BRB No. 10-0731

ANTONIO LOMELI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LABOR READY, INCORPORATED	)	DATE ISSUED: 08/05/2011
	)	
and	)	
	)	
ACE FIRE UNDERWRITERS INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Laura Y. Rodriguez, Bellaire, Texas, for claimant.

John J. Rabalias, Janice B. Unland and Gabriel E. F. Thompson (Rabalais, Unland & Lorio), Covington, Louisiana, for employer/carrier.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2009-LHC-1376) 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On December 18, 2007, claimant was working for employer on a barge when he fell into a hole and twisted his left knee. He initially continued to work at modified duty. On March 4, 2008, claimant saw Dr. Roberts who diagnosed a left knee contusion and medial meniscus tear. On March 10, 2008, Dr. Roberts performed a left knee arthroscopy and resection of the medial shelf plica. Claimant returned to modified duty with no loss of wages. Claimant testified he continued to have knee pain and that his knee would give out. On June 11, 2008, Dr. Roberts stated that claimant's complaints are without significant physical findings and that his knee function appeared to have returned to normal. CX 10 at 20. Dr. Roberts recommended claimant return to his usual work, and he released claimant with a one percent impairment rating. CX 10. Claimant remained on light-duty work until December 10, 2008. On May 1, 2009, he first saw Dr. Cupic, who later diagnosed bursitis and recommended exploratory arthroscopic surgery. Dr. Cupic explained that the surgery would not help claimant's bursitis; rather, its purpose would be to see if his medial meniscus is torn and to "take care of [it] if it is still there." CX 1 at 7, 11. Both Dr. Vanderweide, employer's expert who saw claimant on November 19, 2008, and Dr. Watters, an independent medical expert who saw claimant on March 31, 2010, stated that there is no indication for arthroscopy and that claimant's knee injury had resolved. EXs 8, 9; DOL IME at 7. Claimant filed a claim for benefits.

The parties stipulated that claimant sustained a work-related injury on December 18, 2007. The administrative law judge found that claimant's condition reached maximum medical improvement on January 27, 2009, that claimant cannot return to his usual work, and that employer established the availability of suitable alternate employment on December 1, 2009. The administrative law judge awarded claimant temporary total disability benefits from December 11, 2008 to January 27, 2009, permanent total disability benefits from January 28 to March 9, 2011 and from April 16 to December 1, 2009, and permanent partial disability benefits thereafter. The administrative law judge found that the preponderance of evidence establishes that the requested knee surgery is unnecessary. Consequently, the administrative law judge denied the request for the surgery proposed by Dr. Cupic.

On appeal, claimant asserts only that the administrative law judge erred in denying the surgery recommended by Dr. Cupic. Employer responds, urging affirmance.

Section 7(a) of the Act, 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." 33 U.S.C. §907(a); *see Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). In order for a medical expense to be assessed against employer, therefore, the expense must be related to, and appropriate for, the work injury. *See Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); 20

C.F.R. §702.402. A claimant may establish his *prima facie* case for compensable medical treatment when a qualified physician indicates that treatment is necessary for a work-related condition. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). However, whether a particular medical expense is necessary for the work injury is a factual issue within the administrative law judge's authority to resolve. *See Weikert v. Universal Maritime Serv. Corp*., 36 BRBS 38 (2002*); Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

Claimant contends that the administrative law judge erred in finding the exploratory knee surgery recommended by Dr. Cupic to be unnecessary. Specifically, claimant asserts that the consistent notations of "swelling" and "tenderness" in claimant's medical records undermine the thoroughness of Dr. Watters's examination and constitute objective evidence that support Dr. Cupic's opinion. CB at 3. We reject claimant's contention of error.

In finding the recommended exploratory knee surgery to be unnecessary, the administrative law judge gave greater weight to Dr. Watters's opinion that no further treatment is necessary because "he was selected independently,"[1] and he based his opinion on an examination, claimant's history, and post-arthroscopic imaging. Decision and Order at 20. On examination, Dr. Watters found no evidence of swelling, full range of motion, no specific findings on palpations and intact stability. Dr. Watters diagnosed a resolved sprain/strain. He stated that claimant "needs no further treatment. There is absolutely no indication, based on examination, history, or post-arthroscopic imaging for additional arthroscopic intervention." DOL IME at 6. Thus, contrary to claimant's assertions, Dr. Watters found no objective evidence of continuing problems despite claimant's complaints. The administrative law judge found that Dr. Watters's opinion is corroborated by Dr. Vanderweide's opinion that no additional treatment is necessary,[2] and Dr. Roberts's opinion that claimant's knee function appeared to have returned to normal. CX 10 at 20; EXs 8, 9. Further, the administrative law judge declined to rely on Dr. Cupic's opinion because it was based on claimant's subjective complaints of pain, and the administrative law judge questioned claimant's credibility. *See Cordero v. Triple*

[1]On March 31, 2010, Dr. Watters performed an independent medical evaluation at the behest of the Department of Labor.

[2]We reject claimant's assertion that Dr. Vanderweide's November 19, 2008 report stating that claimant's "ongoing focal medial joint line symptoms may be consistent with a recurrent tear or incomplete resection" supports Dr. Cupic's recommendation for exploratory surgery. CB at 3 *quoting* EX 7 at 3. On December 8, 2009, after reviewing additional records, Dr. Vanderweide amended his prior report and stated that there was "no indication for arthroscopy." EX 8.

A Machine Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); Decision and Order at 19, 21. Moreover, the administrative law judge accurately observed that Dr. Cupic's opinion was not corroborated by any objective evidence. None of the MRI or bone scan interpretations after the first surgery noted a finding of a torn meniscus or a bony trauma. CX 1; *see Brooks v. Newport New Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

The administrative law judge is authorized to weigh the evidence, including medical opinions, *Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962), and his decision to give greater weight to Dr. Watters's opinion on the basis of his independent status and less weight to Dr. Cupic's opinion is rational and supported by substantial evidence. Therefore, we affirm his finding that the proposed exploratory arthroscopy is unnecessary and the denial of this procedure. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed. Appx. 126 (5th Cir. 2002).

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge