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Claimant-Respondent)	
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v.)	
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CERES MARINE TERMINALS, INCORPORATED)	DATE ISSUED: 01/31/2008
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins (Dennis L. Brown, PC), Houston, Texas, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, DC, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2006-LHC-210) of Administrative Law Judge Patrick M. Rosenow 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On January 18, 2005, claimant sustained multiple injuries to his body when, while working for employer as a rigger, he fell between two hatch covers. Claimant required the assistance of two workers after his fall, and after informing employer of the incident, he was taken to the hospital where he was diagnosed with a chest contusion and strained

neck. Claimant subsequently received medical treatment and therapy for pain allegedly resulting from his fall and returned to light-duty employment with employer as a painter. Employer voluntarily paid claimant temporary total disability benefits from January 19, 2005 through May 10, 2005. Claimant thereafter filed a claim seeking additional compensation and medical benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant suffered the alleged injuries and that the weight of the evidence establishes that claimant's injuries were either caused or aggravated by his work-accident. The administrative law judge determined that claimant was incapable of returning to his usual employment duties as a rigger with employer. Regarding the issue of suitable alternate employment, the administrative law judge found that claimant was not capable of performing the duties of other positions identified by employer, but that claimant was capable of performing the work of a painter which he had in fact returned to in May 2006. Consequently, the administrative law judge awarded claimant temporary total disability benefits from January 19, 2005, through May 1, 2006, and temporary partial disability benefits from May 2, 2006, and continuing. 33 U.S.C. §908(b), (e). The administrative law judge also found employer liable for the future medical expenses incurred by claimant as a result of his January 18, 2005, work injury, including treatment with a pain management specialist and surgery on claimant's left shoulder. 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's decision to consider claimant's claim for benefits resulting from an alleged injury to his left shoulder, his determination that claimant is incapable of performing the two positions identified by employer as establishing the availability of suitable alternate employment, and his award of future medical benefits to claimant. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer initially asserts that the administrative law judge erred in considering a claim for benefits resulting from an alleged work-related injury to claimant's left shoulder, arguing that claimant's LS-203 claim form and his LS-18 pre-hearing statement do not specifically identify this body part as being injured. We reject this contention. Claimant sought and received treatment for shoulder pain as early as January 20, 2005, two days after his work-injury. CX 11 at 1-4. While, as employer avers, claimant's LS-203 and LS-18 forms do not specifically list claimant's shoulder as a body part injured in the January 18, 2005, work-incident, this injury is encompassed in the injuries claimed on the forms. Both forms list specific injuries to claimant's knees, ankles, foot, head, neck, arms, wrists, back, and chest, and in addition to these specific body parts, both forms state that claimant injured "various" or "other" parts of his body. EX 4; CX 8. Employer's subsequently filed LS-18 pre-hearing statement acknowledges claimant's alleged injury to, *inter alia*, his shoulders in the January 18, 2005 fall, CX 9, and a shoulder injury was unequivocally presented to the administrative law judge for adjudication by both parties. *See* Tr. at 20-21, 29. In addressing employer's contention,

the administrative law judge determined that claimant's reference to multiple injuries on his claim form, specifically including pain in his arms and neck, when coupled with claimant's documented receipt of medical treatment for shoulder pain as early as January 20, 2005, resulted in a reasonable inference that a shoulder injury was also claimed. Decision and Order at 65-66. As claimant may amend his claim to state a new theory of causation as the evidence develops, see *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.7 (1982), and the record establishes that employer received timely notice of an alleged relationship between claimant's left shoulder condition and his January 18, 2005, work-injury, we affirm the administrative law judge's finding that this issue was properly before him for adjudication. See *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); 20 C.F.R. §702.336.

Employer next challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment as of January 2006. Where, as in the instant case, claimant has established that he is unable to return to his usual employment duties with employer as a result of his work-related injury, the burden shifts to employer to establish the availability of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. See *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); see also *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986). Employer may meet its burden by offering an injured employee a light-duty job in its facility which is tailored to the employee's physical limitations, *Darby v. Ingalls Shipbuilding & Dry Dock Co.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987), so long as the job is necessary and claimant is capable of performing it. *Diosdado v. Newport News Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). It is undisputed that claimant returned to work in May 2006, but employer argues other suitable work was available at an earlier date.

Employer asserts that the evidence establishes the availability of suitable alternate employment for claimant as of January 2006. Specifically, employer alleges that the job of hustler driver and an "under the whip" position were available for claimant and were approved by Drs. DeBender and Brownhill. In rejecting this argument, the administrative law judge initially set forth in detail the requirements of these two identified positions, finding that a hustler driver must be able to swivel his head continuously, climb in and out of the hustler cab throughout the day, and be able to sit throughout the day, while the under the whip position requires continuous bending, stooping and standing throughout the day. Decision and Order at 71-72. Next, the administrative law judge relied upon claimant's testimony that he cannot turn his head to the left, that he can only turn his head to the right slowly, and that he continues to experience pain radiating from his head and neck through his shoulder. The administrative law judge further found that Dr. DeBender

opined that claimant could not perform the hustler driver position and that Dr. DeBender's statement that claimant could try the under the whip position, although he would have problems with prolonged standing on concrete, was equivocal at best.¹ *Id.*

Addressing the testimony of Dr. Brownhill, the administrative law judge found that this physician did not believe that claimant was capable of performing the positions. Dr. Brownhill examined claimant on September 14, 2005, and in his subsequent September 19 report, stated claimant had not reached maximum medical improvement. In a supplemental report dated November 16, 2005, he opined that claimant was incapable of performing either the hustler driver or whipman positions identified by employer, although he expected claimant to have fully recovered by January 2006. EX 26. In a supplemental report dated September 18, 2006, Dr. Brownhill stated that without re-examining claimant, he could not give an opinion regarding claimant's recovery although he felt that, due to the physical requirements of the hustler and whipman jobs identified by employer, claimant is incapable of performing either of these positions. EX 58. Relying on claimant's credible testimony, the opinions of Drs. DeBender and Brownhill, and giving less weight to the opinion of Dr. Likover, who opined that claimant could return to longshore work without restrictions, the administrative law judge concluded that claimant was unable to perform the duties required by the jobs at issue. Decision and Order at 70-72. As it is well-established that the administrative law judge is entitled to draw his own inferences from the evidence, and his decision must be affirmed if it is supported by substantial evidence, *O'Keefe*, 380 U.S. 359, we affirm the administrative law judge's determination that as of January 2006, claimant's condition rendered him incapable of performing the positions relied upon by employer, as that finding is supported by claimant's testimony and the medical evidence of record. *See generally Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). Accordingly, as no party challenges the administrative law judge's finding that claimant is capable of continuing to perform light duty employment as a painter for employer, we affirm the administrative law judge's conclusion that claimant is entitled to temporary partial disability compensation from May 2, 2006, and continuing.² 33 U.S.C. §908(e).

¹ Based in part on claimant's May 12, 2005, functional capacities evaluation, Dr. DeBender testified that he would not recommend in May 2005 that claimant attempt to perform the hustler driver or under the whip positions with employer, CX 26 at 33-37, 54, but that claimant subsequently might have been able to try to perform the under the whip position. *Id.* at 54.

² Employer summarily states in its brief, without citation to supporting evidence, that the administrative law judge's decision to limit claimant to 34 hours a week at the light duty position of painter based on his need for physical therapy is in error since claimant has not undergone physical therapy since May 2006. *See* Emp. br. at 37. At the June 6, 2006, hearing, however, claimant testified that he attends physical therapy three times a week. Tr. at 120. As employer has neither briefed this issue nor presented

Employer also challenges the administrative law judge's finding that claimant is entitled to continued physical therapy and surgery on his left shoulder. Once claimant has established that his injury is work-related, employer is liable for reasonable and necessary medical expenses related to that injury. 33 U.S.C. §907; *Weikert v. Universal Maritime Serv. Corp.*, 36 BRBS 38 (2002). In order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary, and must be related to the work injury. See *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. See *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

Employer first alleges that the administrative law judge erred in holding it liable for claimant's continued physical therapy and reevaluation. Specifically, employer asserts that Drs. DeBender and Brownhill felt that claimant did not need further treatment and that the administrative law judge did not provide sufficient reasons for rejecting these opinions. Employer's assertions of error in this regard are without merit, as neither physician opined that physical therapy was unnecessary. Dr. DeBender stated in July 2005 that claimant did not need additional treatment for his shoulder, arms or knees, but referred claimant for follow-up for his spine problems. See Decision and Order at 41. Dr. DeBender subsequently agreed with the recommendation that claimant undergo treatment with a pain management specialist. Claimant commenced physical therapy in February 2006, and upon evaluation in May 2006, Dr. DeBender noted claimant had improved. Moreover, in commenting on claimant's ongoing treatment, Dr. DeBender stated that while physical therapy typically ends after a period of six to eight weeks, such therapy can be continued on a case by case basis if claimant is showing progress and benefiting from the treatment. *Id.* at 42 – 43. Similarly, Dr. Brownhill, in his September 19, 2005, report, stated that while claimant did not need further treatment for his lumbar spine, upper extremities, shoulders or legs, his chief complaint was neck pain and he should complete pain management treatment for that. CX 14 at 13. He concluded that claimant had not reached maximum medical improvement and required further treatment.³ *Id.* Thus, while both doctors felt at that time that some of claimant's injuries had resolved, neither opined that claimant had fully recovered. In fact, contrary to employer's

evidence contrary to claimant's testimony, the administrative law judge's decision on this issue is affirmed.

³ As discussed above, Dr. Brownhill also provided two supplemental medical reports in November 2005 and September 2006 which stated that claimant was incapable of performing the longshore jobs that employer asserted established the availability of suitable alternate employment. EX 26; EX 58. These reports did not address claimant's need for ongoing pain management or physical therapy.

argument, both doctors acknowledged claimant's complaints of pain and discussed pain management.

In finding continued physical therapy compensable, the administrative law judge relied on medical opinion evidence that continued therapy is not unusual if the patient is benefiting, consistent with Dr. DeBender's opinion, as well as claimant's treatment records from the pain and recovery clinic. Decision and Order at 75. He stated that claimant commenced physical therapy and strengthening exercises in February 2006, at which time Dr. Long noted that claimant exhibited weakness and a lack of motion, and the pain clinic's last report of April 12, 2006, which states that claimant is in need of continued physical therapy. *Id.* The administrative law judge sufficiently discussed the relevant evidence and provided a rational explanation for his decision to award benefits for physical therapy. See *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). The Board is not permitted to reweigh the evidence but may only ascertain whether substantial evidence supports the administrative law judge's decision. See *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994). The administrative law judge specifically found that claimant's testimony regarding his pain was credible, Decision and Order at 64-65, see *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and his decision is supported by the opinions of Drs. DeBender and Long, as well as claimant's pain clinic reports. As the administrative law judge's finding regarding claimant's need for physical therapy is rational and supported by substantial evidence, his award of medical benefits for this treatment is affirmed. See *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997).

Employer similarly alleges that the administrative law judge's finding that surgery for claimant's left shoulder condition is reasonable, appropriate and necessary must be vacated and remanded for findings which comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as the administrative law judge did not explain his decision to rely on the opinion of Dr. Masson rather than those of Drs. DeBender and Brownhill. As the administrative law judge noted, in 2005 opinions both Drs. DeBender and Brownhill opined that left shoulder surgery was not necessary, CX 26; CX 14, and Dr. Brownhill reiterated this conclusion in his September 2006 report. EX 58. In contrast, Dr. Masson, who examined claimant in the summer of 2006 upon the referral of Dr. DeBender, diagnosed claimant with thoracic outlet syndrome (TOS) and concluded that claimant may need shoulder surgery to treat this condition. CX 37. In his decision, the administrative law judge determined that Dr. DeBender's referral to, and claimant's treatment by, Dr. Masson for TOS was reasonable, appropriate, and necessary. Decision and Order at 75. Acknowledging the conflicting opinions of record regarding claimant's need for shoulder surgery, the administrative law judge credited the opinion of Dr. Masson consistent with his prior determination that claimant's shoulder condition is compensable due to the TOS. He thus concluded that the left shoulder surgery recommended by Dr. Masson for claimant is reasonable, appropriate, and necessary. *Id.*

The administrative law judge's finding in this regard is rational, supported by the credited opinion of Dr. Masson, and will not be disturbed. *See Calbeck*, 306 F.2d 693; *Pozos*, 31 BRBS 173. *See also Quinones*, 206 F.3d at 479-480, 34 BRBS at 27. We therefore affirm the administrative law judge's determination that employer is liable to claimant for surgery to his left shoulder.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge