BRB No. 04-0777

JUAN C. GONZALEZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMERICAN WAREHOUSE OF NEW YORK INCORPORATED	)	DATE ISSUED: 06/22/2005
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2003-LHC-02424) of Administrative Law Judge Ralph A. Romano 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 administrative law judge's findings of fact and conclusions of law 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).

Claimant, a warehouse foreman, injured his back and right fifth finger at work on February 11, 2003. Claimant has not returned to work since his injury. Employer voluntarily paid claimant temporary total disability benefits from February 13 to March 24, 2003. After concluding that claimant timely raised the issue of permanency, the administrative law judge determined that claimant's condition reached maximum medical improvement on July 8, 2003. The administrative law judge also found that claimant is totally disabled, and thus awarded him temporary total disability benefits from February 12 to July 7, 2003, and ongoing permanent total disability benefits from July 8, 2003.

On appeal, employer challenges the administrative law judge's findings regarding the nature and extent of claimant's disability. Claimant responds in support of the decision and also filed an attorney's fee petition for work performed before the Board on appeal.

We affirm the administrative law judge's award of total disability benefits as it is rational, supported by substantial evidence, and in accordance with law. Initially, the administrative law judge rationally found that the issue of permanency was timely raised at the formal hearing, based on claimant's counsel's unambiguous identification of it as an issue to be resolved at the hearing. *See* Tr. at 5-6. The administrative law judge rejected employer's argument that the claim must be limited to one for temporary disability benefits because, contrary to employer's assertion, employer did acknowledge that claimant's claim was one for permanent disability benefits. *See* Employer's Closing Argument at 2 n. 1; Decision and Order at 6-7. Moreover, the administrative law judge rejected employer's argument that the issue of permanency was not raised early enough because Dr. Bercik, employer's consultant, had opined on June 6, 2003, seven months prior to the hearing, that claimant had reached maximum medical improvement.[1] See Emp. Ex. 5 at 3. In addition, employer did not request additional time or submit additional evidence to address the issue of permanency. Under these circumstances, we hold that the administrative law judge acted properly in addressing the claim for permanency.[2] *See Duran v. Interport Maintenance*

[1] At the hearing, claimant's attorney identified the issue as "whether the Claimant's condition is permanent." Tr. at 5. The administrative law judge sought clarification of the issues, and claimant's attorney specifically noted that claimant's doctor, Dr. Elamir, reported claimant's condition as permanent. Tr. at 6. Employer disputed only the existence of any continuing disability after March 24, 2003. Tr. at 6. Claimant's pre-hearing statement identified the issue of "Degree of disability" for resolution. Administrative Law Judge Ex. 1.

[2] Employer's contention that it would have introduced evidence regarding the availability of suitable alternate employment had it known it was challenging a claim for permanent disability confuses the issue of the extent of the disability with the nature of the

Corp., 27 BRBS 8 (1993); 20 C.F.R. §702.336(a); Emp. Ex. 5 at 3; Administrative Law Judge Ex. 1; Tr. at 5-6.

In resolving the issue of permanency, the administrative law judge addressed the opinions of Dr. Elamir, claimant's treating neurologist, and Dr. Bercik, employer's consulting orthopedic surgeon. Dr. Elamir opined that claimant's condition reached permanency on July 8, 2003. Cl. Ex. 1. Dr. Bercik opined that claimant reached maximum medical improvement on June 6, 2003. Emp. Ex. 5 at 3. The administrative law judge's finding that claimant reached permanency on July 8, 2003, based on Dr. Elamir's opinion, corroborated by Dr. Bercik's opinion, is supported by substantial evidence, and thus we affirm this finding.[3] *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989); Decision and Order Awarding Benefits at 7; Cl. Ex. 1; Emp. Ex. 5 at 3.

With regard to the extent of claimant's disability, Dr. Elamir opined, and claimant testified, that he is unable to return to his usual work. Cl. Ex. 9 at 20; Tr. at 20-21. Dr. Bercik, on the other hand, stated that claimant is capable of returning to his usual work. Emp. Exs. 5 at 3; 6 at 4; 7 at 31-32. The administrative law judge discussed and weighed this evidence and acted within his discretion in crediting claimant's testimony and Dr. Elamir's opinion over that of Dr. Bercik, explaining that claimant's testimony and demeanor are credible and that Dr. Elamir has greater experience with claimant as his treating physician. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); Decision and Order Awarding Benefits at 7-8; Cl. Ex. 9 at 20; Emp. Exs. 5 at 3; 6 at 4; 7 at 31-32; Tr. at 20-21. As employer presented no evidence of suitable alternate employment, the administrative law judge's award of total disability benefits is affirmed. *See generally Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT).

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board, requesting a fee of $2,350, representing 11.75 hours at an hourly rate of $200. Employer has not objected to the fee petition. We award counsel the fee as requested as it is

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disability. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); Emp. Br. at 9.

[3] Any error in the administrative law judge's failure to consider Dr. Elamir's recommendation that claimant be evaluated for lumbar spine surgery is harmless as the possibility of surgery does not preclude a finding that maximum medical improvement was reached. *See McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

reasonably commensurate with his work defending the award of total disability benefits against employer's appeal. *See McKnight v. Carolina Shipping Co.*, 32 BRBS 251 (1998)(decision on reconsideration *en banc*); 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed. Claimant's counsel is entitled to an attorney's fee of $2,350 for work performed before the Board to be paid directly to claimant's counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge