BRB No. 96-0810

TIMOTHY DIVITA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THAMES VALLEY STEEL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
HARTFORD INSURANCE GROUP	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Award of Benefits and the Amendment of Decision and Order on Employer's Petition for Reconsideration of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Montstream and May), Glastonbury, Connecticut, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order of Award of Benefits and the Amendment of Decision and Order on Employer's Petition for Reconsideration (93-LHC-2170) of Administrative Law Judge Clement J. Kichuk 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, on May 15, 1987, sustained a work-related back injury while working for employer. Thereafter, while working as a landscaper, claimant experienced additional back pain. In his Decision and Order, the administrative law judge found that claimant's present lower back pain is related to his May 15, 1987 work-related back injury; specifically, the administrative law judge determined that claimant's subsequent work as landscaper aggravated his back, and that his present condition was a natural consequence that flowed from his May 1987 work-injury. Next, the administrative law judge found that claimant reached maximum medical improvement on February 12, 1990, with a fifteen percent permanent partial disability of the back. The administrative law judge awarded claimant temporary total disability benefits from May 1, 1990 through June 23, 1992, and permanent partial disability benefits from June 24, 1992, and continuing. Lastly, the administrative law judge awarded employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Employer filed a petition for reconsideration with the administrative law judge, requesting that the contradictory finding of temporary total disability be corrected to coincide with the uncontested finding of permanency as of February 12, 1990. In his amended Decision and Order, the administrative law judge again found that claimant reached maximum medical improvement on February 12, 1990, but reasoned that claimant was only temporary totally disabled for the period of May 1, 1990 through June 23, 1992, since claimant's subsequent work as a landscaper demonstrated that claimant was able to work within the limits of his permanent partial disability. Thus, the administrative law judge did not make the substantive change requested by employer. By Order dated March 1, 1990, employer's second motion for reconsideration was denied by the administrative law judge.

On appeal, employer challenges the administrative law judge's award of temporary total disability for the period of May 1, 1990 through June 23, 1992; specifically, employer asserts that, as it is uncontroverted that claimant's back condition reached maximum medical improvement when he received an impairment rating on February 12, 1990, the nature of his disability must be considered permanent as of that date.

An employee is considered permanently disabled when he has any residual disability following maximum medical improvement, *see Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds), the date of which is determined solely by medical evidence. *See Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 61 (1985). Furthermore, the date a doctor rates a condition may be deemed to be the date of maximum medical improvement. *Phillips v. Maine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), *vacated en banc on other grounds*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990). Thus, the Board has held that, when addressing the permanency of claimant's disability, the administrative law judge should discuss the medical opinions of record regarding permanency rather than relying on the date claimant returned to work. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

In the instant case, the administrative law judge, in both his initial decision and his decision

on reconsideration, determined that claimant reached maximum medical improvement on February 12, 1990. In rendering this determination, the administrative law judge specifically credited the testimony of Dr. Cooper, the physician who performed back surgery on claimant following his work-injury, who opined that claimant reached maximum medical improvement on February 12, 1990, with a fifteen percent permanent partial disability.[1] In rendering his finding regarding the nature of claimant's disability, however, the administrative law judge subsequently confused the issue of the nature of claimant's disability with the extent of his disability when he focused on claimant's return to work two years later. Where claimant obtains alternate employment, his partial disability award commences on the date the alternate employment was available, and claimant may receive permanent total disability benefits from the date of maximum medical improvement until that date. *See Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). Inasmuch as the Board has recognized that the date of permanency may be established by either the date on which a claimant's condition reaches maximum medical improvement or the date on which a physician assesses a claimant with a disability rating, and as all parties as well as the administrative law judge agree that claimant in the instant case reached maximum medical improvement on February 12, 1990, the date on which he was given a disability rating by Dr. Cooper, we vacate the administrative law judge's finding that claimant's disability was temporary in nature during the period of May 1, 1990, through June 23, 1992, and we modify the administrative law judge decision to reflect that claimant's back condition reached permanency as of February 12, 1990, based upon Dr. Cooper's fifteen percent permanent disability assessment.

Accordingly, the administrative law judge's finding that claimant's disability was temporary in nature during the period of May 1, 1990 through June 23, 1992 is vacated, and his decision modified to reflect that claimant's disability became permanent as of February 12, 1990; consequently, the administrative law judge's award of benefits is modified to reflect

[1] At the formal hearing, claimant urged the administrative law judge to accept the opinion of Dr. Cooper regarding the date upon which he reached maximum medical improvement. Thus, all parties are in agreement that maximum medical improvement was achieved by claimant on February 12, 1990.

claimant's entitlement to permanent total disability benefits from May 1, 1990, through June 23, 1992. In all other aspects, the administrative law judge's Decision and Order of Award of Benefits and Amendment of Decision and Order on Employer's Petition for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge