BRB No. 96-1512

MERCY JULES, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DANOS & CUROLE MARINE CONTRACTORS	)	DATE ISSUED:
	)	
and	)	
	)	
THE GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joseph R. Joy III, Lafayette, Louisiana, for claimant.

Richard S. Vale (Blue Williams, L.L.P.), Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (94-LHC-2310) of Administrative Law Judge Lee J. Romero, Jr., awarding benefits 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, a welder by trade, was working as a roustabout for employer on August 17, 1990, when he sustained a back injury after he fell backward down stairs and landed on his back. Claimant has not returned to work since the time of his injury, and employer does not dispute that claimant's injury precludes his return to his regular employment duties. Employer voluntarily paid claimant temporary total disability compensation from August 18, 1990 to March 18, 1992. 33 U.S.C. §908(b). Claimant's treating orthopedic surgeon, Dr.

Blanda, diagnosed claimant as having a herniated disc at L4-5 on the right and recommended that claimant undergo surgery; however, claimant's request for authorization for this surgery was denied by employer.

In his Decision and Order, the administrative law judge determined that claimant sustained a herniated disc at L4-5 which is causally related to his August 17, 1990 work injury and that claimant has not yet reached maximum medical improvement. Next, the administrative law judge, relying on Dr. Blanda's opinion that claimant is limited to light duty work, found that claimant is incapable of resuming his usual employment. Having determined that employer failed to establish the availability of suitable alternate employment, the administrative law judge awarded claimant temporary total disability compensation from August 17, 1990, and continuing. Finally, the administrative law judge determined that the surgical intervention recommended by Dr. Blanda is reasonable and necessary, and ordered employer to pay for such treatment pursuant to Section 7 of the Act, 33 U.S.C. §907.

On appeal, employer contends that claimant has no loss of wage-earning capacity and, thus, is not disabled within the meaning of the Act, that claimant reached maximum medical improvement prior to March 1992, and that claimant is not entitled to medical benefits. Claimant responds, urging affirmance.

Employer initially challenges the administrative law judge's award of temporary total disability benefits to claimant, contending that inasmuch as even a minimum wage light duty job would pay more than claimant's average weekly wage at the time of injury, claimant has no loss of wage-earning capacity. 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 and Construction Co.,* 17 BRBS 56 (1985). Where, as in the instant case, it is uncontroverted that claimant is unable to perform his usual employment duties, 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 availability of realistic job opportunities which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). *See also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991). If an employer satisfies this burden, the wages that would have been paid at the time of a claimant's injury by the jobs identified as constituting suitable alternate employment are compared to claimant's pre-injury wages to determine whether claimant has sustained a loss of wage-earning capacity as a result of his injury.

See 33 U.S.C. §908(c)(21), (e), (h). The issue of post-injury wage-earning capacity, therefore, is not reached until the availability of suitable alternate employment is established.

In the instant case, the administrative law judge, after determining that employer's vocational evidence did not specify the physical requirements of the positions identified as being suitable for claimant, concluded that employer failed to establish the availability of suitable alternate employment. *See* Decision and Order at 16. As employer does not challenge the administrative law judge's finding on this issue, its contentions regarding the calculation of claimant's post-injury wage-earning capacity are moot. Accordingly, we affirm the administrative law judge's finding that claimant is totally disabled.

Next, employer contends that the administrative law judge erred in failing to find that claimant reached maximum medical improvement prior to March 1992. We disagree. It is well-established that a claimant is entitled to temporary disability benefits until he reaches maximum medical improvement, the date of which is determined by medical evidence. A claimant has reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994). In concluding that claimant has not yet reached maximum medical improvement, the administrative law judge relied on the opinion of Dr. Blanda, claimant's treating physician and a Board-certified orthopedic surgeon, that claimant requires surgery for a herniated disc at L4-5 on the right.[1] We hold that the administrative law judge could properly find that Dr. Blanda's surgical recommendation constitutes substantial evidence that claimant has not yet reached maximum medical improvement, and, therefore, affirm the administrative law judge's finding on this issue. *See generally Leone v. Sealand Terminals Corp.*, 19 BRBS 100 (1986).

Lastly, employer challenges the administrative law judge's award of medical benefits to claimant, including the costs of the surgical intervention recommended by Dr. Blanda. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be assessed against employer,

[1]The administrative law judge noted that Dr. Laborde, a radiologist who administered claimant's December 2, 1993 MRI, interpreted the MRI as showing a herniated disc at L4-5. The administrative law judge additionally acknowledged Dr. Shepherd's testimony that, assuming the validity of the December 2, 1993 MRI findings, he did not disagree with the surgical intervention recommended by Dr. Blanda.

however, 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*, 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, 35-36 (1988).

In the instant case, the administrative law judge determined that the surgery recommended by Dr. Blanda is both reasonable and necessary, and, thus, is covered under Section 7(a) of the Act. It is well-established that the administrative law judge is entitled to evaluate the credibility of the medical evidence and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961). It was, therefore, within the administrative law judge's discretionary authority as factfinder to credit the testimony of Dr. Blanda, as supported by the testimony of Dr. Shepherd, that claimant's herniated disc requires surgical intervention. *See McGrath*, 289 F.2d at 403; *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We therefore affirm the administrative law judge's determination that employer is liable for the medical treatment recommended by Dr. Blanda, as that finding is rational and in accordance with law. *See generally Wheeler*, 21 BRBS at 35.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge