

A.D.	)	BRB No. 07-0711
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT,	)	DATE ISSUED: 04/28/2008
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	

A.D.	)	BRB No. 08-0121
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeals of the Order on Remand of David Groeneveld, District Director, and the Decision and Order Denying Benefits and the Order Denying Claimant's Motion for Reconsideration of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

David A. Kelly and Matthew S. Necci (Montstream & May, L.L.P.), Glastonbury, Connecticut, for claimant.

Neil J. Ambrose (Letizia, Ambrose & Falls, P.C.), New Haven, Connecticut, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order on Remand (01-150967, 01-148806) of District Director David Groeneveld, and claimant appeals the Decision and Order Denying Benefits and the Order Denying Claimant's Motion for Reconsideration (2006-LHC-0940, 2006-LHC-0941) of Administrative Law Judge Colleen A. Geraghty, 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).<sup>1</sup> We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The determinations of the district director must be affirmed unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Sans v. Todd Shipyard Corp.*, 19 BRBS 24 (1986). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984). This case has been before the Board previously.

Claimant began working for employer as a longshoreman in 1986. He initially worked as a laborer, but as his seniority increased, he became a forklift operator and a hatch boss. He injured his right shoulder at work on December 28, 1999, during the course of his employment, and employer paid claimant temporary total disability benefits under the Act from that date until March 27, 2000, when claimant returned to work. ALJ Ex. 9; Cl. Ex. 17. On July 10, 2000, claimant's condition reached maximum medical improvement, and he and employer agreed to settle his state claim for permanent partial disability benefits. Employer agreed to pay claimant \$8,265.48, representing 20.8 weeks of benefits beginning July 10, 2000, for a 10 percent impairment to the right upper extremity. Cl. Exs. 23, 57. On August 26, 2000, claimant injured his left shoulder at work. His disability due to this injury began on August 29, 2000, and, under the Act, employer paid \$1,676.14 in temporary partial disability benefits from that date until November 13, 2000, and \$3,918.30 in temporary total disability benefits from November 14, 2000, through January 22, 2001.<sup>2</sup> ALJ Ex. 9; Cl. Ex. 52; Amended LS-208 dated July 5, 2007. On November 22, 2000, claimant filed a claim for additional compensation

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<sup>1</sup>Pursuant to the Board's Order dated October 19, 2007, claimant's appeal, BRB No. 08-0121, was consolidated for purposes of decision with employer's appeal, BRB No. 07-0711.

<sup>2</sup>Claimant returned to work on January 2, 2001, and employer took a credit for the overpayment. ALJ Ex. 9; Cl. Ex. 58.

under the Act.<sup>3</sup> Cl. Ex. 41. On January 2, 2001, claimant returned to work without restrictions. Tr. at 94, 131-132; Emp. Exs. 31-34. On November 26, 2001, when his left shoulder condition reached maximum medical improvement, claimant and employer agreed to settle his state claim for compensation for permanent partial disability benefits for a 15 percent impairment to his left upper extremity. Employer agreed to pay \$9,835.56, representing 29.1 weeks of benefits from November 26, 2001. Cl. Exs. 55, 58.

Claimant experienced a flare-up of shoulder pain in March 2002, and Dr. Spak, his treating physician, prescribed medication and work restrictions, which employer accommodated. Tr. at 133-134; Emp. Exs. 36-37. Claimant was released to return to full duty work on April 8, 2002, and continued in this manner until his resignation in May 2002. Decision and Order at 4;<sup>4</sup> Tr. at 136. Employer asserts it voluntarily paid medical benefits until March 15, 2004, when it disputed claimant's need for continuing medical treatment. Emp. Brief at 2. Following a December 14, 2004, informal conference, the district director recommended that employer continue to pay claimant's medical expenses. On January 5, 2005, employer filed a notice controverting the district director's recommendation. The administrative law judge conducted a formal hearing in June 2005. Jt. Ex. 1.

In her 2005 decision, the administrative law judge found that both of claimant's shoulder injuries are work-related, and she determined that employer is responsible for Dr. Spak's past treatment as well as reasonable and necessary treatment related to future exacerbations of the shoulder conditions. However, she concluded that claimant failed to demonstrate the need for a continuing formal physical therapy program, and she found that employer is not liable for that cost. Jt. Ex. 1 at 11-12.

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<sup>3</sup>Although claimant identified the nature of his injuries as right and left shoulder pain and back pain, he indicated that he stopped working on December 28, 1999, and returned to work on March 27, 2000. This period would pertain to only the right shoulder injury. There is no indication in the record that claimant's back was involved in the injury of December 28, 1999, *see* Jt. Ex. 1, and the notice of the claim to employer from the district director's office is not in the record.

<sup>4</sup>The administrative law judge's 2007 decision which is on appeal in the companion case, BRB No. 08-0121, *infra*, is referred to as the Decision and Order in this opinion. The administrative law judge's 2005 decision awarding medical benefits is in the record and cited as Jt. Ex. 1.

Counsel subsequently filed petitions before both the administrative law judge and the district director seeking an employer-paid attorney's fee. The administrative law judge awarded a fee in the amount of \$11,749.25 after noting that employer did not file objections. The district director also awarded counsel a fee in the full amount requested, \$7,488.57. Employer appealed both fee awards to the Board. The Board modified in part the administrative law judge's fee award. The Board vacated the district director's fee award because the district director did not fully address employer's objections and remanded the case. *[A.D.] v. Logistec of Connecticut, Inc.*, BRB Nos. 06-485, 06-587 (Jan. 31, 2007). On remand, the district director summarized the parties' positions regarding the fee objections, made brief findings which rejected employer's objections, and awarded the full amount requested. Order on Remand at 2-3. Employer appeals the district director's fee award. Claimant responds, urging affirmance.<sup>5</sup> BRB No. 07-0711.

### **District Director's Fee Award**

Claimant's counsel filed a fee petition for work performed before the district director between January 15, 2001, and December 14, 2004, seeking \$6,636, plus \$852.57 in expenses. Employer objected to the hourly rate of \$185 and argued that counsel is not entitled to a fee for work performed prior to March 15, 2004, when the controversy over medical benefits arose, or for any work performed on the unsuccessful physical therapy issue, on the undisputed issues, or on the state claims. Initially, the district director awarded the fee request in full, stating only that he could "see nothing in the billing to suggest that such work was not contributory to the successful prosecution of benefits under the federal statute." Comp. Order (April 3, 2006). In its initial decision on the matter, the Board noted that, while the district director cited the appropriate regulatory criteria, "and provided sufficient explanation for rejecting employer's specific objection regarding time allegedly spent exclusively on the state claim, he did not adequately discuss employer's other objections to the fee petition." *[A.D.]*, slip op. at 5-6. Consequently, the Board remanded the case for further consideration of the fee request and objections.

On remand, the district director summarized employer's objections and claimant's responses, and made a brief finding for each. To the pre-March 15, 2004, and unsuccessful issues objections, the district director stated only that, pursuant to the Act and the regulations, "the fees appear to be reasonably commensurate with the actual necessary work performed." Order on Remand at 2. On the hourly rate issue, the district director stated that he took into consideration the complexity of the case, the issues involved, the results obtained, the actual work performed and the expertise of the

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<sup>5</sup>The administrative law judge's fee award is no longer at issue.

attorney, and he found the hourly rate reasonable. *Id.* Finally, with regard to the fee allegedly related to work performed solely on the state claim, the district director found that the objections lacked specificity in identifying either entries that should be excluded or why they did not contribute to the claim under the Act. Therefore, he stated he was “unable to discount any of the billing hours” requested by claimant’s counsel, and he again awarded the full amount requested. *Id.* at 2-3. On appeal, employer concedes liability for 7.5 hours of work performed between March 24, 2004, and December 14, 2004.<sup>6</sup> However, it asserts that the district director erred in awarding a fee for work performed prior to the time the controversy arose in March 2004, for work performed on the state claims and the unsuccessful physical therapy issue, and in placing the burden of proof on employer to show that services were unnecessary rather than requiring claimant to show that he was entitled to a fee for these services.<sup>7</sup>

#### Pre-March 15, 2004, Services

Employer first argues that claimant’s attorney is not entitled to any fee for work performed prior to March 15, 2004, when a controversy over continuing medical benefits arose. The claim for compensation was filed on November 22, 2000, during a period when employer was voluntarily paying claimant temporary total disability benefits. The dispute involving employer’s liability for continuing medical benefits arose over three years after the claim was filed. When an employer voluntarily pays benefits, its liability for an attorney’s fee under Section 28(b) commences at the time a controversy arises between the parties, presuming the other requirements of Section 28(b) have been fulfilled.<sup>8</sup> 33 U.S.C. §928(b) (providing for an employer-paid fee where employer pays

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<sup>6</sup>Employer also does not challenge the district director’s finding that the hourly rate of \$185 is reasonable under the regulatory criteria, 20 C.F.R. §702.132, and it is therefore affirmed.

<sup>7</sup>Employer’s brief in the current appeal is essentially the same as the brief filed in the prior appeal, except that the burden of proof issue has been added. Claimant argues that employer merely is raising the same issues that already have been addressed and that it improperly raises for the first time the burden of proof issue. Contrary to claimant’s arguments, employer may raise the same arguments as before if, as here, those arguments are still appropriate to the issues in contention. Moreover, employer properly raises the burden of proof issue in this appeal as the district director’s statements which give rise to the issue were first made in the Order on Remand. *See, e.g., Luna v. Todd Shipyards Corp.*, 12 BRBS 70 (1980) (Board addressed issue that first arose after administrative law judge’s decision was issued).

<sup>8</sup>For an attorney to be entitled to a fee under Section 28(b), the district director must have held an informal conference and written a recommendation, the employer must

benefits in accordance with 33 U.S.C. §914(a), (b), and “thereafter a controversy arises over additional compensation”). *See Day v. James Marine, Inc.*, 518 F.3d 411, \_\_\_ BRBS \_\_\_(CRT) (6<sup>th</sup> Cir. 2008); *Andrepoint v. Murphy Exploration & Prod. Co.*, 41 BRBS 1 (2007) (Hall, J., dissenting), *aff’d on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring).

In this case, claimant’s counsel requested a fee from the district director for 43.30 hours of work beginning in January 2001. Counsel identified work related to issues such as claimant’s work status or permanent partial disability, wages, the voluntary state agreements, mileage, arbitration, and medical bills from 2002. However, according to the record, employer voluntarily paid benefits under the Act for all periods of disability until it formally controverted the need for continuing medical and physical therapy benefits in March 2004. Claimant thereafter was successful in obtaining the medical benefits sought. In awarding a fee for counsel’s pre-March 2004 work, the district director stated only that the fee was reasonably commensurate with the work performed. Absent, however, is a finding by the district director as to when the controversy over medical benefits actually arose. Such a finding is necessary as it constitutes the date from which any employer-paid fee may commence. *See Day*, 518 F.3d 411. As the district director has not determined the date the controversy over medical benefits arose, we must vacate his fee award and remand the case for him to specifically address this issue. After determining said date, the district director must ascertain which services are related to the medical benefits controversy on which claimant succeeded such that employer is liable for a fee for the services. *Andrepoint*, 41 BRBS 1.

#### Unsuccessful Issue

Next, employer argues that counsel is not entitled to a fee for work performed on the unsuccessful physical therapy issue and/or that the fee should be reduced overall because claimant was only partially successful before the administrative law judge. The applicable regulation, 20 C.F.R. §702.132, provides that the award of any attorney’s fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. If a claimant obtains only a limited degree of success, then the fact-finder should award a fee in an amount that is reasonable in relation to the results obtained. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5<sup>th</sup> Cir. 1993); *George*

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have rejected that recommendation, and the claimant must have used the services of an attorney to secure greater compensation than the employer had voluntarily paid or tendered. 33 U.S.C. §928(b); *Devor v. Dep’t of the Army*, 41 BRBS 77 (2007).

*Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1<sup>st</sup> Cir. 1988), *cert. denied*, 488 U.S. 992 (1988).

Although medical benefits encompass physical therapy costs and *Hensley* allows a fee for issues with a common core of facts, claimant's counsel is not entitled to a fee for severable work related to the unsuccessful physical therapy issue. Specifically, employer asserts there are three entries in September and December 2004 which are solely for work related to the unsuccessful physical therapy issue as they refer to the "Back and Neck Center" where claimant underwent physical therapy. On remand, the district director must specifically address employer's argument and determine whether a fee should be awarded for those services.<sup>9</sup> See generally *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT).

### Services Performed Solely on the State Claims

Employer next contends the district director erred in awarding a fee for work performed on the state claims. Claimant argues that this objection was addressed and resolved by the Board's first decision. We conclude that employer's argument has merit, as, on further review, the Board's summary statement in its prior decision did not address the specific charges related to employer's objection. Moreover, the district director reconsidered employer's objection on remand and cited a different reason for rejecting it – one which triggered employer's burden-of-proof contention.

Generally, an attorney is not entitled to compensation under the Act for time spent preparing a state workers' compensation suit. *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981). However, if an attorney can show that the same services were necessary to the prosecution of the federal claim, he may be entitled to a fee for those services. *Roach*, 16 BRBS 114. In his initial order awarding a fee, the district director rejected employer's argument regarding work performed on the state claim by stating: "I see nothing in the billing to suggest that such work was not contributory to the successful prosecution of benefits under the federal statute." On remand, the district director stated:

While [employer] raises the issue of work being billed that was directed towards the State of Connecticut Act, I find that [employer's] protest of alleged 'state' work, vis-à-vis the federal statute, *lacks any specificity* i.e.

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<sup>9</sup>Counsel Kelly requested his fee based on an hourly rate of \$185. According to claimant, Mr. Kelly's requested rate is already reduced from his normal rate of \$225 per hour. Thus, additional reduction of the overall fee due to claimant's partial success may not be warranted.

neither letter identifies specific dated billing entries as work that should be excluded by its connection to the state act. It is also noted that *neither letters (sic) articulates how any of the billed service descriptions can be readily identifiable as uniquely and solely serving to the prosecution of the state claim* and that said service/function did not concurrently contribute to the ultimate successful prosecution under the federal statute. *This failure to detail which entries are unrelated to the federal claim as well as the failure to provide the rationale that said entries were noncontributory towards the success of the federal claim prosecution leaves me unable to discount any of the billing hours as submitted by claimant's counsel.*

Order on Remand at 2-3 (emphasis added).

We reject claimant's assertion that pursuant to the law of the case doctrine, the Board is precluded from considering anew employer's arguments regarding fees for work performed on the state claims in this case. The doctrine is not an absolute bar when a tribunal is reviewing its own order, *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991); *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986); *Stark v. Bethlehem Steel Corp.*, 15 BRBS 288 (1983), as its application is one of practice and not of law. *Devilla v. Schriver*, 245 F.3d 192 (2<sup>d</sup> Cir. 2001); *In re Crysens/Montenay Energy Co.*, 226 F.3d 160 (2<sup>d</sup> Cir. 2000), *cert. denied*, 532 U.S. 920 (2001). In the instant case, upon closer scrutiny, it is apparent that employer correctly points out that some entries on the fee petition appear to be related exclusively to the state claims.<sup>10</sup> Thus, the Board's summary statement in its previous decision that the district director provided a sufficient explanation for rejecting employer's objection to awarding time for work on the state claim does not preclude the Board's reconsideration of this argument. As employer cannot be held liable under the Act for work performed exclusively on a collateral action, we hold that the district director must address this objection fully on remand. *See generally Devilla*, 245 F.3d 192. He must consider the fee petition and employer's objections, explaining his determinations regarding compensable hours. Claimant's counsel, as the fee applicant, bears the burden of demonstrating that the time claimed and services performed were reasonable and necessary for the successful prosecution of his

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<sup>10</sup>In its January 23, 2006, objections to the fee, employer argued, *inter alia*, that the fee should cover only disputed issues under the Act, as counsel is not entitled to a fee for work performed on issues arising in the state claims. In its March 15, 2006, objections, employer went into substantially more detail, identifying the entries which it concluded should be approved, and thereby implicitly identifying the entries it challenged. On appeal to the Board, employer set forth its objections in even greater detail, identifying services it asserts are for such things as scheduling a hearing before the state board and drafting a memo on a jurisdictional defense issue in the state proceedings.

Longshore claim. *See Hensley*, 461 U.S. 424; *see generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10<sup>th</sup> Cir. 1997); *Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17 (2002). Any work performed solely on the state claims, or which is unrelated to the claimant's success in obtaining medical benefits, cannot be approved and must be disallowed. *Hensley*, 461 U.S. 424; *Miller*, 14 BRBS 811. Accordingly, the district director's fee award is vacated, and the case is remanded for further consideration consistent with this decision.

### **ALJ's Denial of Benefits under Section 8(c)(21)**

Subsequent to the issuance of the fee orders, claimant requested a hearing to determine his entitlement to continuing benefits under the Act pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21).<sup>11</sup> Relevant to this issue, claimant returned to full-duty work during 2001, and Dr. Spak assessed claimant's left shoulder at 15 percent permanent impairment on November 26, 2001. Claimant experienced a flare-up of shoulder discomfort on March 25, 2002. Dr. Spak prescribed medication and work restrictions for a short period. Claimant was released to full-duty work on April 8, 2002, and he continued at full-duty until he resigned in May 2002. Decision and Order at 4. Claimant contends he should not have been considered a "full duty" employee because he was unable to perform his regular duties on a consistent basis; thus, he asserts that his wage earning-capacity was diminished.

In her 2007 decision, the administrative law judge found that claimant suffered a 15 percent permanent impairment to each shoulder, and she addressed claimant's loss of wage-earning capacity during two time periods: 1) between November 26, 2001, when claimant's condition reached maximum medical improvement, and May 29, 2002, when claimant resigned, and 2) continuing from May 30, 2002. The administrative law judge rejected claimant's testimony that his wages decreased due to his inability to perform his work, and she found that he did not suffer a loss of wage-earning capacity related to his shoulder injuries during either time period. Decision and Order at 10. Accordingly, she denied benefits. *Id.* at 11. On claimant's motion for reconsideration, the administrative law judge reiterated her finding that any decrease in claimant's wage-earning capacity was the result of his voluntary choices and not of his work injuries. Order Denying

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<sup>11</sup>Claimant contended that a comparison between the parties' stipulation as to his average weekly wage, \$640.59, and his earnings during a 33-week period in 2001 and 2002, which resulted in a decrease in his average weekly wage by \$201.37, entitled him to benefits. Employer did not challenge the calculation; rather, it disputed the cause of the reduced wage-earning capacity. Decision and Order at 8.

Recon. at 3.<sup>12</sup> Claimant appeals the denial of benefits for the period between November 26, 2001, and May 28, 2002.<sup>13</sup> Employer has not responded. BRB No. 08-0121.

Claimant contends the administrative law judge erred in denying disability benefits because she based her decision on two contradictory findings. Specifically, claimant contends the administrative law judge erred in finding that his reduction in wages was due to a refusal of work offered, as well as to a general slow-down in the business, when she also found that there was a significant labor shortage. Claimant argues that there cannot be both a labor shortage and a business slow-down and that there is no evidence in the record of a general slow-down.

A claimant bears the burden of establishing the extent of his disability, *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985), including any loss in his wage-earning capacity, *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9<sup>th</sup> Cir. 2002). The administrative law judge initially acknowledged that in her prior decision she had credited claimant's testimony regarding his inability to perform certain labor tasks involving overhead work and heavy lifting following his shoulder surgeries; however, she found that his claims that his reduced earnings in late 2001 and early 2002 were due to his inability to perform work involving operating some machinery were not credible. Decision and Order at 9. Although claimant stated that he had difficulties operating some machinery and that he chose not to work on days he was assigned to heavy labor, the administrative law judge credited claimant's testimony that he had sufficient seniority to avoid the more physically-demanding jobs and that he was able to perform the duties necessary to his self-employment, which required similar actions, such as driving a truck or forklift, as his regular employment. *Id.* The administrative law judge also found claimant did not ask Dr. Spak for work restrictions despite Dr. Spak's willingness to set such restrictions.<sup>14</sup> Accordingly, the administrative

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<sup>12</sup>The administrative law judge also rejected claimant's argument that he is entitled to a *de minimis* award. Order Denying Recon. at 3-4.

<sup>13</sup>Claimant does not challenge the administrative law judge's finding that his post-May 29, 2002, decrease in earnings was related to his decision to begin self-employment. Decision and Order at 10; Cl's Brief. Therefore, the denial of benefits for the period beginning May 30, 2002, is affirmed.

<sup>14</sup>The administrative law judge found that Dr. Spak prescribed medication and work restrictions when claimant informed him of symptom flare-ups, that he would authorize work absences if patients so needed, and that he knew claimant had some difficulty with some overhead activities but that claimant had been cleared for full-duty work. Decision and Order at 6; Cl. Ex. 73 at 37-38, 47-51.

law judge determined that claimant's testimony concerning missed work due to his shoulder injuries was not credible. Decision and Order at 8-9.

In taking these factors into consideration, as well as claimant's testimony regarding a significant slow-down in business in 2002 which caused part of his reduction in earnings, Tr. at 114, the administrative law judge stated:

I find that any diminution in the Claimant's earning capacity between November 26, 2001 and his resignation from Logistec on May 29, 2002, was the result of both the Claimant's decision not to accept all of the hours offered by Logistec and a general slow-down in business resulting in less work for all employees. Accordingly, the Claimant failed to show that any reduction in his earnings between November 26, 2001 and his May 29, 2002 voluntary resignation was attributable to his shoulder injuries.

Decision and Order at 10. In this regard, the administrative law judge found that Mr. Atwood, employer's director of safety and health, reliably testified that employer had difficulty filling its labor demands on a daily basis and often had to use a temporary labor pool and that, had claimant not left its employment, there would have been work available for him. Decision and Order at 5, 10; Tr. at 220-221. Claimant argues that there is no evidence other than his own credited testimony, Decision and Order at 10; Tr. at 114, to support the finding that there was a general business slow-down in 2002, especially given Mr. Atwood's testimony that there was a labor shortage. Mr. Atwood explained that a labor shortage may occur on any given day because employer does not know who will show up, and with what skills, or who will return from lunch. Tr. at 219-222. Thus, contrary to claimant's contention, the administrative law judge's reliance on this testimony to find there was a "labor shortage" is not in contradiction with her crediting claimant's testimony and finding there was an overall slow-down in business. If an insufficient number of workers appear for work, then there is a shortage of workers even if a lesser amount of work needs to be done. Thus, we reject claimant's assertion that the administrative law judge's findings are contradictory.

Even absent those particular findings, the record contains substantial evidence to support the administrative law judge's conclusion that claimant's reduced earnings prior to his resignation were not due to his injuries. Although Dr. Spak acknowledged that claimant may have had some difficulties with overhead work, he cleared claimant to return to full-duty work; thus, there is no medical evidence to support claimant's assertion that he was restricted in his ability to work as a forklift driver. Moreover, the administrative law judge rationally found that claimant's testimony regarding his being unable to perform his duties for employer was undermined by his performance of similarly heavy duties in his self-employment and that his testimony concerning missing

work on days he was assigned heavy jobs was contradicted by his testimony that he had sufficient seniority to avoid the heavy work. Finally, the administrative law judge rationally determined that claimant's reason for not looking for additional forklift work was because he wanted to work outside, as opposed to in the hulls of ships, and not because his condition limited his ability to drive a forklift. Decision and Order at 9. The administrative law judge's findings, based on her decision to credit various parts of the testimony, are rational. As questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961), and as it is solely within her discretion to accept or reject all or any part of any testimony according to her judgment, *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), we affirm the administrative law judge's credibility determinations. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that any decrease in claimant's earnings between November 26, 2001, and May 29, 2002, was not the result of his work-related shoulder injuries. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984). Consequently, we affirm the denial of disability benefits for that period.

Accordingly, the administrative law judge's Decision and Order is affirmed. BRB No. 08-0121. The district director's Order on Remand awarding an attorney's fee is vacated, and the case is remanded to the district director for further consideration of claimant's fee petition and employer's objections thereto consistent with this opinion. BRB No. 07-0711.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge