

LARRY LUCAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CASCADE GENERAL,	)	DATE ISSUED:
INCORPORATED	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Order Granting Motion to Reconsider and Denying the Requested Relief of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Jeffrey S. Mutnick (Pozzi Wilson Atchison), Portland, Oregon, for claimant.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Granting Motion to Reconsider and Denying the Requested Relief (93-LHC-1501 and 93-LHC-1502) of Administrative Law Judge Robert G. Mahony rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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 June 6, 1990, while working for employer as a boilermaker/welder, claimant sustained a lumbosacral strain when he slipped and fell in the hull of a tugboat. He was treated conservatively and remained unable to work until August 9, 1990, when he was cleared to return to his usual work. On August 11, 1990, the day after he returned to his regular duties, claimant sustained further injury, fracturing his left foot and right ribs when he fell from a scaffold. Claimant thereafter came under the care of Dr. Graham, an orthopedic surgeon, who had treated him previously for back

problems. Dr. Graham provided conservative treatment for claimant's back and operated on claimant's left ankle on two occasions -- December 18, 1990 and September 3, 1991. In addition, Dr. Graham treated claimant's right ankle, which he had previously fractured in a car accident in 1975, and which claimant contended became aggravated because of overuse when he had to wear a cast and walk on crutches due to the August 11, 1990, left foot injury. After conservative measures failed to alleviate claimant's right ankle symptoms, Dr. Graham suggested surgery on the right ankle. As of the time of the hearing, the recommended surgical procedure for the right ankle had not been performed as employer refused to authorize the surgery because employer had controverted the fact that this condition was work-related.

Employer voluntarily paid claimant temporary total disability benefits for his left foot injury until April 1, 1994, Emp. Exs. 54, 59, when it stopped payments based on Dr. Graham's opinion that claimant's left foot was medically stationary. In addition, employer voluntarily paid claimant permanent partial disability benefits of \$58 per week for his back pursuant to 33 U.S.C. §908(c)(21), (h). Claimant sought permanent partial disability benefits under the schedule for a 14 percent loss of use of the left foot, and increased unscheduled permanent partial disability compensation for his back injury. In addition, claimant sought medical benefits for the alleged aggravation of his pre-existing right ankle condition.

In his Decision and Order, the administrative law judge awarded claimant compensation for a 14 percent loss of use of his left foot, consistent with the agreement of the parties, based upon an average weekly wage of \$327.62. In addition, he determined that claimant was entitled to permanent partial disability compensation for his back beginning July 7, 1994, at the rate of \$78.41 per week, based on the difference between his average weekly wage of \$327.62 and his post-injury wage-earning capacity in sedentary work of \$210 per week, as established by employer's vocational expert, Roy Katzen. Finally, the administrative law judge found that claimant's right ankle condition was aggravated by and causally related to his August 11, 1990, work injury to the left foot, and that, consequently, employer was liable for medical treatment associated with this condition.

Subsequent to the administrative law judge's Decision and Order, claimant submitted an amended Motion for Reconsideration to the administrative law judge.<sup>1</sup> In this motion, claimant argued that although the administrative law judge properly found that his right ankle condition was work-related, he also should have been awarded temporary total disability benefits for this condition, asserting that because Dr. Graham recommended surgery, claimant's right ankle is not medically stationary. Employer responded, moving to dismiss claimant's motion as untimely and opposing the motion on the merits.

In an Order dated December 5, 1995, the administrative law judge granted claimant's Motion to Reconsider but denied claimant additional temporary total disability compensation requested in anticipation of the surgery as premature. In so concluding, the administrative law judge agreed with employer's position that claimant's right ankle was medically stationary until such time that he

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<sup>1</sup>In his initial Motion to Reconsider, claimant argued that he was entitled to temporary partial disability benefits for his right ankle condition. When claimant filed his amended Motion to Reconsider, he indicated that it was to supersede the prior motion.

chooses to undergo additional surgery. The administrative law judge further determined that once the surgery occurs, but not before, claimant will undoubtedly be entitled to compensation for a period of temporary total disability. Claimant appeals this Order, reiterating the arguments he made below. Employer responds, urging affirmance.

The administrative law judge's denial of temporary total disability benefits for claimant's right ankle condition is affirmed. Claimant argues that because his treating physician, Dr. Graham, indicated that his ankle will require surgery, the administrative law judge's conclusion that his right ankle was medically stationary is in error. Claimant correctly states that Dr. Graham testified in his deposition that claimant has a reasonable probability of improvement after the anticipated surgery and is, from that perspective, not medically stationary. Deposition at 27. The fact that claimant's right ankle has not reached maximum medical improvement, however, does not establish entitlement to temporary total disability benefits. An award of total disability is premised on claimant's inability to perform his usual or alternate work. *See generally Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989). Because Dr. Graham released claimant to perform sedentary work based on his back, left foot and right ankle conditions, even without the right ankle surgery, on July 7, 1994, the administrative law judge could reasonably conclude that claimant was not temporarily totally disabled as his right ankle did not preclude him from performing sedentary work. In addition, as Dr. Graham had released claimant to perform sedentary work prior to the anticipated surgery, and such work was available based on Mr. Katzen's vocational testimony in the administrative law judge's initial Decision and Order, he also reasonably determined that claimant's right ankle did not render him totally disabled while he was awaiting the surgery. Inasmuch as the administrative law judge's finding that an award of temporary total disability benefits in anticipation of claimant's surgery would be premature on the facts presented is rational, supported by substantial evidence, and in accordance with applicable law, the denial of temporary total disability compensation for claimant's right ankle is affirmed. *See O'Keeffe*, 380 U.S. at 359; *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154, 157 (1993).

Accordingly, the administrative law judge's Order Granting Motion to Reconsider and Denying the Requested Relief is affirmed.

SO ORDERED.

ROY P. SMITH

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Administrative Appeals Judge

JAMES F. BROWN

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Administrative Appeals Judge

NANCY S. DOLDER

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Administrative Appeals Judge