining the extent of the disability, and the administrative law judge is not bound by a physician's opinion or required to apply the *Guides*. *Mazze*, [9 BRBS at 1055](#).

Claimant seeks a 4% permanent partial disability rating for his right foot. The Third and Fourth Editions of the AMA *Guides* provide conflicting ratings for Claimant's right foot. According to the Fourth Edition, Dr. Willetts indicated that Claimant did not have a disability rating. However, under the Third Edition, Dr. Willetts assessed Claimant with a 4% disability to his right foot. (CX 3 at 24). Having established that an administrative law judge is not bound to apply the *Guides*, I reject the assessment that Claimant has a zero disability rating. Claimant has a residual arthritic condition as a result of his September, 1992 injury. Dr. Willetts indicated that this condition developed in

approximately 50% of his patients who suffered an injury to the Lisfranc's joint. Claimant's x-rays showed that his foot was healing well, but there was indication of minimal sclerosis. Although Dr. Willetts described Claimant's reports of discomfort to be dramatic, Dr. Willetts also indicated that Claimant's discomfort was compatible with his arthritic development. Dr. Willetts recommended the use of an orthotic arch support for his right foot. Claimant testified that his foot still bothered him after eight hour days of climbing ladders in order to inspect the cranes. I credit Claimant's testimony of residual pain and discomfort and Dr. Willetts finding that Claimant's slight sclerosis was a permanent condition. Accordingly, I find that Claimant has a compensable 4% permanent partial disability rating for his right foot pursuant to § 8(c)(4) of the Act.

Medical Benefits

Section 7 of the Act provides that an employer who is found liable for the payment of compensation also bears the responsibility for the payment of medical expenses which are, or were, reasonably and necessarily incurred as a result of a work-related injury. *Perez v. Sea-Land Servs., Inc.*, [8 BRBS 130](#) (1978). Medical expenses that are unnecessary for treatment may be rejected. *Ballesteros v. Williamette W. Corp.*, [20 BRBS 184](#), 187 (1988). Moreover, the employer need only compensate a claimant for the reasonable value of medical services. *Bulone v. Universal Terminal & Stevedoring Corp.*, [8 BRBS 515](#), 518 (1978); *Potenza v. United Terminals*, [1 BRBS 150](#) (1974), *aff'd*, 524 F.2d 1136, [3 BRBS 51](#) (2d Cir. 1975). Employer must reimburse or pay for those reasonable and necessary medical expenses incurred as a result of his September, 1992 right foot injury.

Attorney Fees and Expenses

Having successfully prosecuted this matter, Claimant's attorney is entitled to an award of reasonable attorney fees and services. The administrative law judge may only award fees for services performed before him, namely the time between the informal conference proceedings and the issuance of the Decision and Order. *Revoir v. General Dynamics Corp.*, [12 BRBS 524](#) (1980).

In the instant matter, Claimant's counsel, Scott Roberts, filed a fully documented fee application in the amount of \$4,023.65. [2](#). This fee consisted of \$3,460.35 in attorney and paralegal services and \$563.30 in costs. The undersigned cannot approve those fees for services rendered prior to the letter of referral dated April 4, 1994. Accordingly, the charges on the fee application under attorney time and paralegal time, each for 35 minutes, must be redacted from this fee petition. These charges should be presented to the District Director.

By letters dated April 11, 1995 and April 17, 1995, counsel for Employer filed an objection to Attorney Robert's requested hourly rate of \$200 and the paralegal hourly rate of \$55.00. Employer noted that the \$165.00 an hour for attorney time and \$55.00 an hour for paralegal time was reasonable for this relatively straightforward case. Attorney Roberts cited longshore cases in support of his \$200.00 an hour rate. Nevertheless, only four of those {(ALJ) 783} ten cases awarded \$200.00 an hour for attorney time. Moreover, five of the remaining six cases awarded an hourly rate less than \$175.00 an hour. I find that an hourly rate \$175.00 for attorney time and that \$55.00 per hour for

paralegal time is reasonable in this matter. After the two redactions and the change in the hourly rate, the fee for attorney and paralegal services time is reduced to \$2,972.10. In light of the foregoing, I find that this fee application reduced to \$3,535.40 (including services of \$2,972.10 and expenses of \$563.30) is reasonable and complies with the regulations set forth at 20 C.F.R. § 702.132 . The fee of \$3,535.40 is hereby approved.

ORDER

Based on the foregoing findings of fact and conclusions of law, I make the following order. The District Director shall administratively perform the specific dollar computations of this Decision and Order.

It is hereby ORDERED that:

1. General Dynamics Corp., as the self-insured employe, shall compensate Claimant for his 4% permanent partial disability to his right foot pursuant to § 8(c)(4) of the Act. The disability compensation commencing on December 15, 1993 shall be based on Claimant's average weekly wages of \$798.47.
2. General Dynamics Corp., as the self-insured employer, shall pay Claimant interest on all accrued benefits at the rate applicable under 28 U.S.C. § 1961 , computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.
3. General Dynamics Corp., as the self-insured employer, shall furnish Claimant with such reasonable, appropriate, and necessary medical care and treatment relating to Claimant's work-related right foot injury, subject to the provisions of § 7 of the Act.
4. General Dynamics Corp., as the self-insured employer, shall pay to Claimant's counsel attorney fees and costs in the amount of \$3,535.40.

Footnotes for 29 BRBS 777(ALJ)

1.

The following references will be used herein: ``CX" refers to the Claimant's exhibits; ``RX" refers to Employer's exhibits; and ``TR" refers to the official transcript of this proceeding.

2.

This total represents the corrected figures submitted by Attorney Roberts upon notice of an error on p. 3 of the original application.

[Group:"29 BRBS 783(ALJ) "]

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