

DAVID PICKLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BENDER SHIPBUILDING AND	)	DATE ISSUED: 08/29/2003
REPAIR COMPANY,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order-Denying Motion for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks, Gibbons & Kittrell, P.C.), Mobile, Alabama, for claimant.

Douglas L. Brown (Armbrecht Jackson LLP), Mobile, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and Order-Denying Motion for Reconsideration (01-LHC-1553) of Administrative Law Judge Richard D. Mills 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a shipboard welder, suffered an injury to his neck and upper arm when he grabbed a falling welding machine on October 20, 1998.<sup>1</sup> Although he immediately reported the accident to employer, claimant initially sought treatment from his private physician; employer subsequently referred claimant to a different physician for the treatment of his strained neck and possible herniated disc. Employer paid temporary total disability benefits from October 22, 1998, to November 15, 1998, and from May 26, 1999, to July 23, 1999. Claimant was released to light duty work in July 1999 and worked for employer on the day shift from August 1999 through January 2000, when he again left work due to pain. Claimant was last assigned work as a bucket welder, an assignment which he stated he could not perform due to pain. Claimant thereafter was terminated by employer for excessive unexcused absences. Claimant sought additional compensation as well as reimbursement of his medical expenses.

In his decision, the administrative law judge accepted the parties' stipulated date of maximum medical improvement, July 20, 1999, and found claimant entitled to temporary total disability compensation from the date of injury through November 30, 1998, and from February 1999 through July 20, 1999, and to permanent partial disability benefits from July 21, 1999, to January 18, 2000.<sup>2</sup> The administrative law judge further found that claimant is not entitled to further compensation after January 18, 2000, because he was terminated for reasons unrelated to his work injury. In addressing claimant's request for reimbursement of his medical expenses, the administrative law judge held employer responsible for the medical expenses arising out of claimant's treatment with Drs. Crotwell, White, Boltz, Schnitzer and Irwin but not for those resulting from claimant's treatment with Drs. August, Middleton, Albertson, Quindlen, Houston or Tarabein. The administrative law judge also held employer liable for necessary future medical care. The administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant argues that the administrative law judge erred in denying him further disability compensation and in not holding employer liable for the medical expenses incurred by claimant's treatment with Drs. August, Middleton, Albertson and

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<sup>1</sup>At the time of his injury, claimant worked as a welder at night and repaired mobile homes during the day.

<sup>2</sup>The administrative law judge found that claimant was not entitled to compensation for the period of December 1998 through January 1999, when claimant concedes he was self-employed as a mobile home repairman.

Quindlen.<sup>3</sup> Employer responds, urging affirmance of the administrative law judge's decisions.

We first address claimant's contention that the administrative law judge erred in denying compensation after claimant's termination on January 18, 2000. The administrative law judge found that employer provided suitable alternate employment within its own facility to claimant, but that claimant nonetheless suffered a partial loss in wage-earning capacity based on both a lower hourly rate paid and fewer hours worked. He, accordingly, awarded claimant compensation for this permanent partial disability based upon "the stipulated average weekly wage, \$633.68, less [claimant's] actual earnings during the period from July 23, 1999, to January 18, 2000." Decision and Order at 16. The administrative law judge found, however, that claimant's termination from this position was due to reasons unrelated to his work injury, thereby absolving employer from the necessity of demonstrating other suitable alternate employment. Further, the administrative law judge concluded that claimant failed to exercise any effort in an attempt to find other employment. Accordingly, he denied further compensation after January 18, 2000. On appeal, claimant contends that the jobs in employer's facility were not within his post-injury capabilities and that he could no longer perform the jobs due to pain; as employer demonstrated the existence of no other suitable alternate employment, claimant contends he is entitled to compensation for total disability. Alternatively, claimant contends he is entitled to continuing permanent partial disability benefits following his termination.

In the instant case, it is undisputed that claimant is incapable of performing his pre-injury job duties. Thus, the burden shifts to employer to prove that claimant is not totally disabled by presenting evidence of the realistic availability of jobs within the geographic area in which claimant resides which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5<sup>th</sup> Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 689, 18 BRBS 79(CRT) (5<sup>th</sup> Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). An employer can establish the availability of suitable alternate employment by offering an injured employee a light duty job at its facility which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing it. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT)(5<sup>th</sup> Cir. 1996); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986).

In the instant case, the administrative law judge determined that the light duty positions provided by employer following claimant's post-injury return to work

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<sup>3</sup>Claimant concedes that employer is not liable for the treatment he received from Drs. Houston and Tarabein.

constituted suitable alternate employment based upon the jobs' approval by claimant's treating physician, Dr. Schnitzer. Following claimant's return to work, he was assigned job duties with pipe and hose repair but was subsequently transferred to a bucket welding position. The administrative law judge rationally found that the job duties associated with pipe and hose repair were within the physical restrictions approved by Dr. Schnitzer. CX 18 at 65. Additionally, Dr. Schnitzer approved the position of bucket welder after viewing a videotape of that position's being performed. CX 18 at 76.

We reject claimant's contention that the administrative law judge erred in finding that the bucket welding position was suitable. First, claimant offers no support for his contention that the "welder-fitter" position disapproved by Dr. Schnitzer and the "bucket welder" position are the same position. Second, claimant's argument that because the videotape shown Dr. Schnitzer was not of claimant performing the bucket welding position, Dr. Schnitzer's approval of the position is invalid, is similarly flawed. There is no requirement that a physician actually view his patient performing a proposed job; his familiarity with the job requirements and his patient's restrictions qualify him to render an opinion as to the job's suitability. Moreover, the administrative law judge found Dr. Schnitzer's opinion bolstered by the functional capacity evaluation, RX 4, which placed claimant's residual physical capabilities within the requirements of the bucket welding position. Lastly, based on the opinions of Drs. Schnitzer and Irvin that claimant's reported symptoms were out of proportion to the physicians' objective findings, the administrative law judge found that claimant's allegation that he could not perform the jobs due to pain is not credible. Decision and Order at 16. It is well established that the administrative law judge as the trier of fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, Dr. Schnitzer's opinion, supported by that of Dr. Irvin and the objective medical findings of record constitute substantial evidence in support of the administrative law judge's finding that employer established the availability of suitable alternate employment within its facility. We therefore affirm the administrative law judge's finding that employer established the availability of suitable alternate employment. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT)(5<sup>th</sup> Cir. 2001).

The administrative law judge further found that claimant's loss of employment was due to his failure to follow company policy regarding the requirements for substantiating his medical absences from work. He found that claimant was repeatedly warned of his failure to document these absences as required. RX 10. Although claimant contends that his loss of employment was due to his incapacity to perform the light duty work offered because of his work injury restrictions, he offered no evidence other than his discredited testimony to support the contention that his repeated absences were due to his medical condition. Because the administrative law judge rationally found that claimant's inability to perform the post injury job at employer's facility after January 18, 2000, was due to his own misfeasance in violating a company rule, any loss in his wage-earning capacity due to the termination is not compensable under the Act because it was

not due to the work-related accident. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4<sup>th</sup> Cir. 1993). Thus, because employer established the availability of suitable alternate employment at its facility, and claimant was released for reasons unrelated to his injury, employer does not have a responsibility to identify new suitable alternate employment and claimant is not entitled to total disability benefits. *Id.*

The administrative law judge erred, however, in terminating all compensation. That a claimant is discharged due to his own misfeasance does not negate his entitlement to any benefits to which he otherwise would be entitled had the job continued to be available to him. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Thus, as claimant was entitled to partial disability benefits prior to his dismissal, he remains entitled to partial disability benefits after his dismissal. *Id.* The amount of this award, however, is not clear from the administrative law judge's decision. The administrative law judge stated only that claimant is entitled to partial disability benefits for the period between July 21, 1999 through January 19, 2000, based on claimant's average weekly wage of \$633.38 and "reduced by Claimant's actual earnings during this period of time." Decision and Order at 19. With regard to claimant's post-injury wage-earning capacity, the administrative law judge stated that the hourly rate for the alternate jobs was "approximately forty-five cents" less per hour than claimant's pre-injury position. Decision and Order at 16. On appeal, claimant contends the jobs paid 75 cents less per hour, and that, moreover, he averaged \$299.53 per week during his light-duty employment with employer.

We must remand this case for further findings regarding the extent of claimant's loss in wage-earning capacity. The administrative law judge must provide a means of calculating the benefits due. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5<sup>th</sup> Cir. 1998). Thus, the administrative law judge must discuss the evidence regarding claimant's post-injury earnings and determine claimant's post-injury wage-earning capacity in accordance with Section 8(h) of the Act, 33 U.S.C. §908(h). *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5<sup>th</sup> Cir. 1990). Claimant is entitled to partial disability benefits in the amount of two-thirds of the difference between his average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21).

Claimant next argues that the administrative law judge erred in not holding employer liable for the medical expenses incurred by his treatment with Drs. August, Middleton, Albertson and Quindlen. Following claimant's work accident on October 20, 1998, claimant sought treatment from Dr. August, his preferred care physician, on October 23, 1998, CX 8, initially believing that the back pain he was suffering was a pulled muscle. As the pain became worse and Dr. August diagnosed a herniated disc, claimant informed employer that his condition was related to the work accident; employer then referred claimant to Dr. Crotwell on November 12, 1998. The

administrative law judge held that employer was not liable for the medical expenses arising out of claimant's treatment by Dr. August or by Drs. Middleton, Albertson and Quindlen, to whom Dr. August referred claimant, because claimant failed to seek employer's prior authorization for the treatment from Dr. August. On appeal, claimant contends that the administrative law judge erred in not finding employer liable for these expenses because claimant testified he sought employer's approval for this treatment in November 1998.

Section 7 of the Act, 33 U.S.C. §907, describes an employer's duty to provide medical services necessitated by its employee's work-related injuries. Under Section 7(d), 33 U.S.C. §907(d), employer is not liable for claimant's medical expenses unless authorization for treatment is first requested or treatment has been refused by employer. See *Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in part and rev'd in part on other grounds sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT) (9<sup>th</sup> Cir. 1989); *McQuillen v. Horne Brothers, Inc.*, 16 BRBS 10 (1983). Claimant must seek authorization for treatment from his initial choice of physician. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In this case claimant's initial treatment with Dr. August was on October 23, 1998, and he did not notify employer of any treatment until November 10, 1998. Because the request post-dated the initial treatment, the cost of the initial treatment provided by Dr. August prior to November 10, 1998, is not employer's responsibility. *Galle v. Ingalls Shipbuilding Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17 (CRT)(5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 479 (2001).

However, we cannot affirm the administrative law judge's finding that claimant failed to seek authorization for treatment after mid-November 1998. The administrative law judge found that there is no credible evidence that claimant sought authorization at this time or that employer refused claimant's request for treatment. Although the administrative law judge referenced pages of the hearing transcript, he did not discuss claimant's testimony in this regard or determine its credibility, and therefore we must remand this case for further consideration. *Hite v. Dresser Guiberson Pumping Co.*, 22 BRBS 87 (1989). Claimant testified that he advised employer that he was seeing Dr. August for his work injury. Tr. at 54. At this time, employer sent claimant to see Dr. Crotwell. *Id.* Dr. August subsequently referred claimant to Dr. Middleton, a neurosurgeon. Claimant testified that after he saw Dr. Middleton, he advised employer that he "wanted to see the neurosurgeon." Tr. at 58. Dr. August also referred claimant to an orthopedic surgeon, Dr. Albertson. Tr. at 60. Claimant testified he did not seek prior authorization for Dr. Albertson's treatment. Tr. at 119. Dr. Albertson referred claimant to Dr. Quindlen, a neurosurgeon at the University of South Alabama. Tr. at 66. Claimant testified that Dr. Quindlen advised him to get employer's authorization for treatment. Claimant stated that Vicky Wagner, employer's workers' compensation supervisor, refused to authorize this treatment, Tr. at 68, but that his attorney and employer ultimately agreed that he would see Dr. White, who was in the same practice group as Dr. Middleton. Tr. at 121. Employer did not offer the testimony of any of its employees to

rebut claimant's testimony or to elaborate on the conversations concerning claimant's medical care.

The record contains evidence which, if credited may be sufficient to establish that claimant requested employer's authorization for treatment from his initial choice of physician, Dr. August, in November 1998, and from Dr. Middleton thereafter. *See Hite*, 22 BRBS at 92. Moreover, employer is required to consent to a change in physicians when the claimant's initial physician is not a specialist whose services are appropriate for the care of claimant's injury. 20 C.F.R. §702.406(a); *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992) (Smith, J., dissenting on other grounds). As the administrative law judge did not fully discuss the relevant evidence of record, we vacate his finding that employer is not liable for the medical charges in question and remand the case for further findings.

Accordingly, the administrative law judge's denial of total disability benefits after January 18, 2000, is affirmed. The denial of partial disability benefits after January 18, 2000, is vacated, and the case is remanded to the administrative law judge for calculation of the amount of the partial disability award. The administrative law judge's finding that employer is not liable for the treatment provided by Drs. August, Middleton, Albertson and Quindlen is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects the administrative law judge's decisions 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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BETTY JEAN HALL  
Administrative Appeals Judge