

BRB Nos. 90-1081
and 91-729

RICHARD WILLIAM FINLAY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
METROPOLITAN STEVEDORE)	DATE ISSUED:
COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor, and the Amended Compensation Award of Attorney's Fee of Edward B. Bounds, District Director, United States Department of Labor.

Diana L. Middleton, San Pedro, California, for claimant.

Robert E. Babcock (Laughlin, Falbo, Levy & Moresi), Long Beach, California, for self-insured employer.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order awarding benefits (88-LHC-3697) of Administrative Law Judge Ellin M. O'Shea, and the Amended Compensation Order Award of Attorney Fees (18-26662) of District Director Edward B. Bounds 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). 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. *Muscella v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 272 (1980).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant injured his right elbow on July 15, 1985, while working for employer as a

longshoreman. Claimant initially treated with Dr. Leesment, and then sought treatment with Dr. Morrison, who diagnosed chronic irritation of the right ulnar nerve. Dr. Morrison performed neurolysis of the right ulnar nerve and anterior transposition on November 25, 1987. Claimant returned to work on January 18, 1988, and although he suffered no wage loss, he was unable to do work he had been able to do prior to his injury.¹ Claimant testified that after his injury, he could not perform lashing on container jobs, he could no longer lift boxes of bananas weighing 45 pounds, and he avoided driving lifts. Claimant also testified that outside of work, his elbow ached when he mowed the lawn, washed windows, hammered nails and played ball.

The administrative law judge awarded claimant permanent partial disability benefits for a ten percent impairment to his right arm pursuant to Section 8(c)(1), (19) of the Act, 33 U.S.C. §908(c)(1),(19), based on the parties' stipulated average weekly wage of \$579.66. On appeal, employer contends that the administrative law judge erred in awarding claimant permanent partial disability benefits. BRB No. 90-1081. Claimant responds, urging affirmance.

On September 25, 1989, claimant submitted a petition for an attorney's fee in the amount of \$6,562.50 and costs in the amount of \$1033 for services performed before the administrative law judge and district director. On October 2, 1990, the district director issued an attorney's fee award for \$3,112.50 to be paid by employer, followed by an Amended Compensation Order Awarding Attorney Fees in the amount of \$3,306.25. Employer appeals the district director's amended attorney's fee award. BRB No. 91-729. Claimant has not responded to employer's appeal. By Order of the Board dated November 15, 1981, employer's appeals, BRB Nos. 90-1081 and 91-729, are consolidated for review.

On appeal, employer contends that there must be a medical basis for establishing a permanent impairment, and that Dr. Morrison's opinion that claimant will have intermittent episodes of pain-related functional restrictions which most likely can be controlled with aspirin and has no long-term deficit do not establish that claimant has a permanent impairment. Employer contends an award cannot be based solely on claimant's subjective complaints. Further, citing *Bachich v. Sea Train Terminals of California*, 9 BRBS 184 (1978), employer contends that the administrative law judge, in relying in part on the functional impact of claimant's injury on his work and non-work activities, considered claimant's economic loss, which is precluded in awarding benefits under the schedule.

We reject employer's contentions. Because loss of wage-earning capacity is presumed under the schedule, employer is correct that economic loss may not be considered in issuing a scheduled award. See *Wright v. Superior Boat Works*, 16 BRBS 17 (1984); *Bachich*, 9 BRBS at 187. In *Bachich*, however, the Board also stated that the administrative law judge is not bound by ratings under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), and may base his or her findings on medical evaluations plus claimant's own description of his symptoms and the physical effect of his injury. *Bachich*, 9 BRBS at 187 n.1. Further, the Board

¹Employer voluntarily paid claimant temporary total disability benefits from November 25, 1987 through January 17, 1988.

has held that although the administrative law judge may not use claimant's ability to work to measure his economic loss, she may use it to measure the extent of claimant's physical injury. *See Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053, 1055 (1979). The administrative law judge is not bound by a particular doctor's disability rating but may determine the degree of claimant's disability based on the relevant medical evidence and claimant's testimony on the whole. *Id.*

In this case, the administrative law judge rationally relied on claimant's testimony and Dr. Morrison's opinion as to claimant's symptoms and their effect on him. *Id.* The administrative law judge considered claimant's testimony that he had loss of feeling in parts of his right hand, that he has pain below the elbow which runs up toward the wrists, that he has weakness in his elbow which makes it hard for him to firmly grip objects, and that his arm feels heavy at the end of the day. *Bachich*, 9 BRBS at 187. Although Dr. Morrison stated that claimant has a zero percent impairment under the *AMA Guides* the administrative law judge also considered Dr. Morrison's opinion that claimant has occasional mild pain in his elbow with heavy use and may have some intermittent symptoms of weakness in the arm. Further, the administrative law judge considered Dr. Morrison's March 7, 1988 opinion that claimant has full normal range of motion of his elbow but will continue to have intermittent mild to moderate pain in the elbow which will cause him some functional restrictions at times. The administrative law judge concluded that even though Dr. Morrison found no medical impairment under the *AMA Guides*, Dr. Morrison's opinion reflected the pain and functional restrictions claimant would at times experience. As claimant's testimony and Dr. Morrison's opinion establish that claimant continues to have physical restrictions as a result of the work injury, and as the administrative law judge's finding of a 10 percent impairment is reasonable, we affirm the administrative law judge's finding that claimant is entitled to a permanent partial disability award under the schedule for a 10 percent impairment to his right arm as it is supported by substantial evidence. *Mazze*, 9 BRBS at 1055; *Bachich*, 9 BRBS at 187.

Employer also contends that it is not liable for an attorney's fee for work performed before the district director prior to the time a controversy arose over claimant's right to further benefits. *See generally* 33 U.S.C. §928(a). We decline to address employer's contentions regarding the district director's attorney's fee award as employer did not object to the fee petition below and the Board will not consider objections raised for the first time on appeal. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988); *Burch v. Superior Oil Co.*, 15 BRBS 423 (1983).

Accordingly, the administrative law judge's Decision and Order is affirmed. The district director's Amended Compensation Order Awarding Attorney Fees also is affirmed.
SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge