BRB No. 91-1447

WILLIE R. ANDERSEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PACIFIC FISHERMEN, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
INDUSTRIAL INDEMNITY INSURANCE	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

J. Bradford Doyle, Seattle, Washington, for claimant.

Gregory J. Wall, Port Orchard, Washington, for employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (90-LHC-1110) of Administrative Law Judge Alfred Lindeman 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant, on October 7, 1987, sustained a back injury while in the course of his employment

as a scaler/painter leadman with employer. Employer voluntarily paid claimant temporary total disability compensation from October 14, 1987 to November 22, 1988, and temporary partial disability compensation from May 15, 1989 to May 26, 1989. 33 U.S.C. §908(b), (e). Claimant attempted to return to work for employer in a modified part-time position in May 1989, but terminated this attempt after nine days due to complaints of back pain.

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on November 1, 1988. The administrative law judge further determined that claimant is unable to perform his usual job and that employer's offer of a modified position in May 1989 did not establish the availability of suitable alternate employment. The administrative law judge accordingly awarded claimant permanent total disability compensation commencing November 1, 1988, and continuing. 33 U.S.C. §908(a). Additionally, the administrative law judge found employer liable for the medical charges incurred by claimant as a result of the chiropractic treatment rendered by Dr. Bentz, pursuant to Section 7 of the Act, 33 U.S.C. §907. Finally, the administrative law judge found employer liable for claimant's attorney's fees.

On appeal, employer challenges the administrative law judge's determination that it failed to establish the availability of suitable alternate employment, his decision to award claimant reimbursement for the chiropractic treatment rendered by Dr. Bentz, and his approval of the hourly rate sought by claimant's counsel. Claimant responds, urging affirmance.

Where, as in the instant case, a claimant establishes that he is unable to perform his usual employment, he has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988). Employer may meet its burden of establishing the availability of suitable alternate employment by showing that such employment is available in its facility. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986); *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984). Employer's offer of a job which is too physically demanding for the employee to perform, however, will not satisfy its burden of establishing the availability of suitable alternate employment. *See Bumble Bee*, 629 F.2d at 1330, 12 BRBS at 662; *Darden*, 18 BRBS at 226.

In the instant case, employer initially challenges the administrative law judge's finding that claimant is totally disabled; specifically, employer asserts that the administrative law judge erred in determining that its offer of a modified job to claimant in May 1989 did not satisfy its burden of establishing the availability of suitable alternate employment. We disagree. In addressing this issue, the administrative law judge found that claimant was incapable of performing the duties involved in

either painting or sandblasting, as well as those required to operate a crane or forklift.[1] In rendering this determination, the administrative law judge properly compared the record evidence regarding claimant's physical limitations with the requirements of the modified position. *See generally Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988). Specifically, the administrative law judge relied upon the testimony of Drs. Mallea and Bentz, who testified that claimant should not sit for more than two hours at a time, as well as the testimony of Dr. Holland, who opined that claimant should avoid twisting and heavy lifting. *See* Cl. Exs. 16, 15, 17. The administrative law judge, after noting the testimony of the examining physicians that claimant's complaints were genuine, additionally credited claimant's testimony regarding both his complaints of pain and the physical demands of the job offered by employer in May 1989. *See* Decision and Order at 3-4. It is well-established that the administrative law judge 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). Furthermore, contrary to employer's contention, a claimant's credible complaints of pain alone may form the basis for an administrative law judge's finding of total disability. *See, e.g., Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Thus, the opinions of Drs. Mallea, Bentz and Holland, as well as the testimony of claimant, constitute substantial evidence to support the administrative law judge's finding that claimant is incapable of performing the modified job offered by employer in May 1989, and therefore that employer failed to establish the availability of suitable alternate employment. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We therefore affirm the administrative law judge's finding that employer's offered position fails to establish the availability of suitable alternate employment and the resultant award of permanent total disability compensation, as it is rational and supported by evidence of record. *See Bumble Bee*, 629 F.2d at 1327, 12 BRBS at 660; *Darden*, 18 BRBS at 224.

Employer next argues that the administrative law judge erred in ordering it to reimburse claimant for the medical charges incurred as a result of his treatment with Dr. Bentz. 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. 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.[2] *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, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was necessary for his injury in order to be entitled to such treatment at

[1]Claimant testified that after returning to work in May 1989 in a modified painter/scaler position, he experienced back pain after being assigned to operate a forklift. *See* transcript at 20, 29-30, 98.

[2]In addition, Section 702.406(a) of the Act's regulations, 20 C.F.R. §702.406(a), requires that authorization from the employer be obtained when a change of physicians occurs.

employer's expense. *See Anderson*, 22 BRBS at 20. Section 702.404 of the Act's regulations provides that chiropractors are included in the definition of the term "physician" within the meaning of Section 7, subject to the limitation that their services are reimbursable only for "treatment consisting of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings." 20 C.F.R. §702.404.

In holding employer liable for the medical charges of Dr. Bentz, the administrative law judge specifically found Dr. Bentz's treatment, which consisted of spinal manipulation for a lumbar subluxation, to be both reasonable and the type of chiropractic treatment covered by the Act. In contesting its liability for this treatment, employer on appeal initially notes that Dr. Bentz took no x-rays of claimant. We reject this argument, as neither the Act nor its implementing regulations require that a chiropractor take his own x-rays.[3] Next, employer contends that Dr. Bentz's diagnosis is unsupported by objective clinical findings, and that Dr. Bentz's treatment of claimant was not in compliance with the Act. We disagree. Initially, employer has failed to set forth evidence to establish that the administrative law judge's decision to accept the diagnosis of Dr. Bentz, based upon that physician's examination of claimant and review of claimant's x-rays, is inherently incredible or patently unreasonable; we therefore affirm the administrative law judge's determination that Dr. Bentz's treatment of claimant was reasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, as it is uncontroverted that Dr. Bentz treated claimant to correct a subluxation, the administrative law judge's determination that Dr. Bentz's treatment was within the provisions of the Act is affirmed.[4] *See* 20 C.F.R. §702.404. Accordingly, we affirm the administrative law judge's finding that employer is liable for the medical charges of Dr. Bentz. *See generally Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988).

[3]The administrative law judge, in discussing this issue, noted that Dr. Bentz reviewed x-rays of claimant taken by Dr. Holland. *See* Decision and Order at 5.

[4]We note that employer does not challenge the administrative law judge's finding that its refusal of claimant's request for treatment by Dr. Bentz was unreasonable. *See* Decision and Order at 5-6. In making this finding, the administrative law judge noted that Dr. Mallea, claimant's initial treating physician, stated that chiropractic care might be helpful and Dr. Holland, while acknowledging claimant's poor prognosis, discontinued treatment in 1989. *Id.; see also* Cl. Exs. 3, 15, 16.

Lastly, employer contends that the hourly rate sought by claimant's counsel and awarded by the administrative law judge is excessive. The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). In approving the $150 hourly rate requested by counsel, the administrative law judge specifically took into consideration the result achieved, the quality of the representation, the nature of the case, and the risk of loss factor, as well as employer's objections. As employer's mere assertion that the awarded hourly rate is excessive is insufficient to meet its burden of proving that the rate is excessive, we affirm the rate awarded by the administrative law judge to claimant's counsel.[5] *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *see generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

[5]We reject employer's contention that the Board's decision in *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), mandates a different result in this case. In *Edwards*, the Board affirmed, as reasonable, an administrative law judge's reduction of a requested hourly rate from $150 to $125. The amount of an attorney's fee award is discretionary and the Board's affirmance of this exercise of discretion by an administrative law judge in one case does not mandate reduction of the hourly rate by another administrative law judge in a different case.