BRB No. 93-0636

JAMES D. HURD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BAY SHIPBUILDING CORPORATION	)	
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	DATE ISSUED:
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

James Courtney, III, Duluth, Minnesota, for claimant.

David Topczewski (Schuch and Stilp, Law Offices), Appleton, Wisconsin, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (92-LHC-0696) of Administrative Law Judge Charles W. Campbell 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).

In May 1991, claimant, an outside machinist, informed employer's shipyard nurse, Cheryl Langreder, that he had been experiencing numbness and tingling in his hands. Claimant was instructed to do hand exercises and to return if his problems persisted. In July 1991, claimant returned to the shipyard clinic at which time some discussion was held regarding claimant's need to

see a physician. Nurse Langreder set up an appointment for claimant with Dr. Beck, the physician on call at the local medical clinic.

Claimant went to see Dr. Beck on July 8, 1991. Dr. Beck diagnosed questionable carpal tunnel syndrome, noted that he would schedule claimant for a EMG on July 15, 1991, and released claimant to return to work without restrictions. CX B. The EMG indicated that claimant's symptoms were consistent with "mild or borderline carpal tunnel syndrome bilaterally." CX C. On July 16, 1991, Dr. Beck apparently revised claimant's work release and allowed him to return to light duty work with no lifting of greater than 20 pounds or using his hands for activities that involved "strong grasp or grip, such as hammer or pliers." CX J. On July 18, 1991, claimant was laid off due to employer's economic conditions. Tr. at 39.

Claimant was seen by Dr. Beck again on September 3, 1991, at which time he diagnosed mild carpal tunnel syndrome and noted that claimant was able to return to work with the same restrictions previously imposed in July 1991. CX B. Unsatisfied with Dr. Beck's treatment, claimant requested information from the clinic nurse about the requirements for obtaining a second opinion. EX 4 at 10. Claimant was provided with a copy of employer's procedure letter which required the employee to submit a written request for the second opinion and the insurance company to approve the request prior to the appointment's being scheduled. Claimant testified that thereafter he spoke with carrier's representative who informed him that he did not have to complete the second opinion form because he had not made his first choice of physician.

On September 18, 1991, claimant went to see Dr. Papendick, who diagnosed bilateral carpal tunnel syndrome which required immediate surgery. CX D1. Surgery was performed on claimant's right hand that day and on his left hand on October 25, 1991. CX D1.

On November 18, 1991, claimant was called back to work but no work was available within the restrictions which Dr. Papendick had imposed at that time. On December 13, 1991, claimant's restrictions were updated but there was still no suitable work available.[1] On January 6, 1992, claimant's restrictions were again revised,[2] and claimant returned to work under these restrictions on January 13, 1992. Tr. at 42; CX G. On January 21, 1992, Dr. Papendick again revised claimant's restrictions to allow him to lift 20-30 pounds, but stated that he must continue to refrain from pounding with his left hand. CX D4. Claimant continued to work under these restrictions until April 11, 1992, when he was again laid off due to employer's economic conditions. Claimant sought temporary total disability benefits under the Act from July 19, 1991 through January 12, 1992, and from April 12, 1992 onward, as well as unspecified permanent partial disability compensation. Claimant also sought reimbursement for the medical services provided by Dr. Papendick.

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[1]Dr. Papendick stated that claimant could work doing one-handed jobs with lifting of no more than 25-50 pounds but that he should avoid vibration and hammering and could not perform any work with his left hand. CX D4

[2]Dr. Papendick stated that claimant could lift up to 10 pounds with the left hand but that he should avoid repetitive jobs. CX D4.

The administrative law judge determined that claimant's hand condition was work-related and that, as of the time of the hearing, he was still subject to weight and performance restrictions which would preclude his performing his usual work. The administrative law judge further determined that although employer had provided claimant with a light duty job within its facility, this job was insufficient to establish the availability of suitable alternate employment because the work which claimant performed was at least partly sheltered in nature. Accordingly, he awarded claimant the temporary total disability benefits claimed.[3] The administrative law judge further determined that claimant was entitled to reimbursement for the medical treatment provided by Dr. Papendick and that claimant was entitled to an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e).

Employer appeals, arguing that the administrative law judge erred in holding it liable for the medical treatment provided by Dr. Papendick because Dr. Papendick was not claimant's initial free choice of physician and claimant failed to obtain approval for a change in physicians as is required under Section 7(c)(2) of the Act, 33 U.S.C. §907(c)(2). Moreover, employer challenges the administrative law judge's award of temporary total disability compensation from July 19, 1991 to September 18, 1991, and from April 12, 1992 onward, arguing that the light duty work claimant performed for employer constituted suitable alternate employment and that as claimant was dismissed from this job for economic reasons unrelated to his work injury, he is not entitled to disability compensation.

We reject employer's argument that the administrative law judge erred in holding it liable for the medical treatment provided by Dr. Papendick. Section 702.406(a) of the regulations provides that where "the employee has made his initial, free choice of an attending physician, he may not thereafter change physicians without the prior written consent of the employer (or carrier) or the district director." 20 C.F.R. §702.406(a); *see also* 33 U.S.C. §907(c)(2); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988). Under Section 7(d) of the Act, 33 U.S.C. §907(d), an employee is entitled to recover medical benefits if he requests employer's authorization for treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. *See Anderson v. Todd Shipyards Corp*, 22 BRBS 20, 23 (1989); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Employer argues on appeal that the administrative law judge erred in holding it liable for Dr. Papendick's medical treatment because claimant chose Dr. Beck as his initial free choice of physician and did not request a change in physician to Dr. Papendick as is required by 20 C.F.R. §702.406(a) and Section 7(c)(2) of the Act. The administrative law judge, however, rationally determined based on the testimony of Nurse Langreder that while claimant requested that he be

[3]The administrative law judge found that although claimant requested permanent partial disability benefits at the hearing, because Dr. Papendick's opinion established that claimant's condition had not yet reached maximum medical improvement, any disability claimant had is temporary. Decision and Order at 13, 16.

provided with medical treatment when he came to the shipyard clinic in July 1991, he did not choose Dr. Beck as his initial free choice of physician. Tr. at 34, 49-50. Nurse Langreder testified that at that time she concurred with claimant that he needed to see a physician and did not ask him if he had a preference for a specific physician or inform him of his right to make his own choice. Tr. at 88. Moreover, she testified that claimant did not specifically state that he wished to be treated by Dr. Beck, and that accordingly, consistent with her usual practice, she called a nearby medical clinic to schedule an appointment for him with the doctor on call, who happened to be Dr. Beck. Tr. at 98. Inasmuch as Nurse Langreder's testimony provides substantial evidence to support the administrative law judge's finding that Dr. Beck was not claimant's initial free choice of physician, we affirm the administrative law judge's determination that claimant was not required to obtain authorization for a change in physician.[4] *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515, 517 (1978), *overruled on other grounds Shahady v. Atlas Tile & Marble,* 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983); *see generally Hunt v. Newport News Shipbuilding and Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.,* 61 F.3d 900 (4th Cir. 1995). Inasmuch as employer does not otherwise contest the compensability of the services provided by Dr. Papendick, the administrative law judge's determination that employer is liable for Dr. Papendick's treatment is affirmed. *See generally Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 307-8 (1989); *see also Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part and rev'd in part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989). [5]

We also reject employer's argument that the administrative law judge erred in awarding claimant temporary total disability from July 19, 1991 to January 12, 1992, and from April 12, 1992 onward. In the present case, as it is uncontested that claimant is unable to perform his usual work, the burden shifted to employer to establish the availability of suitable alternate employment. *See Caudill v. Sea Tac Alaska Shipbuilding, Inc.*, 25 BRBS 92, 96-7 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer attempted to meet its burden in this case by providing claimant with a light duty job within his restrictions at its facility. The administrative law judge, however, found that the light duty work claimant performed for employer did not constitute suitable alternate employment because employer had not introduced evidence relating to its necessity and profitability, and claimant's testimony, the only relevant evidence, indicated that the work was at least partly of a sheltered nature.

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[4]Contrary to employer's assertions, the fact that the United States Court of Appeals for the District of Columbia Circuit upheld an administrative law judge's determination that the doctor to which claimant was referred by employer was not employer's physician in *Slattery Associates, Inc. v. Lloyd,*, 725 F.2d 780, 16 BRBS 44 (CRT) (D.C. Cir. 1984), *rev'g* 15 BRBS 100 (1980), does not mandate that the administrative law judge's contrary finding in the present case be overturned. The determination of whether a doctor is claimant's initial free choice of physician is a factual determination within the discretion of the administrative law judge.

[5]Although employer contends that the administrative law judge erred in finding that employer neglected claimant's request for medical treatment because it provided claimant with Dr. Beck's services, the administrative law judge rationally found that employer neglected to provide claimant with medical services by a physician of his own free choice.

Employer argues on appeal that the administrative law judge erred in finding that claimant's light duty work for employer did not constitute suitable alternate employment and in awarding him temporary total disability compensation in the periods subsequent to the layoff. Employer maintains that because claimant's incapacity to work during these periods was due to employer's economic circumstances rather than the work injury, he is not entitled to disability compensation. We need not determine, however, whether the light duty work claimant performed for employer constituted suitable alternate employment to resolve this issue. Even if this job had been suitable, where an employer provides claimant with a light duty job and claimant is subsequently laid off due to economic conditions, employer has made the alternate employment unavailable and claimant is totally disabled unless the employer provides additional evidence of suitable alternate employment, which it failed to do in the instant case. *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988); *Swain v. Bath Iron Works Corp.*, 17 BRBS 145, 147 (1985). Accordingly, the administrative law judge's award of temporary total disability compensation for the periods subsequent to the layoffs is affirmed.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge