BRB No. 09-0213

R.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PRODUCTION MANAGEMENT CORPORATION	)	DATE ISSUED: 07/29/2009
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Awarding Attorney Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Jim S. Hall (Jim S. Hall & Associates, LLC), Metairie, Louisiana, for claimant.

Christopher L. Zaunbrecher (Briney & Foret), Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-LHC-00396) of Administrative Law Judge Clement J. Kennington 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 August 14, 2002, injured his left knee while working for employer on a jack-up barge in the Gulf of Mexico. Within a few days of this injury claimant visited a hospital and was told to stay off of his leg. On February 12, 2003, claimant underwent arthroscopic knee surgery performed by Dr. Jones. On May 12, 2004, Dr. Jones performed a second surgical procedure, consisting of a medial wedge osteotomy and an iliac crest and osteoset graft on claimant's left knee. Dr. Jones released claimant to return to work in December 2004. In October 2005, claimant commenced treatment with Dr. Hamsa. Tr. at 16. Employer voluntarily paid claimant temporary total disability benefits from January 2, 2003, through June 12, 2005, when it terminated benefits.

In his Decision and Order, the administrative law judge initially found claimant and Dr. Hamsa credible. The administrative law judge determined that claimant's knee condition had not yet reached maximum medical improvement. The administrative law judge further found that claimant is unable to return to his usual job with employer and that employer failed to establish the availability of suitable alternate employment. Consequently, the administrative law judge awarded claimant temporary total disability compensation from August 14, 2002, and continuing. 33 U.S.C. §908(b). The administrative law judge also found employer liable for all reasonable and necessary medical expenses related to claimant's work injury. 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's findings regarding the nature and extent of claimant's disability, claimant's entitlement to medical benefits, and the amount of the attorney's fee awarded to claimant's counsel. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer initially contends that the administrative law judge erred in failing to find that claimant's knee condition had reached maximum medical improvement. We reject this contention. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant has reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *see also McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000).

Employer relies upon the opinion of Dr. Jones to support its assertion that claimant's knee condition reached permanency by December 2004. In concluding that claimant's knee condition had not reached maximum medical improvement, the administrative law judge relied upon the opinion of Dr. Hamsa, who began treating claimant in 2005. The administrative law judge acknowledged Dr. Jones's conclusion that claimant had reached maximum medical improvement as to his treatment regimen on

December 10, 2004, *see* EX 8 at 10, but found that due to claimant's continued severe pain and the need for additional medical treatment, he had not reached maximum medical improvement. Decision and Order at 11, 13. In this regard, Dr. Hamsa recommended that claimant undergo several procedures, including the surgical removal of the hardware previously installed in claimant's knee and a series of injections for claimant's knee arthosis, in order to improve claimant's condition. *See* CX 8 at 22. The administrative law judge reasoned that while the mere possibility of surgery itself does not preclude a finding of permanency, it is reasonable to conclude that when future surgery and re-evaluations are necessary within a limited time period, permanency has not been reached. Decision and Order at 13; *Methe*, 396 F.3d 601, 38 BRBS 99(CRT). As the administrative law judge rationally relied upon the opinion of Dr. Hamsa, the administrative law judge's conclusion that claimant has not reached maximum medical improvement is supported by substantial evidence. *Abbott*, 40 BRBS 122, 29 BRBS 22(CRT). We therefore affirm the administrative law judge's finding that claimant's disability is temporary in nature.

Employer next challenges the administrative law judge's finding that claimant remains totally disabled as a result of his August 14, 2002, work injury. Employer initially contends that whether it identified the availability of suitable alternate employment after claimant reached maximum medical improvement is irrelevant since, once claimant's condition reached a state of permanency, his exclusive remedy for additional benefits is under the schedule of Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2). Alternatively, employer alleges that claimant's post-injury employment establishes the availability of suitable alternate employment.

We reject employer's assertion that, since claimant's injury was to a scheduled member, employer was not required to establish the availability of suitable alternate employment. Initially, we have affirmed the finding that claimant's disability is temporary; thus, any partial disability is compensable under Section 8(e) rather than Section 8(c). Moreover, the schedule applies to permanent partial disability and does not apply where claimant establishes total disability. Thus, where claimant injures a body part covered by the schedule, his permanent partial disability under Section 8(c) is confined to the schedule, and wage-earning capacity is irrelevant. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). However, if claimant establishes that he is permanently or temporarily totally disabled as a result of a work-related injury to a scheduled member, his entitlement to benefits is determined under Section 8(a) or (b) of the Act, 33 U.S.C. §908(a), (b). *Id.*, 449 U.S. at 277 n.17, 14 BRBS at 366 n.17. *See, e.g., DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998); *Carter v. Merritt Ship Repair*, 19 BRBS 94 (1986). Consequently, the administrative law judge properly applied the established standards for determining whether claimant is totally disabled.

In this regard, the administrative law judge found, and the parties do not dispute, that claimant is incapable of returning to his former employment duties with employer.

Claimant thus established a *prima facie* case of total disability, and employer was required to establish the availability of suitable alternate employment which claimant is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, employer must establish the availability of realistic job opportunities within the geographic area in which claimant resides, which he is capable of performing considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Id; see P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). The fact that a claimant works after an injury will not forestall a finding of total disability if the claimant works only with extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence, although an award of total disability while working is to be the exception, rather than the rule. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978); *Reposky v. Int'l Transp. Serv.*, 40 BRBS 65 (2006).

Employer challenges the administrative law judge's determination that claimant was totally disabled during the periods of his post-injury employment; specifically, employer asserts that claimant's post-injury work for Tree Savers and Labor Ready between July 2005 and March 3, 2006, establishes the availability of suitable alternate employment, thus rendering claimant's disability partial rather than total.[1] We reject employer's contentions and affirm the administrative law judge's conclusion that claimant was totally disabled during this period as the administrative law judge's findings that claimant worked only with extraordinary effort and in great pain and that these short-term jobs were insufficient to establish realistic job opportunities are supported by substantial evidence. Decision and Order at 11–12.

In determining that claimant worked for Tree Savers and Labor Ready only through "extraordinary effort," the administrative law judge credited claimant's testimony that he was required to double his pain medication in order to work, that he worked in pain, and that ultimately his pain became so great that he ceased all attempts to work post-injury.[2] The administrative law judge further credited Dr. Hamsa's opinion,

[1] The administrative law judge found that since the labor market survey relied upon by employer identified only general job categories rather than specific employment opportunities that were available for claimant, that survey did not satisfy employer's burden of establishing the availability of suitable alternate employment. Decision and Order at 11; EX 10. As employer does not challenge this finding on appeal, it is affirmed.

[2] Claimant testified that his current medications include Percocet, Soma and Indocin. Tr. at 91 – 92.

stating that he initially opined that claimant was unable to perform full-time employment, and testified that claimant's condition became progressively worse over time. Decision and Order at 11. This evidence supports the conclusion that claimant was working only through extraordinary effort. *See Reposky*, 40 BRBS at 72–73. After noting that claimant worked for a limited period with Tree Savers[3] and for only 17 days during an eight month period with Labor Ready,[4] the administrative law judge also found that claimant's post-injury employment was sporadic in nature and did not appear to rise to the level of an ongoing actual employment opportunity. Under these circumstances, the administrative law judge did not err in finding that these jobs do not demonstrate realistic job opportunities for claimant. We thus affirm the administrative law judge's finding that claimant is totally disabled.

Employer additionally challenges the administrative law judge's award of medical benefits related to claimant's work injury; specifically, employer contends that claimant did not seek its approval to undergo the medical procedures performed by Dr. Hamsa.[5] We affirm the administrative law judge's award of medical benefits to claimant.

Section 7(a) of the Act, 33 U.S.C. §907(a), states:

> The employer shall furnish such medical, surgical, and other attendance or treatment ... for such period as the nature of the injury or the process of recovery may require.

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[3] Claimant testified that he worked for Tree Savers on a part-time basis for approximately three and a half weeks in July 2005. Tr. at 104.

[4] The record indicates that claimant grossed $1,114.31, during this eight month period. CX 7.

[5] We need not address employer's summary contention that claimant did not seek employer's approval to change his treating physician to Dr. Hamsa, *see Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989), as this contention has been raised for the first time on appeal. *See Jourdan v. Equitable Equip. Co.*, 889 F.2d 637, 23 BRBS 9(CRT) (5th Cir. 1989); *Maples v. Texports Stevedores Co.*, 23 BRBS 302 (1990). In this regard, moreover, employer has not addressed any of the evidence relevant to claimant's commencing treatment with Dr. Hamsa. Claimant testified that after Dr. Jones released him to work in December 2004 and employer cut off his benefits in June 2005, he attempted to return to Dr. Jones but was told Dr. Jones would not see him because the insurance company would not cover the cost. Tr. at 89-90. After Hurricane Katrina, he went to see Dr. Hamsa. *Id.* As noted above, employer did not raise the argument before the administrative law judge that claimant was not entitled to treatment with Dr. Hamsa, and it has not asserted at any point that it was willing to pay for treatment by Dr. Jones or any other physician after it terminated compensation in June 2005.

Thus, once claimant has established that his injury is work-related, employer is liable for reasonable and necessary medical expenses related to that injury. *See Weikert v. Universal Maritime Serv. Corp.*, 36 BRBS 38 (2003); 20 C.F.R. §702.402. Pursuant to Section 7(d), 33 U.S.C. §907(d), in order for employer to be liable, claimant must request employer's authorization for treatment; however, where employer refuses a request for treatment, claimant is released from the continuing obligation to seek employer's approval, and employer is liable for any treatment claimant thereafter procures on his own initiative if it is reasonable and necessary. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Initially, employer focuses its argument on whether Dr. Hamsa requested authorization for specific procedures in 2006 and 2007. However, under the applicable legal standard, once employer refused to provide treatment, claimant was not obligated to continue to seek approval, *id.*, and Dr. Hamsa's testimony supports the conclusion that the carrier refused to approve anything he wanted to do. Tr. at 41, 48-50. The administrative law judge found that Dr. Hamsa recommended specific procedures that he believed were necessary in order for claimant to recover from his work injury. The administrative law judge credited Dr. Hamsa's testimony that, while he desired to perform the recommended procedures, his treatment of claimant focused on pain management due to his inability to acquire employer's approval of his requested treatment. With regard to Section 7(d), the administrative law judge found that Dr. Hamsa's testimony and claimant's counsel's letters to employer's counsel establish that claimant sought employer's approval for the treatment recommended by Dr. Hamsa. Decision and Order at 15; CX 11. Consequently, the administrative law judge found employer liable for the surgeries, procedures and pain management recommended by Dr. Hamsa. Decision and Order at 15, 17. As the administrative law judge's finding that employer refused to authorize further care is supported by substantial evidence, we reject employer's assertion that it is not liable for Dr. Hamsa's treatment based on a lack of authorization. *Roger's Terminal*, 784 F.2d at 693, 18 BRBS at 86(CRT). As employer has not demonstrated error in the administrative law judge's finding that the treatment was reasonable and necessary, the award of medical benefits is affirmed.

Lastly, employer challenges the administrative law judge's decision to award claimant's counsel an attorney's fee for time spent by counsel on claimant's third-party cause of action. 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. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). For the reasons that follow, we affirm the administrative law judge's fee award to claimant's counsel.

Following the issuance of the administrative law judge's decision, claimant's counsel filed a fee petition seeking an attorney's fee of $25,462.50, representing 135.8 hours of legal services rendered at an hourly rate of $175, and $1,697.50 in expenses.

Employer filed objections, including disputing time sought by claimant's counsel for his preparation and attendance at depositions which employer asserted were related to claimant's third-party civil action. In his Order Awarding Attorney Fees, the administrative law judge rejected employer's objections to these hours, finding that the depositions had been entered into evidence during the longshore proceedings by employer and that claimant's counsel had not been compensated for his services regarding them. Accepting employer's remaining objections to the time sought by claimant's counsel, the administrative law judge awarded claimant's counsel a fee of $21,525, representing 111.3 hours of services rendered at an hourly rate of $175, and $1,697.50 in expenses.

We reject employer's challenge to the administrative law judge's decision to award claimant's counsel an attorney's fee for the time and expenses incurred in procuring the subject depositions.[6] The administrative law judge relied on precedent holding that a fee for services performed in connection with a collateral action may be awarded if counsel establishes that the service was necessary to, and used in the prosecution of, the longshore claim. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984). A review of counsel's fee application reveals that counsel sought and was awarded payment for 5 hours spent attending claimant's deposition on July 19, 2006, and for 2 hours spent attending the deposition of Mr. Shefler on July 25, 2007.[7] On appeal, although employer argues that the occurrence and circumstances of claimant's work injury were not in dispute, it concedes that it offered the two depositions in question into evidence in order to show the occurrence and circumstances of the accident. *See* Er's br. at 19; EXs 11, 12. Consequently, as this evidence was utilized by employer in defending against claimant's claim for benefits under the Act, we affirm the administrative law judge's determination that counsel's services regarding this evidence are compensable.

[6] Employer asserts error by the administrative law judge in awarding fees for "depositions and other activity" related to the third-party action without specifying which hours remain in dispute. However, its argument specifically addresses only the depositions, and we will review it accordingly.

[7] Mr. Shefler was claimant's supervisor on August 14, 2004, the date of claimant's work injury.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Awarding Attorney Fees are affirmed.

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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REGINA C. McGRANERY
Administrative Appeals Judge