BRB No. 91-1219

JOSEPH SZLAMNIK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Robert R. Reyff, San Francisco, California, for claimant.

Judith A. Leichtnam (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (90-LHC-2686) of Administrative Law Judge Henry B. Lasky 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 if they 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. §21(b)(3).

On March 24, 1987, claimant sustained a work-related injury during the course of his employment with employer as a machinist when he slipped and fell on an unsecured steel plate, striking his coccyx on the edge of the plate. Claimant, who had not returned to gainful employment through the date of the formal hearing, subsequently sought permanent total disability compensation under the Act.

In his Decision and Order, the administrative law judge found that claimant's work-related

physical condition had resolved as of July 6, 1987, when he was released to return to work by Dr. Ho, but that claimant's work-related psychiatric condition, which became permanent and stationary as of March 14, 1988, rendered claimant incapable of returning to his usual employment duties with employer; thereafter, the administrative law judge determined that employer had established the availability of suitable alternate employment as of June 29, 1990. Claimant was thus awarded temporary total disability compensation from March 24, 1987, through March 14, 1988, permanent total disability compensation from March 15, 1988, through June 29, 1990, and permanent partial disability compensation thereafter. 33 U.S.C. §908(a), (b), (c)(21). Additionally, the administrative law judge awarded claimant medical benefits for his continuing psychiatric condition. 33 U.S.C. §907.

On appeal, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment and in denying claimant continuing medical benefits for his ongoing work-related physical problems. Employer responds, urging affirmance.

Claimant initially contends that the administrative law judge erred in failing to find that he is totally disabled as a result of his work-related accident; specifically, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Where, as in the instant case, claimant establishes that he is unable to return to his usual employment duties, the burden shifts to employer to establish the availability of suitable alternate employment. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing. *See generally Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). While an employer need not actually obtain a job for claimant, it must nevertheless establish the existence of actual, not theoretical, job opportunities. *See Preziosi v. Controlled Industries Inc.*, 22 BRBS 468 (1989), (Brown, J., dissenting on other grounds). The credible testimony of a vocational rehabilitation specialist is sufficient to meet employer's burden of establishing the availability of suitable alternate employment. *See Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

In the instant case, the administrative law judge, based upon the labor market survey and testimony of Ms. Winkler, a vocational rehabilitation consultant, concluded that employer established the availability of suitable alternate employment. While, as claimant contends, Dr. Murphey, an independent psychiatric medical examiner agreed to by both parties, entertained doubt as to whether claimant could participate in a vocational training program, Dr. Murphey further testified that he would defer to the opinion of a vocational rehabilitation specialist in determining the availability of suitable alternate employment for claimant. *See* Transcript at 128-129; CX-15 at 8. Ms. Winkler identified a number of specific, available employment opportunities which she found to be appropriate for claimant after considering claimant's physical and psychological capabilities and limitations, as well as claimant's educational and vocational background. *See* EX-5. Additionally, Ms. Winkler noted that each contacted employer was informed of the physical limitations placed on claimant, as well as claimant's psychological condition and his accent. *See* Transcript at 76-77; EX-

5. Based upon the record before us, the administrative law judge's determination that claimant is capable of performing the identified jobs is supported by substantial evidence and is consistent with law. *See Bumble Bee Seafoods*, 629 F.2d at 1327, 12 BRBS at 660; *Southern*, 17 BRBS at 64. Accordingly, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment, and his consequent award of permanent partial disability compensation. *See generally Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

Next, we reject claimant's contention that the administrative law judge erred in failing to hold employer liable for the medical charges associated with claimant's physical condition subsequent to July 6, 1987. In his decision, the administrative law judge found that claimant had physically recovered from his work accident, and was capable of returning to work from a physical standpoint, as of July 6, 1987, the date on which claimant was released to return to work and his condition became permanent and stationary with no residual orthopedic impairment. Therefore, the administrative law judge found that the medical treatment rendered after that time for a physical impairment was unnecessary.

Section 7(a) of the Act, 33 U.S.C. §907(a), generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injury. 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 injury at hand. *See Pardee v. Army & Air Force Exchange Service*, 7 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether treatment is necessary and related is a factual issue within the administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring Co.*, 21 BRBS 33 (1988). The administrative law judge's determination that further medical treatment was unnecessary after claimant's physical condition resolved and claimant was physically capable of returning to work is supported by substantial evidence. Dr. Ho found no orthopedic problem and released claimant to return to work as of July 6, 1987. *See* CX-2. Dr. Stark opined that no further treatment for the injury is indicated and no additional diagnostic tests were warranted. *See* EX-1. We thus affirm the administrative law judge's finding that employer is not liable for any medical charges related to claimant's physical condition subsequent to July 6, 1987. *See generally Wheeler*, 21 BRBS at 33.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge