BRB No. 98-0324

RUBY L. BROWN	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Ruby L. Brown, Moss Point, Mississippi, *pro se.*

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (96-LHC-0944) of Administrative Law 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine 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); 20 C.F.R. §§802.211(e), 802.220.

Claimant reinjured her left knee on February 13, 1995, while working for employer as a sheet metal mechanic. Claimant returned to work for employer in a light duty position, but was subsequently laid off in a reduction in force by employer on June 19, 1995. Claimant was unable to secure employment until November 11, 1995, and has held a number of jobs since that time.

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on April 7, 1995. He further concluded that employer established the availability of suitable alternate employment within its facility and that, because claimant's lay off was based not solely on her injury, employer was not liable for any additional benefits. Finally, the administrative law judge found that claimant was not entitled to reimbursement for the second opinion of Dr. Longnecker nor any future medical treatment.

On appeal, claimant, representing herself, challenges the administrative law judge's denial of her claim for disability and medical benefits. Employer has not responded to this appeal.

Where, as in the instant case, claimant establishes that she is unable to perform her usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of specific jobs within the geographic area in which claimant resides which she is, by virtue of her age, education, work experience, and physical restrictions, capable of performing and for which she can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986). Employer may meet this burden by offering claimant a job in its facility. *See Darby v. Ingalls Shipbuilding & Dry Dock Co.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Peele v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). In order for such a job to constitute suitable alternate employment, however, the job must be actually available to claimant. *See Wilson v. Dravo Corp.,* 22 BRBS 463 (1989); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

Upon a through review of the administrative law judge's decision and the record before us, we hold that the administrative law judge's determination that employer affirmatively established the availability of suitable alternate employment subsequent to the date of claimant's economic lay off cannot be affirmed. This specific issue was addressed by the Board in *Mendez*, 21 BRBS at 22, wherein the Board held that where an employer provides claimant with a light duty job at its facility but then lays claimant off for economic reasons, it cannot rely on that job to meet its burden of establishing suitable alternate employment because it has made the alternate work unavailable. *See also Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994).

In the instant case, the administrative law judge determined that the light-duty suitable alternate employment position at employer's facility became unavailable to

claimant due to an economic lay off. *See* Decision and Order at 10. Thus, as it is uncontroverted that employer made alternate work at its facility unavailable to claimant as of the date of her lay off, we reverse the administrative law judge's finding that claimant's prior light duty position with employer established the availability of suitable alternate employment subsequent to June 19, 1995, the date of her economic lay off. As claimant established a *prima facie* case of total disability as of that date, the burden of proof shifted to employer to establish the availability of suitable alternate employment during the period of claimant's economic lay off. *See generally Vasquez v. Continental Maritime of San Francisco*, 23 BRBS 428 (1990). As the record contains evidence not addressed by the administrative law judge which, if credited, may support a finding that employer established the availability of suitable alternate employment subsequent to June 19, 1995, this case is remanded to the administrative law judge for consideration of the issue of the extent of claimant's disability subsequent to June 19, 1995.

We next address the administrative law judge's decision to deny claimant both future medical benefits and reimbursement for the medical charges of Dr. Longnecker. Section 7 of the Act, 33 U.S.C. §907, generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injury, employer's rights regarding control of those services, and the Secretary's duty to oversee them. *See Anderson v Todd Shipyards Corp.*, 22 BRBS 20 (1989). In this regard, Section 7(a) of the Act states that

> [t]he employer shall furnish such medical, surgical, and other attendance or treatment ... medicine, crutches, and apparatus,for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a); *see Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be assessed against employer, however, the expense must be both reasonable and necessary, and it must be related to the injury at hand. *See Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Section 7 does not require that an injury be economically disabling in order for a claimant to be entitled to medical expenses, but only that the injury be work-related. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1992).

In the instant case, claimant was initially treated by Dr. Wiggins, an orthopedic surgeon, who ultimately declined to remove the permanent restrictions that he placed on claimant's activities. Upon claimant's inquiry regarding a second opinion concerning those restrictions, Dr. Wiggins suggested that claimant be referred to another orthopedic surgeon for such an opinion. Employer, however, denied claimant's request for a second opinion. Claimant thereafter sought the opinion of Dr. Longnecker. In his decision, the administrative law judge found that this second medical opinion was not appropriate in this case as claimant sought that opinion only after she was put on leave and Dr. Wiggins refused to lift her permanent restrictions; accordingly, the administrative law judge determined that employer is not liable for the medical evaluation of Dr. Longnecker.

Section 7(d) of the Act, 33 U.S.C. §907(d), requires that a claimant request employer's authorization for the medical services performed by any physician, including claimant's initial choice. *See Anderson,* 22 BRBS at 20. However, where a claimant's request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for her subsequent treatment and thereafter need only establish that the treatment she subsequently procured on her own initiative was necessary for the injury in order to be entitled to such treatment at employer's expense. *See Roger's Terminal & Shipping Corp.,* 784 F.2d at 687, 18 BRBS at 79 (CRT). In the instant case, as it is uncontroverted that claimant sought, and was refused, authorization from employer for a second evaluation, the question becomes whether the second opinion obtained by claimant in the case at bar was reasonable and necessary. A review of the record establishes that Dr. Wiggins, claimant's treating physician, did in fact suggest that claimant be referred to another orthopedic surgeon *see* CX-2; moreover, employer submitted no evidence contradicting Dr. Wiggins' referral. Based upon the foregoing, we hold that the administrative law judge erred failing to hold employer liable for the medical evaluation of Dr. Longnecker. Accordingly, the administrative law judge's finding on this issue is reversed, and his decision is modified to reflect employer's liability for the medical evaluation of Dr. Longnecker.

Lastly, the administrative law judge denied claimant future medical treatment for her work-related condition based on the fact that claimant reached maximum medical improvement and that Dr. Wiggins both released claimant from further treatment and opined that surgery would not likely be curative or return claimant to her regular employment. *See* Decision and Order at 12. Although maximum medical improvement may have been reached by claimant in the case at bar, employer has a continuing obligation to furnish medical care with respect to a disability which flows from a work-related accident. *See generally Strachan Shipping Co. v. Hollis,* 460 F.2d 1108, 1116 (5th Cir.), *cert. denied sub nom. Lewis v.*

Strachan Shipping Co., 409 U.S. 867 (1972); *Ryan v. Alaska Constructors, Inc.,* 24 BRBS 65 (1990). Such medical care must be reasonable, necessary, and related to the injury at hand. *See Pardee*, 13 BRBS at 1130. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Wheeler,* 21 BRBS at 33. Based upon the foregoing, we hold that the administrative law judge's denial of all future medical treatment cannot stand. Specifically, the administrative law judge in the instant case found future medical treatment to be unnecessary since such treatment would neither cure claimant's condition nor return her to her former employment duties.[1] Such a strict standard, however, is supported by neither the Act nor the regulations. We therefore vacate the administrative law judge's decision regarding employer's liability for future medical treatment of claimant's condition. On remand, the administrative law judge must fully consider all of the evidence on this issue in determining whether future medical treatment may be reasonable, necessary, and related to claimant's disability.

Accordingly, the administrative law judge's decision denying claimant reimbursement for the medical evaluation of Dr. Longnecker is reversed. The administrative law judge's denial of compensation subsequent to the period claimant was laid off at employer's facility and his denial of all future medical benefits to claimant are vacated, and the case is remanded for consideration of the extent of claimant's disability and whether future medical treatment is reasonable and necessary.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[1]In this regard, Dr. Wiggins found that surgery to claimant's left knee was a reasonable option. The parties are, however, in dispute as to whether claimant declined to undergo a surgical procedure.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge