BRB No. 00-0537

JAMES ARNOLD, JR.	)	
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Claimant-Petitioner	)	
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	)	
NABORS OFFSHORE DRILLING, INCORPORATED	)	DATE ISSUED:
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Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.
Tony B. Jobe, Madisonville, Louisiana, for claimant.

Thomas J. Smith and J. Geoffrey Ormsby (Galloway, Johnson, Tompkins, Burr & Smith), New Orleans, Louisiana, for self-insured employer.

Before: SMITH and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (99-LHC-819) of Administrative Law Judge Clement J. Kennington 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, who worked for employer as a roustabout on an offshore oil rig, injured his back on September 8, 1997, while attempting to lift a stabilizer off of the rig floor. He continued to work until September 11, 1997, when his seven-day shift ended, and returned to offshore duty on September 19, 1997, but ceased working due to pain on either September 20 or 21, 1997. Dr. Duval diagnosed claimant as suffering from a lumbar strain, and placed him on light duty with a 35 pound lifting restriction. Claimant went on light duty in employer's

Transitional Education Program (TEP) from October 6, 1997, through October 27, 1997. On October 27, 1997, employer offered claimant a job as a motorman, which was allegedly within claimant's physical limitations. When claimant failed to report for duty on October 31, 1997, employer terminated him. Claimant has not worked since that time due to his back pain, and filed a claim under the Act for permanent total disability compensation.

Subsequent to the hearing in this matter, claimant filed with the administrative law judge a Motion to Seal the Record and Expunge the Record of Illegally Disclosed Evidence and Testimony, contending that claimant's medical records pertaining to his drug and alcohol treatment were obtained in violation of Section 290dd-2 of the Public Health Service Act, 42 U.S.C. §290dd-2; 42 C.F.R. Part 2. Claimant requested that the administrative law judge seal the record, expunge from the record all references to information concerning claimant's drug and alcohol treatment at Pauline Faulk Center for Behavioral Health and other unspecified mental health facilities, and determine whether a violation of this law had occurred, and if so, refer the matter to the United States Attorney's office for review. Specifically, claimant alleged that although he signed general consent forms allowing the release of his mental health records during the course of discovery, these waivers did not meet the requirements under 42 C.F.R. §2.31, and were therefore deficient. Claimant also filed a Motion in Limine to exclude from the record all evidence relating to his pre-existing bipolar disorder. In his Decision and Order, the administrative law judge, without deciding the merits of claimant's motions, determined that all information related to claimant's mental health was not relevant to the claim, and that his decision would be based solely on claimant's alleged physical condition. The administrative law judge noted that claimant may refer employer's alleged misconduct to the United States Attorney's office for further action.

With regard to the merits of claimant's claim under the Act, the administrative law judge found that claimant suffered a back strain as a result of the September 8, 1997, accident, and was therefore entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a); he further found that employer failed to establish rebuttal of the presumption. The administrative law judge next determined that claimant reached maximum medical improvement on October 22, 1997, and that any further back problems claimant has are a result of a fight claimant was involved in on February 22, 1998, and not the September 8, 1997, work injury. As claimant was placed on physical restrictions by Drs. Duval and Cenac, the administrative law judge determined that claimant established a *prima facie* case of temporary total disability, but that employer established suitable alternate employment by virtue of its light duty program, its offer of a motorman position, and the labor market survey of its vocational counselor Dr. Stokes. Accordingly, the administrative law judge determined that employer is not liable for continuing temporary total disability compensation under the Act. 33 U.S.C. §908(b). Lastly, the administrative law judge found that employer was not required to consent to the treatment by Dr. Raffai, and that employer is not liable for any treatment by Dr. Raffai, as claimant's current back condition is unrelated to his work-related injury.

On appeal, claimant contends that the administrative law judge committed reversible error by refusing to rule on his Motion to Seal the Record and Expunge, by condoning the violation of 42 U.S.C. §290dd-2 and allowing claimant's drug and alcohol treatment records into the record, and by refusing to rule on claimant's Motion in Limine to exclude records relating to claimant's pre-existing bipolar disorder, which claimant alleges was obtained in violation of the Americans With Disabilities Act (ADA). For these reasons, claimant requests that the case be remanded for reconsideration and assigned to a different administrative law judge. With regard to the merits, claimant contends that the administrative law judge erred in finding that employer is not liable for continuing disability compensation; specifically, claimant asserts that the administrative law judge erred in finding that his current back condition is the result of an intervening cause. Claimant further avers that the administrative law judge erred in finding that employer is not liable for the treatment provided by Dr. Raffai. Employer responds, urging affirmance of the administrative law judge's decision. Claimant submitted a reply brief, wherein he reiterates his contentions that the administrative law judge committed error by allowing evidence into the record in violation of 42 U.S.C. §290dd-2, and that the administrative law judge's denial of benefits is not supported by substantial evidence.

As a threshold matter, we first address claimant's contentions regarding the administrative law judge's allowance of references to claimant's drug and alcohol treatment into the record. Pursuant to 20 C.F.R. §702.338, an administrative law judge has a duty to inquire fully into the matters at issue and receive in evidence any documents or testimony relevant to such matter. An administrative law judge is not bound by the formal rules of evidence. *See* 33 U.S.C. §923(a); 20 C.F.R. §702.339; *Powell v. Nacirema Operating Co.*, 19 BRBS 124 (1986). Moreover, it is well-established that an administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). However, the admission of records which are federally protected by a confidentiality privilege may constitute an abuse of discretion. *See Cybok v. Niagra Machine & Tool Works*, 1990 WL 182126 (E.D.Pa. 1990).

With regard to Section 290dd-2, claimant's argument contains two elements. First, claimant asserts that the administrative law judge erred by not holding a hearing to determine whether employer had violated 42 U.S.C. §290dd-2 and 42 C.F.R. Part 2, with regard to records concerning claimant's drug and alcohol treatment. Had the administrative law judge made such a determination, claimant argues that the administrative law judge would have been required to refer the matter to the United States Attorney. The refusal to hold a hearing, claimant contends, is itself a violation of Section 290dd-2. Second, claimant asserts that the administrative law judge erred by not expunging information regarding his drug and alcohol

treatment from the record. We address each contention in turn.

By way of background, the Drug Abuse Office and Treatment Act of 1972 was enacted to coordinate federal drug abuse prevention efforts. Essential to that endeavor was the confidentiality of medical records in conjunction with substance abuse treatment programs. *See* H.R. Rep. Nos. 92-775, 920, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2045, 2062, 2072. Without guarantees of confidentiality, many individuals with substance abuse problems may be reluctant to participate in the programs. *See Whyte v. Connecticut Mutual Life Ins. Co.*, 818 F.2d 1005, 1010 (1st Cir. 1987). In 1992, the provisions were recodified into the present Section 290dd-2, which provides:

> Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall . . . be confidential . . . .

42 U.S.C. §290dd-2(a). Section 290dd-2(b) provides that these records may be disclosed "in accordance with the prior written consent of the patient." 42 U.S.C. §290dd-2(b). Pursuant to 42 C.F.R. §2.31, a written consent must contain (1) the specific name of the program permitted to make the disclosure, (2) the name or title of the person or organization to which disclosure is made, (3) the name of the patient, (4) the purpose of the disclosure, (5) how much and what kind of information is to be disclosed, (6) the signature of the patient, (7) the date on which consent is signed, (8) a statement that the consent is subject to revocation at any time, and (9) the date, event, or condition upon which the consent will expire if not revoked before. Section 290dd-2(f) establishes a criminal penalty applicable to "[a]ny person who violates any provision of this section or any regulation issued pursuant to this section." 42 U.S.C. §290dd-2(f).

In the instant case, employer, during the course of discovery, sought information regarding claimant's mental health, including information with respect to claimant's drug and alcohol treatment. Towards this end, employer requested that claimant sign consent forms in order to disclose records from various medical facilities. Claimant did not seek a protective order and signed these consent forms. In particular, claimant signed a consent form with regard to the disclosure of records from the Pauline Faulk Center for Behavioral Health/American Legion Hospital. While several documents were disclosed during the course of discovery, only portions of claimant's records from the Pauline Faulk Center were submitted into the formal record. *See* Emp. Ex. 19. Claimant contends that 42 U.S.C. §290dd-2(b) and 42 C.F.R. §2.31 were violated as the consent forms claimant signed were deficient under the regulations, and asserts that the administrative law judge erred by not

holding a separate hearing to make this determination.[1] We reject claimant's assertion, and hold that the administrative law judge does not have the authority to hold such a hearing. The Act vests jurisdiction in an administrative law judge over "a claim of compensation." 33 U.S.C. §919(a), (d). An administrative law judge has "full power and authority to hear and determine all questions in respect of such a claim." *Id.*; *see generally Equitable Equipment Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167 (CRT)(5th Cir. 1999), *aff'g* 32 BRBS 200 (1998). In the instant case, a hearing to determine whether 42 U.S.C. §290dd-2(b) and 42 C.F.R. §2.31 were violated does not concern "a claim of compensation" under Section 19(a) of the Act, 33 U.S.C. §919(a). Moreover, federal courts have held that Section 290dd-2 does not provide for a private right of action for violations of the confidentiality provisions, but rather, this law is a criminal statute to be enforced by the United States Attorney, guided by the statute and corresponding regulations. *See Ellison v. Cocke County, Tenn.*, 63 F.3d 467, 470-471 (6th Cir. 1995); *Kathleen "S" v. Ochsner Clinic*, 1997 WL 786229 (E.D. La. 1997). Thus, the jurisdiction for the investigation and prosecution of alleged violations of this statute is solely within the province of the United States Attorney, not the administrative law judge herein.[2] Accordingly, we hold that the administrative law judge did not commit error by not holding a hearing to determine whether Section 290dd-2 and the corresponding regulations were violated.

The next issue regarding Section 290dd-2 is whether the administrative law judge committed reversible error by not expunging from the record any references to claimant's drug and alcohol treatment. We hold that any error the administrative law judge may have committed in this regard is harmless in light of his decision not to consider any reference to claimant's drug and alcohol treatment in his consideration of the merits of the case. As an initial matter, as stated above, only portions of the Pauline Faulk Center records were submitted into the formal record. At the hearing, claimant did not object to this evidence being admitted into the record. *See* Tr. at 324-325. In fact, claimant's counsel, on direct

[1]In fact, the consent forms do not contain a notice that the consent is subject to revocation or the date upon which consent will expire, a requirement under 42 C.F.R. §2.31.

[2]Indeed, in his Decision and Order, the administrative law judge advised claimant's counsel that he may refer any alleged misconduct to the United States Attorney for further action. *See* Decision and Order at 3.

examination, questioned claimant about his admittance to the Pauline Faulk Center, *id.* at 174, and specifically asked claimant questions about his alcohol abuse. *Id.* at 202. Where claimant voluntarily discloses information regarding his substance abuse treatment, Section 290dd-2 does not bar the use of such records. *See Dresser v. The Ohio Hempery, Inc.*, 1999 WL 1063068 (E.D.La. 1999). Moreover, at the hearing, the administrative law judge specifically inquired whether any psychological disability was being asserted by claimant, with claimant's counsel responding in the negative. *See* Tr. at 61-63. Thus, in his decision, the administrative law judge specified that any information regarding claimant's mental health was irrelevant, and that his decision would be based solely on the medical evidence concerning claimant's physical condition. *See* Decision and Order at 2-3. In fact, the administrative law judge made no reference to these records in his discussion and analysis of the merits of the case. Therefore, assuming the administrative law judge committed error by not expunging from the record claimant's drug and alcohol treatment records from the record, such error did not cause claimant to be prejudiced in the disposition of the claim herein. Stated another way, the administrative law judge's decision on the merits in this case would have been no different had he formally expunged these records.

Similarly, we hold that claimant's contention that the administrative law judge committed reversible error by not expunging all references to his bipolar condition must fail. Claimant asserts that information about his bipolar condition was obtained in violation of the ADA, which forbids employers from using medical information to pre-screen job applicants. *See* 42 U.S.C. §12112(d)(2)(A). In support of its argument, claimant points to his testimony that he was required to have a physical examination prior to being offered employment by employer. *See* Tr. at 171. However, this examination concerned only claimant's physical condition, and claimant conceded that nothing was ever asked about his psychological condition prior to his being offered employment by employer. *Id.* at 172. Thus, it is questionable whether a violation of the ADA in fact occurred. In any event, we reject claimant's contention of reversible error as the administrative law judge did not consider any of the evidence with regard to claimant's psychological condition in deciding the instant case.[3] Based on the foregoing, we reject claimant's contentions that the administrative law judge committed reversible error by not expunging references to claimant's drug and alcohol treatment and mental health, and hold that claimant has not met his burden in establishing that the administrative law judge's actions were arbitrary, capricious or an abuse of

[3]We note again that claimant requested that the administrative law judge expunge references to his mental health only after he testified at length on direct and re-direct examination about his bipolar condition. *See* Tr. at 172-174, 178, 201-202.

discretion. *See, e.g., Ezell*, 33 BRBS at 29; *Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986).

We now consider the merits of the instant case. On appeal, claimant challenges the administrative law judge's finding that he is not totally disabled as a result of the September 8, 1997, work accident. Specifically, claimant contends that the administrative law judge erred in relying on the opinion of Dr. Cenac, and asks the Board to reverse the administrative law judge's weighing of the evidence. We decline to do so.

Claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). If claimant establishes that he is incapable of resuming his usual employment duties with employer, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of suitable alternate employment which claimant, by virtue of his age, background and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If employer makes such a showing, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *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).

In the instant case, the administrative law judge credited the opinions of Drs. Duval and Cenac and found that claimant reached maximum medical improvement by October 22, 1997, and that any further back problems are attributable to the fight he was involved in on February 22, 1998, or his degenerative conditions. Dr. Duval, who first examined claimant on September 30, 1997, found that his neurological tests were normal and diagnosed a lumbar strain, recommending light duty work with a 35-pound lifting restriction. *See* Emp. Ex. 2. Dr. Cenac, an orthopedic surgeon, examined claimant on October 22, 1997, and found that claimant demonstrated a normal neurological exam, with some pre-existing sclerosis of the lumbosacral facets at L5-S1, which accounted for the "popping" sounds claimant was experiencing. Dr. Cenac diagnosed a soft tissue injury to the spine, stated that claimant was at maximum medical improvement, and recommended a 50-pound lifting restriction. *See* Emp. Ex. 1. In his December 9, 1997, report, Dr. Duval agreed with Dr. Cenac's lifting restriction. *See* Emp. Ex. 2. Although Dr. Cenac believed that claimant was magnifying his problems, and did not believe claimant required an MRI, he ordered one due to claimant's subjective complaints, and in his January 26, 1998, report, stated that this exam was normal and that claimant was not in need of any further orthopedic evaluation. *See* Emp. Ex. 1. The administrative law judge accepted the opinions of Drs. Duval and Cenac based on their qualifications as board-certified orthopedists. By contrast, the administrative law judge rejected the opinions of Dr. LaHaye, who opined that claimant has a 50 percent disability due to lower back pain, *see* Emp. Ex. 4, and Dr. Raffai, who opined in 1999 that claimant

suffered from degenerative disc disease and disc bulge at L4-5 and was not capable of working, *see* Cl. Ex. 9A at 64-68; Cl. Ex. 9B, as neither physician is a board-certified orthopedist in the United States and Drs. Duval and Cenac have many more years of experience. *See* Decision and Order at 23. Additionally, the administrative law judge discredited claimant's complaints of pain, finding that his testimony contained inconsistencies and falsehoods with respect to the true nature of his physical condition, especially noting claimant's failure to inform Dr. Raffai that he was severely beaten on February 22, 1998, and his failure to follow Dr. Raffai's recommended course of treatment of steroid injections and physical therapy despite having medical coverage for these treatments through Medicare and Medicaid. *See Id.* at 21.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Accordingly, we hold that the administrative law judge acted within his discretion in crediting the opinions of Drs. Duval and Cenac over the contrary opinions of Drs. LaHaye and Raffai, and affirm the administrative law judge's determination that claimant is capable of light duty work with a 50-pound lifting restriction.

Claimant next asserts that the administrative law judge erred in finding that claimant's back problems are the result of either an intervening cause, the February 1998 fight, or his pre-existing back condition. Although claimant makes this argument in the context of Section 20(a), the administrative law judge, in his decision, made this determination in examining the extent of claimant's disability. Under either analysis, an employer is liable for a claimant's entire disability if a second injury is the natural and unavoidable result of the first injury. Where, however, the second injury is the result of an intervening cause, employer is relieved of liability for that portion of disability attributable to the second injury.[4] *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). In the instant case, the administrative law judge discredited claimant's current complaints of pain, and assuming the complaints were true, rejected the assertion that the September 8, 1997, injury was the cause of his pain, based on the opinions of Drs. Duval and Cenac that claimant suffered a back strain as a result

[4]If the issue is viewed in the context of causation rather than extent of disability, then Section 20(a) would place upon employer the burden of producing substantial evidence that claimant's condition is not work-related. Employer met that burden here by introducing the opinions of Drs. Duval and Cenac that claimant's work-related injury had resolved by October 1997. Thus the issue under either analysis involves the weight accorded the evidence.

of the work-related injury which did not affect his pre-existing condition. *See* Emp. Ex. 1-2; Decision and Order at 21-23. The administrative law judge questioned the view of Dr. Raffai that claimant's disc condition was a result of the September 8, 1997, work accident, as claimant failed to notify the physician that he was involved in a fight with three men on February 22, 1998, in which he was severely kicked and beaten. *See* Cl. Ex. 9A at 63-64; Decision and Order at 12. At his deposition, Dr. Raffai still attributed claimant's disc bulge to the work-injury, but the administrative law judge noted Dr. Raffai's testimony that wrestling was a viable cause of a bulging disc. *See* Cl. Ex. 9A at 35-36. Thus, the administrative law judge determined that claimant's work-related back condition had resolved by October 22, 1997, the date upon which Dr. Cenac placed claimant on a permanent lifting restriction, and rejected Dr. Raffai's opinion that claimant's condition thereafter worsened due to his September 1997 work accident, and that claimant is not capable of work until his treatment plan is followed. *See* Decision and Order at 13, 23-24. As we decline to disturb the administrative law judge's weighing of the evidence in this regard, *see Calbeck*, 306 F.2d 693; *Hughes*, 289 F.2d 403, we affirm the administrative law judge's finding that claimant's work-related back condition resolved on October 22, 1997.

Having accepted the 50-pound lifting restriction imposed by Dr. Cenac, the administrative law judge found that this restriction limited claimant to a less strenuous position than his usual employment with employer. Thus, the administrative law judge determined that claimant established a *prima facie* case of total disability. The administrative law judge then concluded that employer established the availability of suitable alternate employment on the basis of its light duty position, its job offer of a motorman position, and jobs identified by its vocational counselor Dr. Larry Stokes. Claimant challenges this determination, contending that the administrative law judge erred in relying on the limitations imposed on claimant by Dr. Cenac rather than those of Dr. Raffai, and that Dr. Stokes' job market survey is insufficient to establish the availability of suitable alternate employment as Dr. Stokes did not accurately assess claimant's employability.

In the instant case, claimant worked in employer's TEP performing light duty work from October 6, 1997 through October 27, 1997; during this time, he was paid his full wage. Sue Duplantis, employer's claims manager, testified that claimant was offered a permanent position as a motorman trainee to commence on October 31, 1997, which was within the physical limitations imposed by Dr. Cenac, was a necessary position, and paid a higher wage than claimant's usual employment. *See* Tr. at 289-290, 293. Claimant, however, did not report for duty and was terminated thereafter. The administrative law judge accepted the testimony of Ms. Duplantis in this regard and specifically rejected claimant's testimony of subjective complaints of pain based on the objective medical evidence and the opinions by Drs. Duval and Cenac, and therefore rejected Dr. Raffai's opinion that claimant was not capable of working, as this opinion was based on claimant's discredited complaints of pain. *See* Decision and Order at 19-20, 25-26.

It is well-established that employer can meet its burden of establishing the availability of suitable alternate employment by offering claimant a job in its facility, including a light duty job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996). The Board has held that suitable alternate employment is established where employer offers claimant a job tailored to his specific restrictions so long as the work is necessary. *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). As the administrative law judge rationally credited the testimony of Ms. Duplantis and the opinions of Drs. Duval and Cenac, *see Calbeck*, 306 F.2d 693; *Hughes*, 289 F.2d 403, and acted within his discretion in discrediting claimant's complaints of pain, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 470 U.S. 911 (1979), we affirm the administrative law judge's finding that employer established suitable alternate employment at the same or greater wages than claimant earned before the injury by virtue of its motorman trainee position as supported by substantial evidence.[5] *See, e.g., Ezell*, 33 BRBS at 25; *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997). Accordingly, we affirm the administrative law judge's ultimate denial of total disability compensation.[6]

[5]In a footnote in his decision, the administrative law judge found that since employer established suitable alternate employment by virtue of its motorman trainee position, a full discussion of the job market survey of Dr. Stokes was unnecessary, but that all the positions identified in this survey were within the physical limitations imposed by Drs. Duval and Cenac. *See* Decision and Order at 26 n.14. As we affirm the administrative law judge's finding of suitable alternate employment based on the motorman position in its facility, we need not address the administrative law judge's findings with regard to employer's job market survey.

[6]Claimant does not allege on appeal that he diligently sought and was unable to obtain employment. At the hearing, claimant testified that aside from a two-week job as a

Lastly, claimant challenges the administrative law judge's determination that employer is not liable for the treatment performed by Dr. Raffai. Specifically, claimant contends that the administrative law judge erred in finding that claimant did not seek authorization for the treatment by Dr. Raffai and that the treatment provided by Dr. Raffai was not necessary for treatment of the work-related injury.

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." Thus, even where a claimant is not entitled to disability benefits, employer may still be liable for medical benefits for a work-related injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). 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. *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 employer's expense. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

In the instant case, the administrative law judge found that claimant's initial choice of physician was first Dr. LeJeune and then Dr. Cenac, that claimant did not seek authorization for the treatment provided by Dr. Raffai, and that claimant had already received necessary treatment for his work-related injured from Drs. Duval and Cenac, whose credentials were better than those of Dr. Raffai. The administrative law judge further found that Dr. Raffai's proposed course of treatment, including physical therapy, steroid injections and possible surgery, was not necessary and reasonable. Rather, the administrative law judge determined that claimant's subjective complaints of pain, if true, were not related to his employment but were related to the fight he was in on February 22, 1998, or his pre-existing condition. On appeal, claimant contends that Dr. Cenac's release of claimant constitutes a refusal to treat,

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carpenter's helper, he has not applied for any other employment. *See* Tr. at 242-244.

thereby releasing claimant of the obligation to request authorization from employer. Contrary to claimant's contention, the administrative law judge credited Dr. Cenac's diagnosis of a lumbar strain, as well as his opinion that claimant was employable within the 50-pound lifting restriction as of October 22, 1997, and was not in need of further orthopedic treatment for his work-related injury. *See* Emp. Ex. 1. As it was within the administrative law judge's discretion to discredit the opinion of Dr. Raffai, and the administrative law judge's conclusion that claimant's work-related back condition had resolved by October 22, 1997, is rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer is not liable for Dr. Raffai's treatment as it was not rendered for claimant's work-related condition. *See 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. 1993).

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

SO ORDERED

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge