BRB Nos. 97-1227
and 97-1227A

AARON WHARTON	)	
	)	
Claimant-Respondent Cross-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
COOPER/T. SMITH STEVEDORING COMPANY, INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Granting Benefits and Order Denying Employer's Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Marcus J. Poulliard (Seelig, Cosse, Frischhertz & Poulliard), New Orleans, Louisiana, for claimant.

John L. Duvieilh (Jones, Walker, Waechter, Poitevent, Carrere & Denegre), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Granting Benefits and Order Denying Employer's Motion for Reconsideration (95-LHC-2266) of Administrative Appeals Judge James W. Kerr, 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 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. §921(b)(3).

Claimant sustained facial and neck injuries, as well as a skull fracture, on May 3, 1992, when he was struck in the face by a twist lock while working for employer as lasher. Claimant was taken to the emergency room at Methodist Hospital where he was treated by Drs. Buras, Cucinotta, Epps and Veca who are, respectively, an oral surgeon, ear, nose, and throat specialist, neurosurgeon, and orthopedic surgeon. Dr. Veca released claimant to return to work from his neck injury on July 6, 1993. Claimant, who continued to allege that his neck pain persisted, sought the services of an attorney, who referred claimant to Dr. Hoerner. Dr. Hoerner first examined claimant on April 14, 1994, at which time he released claimant to light duty employment. Claimant did not return to his usual employment.

In his Decision and Order, the administrative law judge initially found that claimant reached maximum medical improvement on April 14, 1994, when Dr. Hoerner released claimant for light duty work. The administrative law judge next credited the work restrictions of Dr. Hoerner, as supported by Dr. Murphy, in concluding that claimant is physically unable to return to his usual employment duties as a lasher. The administrative law judge then found that employer established the availability of suitable alternate employment based on the stipulation of the parties that claimant has a residual post-injury wage-earning capacity of $300 per week. Finally, the administrative law judge found that Dr. Veca is claimant's treating physician and that employer is therefore not required to reimburse claimant for Dr. Hoerner's treatment. Employer thereafter requested reconsideration based on numerous video surveillance tapes which it contended establish that claimant can return to his usual employment duties with employer. The administrative law judge, after finding that none of the activities claimant performed on the video tapes approximate claimant's usual employment, where he frequently lifted rods weighing 25 to 50 pounds, denied employer's motion.

On appeal, employer challenges the administrative law judge's findings regarding claimant's inability to return to his usual employment duties and the date claimant reached maximum medical improvement. Employer also asserts that claimant's attorney is not entitled to a fee. BRB No. 97-1227. Claimant responds, urging affirmance. Claimant, in his cross-appeal, asserts that the administrative law judge erred in denying him reimbursement for Dr. Hoerner's treatment. BRB No. 97-1227A.

Employer initially contends that the administrative law judge erred in finding that claimant reached maximum medical improvement on April 14, 1994, rather than on July 12 1993. We disagree. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Thus, a finding of

fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984). In his decision, the administrative law judge relied upon the report of Dr. Hoerner in determining the date upon which claimant's condition reached maximum medical improvement. After his initial evaluation of claimant on April 14, 1994, Dr. Hoerner reported that claimant could return to light duty work. CX 3 at 53. In addressing this issue, the administrative law judge specifically discredited Dr. Veca's full release of claimant for regular duty as of July 13, 1993, as Dr. Veca later opined, after comparing claimant's 1992 and 1994 MRI test results, that claimant could not return to his usual employment as a longshoreman. EX 3 at 14-16. Thus, as the administrative law judge specifically considered Dr. Hoerner's report and the totality of Dr. Veca's testimony, and thereafter concluded that claimant reached maximum medical improvement on April 14, 1994, the administrative law judge's finding in this regard is affirmed. *See generally Leone v. Sealand Terminal Corp.,* 19 BRBS 100 (1986).

Employer next challenges the administrative law judge's determination that claimant is incapable of returning to his usual employment duties with employer. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See Blake v. Bethlehem Steel Corp.,* 21 BRBS 49 (1988).

In finding that claimant established a *prima facie* case of total disability, the administrative law judge determined that claimant's usual job duties were very strenuous, involving frequent lifting of rods weighing 25 to 50 pounds. Next, the administrative law judge credited Dr. Hoerner's work restrictions of no heavy lifting over 20 to 25 pounds, no overhead work, no continuous work above shoulder level, and no work that places claimant's neck in an abnormal position for a long period of time. CX 3 at 22-24. He also credited the opinion of Dr. Murphy, an independent medical examiner, who examined claimant at the request of the Department of Labor and opined that claimant's neck injury precludes him from engaging in significant manual labor. CX 5. Lastly, on reconsideration, the administrative law judge specifically discredited employer's videotape surveillance of claimant on the basis that none of the depicted activities are as strenuous as claimant's usual longshore employment.

It is well-established that the administrative law judge as the trier-of-fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences

from the evidence. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge rationally credited the opinions of Drs. Hoerner and Murphy. As their opinions provide substantial evidence to support the administrative law judge's determination that claimant was incapable of resuming his usual employment duties with employer, *see generally Mijangos v. Avondale Shipyards, Inc.,* 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991), we affirm the administrative law judge's finding that claimant established a *prima facie* case of total disability. *See Manigault v. Stevens Shipping Co.,* 22 BRBS 332 (1989). Moreover, as the administrative law judge thereafter accepted the parties stipulation regarding claimant's post-injury wage-earning capacity, claimant's award of permanent partial disability benefits is affirmed. Since we affirm the administrative law judge's award of benefits, claimant's attorney successfully prosecuted the claim, and employer's contention that the administrative law judge erred by awarding claimant's counsel a fee is rejected. *See generally Quave v. Progress Marine,* 912 F.2d 792, 24 BRBS 43 (CRT), *aff'd on reh'g,* 918 F.2d 33, 24 BRBS 55 (CRT) (5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991).

In his cross-appeal, claimant contends that the administrative law judge erred in finding Dr. Veca to be his treating physician and that Dr. Hoerner should be considered his initial free choice despite the passage of time between his May 1992 injury and the initial treatment by Dr. Hoerner in April 1994. Further, claimant argues that Dr. Veca's release to return to full duty work constitutes a refusal by employer to provide medical treatment and that, as Dr. Hoerner's treatment was reasonable and necessary, it is compensable. In addressing this issue, the administrative law judge determined that, although Dr. Veca first saw claimant in an emergency room setting, claimant should have known that treating with Dr. Veca for over a year following his work injury would affect his choice of physician and, given that claimant had prior injuries falling under the Act, claimant should have known the proper procedure for choosing a physician. *See* Decision and Order at 13. Thus, the administrative law judge concluded that claimant's continued treatment with Dr. Veca confirmed him as his chosen physician.

We reject claimant's contention that he was not given the opportunity to select his own physician. Section 7(b) of the Act, 33 U.S.C. §907(b), permits an injured employee to choose an attending physician to provide medical care; however, if, due to the nature of the injury, the employee is not able to make a selection and is in need of immediate treatment, the employer may select a physician. The Board has previously stated that Section 7(b) and its implementing regulation, Section 702.405, 20 C.F.R. §702.405, contemplate severe injuries, such as unconsciousness or other incapacity, preventing the claimant from selecting a physician. *See Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515, 517 (1978), *overruled on*

other grounds, *Shahady v. Atlas Tile & Marble Co.*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Claimant, in this case, received treatment from Dr. Veca in the emergency room and thereafter elected to continue treating with that physician until July 6, 1993. Because claimant continued to receive treatment from Dr. Veca for over a year following his work injury, we hold that the administrative law judge rationally concluded that Dr. Veca was claimant's physician of choice. *See Senegal v. Strachan Shipping Co.*, 21 BRBS 8, 11 (1988).

Next, pursuant to Section 7(d) of the Act, 33 U.S.C. §907(d) , an employee is entitled to recover medical benefits if he requests his 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 Maguire v. Todd Shipyards Corp.,* 25 BRBS 291 (1992). *Anderson,* 22 BRBS at 20. In this case, there is no evidence that claimant sought employer's authorization for treatment by Dr. Hoerner following his decision to cease treating with Dr. Veca; rather, claimant was referred to Dr. Hoerner by his attorney. The administrative law judge thus found that claimant was not entitled to reimbursement for the cost of medical treatment provided by Dr. Hoerner, as he did not request authorization from employer. Moreover, as we have previously affirmed the finding that Dr. Veca was claimant's choice of physician, his release of claimant cannot be viewed as a refusal of treatment by employer's physician. *See Slattery Assoc., Inc. v. Lloyd,* 725 F.2d 780, 16 BRBS 44 (CRT)(D.C. Cir. 1984). We, therefore, affirm the administrative law judge's finding that employer is not liable for the medical treatment provided by Dr. Hoerner, as that determination is in accordance with law.

Accordingly, the administrative law judge's Decision and Order Granting Benefits and Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge