BRB No. 06-0398

VICTOR MANCINI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOWLAND HOOK CONTAINER TERMINAL, INCORPORATED	)	DATE ISSUED: 11/30/2006
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Amended Decision and Order Upon Employer's Motion for Reconsideration of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Charles S. Gucciardo (Israel, Adler, Ronca & Gucciardo, PLLC), New York, New York, for claimant.

Robert N. Dengler (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Amended Decision and Order Upon Employer's Motion for Reconsideration (2005-LHC-0521) of Administrative Law Judge Janice K. Bullard 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a holdman, suffered injuries to his neck and back on March 29, 2003, as the result of the improper operation of a spreader by a co-worker. Employer paid compensation for temporary total disability from the date of injury until June 30, 2004. Claimant has not worked since the date of injury and contends he remains totally disabled; employer argues that claimant is capable of returning to his pre-injury job.

In her Decision and Order, the administrative law judge found that claimant cannot return to his usual work, but that employer established the availability of suitable alternate employment.[1] The administrative law judge found that claimant has a residual wage-earning capacity of $400 per week, and is entitled to ongoing permanent partial disability benefits commencing July 1, 2004. Additionally, she found employer entitled to relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f).

Employer appeals, arguing that the administrative law judge erred in finding that claimant could not return to his usual job duties. Claimant responds, urging affirmance.

Claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See, e.g., Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). In this case, the administrative law judge relied on the opinion of Dr. Seslowe who examined claimant on behalf of the

[1] In her Amended Decision and Order, the administrative law judge addressed employer's request that she reconsider that portion of her opinion that refers to the job duties of a holdman as described in the *Dictionary of Occupational Titles*, 4th ed. rev. (1991). She vacated that portion of her opinion referring to the *Dictionary of Occupational Titles*, and amended her decision to credit claimant's own description of his job duties. *See* discussion, *infra.* In all other respects her original opinion was unchanged.

Department of Labor. He concluded that claimant is able to perform only light work and is restricted from lifting more than 40 pounds and from frequent bending. EX 14. The administrative law judge found Dr. Seslowe's opinion supported by that of Dr. Marola who found claimant disabled due to left radiculopathy. CX 2.

The administrative law judge found the restrictions imposed by Dr. Seslowe inconsistent with the job duties described by claimant. The administrative law judge specifically credited claimant's testimony that his job required frequent moving and bending. Although employer argues that claimant is not a reliable witness, the administrative law judge found that despite claimant's unreliability as a historian, his job description was more credible than that of John Atkins, employer's Vice President of Operations, who testified that claimant's usual job duties fall within Dr. Seslowe's restrictions. HT at 86-88. The administrative law judge concluded that even if the weight claimant was required to lift was within his lifting restrictions, the frequent bending required by his job was outside of his restrictions. Amended Decision and Order at 2.

We affirm the administrative law judge's finding that claimant is precluded from performing his usual work as it is rational and supported by substantial evidence. The administrative law judge rationally credited the impartial opinion of Dr. Seslowe regarding claimant's work restrictions. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000). Moreover, the administrative law judge has the authority to address questions of witness credibility. *Calbeck v. Strachan Shipping Co*., 306 F.2d 693 (5th Cir. 1962); *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Thus, the administrative law judge rationally relied on claimant's testimony concerning the requirements of his usual job as a holdman. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As claimant's testimony and the credited medical opinions constitute substantial evidence to support the administrative law judge's finding that claimant cannot perform his usual work, it is affirmed. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). There are no other challenges to the administrative law judge's award of benefits. Therefore, we affirm the award of ongoing permanent partial disability benefits.

Claimant's counsel has filed a petition for an attorney's fee for services performed before the Board in connection with his defense of employer's appeal. Counsel seeks a fee of $2,800, representing 8 hours of services performed at an hourly rate of $350. Employer has filed no objections to this fee request. We find the requested hourly rate to be excessive, and we reduce it to $250. 20 C.F.R. §802.203(d). As counsel successfully defended claimant's award against employer's appeal, we grant counsel an attorney's fee

of $2,000. *See generally Lewis v. Todd Shipyards Corp.*, 30 BRBS 154 (1996); *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996); 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the Decision and Order and Amended Decision and Order Upon Employer's Motion for Reconsideration of the administrative law judge are affirmed. Claimant's counsel is awarded an attorney's fee of $2,000, payable directly to counsel by employer.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge