BRB No. 98-0489

WILLIAM CLIFF HATCHER, JR.	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
PROFESSIONAL COATINGS, INCORPORATED	)	
	)	
	)	
and	)	
	)	
CRAWFORD AND COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Eric P. Gordan, Chesapeake, Virginia, for claimant.

R. John Barrett and Kelly O. Stokes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC- 192) of Administrative Law Judge Fletcher E. Campbell, Jr., 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, who has worked for approximately 22 years doing body and paint

work, sustained a back injury while working for employer as a painter on April 16, 1994. After a period of conservative treatment, claimant underwent surgery performed by Dr. Messer on August 1, 1994. Thereafter, claimant was treated by Dr. Williamson, another orthopedic surgeon, after Dr. Messer left the area. In July 1995, Dr. Williamson released claimant to return to work with restrictions.[1] In November 1995, claimant returned to work at Auto Craft Express, an autobody shop where he had worked prior to his injury, and worked there on a light duty basis through July 24, 1996. Claimant's back pain increased, and in February 1996, Dr. Williamson referred him to Dr. Molligan, another orthopedic surgeon. Dr. Molligan provided treatment through January 1997. After a CT scan and an MRI confirmed that he needed additional surgery, Dr. Molligan proposed inserting clasps and screws in claimant's spine at an estimated cost of approximately $41,500. Although this surgery was scheduled, in February 1997, at his family's urging, claimant sought a second opinion from Dr. Penix, another orthopedic surgeon. Dr. Penix performed a less involved, less costly, surgical procedure on February 21, 1997, at Sentara Norfolk General Hospital. The surgery, paid for by claimant's mother, proved to be successful. After a period of work hardening under the direction of Dr. Walko, claimant was released to return to work on May 20, 1997, with restrictions on bending, stooping and climbing, and picking up 20 pounds once per hour. Subsequent to the June 1997 hearing, Dr. Walko increased claimant's weight limitation to 60 pounds, and on August 6, 1997, claimant returned to work at Auto Craft Express, earning wages comparable to, or in excess of, those he had earned pre-injury.

[1]Dr. Williamson found that claimant could sit, walk, lift, bend, squat, climb, kneel, and stand intermittently for various periods ranging from 1- 4 hours but could not twist, lift more than 20-50 pounds, or push or pull. EX-5, p.8. In addition, according to Ms. Beyer, when asked, Dr. Williamson specifically opined that claimant could do any job he pleased provided that it did not require lifting more than 40 pounds, ladder climbing, or exposure to temperature extremes, and that it would be fine for him to perform auto body repair. EX-6, at 49.

Employer voluntarily paid claimant temporary total disability compensation from April 23, 1994 until November 1, 1994, and from April 11, 1995 until November 13, 1995. In addition, employer agreed that claimant was entitled to temporary total disability benefits from February 21, 1997 through May 7, 1997, following Dr. Penix's surgery. Claimant sought additional compensation under the Act, arguing that as of the time he returned to work in August 1997, he was entitled to $63,700, representing 127 weeks of temporary total disability compensation based upon a minimum average weekly wage of $750. In addition, claimant sought partial disability compensation for those periods in 1994, 1995, and 1996 when he worked part-time.[2] Moreover, he claimed entitlement to a lump sum award for a 20 percent permanent physical impairment or other award of permanent disability benefits, after his return to work in August 1997, and, in addition requested past and future medical benefits.

In his Decision and Order, the administrative law judge initially stated that claimant's average weekly wage calculated under Section 10(a), 33 U.S.C. §910(a), was $600, based on claimant's actual earnings while working for Stan Gill's Body Shop, Incorporated (Stan Gill's) in the 23-week period prior to his injury from November 3, 1993 until April 6, 1994. Moreover, the administrative law judge determined that even if Section 10(a) could not reasonably and fairly be applied, he would nonetheless reach the same result in calculating claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c). In addition, claimant was awarded temporary total disability benefits from November 14, 1994 until April 10, 1995, temporary partial disability compensation from November 14, 1995 until July 24, 1996, and from July 25, 1996 until February 21, 1997, and temporary total disability benefits from February 21, 1997 until May 7, 1997. The administrative law judge denied claimant's claim for temporary total disability compensation after May 7, 1997, and his claim for permanent disability compensation. Finally, the administrative law judge determined that claimant failed to establish that employer was liable for any additional medical expenses.

Claimant appeals, arguing that the administrative law judge erred in determining that his average weekly wage was $600 rather than $800, in failing to award him the compensation claimed, and in denying his claim for past and future medical benefits. Employer responds, urging affirmance.

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[2]Claimant sought partial disability benefits for 16 weeks in 1994, 15 weeks in 1995, and 29 weeks in 1996.

A claimant's average weekly wage for compensation purposes is to be calculated pursuant to Section 10 of the Act, 33 U.S.C. §910. Section 10(a) is to be applied when an employee has worked substantially the whole of the year immediately preceding his injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). This average daily wage is then multiplied by 260 if claimant had been a five-day per week worker, or 300 if claimant had been six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. Section 10(b), 33 U.S.C. §910(b), is applicable to injured workers who have not been employed for substantially the whole year preceding the injury and utilizes the earnings of a comparable worker. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Section 10(c) is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b) can be reasonably and fairly applied. *See Newby v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 155 (1988).

In the present case, the administrative law judge stated that claimant suggested an average weekly wage of $750, while employer urged an average weekly wage of $500, but no supporting calculations had been provided for either figure. Accordingly, he determined that in accordance with Section 10(a), he would utilize claimant's actual earnings while working for Stan Gill's in the 52-week period prior to his injury. In so concluding, he noted that he considered the 23-week period that claimant had worked for Stan Gill's to be "substantially the whole of the year," and that prior to that time claimant was unemployed. Inasmuch as claimant's wage records revealed that when he worked 40 hours for Stan Gills he netted $600 per week, the administrative law judge divided this figure by 5 days and determined that claimant's average daily wage was $120. He then multiplied that figure by 260 days for a 5-day worker, which yielded average annual earnings of $31,200, which divided by 52 weeks, as is required under Section 10(d), yielded an average weekly wage of $600. The administrative law judge then determined that even if Section 10(a) could not fairly and reasonably be applied, he would reach the same result under Section 10(c).

We agree with claimant that the administrative law judge's average weekly wage finding cannot be affirmed. Initially, the administrative law judge erred in utilizing Section 10(a) rather than Section 10(c) to determine claimant's average weekly wage; contrary to the administrative law judge's conclusion, the 23 weeks of work claimant performed at Stan Gill's does not equate to working "substantially the whole of the year." *See Lozupone v. Stephano Lozupone and Sons,* 12 BRBS 148 (1979). Moreover, as the record is devoid of information from which an average

daily wage could be determined with regard to claimant's other employers, Section 10(a) cannot be applied on the facts presented in this case. *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990). In this regard, the record contains evidence not considered by the administrative law judge which reflects that in the 52-week period prior to his injury, claimant worked for Jemm Industries during April and May 1993.[3] EX-9 at 31-32.

In addition, in determining that claimant's average weekly wage was $600, the administrative law judge erred in relying on claimant's net instead of his gross earnings at Stan Gill's, and in failing to discuss relevant evidence which suggests that claimant's pre-injury weekly earnings may have been substantially greater. As initially noted in the decision, claimant testified that prior to his injury, he averaged about $1,000 per week when he worked at Autocraft, and $800 per week at Stan Gills. Tr. at 70; Decision and Order at 3. In addition, he testified that he earned $2,000 for the 1.5 weeks he worked for employer prior to his injury. Tr. at 71-72. Finally, claimant testified that when he worked as a mechanic on the frame machine he was paid a commission of $11 per hour based on the insurance company's estimation of how long a particular job should take and that, as he was frequently able to complete the job in a shorter time than that allotted, he would receive payment for an average of 130 hours in a 40-hour work week. Tr. at 171-172. Employer does not dispute this evidence. In light of these facts, we vacate the administrative law judge's finding that claimant's average weekly wage was $600 under either Section 10(a) or Section 10(c), and remand the case for him to reconsider and make a reasonable determination of claimant's annual earning capacity at the time of injury under Section 10(c) based on all of the relevant evidence. *See Richardson,* 14 BRBS at 855; *Hicks v. Pacific Marine & Supply Co., Ltd.,* 14 BRBS 549 (1981).

Next, claimant contends that the administrative law judge erred in awarding

[3]The administrative law judge stated that claimant worked for Stan Gill's from November 1993 to April 6, 1994 and was employed prior to that time. Decision and Order at 6. His decision does not provide a record citation for his statement regarding a period of unemployment, and there is evidence of other employment in the year prior to injury.

him temporary total disability benefits for only 74 of the 127 weeks in which he was unemployed between April 16, 1994, his date of injury, and August 6, 1997, when he resumed work at Auto Craft. In order to establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual employment duties due to a work-related injury. If claimant satisfies this initial burden, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). Employer may meet its burden by showing the availability of a range of job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT); *Bryant v. Carolina Shipping Co., Inc.,* 25 BRBS 294 (1992). If employer establishes the availability of suitable alternate employment, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See Tann*, 841 F.2d at 540, 21 BRBS at 10 (CRT); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In the present case, claimant argues initially that the administrative law judge erred in failing to award him all of the temporary total disability compensation claimed inasmuch as he proved that he was unable to work for the entire 127 week period with the uncontradicted testimony of his treating doctors, himself, and his mother. We disagree. Although claimant argues otherwise, the administrative law judge acted within his discretionary authority in excluding claimant's mother's testimony from the record based on the fact that claimant failed to identify Mrs. Hatcher as a potential witness when employer asked claimant to identify all potential witnesses in its interrogatories. *See Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986). Moreover, the administrative law judge also properly determined that the medical opinions cited by claimant showed that for the periods in question, although claimant could not perform his usual work, he was capable of performing other work. In this regard, claimant argues specifically that the administrative law judge erred in failing to find him totally disabled because claimant asserts that Dr. Molligan stated in his deposition, EX 12 at 11-12, that claimant could not work during the periods he was treating him and further that claimant would be unable to work at his regular job subsequent to the recommended operation, and also cites Dr. Penix's report, CX-15, for the same proposition. We disagree. Consistent with the disability findings made by the administrative law judge, the cited medical testimony reflects that Dr. Molligan testified that claimant

could have performed sedentary work during this period, while Dr. Penix opined that claimant could have worked in an office-type environment pending his surgery. Thus, contrary to claimant's assertions, substantial evidence supports the administrative law judge's determination that claimant was not precluded from working during the entire 127 week period prior to August 6, 1997 in which he did not work.

The administrative law judge's determination that with the exception of the periods from November 1, 1994 until April 10, 1995, and from February 21, 1997 through May 7, 1997, when claimant was entirely precluded from working, he was limited to partial disability compensation is affirmed because it is rational, supported by substantial evidence and in accordance with applicable law. With the exception of these periods in which claimant was awarded total disability compensation, the administrative law judge rationally found that although claimant could not perform his usual work, he was only partially disabled because employer had demonstrated the availability of suitable alternate employment based on the testimony and labor market surveys performed by its vocational consultant, Ms. Beyer, EX-6 at 1-58; Tr. at 120-166. After interviewing claimant on several occasions, and determining his transferable skills and educational level through vocational testing, Ms. Beyers identified a range of available job opportunities which the administrative law judge rationally found to be consistent with claimant's age, education, and physical restrictions during the periods at issue.[4] While claimant argues on appeal that Ms. Beyer's testimony is incredible for various reasons, it is well established that the weighing of the evidence is solely within the purview of the administrative law judge

[4]Although claimant argues on appeal that the administrative law judge erred in failing to set forth the periods in which claimant was able to work or the jobs he was able to perform, we disagree. The administrative law judge specifically found that for the period from November 14, 1995 until July 24, 1996, Ms. Beyer identified suitable alternate job opportunities, consistent with Dr. Williamson's restrictions with several different employers, paying $14 per hour, EX-6, at 38-41. Decision and Order at 7. Moreover, the administrative law judge found that Ms. Beyer identified suitable sedentary work consistent with Dr. Molligan's limitations, EX-12, at 11, for the period from July 25, 1996 until February 21, 1997. Decision and Order at 8. As for the remaining disability benefits claimed after May 7, 1997, the administrative law judge denied compensation, finding that in light of claimant's new work restrictions, employer had demonstrated the availability of suitable alternate employment, and noted that as of August 4, 1997, when claimant returned to work at Auto Craft Express, he was earning in excess of his pre-injury average weekly wage. Decision and Order at 8; EX-6 at 52.

who is free to accept or reject all or any part of any medical evidence as he or she sees fit. *See Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Inasmuch as Ms. Beyer's testimony provides substantial evidence to support the administrative law judge's finding that employer succeeded in establishing the availability of suitable alternate employment, and claimant cites no specific error in Ms. Beyer's findings, we affirm his determination that with the exception of the periods from November 1, 1994 until April 10, 1995, and from February 21, 1997 through May 7, 1997, claimant is not entitled to the claimed temporary total disability compensation.[5] Nonetheless, in light of our decision to remand the case for reconsideration of claimant's average weekly wage, the case must also be remanded for the administrative law judge to reconsider the extent of claimant's disability during these periods. Specifically, if on remand he concludes that claimant has a higher average weekly wage than that determined initially, he must recalculate the extent of claimant's disability for each of the periods in which compensation was claimed by explicitly comparing claimant's newly determined pre-injury average weekly wage with his assessment of claimant's post-injury wage-earning capacity consistent with the requirements of Section 8(c)(21), (e) and (h) of the Act, 33 U.S.C. §908(c)(21),(e),and (h), and the mandate of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A).

In addition, the administrative law judge must reconsider whether claimant has a permanent disability. Claimant asserts that the administrative law judge ignored relevant testimony and the medical records of Drs. Penix and Molligan on this issue. The determination of when permanency is reached is primarily a question of fact based on medical evidence. *Ion v. Duluth, Missabe and Iron Range Railway Co.*, 31 BRBS 75 (1997). An employee is considered permanently disabled when he has any residual disability following maximum medical improvement, *see Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds).

We agree with claimant that the administrative law judge's denial of claimant's claim for permanent disability compensation does not comport with applicable law. The administrative law judge properly concluded that claimant was not entitled to a lump sum award of permanent disability compensation based on Dr. Molligan's impairment rating; as claimant's injury was to his back, he is not entitled to a scheduled recovery under 33 U.S.C. §908(c)(1)-(20). *See Andrews v. Jeffboat,*

[5]Claimant does not contest the administrative law judge's determination that he failed to exercise due diligence in attempting to secure alternate work.

Inc., 23 BRBS 169 (1990). In addition, he also rationally concluded that the record is devoid of evidence that maximum medical improvement has been achieved. A claimant, however, may also be considered permanently disabled if his condition has lasted for a lengthy period of time and appears to be of a lasting and indefinite duration. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). In denying claimant permanent disability benefits, the administrative law judge did not consider this test for permanency. Relevant to this determination, we note that Dr. Molligan testified that claimant would not have been able to return to his regular work regardless of whether he had the second surgery, EX-12 at 1, 23. Moreover, we note that the record also reflects that as of the time claimant underwent his second surgery, he was almost 3 years post-injury. Inasmuch as the administrative law judge erred in failing to consider whether claimant was entitled to permanent disability compensation under the alternate test for permanency articulated in *Watson*, we vacate his denial of the claim for permanent disability compensation. On remand, the administrative law judge must consider whether claimant's condition appears to be of a lasting and indefinite duration so as to qualify as a permanent condition as that term is defined in *Watson* based on Dr. Molligan's testimony and any other relevant evidence of record. *See generally Eckley v. Fibrex & Shipping Co., Inc*., 21 BRBS 120 (1988).

In this regard, we note that for the period after August 4, 1997, when claimant returned to work at Auto Craft Express, although claimant asserted that he worked in some pain, required a helper, and was not able to perform all of his prior duties, the administrative law judge summarily found that claimant no longer had a loss in his wage-earning capacity because he was earning well in excess of his pre-injury average weekly wage. Contrary to the finding of the administrative law judge, however, higher post-injury earnings do not preclude compensation if claimant has suffered a loss of wage-earning capacity. *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 300 , 30 BRBS 1, 5 (CRT) (1995) *(Rambo I)*; *Mangaliman v. Lockheed Shipbuilding Co.,* 30 BRBS 39 (1996). Sections 8(c)(21) and (e) of the Act, 33 U.S.C. §908(c)(21), (e), provide for an award for partial disability benefits based on two-thirds of the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Rambo I*, 515 U.S. at 300, 30 BRBS at 5 (CRT)*; Avondale Shipyards, Inc. v. Guildry,* 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990). The party contending that the employee's actual earnings are not representative of his wage-earning capacity, in this case the claimant, bears the burden of establishing an alternative

reasonable wage-earning capacity. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 117 S.Ct. 1953, 1963, 31 BRBS 54, 62 (CRT) (1997)(*Rambo II*); *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 n.3 (1987). If claimant's actual post-injury earnings do not fairly and reasonably represent claimant's wage-earning capacity, Section 8(h) provides for the administrative law judge to determine a reasonable wage-earning capacity based on "the nature of his injuries, the degree of physical impairment, his usual employment and any other factors or circumstances in the case which may effect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." Thus, to the extent that a claimant's pain and limitations affect his ability to work, these factors should be considered in determining his post-injury wage-earning capacity and may support an award of partial disability based on reduced earning capacity despite the fact that claimant's actual earnings may have increased. S*ee, e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). Inasmuch as the administrative law judge in denying claimant compensation following his return to work in August 1997 never made a specific dollar amount determination of claimant's post-injury wage-earning capacity, he must do so on remand. If he concludes that claimant's actual earnings following his return to work in August 1997 do not fairly and reasonably represent his post-injury wage-earning capacity, he should determine an alternate figure which does, based on consideration of the relevant factors identified in Section 8(h). *See Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT) (D.C. Cir. 1984); *Devillier v. National Steel & Shipbuilding Co.,* 10 BRBS 649 (1979). The administrative law judge must then compare this figure with claimant's pre-injury average weekly wage to determine whether claimant has a present loss in wage-earning capacity. If he concludes that claimant has no present loss of wage-earning capacity, he should then consider whether claimant's physical impairment results in a significant possibility of future economic harm so as to entitle him to a nominal award under *Rambo II.*

Claimant's final argument concerns the administrative law judge's denial of his claim for medical benefits. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." Thus, even where a claimant is not entitled to disability benefits, employer may still be liable for medical benefits for a work-related injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. The Board has held that Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including

the claimant's initial choice. *See Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981)(Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Where a claimant's request for authorization is refused by the employer, however, claimant is released from the obligation of continuing to seek approval for subsequent treatment and thereafter need only establish that the treatment subsequently procured on his own initiative was necessary for his injury in order to be entitled to such treatment at employer's expense. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989).

In addressing the claim for medical benefits in the present case, the administrative law judge found that as claimant had switched from Dr. Molligan to Dr. Penix without obtaining employer's prior authorization for a change in physicians, and there was no evidence indicating that employer had refused further treatment by Dr. Molligan or that a request for a change in physician would have been futile, employer was not liable for the treatment of either Dr. Penix or Dr. Walko. The administrative law judge further found that as claimant admitted that Drs. Messer and Williamson had been paid, Tr. at 105,[6] and the other bills of record appear to have been paid, claimant failed to establish that employer was responsible for any additional medical bills. Decision and Order at 6.

On appeal, claimant argues that the administrative law judge erred in determining that with the exception of Dr. Penix's treatment all of claimant's medical expenses for which employer is liable had been paid. Moreover, he asserts that the administrative law judge erred in failing to address his claim for future medical benefits. Finally, claimant maintains that the administrative law judge erred in denying him medical benefits for Dr. Penix's and Dr. Walko's treatment based on his determination that his treatment was unauthorized inasmuch as the record reflects that employer's workers' compensation carrier exhibited a pattern of stonewalling his treatment requests, and the surgery Dr. Penix ultimately performed cost about one-third of that recommended by Dr. Molligan.

[6]It is not clear from the cited testimony whether claimant was testifying that Dr. Williamson and Dr. Molligan had been paid, or whether Dr. Messer and Dr. Molligan had been paid. Tr. at 105.

We conclude that the administrative law judge's denial of the claim for medical benefits in the present case cannot be affirmed because it does not comport with applicable law. The Administrative Procedure Act requires that the administrative law judge consider, analyze, and discuss all of the relevant evidence in resolving the issues before him. *Cotton v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 380 (1990). In denying claimant's claim for medical benefits in this case, however, the administrative law judge neglected to consider all of the relevant evidence. Initially, we note that in determining that employer was not liable for additional medical benefits because the record reflected that with the exception of Dr. Penix's bills, claimant's medical expenses had been paid previously, the administrative law judge failed to recognize that payment by another does not relieve employer of liability. Claimant testified that he paid for Dr. Schaier's chiropractic treatment, paid $100 to Dr. Williamson, and received numerous other medical bills, most of which have been paid by Medicaid or other public assistance. We further note that in determining that employer was not liable for Dr. Penix's and Dr. Molligan's treatment because claimant failed to request authorization for a change in physicians, the administrative law judge failed to consider claimant's testimony that employer's carrier exhibited a pattern of stone-walling his requests for medical treatment, testimony which was corroborated by notations contained in Dr. Williamson's and Dr. Molligan's medical records. The Board has previously recognized that such evidence of delay could, if properly credited, establish a constructive refusal by employer to provide medical treatment sufficient to relieve claimant of the continuing obligation of the need to request authorization and would render employer liable for reasonable and necessary treatment claimant procured on his own initiative.[7] *Schoen*, 30 BRBS at 114. Accordingly, we vacate the administrative law judge's denial of claimant's claim for medical benefits and remand the case for him to reconsider this issue in light of the evidence and case authority.

[7]Moreover, if claimant's 1997 surgery was necessary and Dr. Molligan was authorized to perform it, reimbursement for the less costly procedure performed by Dr. Penix should be considered.

Accordingly, the administrative law judge's findings regarding claimant's average weekly wage and the extent of his disability are vacated, as is his denial of claimant's claim for permanent disability compensation and medical benefits. The case is remanded for further consideration of these issues consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge